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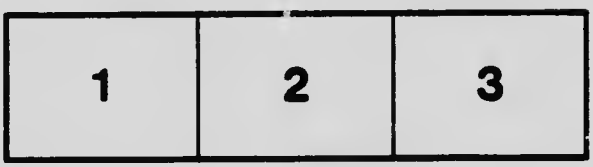

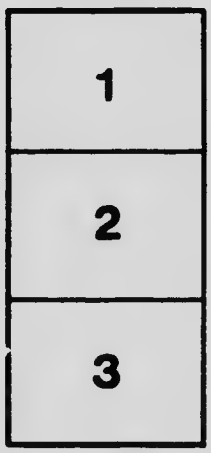

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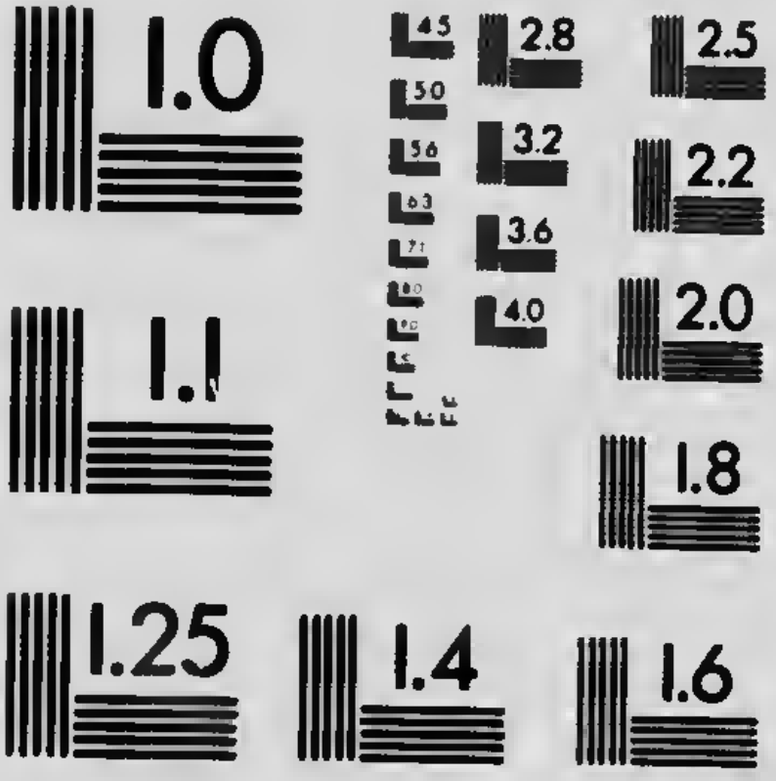

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COMMENTARIES

ON THE

LAW OF MASTER AND SERVANT

BY

O. B. LABATT, B. A. (Canlab.)

In Three Volumes

VOLS. I. AND II.—EMPLOYER'S LIABILITY.
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MASTER AND SERVANT.

CHAPTER XXVI.

COMMON EMPLOYMENT AS A DEFENSE. INTRODUCTORY CHAPTER.

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As to the doctrine adopted in countries other than those in which it [illegible] prevails, see chapter XLVII., *post*.

As to the personal liability of negligent coservants, see the chapter in volume III., *post*, dealing with the general subject of the personal liability of agents for their own defaults.

470. Doctrine of common employment stated.—The doctrine which is to be discussed in this and the following chapters may be enunciated in its most elementary form as follows:

A master is not bound to indemnify one servant for injuries caused by the negligence of another servant in the same common employment as himself, unless the negligent servant was the master's representative.[1]

Since the extraordinary diversity of views which this doctrine has produced in its practical application arises simply from the difficulty of attaching a precise and definite signification to the phrases, "common employment," and "representative of the master," an investigation into the extent of the master's liability under this aspect virtually resolves itself into an inquiry into the proper meaning of these words. The classification of the decisions which is suggested by this circumstance will be adopted in the following chap-

[1] The language used in formulating this rule varies a good deal. But it would be an unprofitable task to attempt to take note of all these variations, inasmuch as they are, from a doctrinal standpoint, wholly immaterial, except in so far as they reflect one or other of the main controversies between the courts, which will be discussed in the following chapters. The subjoined quotations will serve as a sufficient illustration of the phraseology which is commonly found in the opinions of judges.

"With respect to servants in a common employ, the master cannot be made answerable for an injury caused to one servant by the negligence of another." *Vose* v. *Lancashire & Y. R. Co.* (1858) 2 Hurlst. & N. 728, 4 Jur. N. S. 364, 27 L. J. Exch. N. S. 249.

"Where several persons are employed in the same general service, and one is injured from the carelessness of another, the employer is not responsible." *Kuhn* v. *Cumberland Valley R. Co.* (1854) 23 Pa. 281.

"An employer is not liable to one of his agents or servants for the negligence of another of his agents or servants engaged in the same general business." *Coon* v. *Syracuse & U. R. Co.* (1851) 5 N. Y. 492 (1849) 6 Barb. 231.

A master "is not liable to one agent or servant for an injury resulting from the negligence or mis-conduct of another agent or servant while engaged in a common business with him, but without any superior authority or control over him." *Mad River & L. E. R. Co.* v. *Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312.

"The master is not liable to a servant for injuries resulting from the negligence of a fellow servant engaged in the same general line of duty, where the fellow agent act is performed in the capacity of servant." *Indiana Car Co.* v. *Parker* (1884) 100 Ind. 181.

"The employer is not liable for injuries suffered by one employee, solely through the carelessness or negligence of another employee of the same master, engaged in the same general business." *Columbus & I. C. R. Co.* v. *Arnold* (1869) 31 Ind. 174, 99 Am. Dec. 615.

The employer is liable to the servant for negligence of a fellow servant only when the employer's own negligence contributes to the injury, or when the other servant occupies such a relation to the injured party or to his employment, in the course of which his injury was received, as to make the negligence of such servant the negligence of the employer." *Quebec L. C. Co.* v. *Merchant* (1889) 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397.

ters. But it is proposed, in the first place, to give a brief account of the early evolution of the doctrine, to explain and discuss its rationale, and to deal with some general principles, the application of which is not affected by the particular theory which happens to be entertained with regard to its limits and qualifications.

471. Evolution of the doctrine.—High judicial authority may be produced for the view that the doctrine of common employment has always been an integral part of the common law.[1] This theory, however, is purely conjectural,[2] and based mainly, it would seem, on the unsatisfactory ground that, if this defense had not been generally understood to be open to the master, the books would have recorded numerous decisions turning upon his liability for the negligence of a coservant. One objection to the theory is thus stated by Sir Frederick Pollock: "The argument from novelty is altogether a dangerous one. If a duty has been but recently affirmed by decided cases, it is easy to say that it was never before disputed; it is still easier, when an alleged liability is for the first time formally denied, to reply to the charge of innovation that such claims were previously unheard of."[3] Another objection is suggested by the consideration that, even if the doctrine itself was so axiomatic as to be beyond impeachment, as a rule of law, it is inconceivable that there should not at least have been some discussion with regard to the effect of evidence which rendered it a disputable point whether the proximate cause of the injury was the negligence of the master or of a coservant. Supposing the doctrine to have been really recognized prior to the time when it first emerges as a practical element in determining the liability of employers, it seems scarcely possible to account

[1] "The law must have been the same long before it was enunciated in this court in the case of *Priestley* v. *Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987, 7 L. J. Exch. N. S. 42. If not, such actions would have been of frequent occurrence. No such action, however, appears ever to have been brought before the decision of that case." *Vose* v. *Lancashire & Y. R. Co.* (1858) 2 Hurlst. & N. 728, 27 L. J. Exch. N. S. 249, 4 Jur. N. S. 364, per Pollock, C. B.

"That an employer cannot be made responsible for damage resulting to a servant from the negligence of a fellow servant is a principle as old as the common law." *Waddell* v. *Stinson* (1886) 12 Pa. 567, 4 Atl. 725.

[2] A significant commentary on the statements quoted in the last note is that two judges dissented in the earliest American case in which a servant was denied recovery for the negligence of a coservant (*Murray* v. *South Carolina R. Co.* [1841] 1 McMull. L. 385, 36 Am. Dec. 268); and that in the first case in which a similar conclusion was arrived at in Pennsylvania, the doctrine of common employment was only adopted by a majority of three to two (*Ryan* v. *Cumberland Valley R. Co.* [1854] 23 Pa. 384).

It may be remarked in this connection that the doctrine was at one time repudiated in Wisconsin. *Chamberlain* v. *Milwaukee & M. R. Co.* (1860) 11 Wis. 248. But this decision was soon afterwards overruled by *Moseley* v. *Chamberlain* (1860) 18 Wis. 700, appx.

[3] Essays on Jurispr. p. 115.

for the total absence in the reports of any debates upon this question, except by resorting to the wholly inadmissible hypothesis that the master's nonliability for his own negligence was conceded as unreservedly as his nonliability for the act of a coservant.

Abandoning this very unsatisfactory field of conjecture, we find that the first case in which the doctrine of common employment was applied was *Priestly* v. *Fowler*,[1] decided in 1837. There the plaintiff had sustained an injury through the defendant's overloading of a van in which he was traveling by the direction of the defendant in the discharge of his ordinary duties. The gist of the declaration was that "it became the duty of the defendant, on that occasion (of the journey in question), to use due and proper care that the said van should be in a proper state of repair, that it should not be overloaded, and that the plaintiff should be safely and securely carried thereby, . . . in consequence of the neglect of all and each of which duties the van gave way and broke down, and the plaintiff was thrown with violence to the ground, etc." After a verdict for the plaintiff had been rendered, the judgment was arrested on the ground that the declaration was not sufficient.

The very general grounds relied upon by the judges are noticed below (§ 473, note 1, *infra*). At present it will be enough to point out that such a declaration would clearly be good at the present day, in the United States at all events, as it alleges a breach of the duty to provide safe appliances and keep them in good repair; and if this breach was one of the efficient causes of the accident, the master would clearly not have been absolved by the fact that it was partially due to the overloading of the van by a fellow servant.

In 1841 the supreme court of South Carolina adopted the same doctrine as the English court of exchequer, and held that a fireman could not recover against a railway company for injuries caused by the negligence of an engineer.[2] It is worthy of notice that, so far as the report shows, the decision in *Priestley's Case* was not brought to the attention of the judges, and that the two decisions may, therefore, be regarded as reflecting the independent opinions of the profession in England and the United States. But the extracts from the opinions given in § 472, *infra*, show that the reasoning proceeded upon lines somewhat different from those followed in the English case.

In the same year Chief Justice Shaw delivered his famous judg-

[1] 3 Mees. & W. 1, Murph. & H. 205, 1 (1841) 1 McMull. L. 385, 36 Am. Dec. [illegible] 987, 7 L. J. Exch. N. S. 12 [illegible]

[2] *Murray* v. *South Carolina R. Co.*

ment in *Farwell* v. *Boston & W. R. Corp.* (1842).[6] This luminous and scientific disquisition has ever since been regarded in the United States as the principal fountain of the law of this subject, and has exercised a considerable influence upon judicial opinion in England.[7]

The subsequent development of the law has been decidedly less favorable to the servant in England than in the United States. In the former country the doctrine that a master may be held liable for an employee occupying the position of *alter ego* or vice principal was, after much controversy, finally rejected by the House of Lords,[8] at least to the extent of denying that it was applicable to acts done in conducting a business, as contrasted with those done in the original furnishing of the instrumentalities for the use of the servants. See §§ 529, 531, 567, subd. *a*, *post*. In the latter country, on the other hand, the courts have unreservedly accepted this doctrine, and have declined to differentiate between the positions of an employee to whom is delegated the duty of supplying instrumentalities and of an employee who is intrusted with the function of maintaining them in a proper condition. The other important exception to the general rule regarding injuries inflicted by coservants,—*viz.*, that which is based on the fact that the negligent and the injured persons were doing different kinds of work,—has also been much more liberally construed in the United States than in England, some of the American courts having pushed it to an extreme which virtually ignores the true foundation of the rule itself. See chapter XXVII., (C), *post*. The chief influence which has operated in producing this more liberal tendency of judicial opinion has probably been the fact that industrial enterprises have in modern times been falling more and more into the hands of corporate bodies. The harsher aspects of the doctrine of common employment have naturally been brought into clearer relief by this economic situation.[9]

472. Rationale of the doctrine.—Several different explanations of

[6] 4 Met. 49, 38 Am. Dec. 339.

[7] It was mentioned with marked approval in *Barton's Hill Coal Co.* v. *Reid* (1855) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 769, and has been frequently cited in the lower courts.

[8] *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30.

[9] "'In the progress of society, and the general substitution of ideal and invisible masters and employers for the actual and visible ones of former times, in the forms of corporations engaged in varied, detached, and widespread operations, . . . it has been seen and felt that the universal application of the rule' (the rule in regard to fellow-service) 'often resulted in hardship and injustice. Accordingly, the tendency of the more modern authorities appears to be in the direction of such a modification and limitation of the rule as shall eventually devolve upon the employer, under these circumstances, a due and just share of the responsibility of the lives and limbs of the persons in its employ.'" *Parker* v. *Hannibal & St. J. R. Co.* (1891) 109 Mo. 362, 397, 18 L. R. A. 802, 19 S. W. 1119.

the juridical basis of the doctrine of common employment have been propounded by the courts.

One theory is that the standard of ordinary care which fixes the limits of the master's obligations (see § 15, *ante*) is fully satisfied by the employment of competent servants.[1]

Another suggested basis for the doctrine is that which was adopted by Lord Cairns in an oft-cited case, *viz.*, that the master is liable to his servants only for his failure to do what he has contracted to do and that he does not contract to conduct his business in person.[2]

The hypothesis on which the court seems to argue in another case is that the principle which declares that a servant who enters an employment impliedly undertakes to perform his duties carefully involves the corollary that he alone is liable to a fellow servant who is injured by a breach of that undertaking.[3]

[1] In *Fifield* v. *Northern R. Co.* (1860) 42 N. H. 225, the court said:

"It has been held substantially that, whether a workman is injured through inadequacy of machinery, or other aids or means furnished by his master, or through incompetency or carelessness of fellow workmen, his right of action against his employer stands upon the same ground: that between master and servant the implied contract is that each will use ordinary care in all things pertaining to the servant's business; that if a master exercises ordinary care in hiring and retaining in his employment a competent engineer, and in buying and continuing to use a suitable engine, the master should no more be liable to a brakeman, if the engineer should prove to be incompetent, or, being generally competent, should on some occasion be careless, than if the engine, apparently sufficient, should explode; that the master has performed his contract with the brakeman, so far as it relates to the engine and engineer, when he has done all that ordinary care requires him to do to secure an engine and engineer reasonably suitable for the business. If the owner of a railroad, being a person of ordinary care, should select his servants with reasonable circumspection, and ride upon the road himself, he would take as much care of his brakeman as of himself, so far as their safety depended upon the other servants; and the brakeman who would charge the owner with greater obligations should establish his claim upon strong and satisfactory grounds of reason, justice, public policy, or probability as to the actual intention and understanding of the parties in making the contract of service." The transition to the doctrine of ordinary risk is also made in this case. See next section.

[2] *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30. Compare the statement in *Michigan C. R. Co.* v. *Leahey* (1862) 10 Mich. 193, that the reason of the rule is that "the master or employer for whose benefit work is undertaken cannot be regarded as contracting for anything more than his own personal care and diligence."

[3] "After the workmen have been employed, provided with tools and materials, and the work is actually entered upon, each workman is bound by the nature and terms of service to exercise reasonable care, diligence, and skill in the performance of the work he has undertaken. He is also bound to consider and co-operate with his fellow workmen with a view to promote the success of the industry or undertaking in which they are all engaged. He is as much bound to discharge the duty which the law casts upon him, as is his employer. His failure to do what he is thus bound to do, is a breach of duty towards his employer and his fellow workmen, for which he is legally liable. For this reason, the courts have uniformly held that a workman who has been injured by the act or negligence of his fellow workman must look for his compensation to him who was the author of the wrong, and not to their common employer." *Ross* v. *Walker* (1890) 139 Pa. 42, 21 Atl. 157, 159.

In the earliest of the American cases on the subject, one of the judges took the position that there is, on the part of the several agents who are engaged in carrying on the business of a railway company, "a joint undertaking, in which each stipulates for the performance of his several part;" and that "they are not liable to the company for the conduct of each other, nor is the company liable to one for the misconduct of another." [4]

By another judge who delivered a concurring opinion in the same case, it was considered that the inability of the plaintiff to recover was deducible from two concepts, which he treats as being interdependent, *viz.*, that a master does not undertake to answer to each servant for the diligence and skill of the others, and that, as the risk of injury through the negligence of a coservant is one of the perils incident to an employment in which several servants are cooperating, it is presumably accepted by each of them.[5]

[4] *Murray* v. *South Carolina R. Co.* (1841) 1 McMull. L. 385, 36 Am. Dec. 268. The argument of Evans, J., which leads up to this conclusion, is as follows: "It is admitted he [*i. e.*, the servant] takes upon himself the ordinary risks of his vocation: why not the extraordinary ones? Neither are within his contract—and I can see no reason for adding this to the already known and acknowledged liability of a carrier, without a single case or precedent to sustain it. The engineer no more represents the company than the plaintiff. Each, in his several department represents his principal. The regular movement of the train of cars to its destination is the result of the ordinary performance by each of his several duties. If the fireman neglects his part the engine stands still for want of steam; if the engineer neglects his, everyone runs to riot and disaster." In *Louisville, C. & L. R. Co.* v. *Curens* (1873) 9 Bush. 559, fellow servants are also said to be "agents for each other."

The same idea emerges in a case where the court refers to "the rule that one servant is responsible for the negligence of his fellow." *Evans* v. *Atlantic & P. R. Co.* (1876) 62 Mo. 49.

[5] "The foundation of all legal liability" said Chancellor Johnson, "is the omission to do some act which the law commands, the commission of some act which the law prohibits, or the violation of some contract by which the party is injured. There is no law regulating the relative duties of the owners of a steam car, and the persons employed by them to conduct it. The liability, if any attaches, must therefore arise out of contract. What was the contract between these parties? The plaintiff, in consideration that the defendants would pay him so much money, undertook to perform the service of fireman on the train. This is all that is expressed. Is there anything more implied? Assuming that the injury done was in consequence of the negligence of the engineer, the defendants would not be liable, unless they undertook to answer for his diligence and skill. Is that implied? I think not. The law never implies an obligation in relation to a matter about which the parties are, or may, with proper diligence, be equally informed. No one will ever be presumed to undertake for that which a common observer would at once know was not true. The common case of the warranty of the soundness of a horse, notoriously blind, may be put in illustration. The warranty does not extend to the goodness of the eyes, because the purchaser knew, or might have known, with proper care, that they were defective. Now the plaintiff knew that he was not to conduct the train alone. He knew that he was to be placed under the control of the engineer. He knew that the employment in which he was engaged was perilous, and that its success was dependent on the common efforts of all the hands; and with proper diligence and prudence, he might have been as well, and it does not follow that he might not have been

The former of these two concepts makes its appearance in a few other cases, including the Massachusetts decision cited in the preceding section.[6] The latter concept was also enlarged upon in that decision, and furnished the basis of the earliest English case which deals with this branch of law.[7] It is upon this footing that the master's exemption from liability is most frequently explained. That is to say, the doctrine of common employment is regarded as resting upon "an implied undertaking by the servant to bear the risks arising from the possible negligence of a fellow servant who has been selected with due care by his master."[8]

better, informed than the defendants, about the fitness and security of all the appointments connected with the train. If he was not, it was his own want of prudence, for which the defendants are not responsible. If he was, he will be presumed to have undertaken to meet all the perils incident to the employment."

[6] In one part of his opinion in *Farwell* v. *Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339, Chief Justice Shaw remarked (p. 60): "The implied contract of the master does not extend to indemnify the servant against the negligence of anyone but himself; and he is not liable in tort for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied."

In a Pennsylvania case decided some years later the court reasoned thus: "The duty insisted upon is substantially one of protection, which cannot exist without implying the correlative one of dependence or subjection. The relations of husband and wife, parent and child, are in law relations of protection and dependence: and there are those which are so in fact, as where a weak-minded person submits himself to the direction of another; and here the law interferes to protect against an undue exercise of influence and power. And there are others, as, the Sunday laws and the laws regulating the hours of labor in particular occupations, whereby the law protects men against the danger arising from undue competition; but the strictness used in defining this relation, as belonging to special cases, implies that it has no wider existence. There is no relation of protection and dependence between master and servant, or of confidence in the institution of the relation; we speak not of master and apprentice. The servant is no Roman client or feudal villein, with a lord to protect him. Both are equal before the law, and considered equally competent to take care of themselves; and very often the servant is the more intelligent of the two. The argument that the law implies a warranty that one servant shall not be injured by the carelessness of another, is only another way of stating the proposition that the law imposes the duty of protection; and it must be set aside by the same answer." *Ryan* v. *Cumberland Valley R. Co.* (1854) 23 Pa. 384.

[7] *Priestley* v. *Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987, 7 L. J. Exch. N. S. 42.

[8] *Johnson* v. *Lindsay* [1891] A. C. 371, 65 L. T. N. S. 97, 55 J. P. 644, 61 L. J. Q. B. N. S. 90, 40 Week. Rep. 405, per Lord Watson (p. 382).

As illustrative of this point of view the following extracts from the opinions of various judges may be quoted:

"When several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks." *Bartonshill Coal Co.* v. *Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, per Cranworth, L. C.

"The principle is, that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both." *Hutchinson* v. *York, N. & B. R. Co.* (1850) 5 Exch. 343, 19 L. J. Exch. N. S. 296, 6 Railway Cas. 580.

473. Same subject continued.—The effect of the contract thus implied is manifestly to create a very important exception to the juris-

"That principle I take to be that a servant who engages for the performance of services for compensation does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services: the presumption of law being that the compensation was adjusted accordingly; or, in other words, that these risks are considered in his wages, and that, where the nature of the service is such that, as a natural incident to that service, the person undertaking it must be exposed to risk of injury from the negligence of other servants of the same employer, this risk is one of the natural perils which the servant by his contract takes upon himself, as between him and his master, and consequently that he cannot recover against his master for an injury so caused." As is said by Shaw, Ch. J., in *Farwell v. Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339, he "does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied." *Hoigan v. Vale of Neath R. Co.* (1864) 5 Best & S. 570, 33 L. J. Q. B. N. S. 260, 12 Week. Rep. 1032, per Blackburn, J.

"When a man enters into the service of a master, he tacitly agrees to take upon himself to bear all ordinary risks which are incident to his employment, and, amongst others, the possibility of injury happening to him from the negligent acts of his fellow-servants or fellow-workmen." *Lovell v. Howell* (1876) L. R. 1 C. P. Div. 161, 45 L. J. C. P. N. S. 387, 24 Week. Rep. 672, 34 L. T. N. S. 183, per Archibald, J.

"Every man must have his own business, whether as master or as servant, and there is no business without its risks. Where many servants are employed in the same business, the liability to injury from the carelessness of their fellows is but an ordinary risk, against which the law furnishes no protection but by an action against the actual wrongdoer." *Ryan v. Cumberland Valley R. Co.* (1854) 23 Pa. 384.

It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation; among which is the carelessness of those, at least, in the same work or employment, with whose habits, conduct, and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612.

"The rule appears to be founded on the implied contract that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, the compensation, in legal presumption, being adjusted accordingly; and it is said that perils arising from the negligence of fellow servants are incident to the service." *Ford v. Northern R. Co.* (1860) 42 N. H. 225.

"The reason which is said in most of the cases to lie at the foundation of the rule is that when a person engages in any employment, he voluntarily takes upon himself all the ordinary risks belonging to the particular service in which he is to be employed; and is presumed to have indemnified himself, by the terms of his engagement, against any special hazard known to attend it." *Russell v. Hudson River R. Co.* (1858) 17 N. Y. 134.

"Some kinds of business, from the nature of such business, necessarily require a great variety of agents and workmen: and the hazard of the business, we may well conceive, may be materially enhanced from the great number of servants it may become necessary to employ in carrying it on. The person, therefore, who contracts to enter into the service of a man or company engaged in a business of that character, must, when he contracts, regulate his compensation so as to meet the increased risk, or provide in the contract for indemnity against injury in consequence of the negligence of his fellow servants. He then has an opportunity to examine into the nature of the business, the number and character of the persons employed, the duties assigned to each, and everything bearing upon the dangers incident thereto: and must provide for the same in his

tle principle which imposes responsibility for the default of agents.[1] Passages may be quoted from the opinions of judges, in which it seems to be assumed that this result is sufficiently justified by the mere fact of the servant's having entered or remained in the employment with a knowledge of the risks to which he would be exposed from the possible of the commission of negligent acts by other servants.[2] The position thus taken can scarcely be regarded

contract." *Coon* v. *Syracuse & U. R. Co.* (1849) 3 Barb. 231, Affirming (1851) 5 N. Y. 492.

"Where the nature of the service is such that, as a natural incident to that service, the servant must be exposed to the risk of injury from the negligence of other servants of the same employer, or from the use of dangerous machinery, such risk is among the natural perils which the servant assumes upon himself as between himself and the master; and consequently there is no liability of the latter to the former if injuries result from the negligence of other servants." *Cumberland & P. R. Co.* v. *State* (1875) 44 Md. 283.

"A person entering the service of another assumes all risks naturally incident to that employment, including the danger of injury by the fault or negligence of a fellow servant." *Norfolk & W. R. Co.* v. *Nuckols* (1895) 91 Va. 193, 21 S. E. 342.

"Like the main rule [*i. e.*, that a master is liable for his own defaults], this exception is founded upon public policy, and had its origin in the idea that the employee has the means of knowing, just as well as the employer, all the ordinary risks incident to the service in which he is about to engage; and that these including the perils that might arise from the negligence of other servants in the same business, entered into the contemplation of the parties in making the contract; on account of which, the law implies, the servant or employee has insisted upon a rate of compensation which would indemnify him for the hazards of the employment." *Sullivan* v. *Mississippi & M. R. Co.* (1861) 11 Iowa, 421.

The same theory is also impliedly affirmed in those numerous cases in which courts have spoken of the risk of injury from a coservant's negligence, as an ordinary one. See, for example, the following: *Burke* v. *Anderson* (1895) 16 C. C. A. 442, 34 U. S. App. 132, 69 Fed. 814; *Melville* v. *Missouri River, Ft. S & G. R. Co.* (1880) 4 McCrary, 191; *Hudson* v. *Richmond & D. R. Co.* (1894) 2 App. D. C. 98; *Burns* v. *Scott* (1893) 99 Cal. 363, 33 Pac. 916; *Wurth's Columbian Exposition* v. *Bell* (1898) 76 Ill. App. 591; *Sherman* v. *Rochester & S. R. Co.* (1858) 17 N. Y. 153; *Anthony* v. *Leerd* (1887) 105 N. Y. 591, 12 N. E. 561; *Doyle* v. *White* (1896) 9 App. Div. 521, 41 N. Y. Supp. 628; *Elwell* v. *Rucker* (1891) 86 Me. 416, 30 Atl. 64; *Hewitt* v. *Flint & P. M. R. Co.* (1887) 67 Mich. 61, 34 N. W. 659; *Missouri P. R. Co.* v. *Lyons* (1898) 51 Neb. 633, 75 N. W. 31; *Routcright* v. *Northeastern R. Co.* (1886) 25 S. C. 128; *Baltimore & O. R. Co.* v. *McKenzie* (1885) 81 Va. 71.

In *Groves* v. *Wimborne* [1898] 2 Q. B. 402, 67 L. J. Q. B. N. S. 862, it was assumed that the doctrine of common employment might be based either on the maxim, *Volenti non fit injuria*, or the theory of an implied contract. Compare § 370, *ante*.

[1] The following synopsis of the law, extracted from the opinion of Lord Neaves, in *Leddy* v. *Gibson* (1873) 11 Sc. Sess. Cas. 3d series, 301, will be useful in the present connection:

Fundamental principle:—*Culpa tenet suos auctores*; *i. e.*, the person by whose fault an injury is caused, and he alone, is legally liable.

Exception:—The principle of *respondeat superior*.

Counter exceptions:—Nonliability for injuries resulting from—

(1) The fault of an independent contractor or his servants.

(2) The criminal or malicious acts of a servant.

(3) The negligence of a fellow servant of an injured servant.

[2] The following language was used in the earliest of the English cases: "The mere relation of master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no

as a satisfactory one. Even if it be conceded that, in cases where the doctrine summed up in the phrase, *Respondeat superior*, is not a material element in the investigation, the servant's knowledge of a risk is a circumstance which may reasonably be regarded as affording an adequate foundation upon which to base an unvarying inference of law, a proposition which, since the recent English de

doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded and whether it was likely to carry him safely." *Priestley* v. *Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 7 L. J. Exch. N. S. 42, 1 Jur. 987.

In *Hutchinson* v. *York, N. & B. R. Co.* (1850) 5 Exch. 343, 19 L. J. Exch. N. S. 296, 6 Railway Cas. 580, Alderson, B., reasoned thus: "The principle upon which a master is in general liable to answer for accidents resulting from the negligence or unskilfulness of his servant is, that the act of his servant is, in truth, his own act. If the master is himself driving his carriage, and from want of skill causes injury to a passerby, he is, of course, responsible for that want of skill. If, instead of driving the carriage with his own hands, he employs his servant to drive it, the servant is but an instrument set in motion by the master. It was the master's will that the servant should drive, and whatever the servant does in order to give effect to his master's will may be treated by others as the act of the master: *'Qui facit per alium, facit per se.'* So far there is no difficulty. Equally clear is it, that, though a stranger may treat the act of a servant as the act of his master, yet the servant himself, by whose negligence or want of skill the accident has occurred, cannot. And, therefore, he cannot defend himself against the claim of a third person; nor if, by his unskilfulness, he is himself injured, can he claim damages from his master upon an allegation that his own negligence was, in point of law, the negligence of his master. The grounds of these distinctions are so obvious as to need no illustration. The difficulty is as to the principle applicable to the case of several servants employed by the same master, and injury resulting to one of them from the negligence of another. In such a case, however, we are of opinion that the master is not, in general, responsible, when he has selected persons of competent care and skill. Put the case of a master employing A and B, two of his servants, to drive his cattle to market. It is admitted that if by the unskilfulness of A, a stranger is injured, the master is responsible. Not so, if A, by unskilfulness, hurts himself; he cannot treat that as the want of skill of his master. Suppose, then, that by the unskilfulness of A, B, the other servant, is injured while they are jointly engaged in the same service; there we think B has no claim against the master. They have both engaged in a common service, the duties of which impose a certain risk on each of them; and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow servant, and not of his master. He knew, when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow servant; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk."

In *Bartonshill Coal Co.* v. *Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 769, Lord Cranworth, after explaining the reasons by which the doctrine of *respondeat superior*, embodied in the phrase, is supported in actions against strangers, proceeded thus: "But do the same principles apply to the case of a workman injured by the want of care of a fellow workman, engaged together in the same work? I think not. When the workman con-

cisions as to the effect of the maxim, *Volenti non fit injuria* (§ 377, subd. *a*, *ante*), is certainly not beyond the reach of controversy, it is not by any means a necessary conclusion that, in cases where that doctrine is an element to be reckoned with, his knowledge should carry the same consequences.[3] The more reasonable position would seem to be that the justifiability of the deduction thus drawn from the servant's knowledge can be admitted only when it is shown that the logical situation embraces some additional element of sufficient importance to override the effect of that doctrine.

In some instances the receipt of wages has been adduced as the factor which differentiates the position of a servant who is suing his master from that of a person who is suing a stranger.[4] That this

tracts to do work of any particular sort, he knows, or ought to know, to what risks he is exposing himself: he knows, if such be the nature of the risk, that want of care on the part of a fellow workman may be injurious or fatal to him, and that against such want of care his employer cannot, by any possibility, protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame: he knows that the blame was wholly that of the servant; he cannot say that the master need not have engaged in the work at all, for he was party to its being undertaken. Principle, therefore, seems to me opposed to the doctrine that responsibility of a master for ill consequences of his servant's carelessness is applicable to a demand made by a fellow workman in respect of evil resulting from the carelessness of a fellow workman, when engaged in a common work."

"The reason for this rule is, that as the master cannot prevent carelessness in his servants, it is reasonable to presume each servant agrees to run the risk of that which he knows, in the nature of things, to be inevitable." *Putnam* v. *Erie R. Co.* (1870) 34 N. J. L. 151.

"The distinction on which this rule of law is founded is an eminently wise and just one. It is this: A workman or servant, on entering upon any employment, is supposed to know and to assume the risks naturally incident thereto; if he is to work in conjunction with others, he must know that the carelessness or negligence of one of his fellow servants may be productive of injury to himself. And besides this, what is more material, as affecting his right to look to his employer for damages for such injuries, he knows, or ought to know, that no amount of care or diligence by his master or employer can by possibility prevent the want of due care and caution in his fellow servants, although they may have been reasonably fit for the service in which they are engaged." *Snow* v. *Housatonic R. Co.* (1864) 8 Allen, 441, 85 Am. Dec. 720.

It has been remarked that a rule similar to that which exempts a master from liability for the act of a servant, by which a fellow servant is injured, is applicable also to guests, who cannot sue the master of the house for an injury done by his servants. *Swainson* v. *Northeastern R. Co.* (1878) L. R. 3 Exch. Div. 341, 47 L. J. Exch. N. S. 372, 38 L. T. N. S. 201, 26 Week. Rep. 413, per Bramwell, L. J.

[3] "It is assuming the whole question as to the reason, justice, and policy of exempting the master from liability in such cases, to say that such exemption is implied from the contract of service; for, unless the exemption is demanded by reason and sound policy, it ought not to be implied." *Kidley* v. *Belcher Silver Min. Co.* (1875) 3 Sawy. 437, Fed. Cas. No. 7,760, per Hillyer, J.

In one case it was laid down that the rule *respondeat superior* can only be applied in an action sounding in tort, and not where the liability arises out of contract. *Ohio & M. R. Co.* v. *Hammersley* (1867) 28 Ind. 371. This is, however, clearly erroneous, as the rule is constantly applied in the case of carriers.

[4] "If the employer's contract with his workmen is that he will use ordinary care in the employment of other workmen, but that he will not guaran-

consideration is entirely inadequate as a differentiating factor was, however, shown long ago by an eminent English judge.[5]

A theory more generally favored is that a contract to accept the risks of a fellow servant's negligence may properly be implied on the ground of expediency and public policy.[6] As the situation has been

tee their carefulness, and if he use such care, and, by the negligence of one of them, another of them is injured, the employer is not liable, the common rule of torts, that the act of the servant is the act of the master, being suspended as to that case by the contract. But if a third person, not a party to the contract between the master and servant, is injured by the fault of the servant, his right of action against the master does not depend upon, and is not limited by, that contract. The servant has agreed to bear, and is paid for bearing, the risks incident to the service; the stranger has not made such an agreement, and is not paid for bearing such risks." *Fifield* v. *Northern R. Co.* (1860) 42 N. H. 225.

"Some minds find it difficult to understand why an employer,—a railroad company, for instance,—should not be responsible to those in its employment for accidents befalling them, in the same cases and to the same extent, as to the persons not in its service. The different relations of the parties toward each other are not kept in view. The customers of a railroad and the public for whom the company acts as carrier of persons and property, pay it to perform such services for them. Its employees, on the contrary, are paid by the company for the exertion of their skill and diligence in its behalf for the very purpose of making repairs, completing equipment, preventing accidents, and enabling it safely and efficiently to fulfil its engagements. The need of this skill and diligence implies imperfection without them, in the work upon which, or the service for which, the employees are engaged, and they are paid according to the nature and exactions of the service. Generally, also, there must be co-operation with them on the part of other employees of the company in the work to be performed. For these reasons it has been often ruled, that, as between their employer and themselves, employees take the risk of any damage they may sustain from the perils incidental to the service in which they engaged, including those arising from the negligence of others engaged therein, unless they are chargeable upon the misconduct or negligence of the employer. This is now well settled law. Obviously, though, such a rule is not applicable between the company and those not in its employment." *Mobile & M. R. Co.* v. *Smith* (1873) 59 Ala. 245.

"The doctrine has its foundation in justice and policy. The ordinary risks of the service in which one is engaged are usually, in fact, considered in making the engagement and adjusting the wages. And this may, with great propriety, be held to be always so in legal contemplation." *Chicago & G. E. R. Co.* v. *Harney* (1867) 28 Ind. 30, 92 Am. Dec. 282.

[5] "The test is not whether the party complaining is paid to undertake the risk. A guest is in the same position as a servant, because he has the means of judging of the character of the house in which he is. The question is whether, knowing the risk, the party incurs it voluntarily." Pollock, C. B., in *Abraham* v. *Reynolds* (1860) 5 Hurlst. & N. 143, 6 Jur. N. S. 53, 8 Week. Rep. 181, 1 L. T. N. S. 330.

[6] "In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances." "The general rule, resulting from considerations as well of justice as of policy, is that he who engages in the employment of another for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which should except the peril arising from the carelessness and negligence of those who are in the same

explained in several cases, the virtual effect of this theory is simply that the consideration thus relied upon points to different conclusions, according as the person sued is a stranger or an employee.[7]

Various elements have been adverted to by the courts in dealing with this aspect of the doctrine.

In the earliest of the English cases much reliance was placed by Lord Abinger upon the *argumentum ab inconvenienti*.[8]

employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents." *Farwell* v. *Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339. See also the quotation from the opinion in *Hanna* v. *Granger* (1894) 18 R. I. 507, 28 Atl. 659, § 561, note 1 *ad finem*, *post*.

In a Kentucky case the court speaks of "the reason and policy of implying, as between themselves, such associations, knowledge, and trust, as to have induced an undertaking mutually to risk all the contingencies which the ordinary skill and care of each other in his line of service could not avert." *Louisville & N. R. Co.* v. *Robinson* (1868) 1 Bush, 598.

Public policy has also been recognized — being the foundation of the doctrine — in the following cases: *Union P. R. Co.* v. *Dort* (1873) 17 Wall. 553, 21 L. ed. 739; *Chicago, R. & M. P. R. Co.* v. *Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184; *Rogers* v. *Lumbard Iron Co.* (1885) 141 Mass. 198, 59 Am. Rep. 68, 11 N. E. 77; *Hide* v. *Boston & L. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545; *McDermott* v. *Pacific R. Co.* (1850) 30 Mo. 116; *Chicago & N. W. R. Co.* v. *Moranda* (1879) 93 Ill. 302, 34 Am. Rep. 168; *Hard* v. *Vermont & Canada R. Co.* (1863) 32 N. H. 473.

See also the full list of cases.

[7] "In the case of a third person the actual fault of the servant is imputed to the principal solely on the ground of public policy; in the case of a servant, it is not." *Keegan* v. *Western R. Corp.* (1853) 8 N. Y. 175, 59 Am. Dec. 476.

"As the master's responsibility has been extended by the doctrine of *respondeat superior*, from considerations of public policy, so that doctrine has been limited by similar considerations in respect to the master's responsibility to his servants." *Crispin* v. *Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521.

"As to strangers, upon principles of public policy it treats a master as guilty for the negligence of his servant, but public policy does not demand that he should be so treated as to his own servants, who have the option to examine their surroundings in his service, and to receive pay according to the risk they incur." *Hanna* v. *Granger* (1894) 18 R. I. 507, 28 Atl. 659.

Similar language adverting to the difference between these juridical situations, and the principles appropriate to each of them, is found in *Farwell* v. *Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339; *Coon* v. *Syracuse & U. R. Co.* (1849) 6 Barb. 231, Affirming (1851) 5 N. Y. 492.

[8] "If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coachmaker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage may have an action against his master for defect in the carriage owing to the negligence of the coachmaker or for a defect in the harness arising from the negligence of the harness-maker or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in that class of cases, extend

In other cases stress has been laid upon "the injustice of compelling employers to answer for that which their own care cannot prevent, to those whose opportunities for self-protection are as great, and usually much greater."[9]

Occasionally we find it asserted that any departure from the doctrine is dangerous to the prosperity of industrial enterprises requiring the services of a large number of persons.[10]

In one instance we find the argument advanced that the imposition of a liability upon the master would be open to the same objections as the sociologists of a certain school see in all so-called paternal legislation.[11]

to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down, while asleep, and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins.

"The inconvenience, not to say the absurdity, of these consequences, affords a sufficient argument against the application of this principle to the present case." *Priestley* v. *Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987, 7 L. J. Exch. N. S. 42, per Lord Abinger.

[9] *Michigan C. R. Co.* v. *Leahey* (1862) 10 Mich. 193.

"The servant has, commonly, better opportunities than the master of learning the incompetency or carelessness of his fellow servant in the same employment." *Chicago & G. E. R. Co.* v. *Harney* (1867) 28 Ind. 28, 92 Am. Dec. 282. Compare *Priestley* v. *Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987, 7 L. J. Exch. N. S. 42, as quoted in note 1 *supra*.

"The law supposes that the relation which the several employees sustain to each other and the business in which they are engaged would enable them better to guard against such risks and accidents than could the employer." *Sullivan* v. *Mississippi & M. R. Co.* (1860) 11 Iowa, 421.

In *Parker* v. *Hannibal & St. J. R. Co.* (1891) 109 Mo. 362, 18 L. R. A. 802, 19 S. W. 1119, Black, J., stated the ground upon which the defense is based to be, in substance, this: "That from considerations of public policy and convenience the law will imply a contract on the part of the employee to take upon himself all risks arising from the negligent acts of his coemployees. The reasons for the rule are: 'Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends, to a great extent, on the care and skill with which each shall perform his appropriate duty, each is an observer of the conduct of the other, can give notice of any misconduct in capacity or neglect of duty, and leave the service if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require.'"

[10] See *New Pittsburgh Coal & C. Co.* v. *Peterson* (1893) 136 Ind. 398, 35 N. E.

"the servants who do this work exclusively were under no obligation to save each other's lives, and to throw all the risks of their dangerous employment upon the companies who employ them, all these great enterprises which require and employ the services of a large number of men would be seriously retarded." *Schaub* v. *Hannibal & St. J. R. Co.* (1891) 109 Mo. 91, 18 S. W. 924.

"It would violate a law of nature, if it (i. e. the law as administered by the courts) should provide an immunity to one against the ordinary dangers of his business, and it would be treating him as incapable of taking care of himself." *Ryan* v. *Cumberland Valley R. Co.* (1851) 23 Pa. 384.

But perhaps the consideration upon which most reliance is placed is that the practical tendency of the doctrine is to make a servant more cautious in performing his duties and more watchful as to the character and qualifications of his coemployee, and that the result of the influence thus exerted is that tangible benefits are reaped by everyone concerned, by the servant himself, by his master, and by strangers whose personal safety or business interests are more or less dependent upon the manner in which he performs his duties.[12]

[12] "To allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford." *Priestley* v. *Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987, 7 L. J. Exch. N. S. 62.

"Where several persons are employed in the conduct of a common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and have the service, if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the neglect of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer." *Farwell* v. *Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339.

"It is assumed that the exception operates as a stimulant to diligence and caution on the part of the servant, for his own safety, as well as that of the master." *Chicago, M. & St. P. R. Co.* v. *Ross* (1881) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184; 9 C. C. A. 9.

"Public policy requires that each servant should be influenced by its operation to be, not only careful of his own safety, but as watchful as possible over the acts of his associates." *Burke* v. *Norwich & W. R. Co.* (1867) 34 Conn. 474.

"If we declare that workmen are warranted against such carelessness (i. e. of coservants), then the law places all careless men, which means all badly educated or badly trained men, and it places even these who have not acquired a reputation for care, under the ban of at least a partial exclusion from all work. And this is the ordinary result of all undue attempts to protect by law one class of citizens against another. It is done at a practical sacrifice of liberty on the part of those intended to be protected, and to the embarrassment of the common business of life, by imposing upon the people a rule of a new and unusual character which may require half a century to become fitted like a custom, and adapted to the customs already existing which it does not have the effect of annulling. If this were the rule, it would embarrass the conduct of all business, where any risk is to be run. How could a sailor be ordered aloft, in a storm, without the employer's being liable to the charge that the captain had shown want of proper skill and care in giving such an order in the circumstances? How could the wearied laborer be allowed to ride home with the driver without danger that the employer should be called to account for an accidental tilting of the cart?" *Ryan* v. *Cumberland Valley R. Co.* (1851) 23 Pa. 384.

"As most of the enterprises of modern times, which contribute to human progress and the welfare of society, must be carried on by numerous servants working to the same end under common [illegible], it has been supposed that it would cast upon each too much responsibility to hold him liable for injuries against which he could by no possibility guard, especially by the exercise of [illegible] the negligence of a coservant;

474. Judicial criticisms of the doctrine.—Much adverse criticism has been leveled by various judges at the doctrine of common employment and the arguments by which it has been sustained.

One court has expressed the opinion that "the limitation has no foundation in abstract or natural justice, and all attempts to place it upon any other foundation than that of public policy will prove unsatisfactory, when brought to the test of careful and logical an

and that the servants would be better protected if they were obliged to rely upon their own care and vigilance rather than those of the master. Hence, to enforce the supposed public policy, a fiction has been invented by which the servant is said to assume all the risks of the service in which he engages, which include the risks of injuries caused by the negligence of coservants engaged in the same common employment." *Crispin v. Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521.

"It is considered that public policy requires that servants engaged in a common employment should not have an action against their principal for injuries resulting from the negligence of one or more of such servants; because the tendency of such a doctrine is to make them anxious and watchful, and interested for the faithful conduct of each other, and careful to induce it; while the opposite doctrine would tend in a different direction. The safety and welfare of the public, therefore, demand the establishment of the liability principle on the part of the employer in such cases; while, when established, it can work no injury to the servant, because his entering upon the service is voluntary, is with a knowledge of its hazards and with a power and right to demand such wages as he shall deem compensatory." *Madison & I. R. Co. v. Bacon* (1855) 6 Ind. 205.

"The servants owe to the master a diligent and watchful care over his business, and they owe to each other a vigilance and caution for their own safety. . . . The rule which deprives them of compensation for injuries sustained from the neglect each of the other inspires that care and diligence in the discharge of their duties, both to the master and to themselves, which is essential to the welfare of the master and the safety of each other. When the rule is destroyed, its inducement to care is gone, and the master, if not liable for the fault of his servants as between themselves, has servants whose duties require no care excepting that each shall look to his own safety." *New Pittsburgh Coal & C. Co. v. Peterson* (1893) 136 Ind. 398, 35 N. E. 7.

"The moral effect of devolving these risks upon the employees themselves would be to induce a greater degree of caution, prudence, and fidelity than would in all probability be otherwise exercised by them." *Sullivan v. Mississippi & M. R. Co.* (1860) 11 Iowa, 421.

"The rule thus qualified or limited is too well established, both upon reason and authority, to be now departed from. It rests not only upon the implied agreement to assume all the risks consequent upon the negligence of fellow servants, but, in the case of railway employees particularly, it is supported by considerations of a just and true public policy. The safety of the traveling public is largely dependent upon the care and skill with which railway employees discharge their responsible and perilous duties. The fact that such fellow servants must, as between themselves and the company, take upon themselves the results of the carelessness and negligence of a fellow servant, tends to quicken the zeal and arouse the activities of each employee against such negligence. The public weal demands that no guaranty which tends to guard the public against the negligence of servants guiding the powerful appliances of the modern railway shall be broken down; and we can but regard the rule, as qualified by the courts of this state, as well calculated to stimulate each servant to his utmost exertions to prevent negligence in others." *Louisville & N. R. Co. v. Lair* (1887) 86 Tenn. 335, 6 S. W. 663.

"The doctrine was originally adopted because it fixed the liability where it could best be borne. It was intended, by placing this responsibility upon the employees, to introduce a safeguard, beneficial alike to the servant and the master and to the public by invoking

alysis."[1] But even public policy is deemed by many of the authorities to be an inadequate consideration upon which to base the doc-

the self-interest of the employees to see that each carefully and faithfully discharged the duties of his position, while imposing upon the master the duty of care and discretion in the selection of his servants. . . . The object here sought is a plain rule regulating and controlling some, at least, of the more important relations between railway companies and their employees. They are interested in the solution of this problem, the employees, as a class,—and not merely those who have been or may be injured,—the employer, and the public. That the particular rule is, in its application, always invoked by the employer to defeat the demands of the injured employee does not at all prove that the employees, as a class, are not greatly benefited by it. The number of those injured by the negligence of their fellow servants is, unhappily, very great, but the proportion they bear to the whole number of employees is very small. If the rule, while operating to the disadvantage of the injured few, promotes the safety of the far greater number of those who sustain no injuries, by introducing a salutary superintendence over each other among the servants of the company, then the rule, while beneficial to the employer, is not less so to the employee; for that which promotes immunity from danger is more to be desired than the pecuniary compensation for the injury could be, and, being promotive also of the efficiency of the service, is obviously in the interest of the public. It is to be considered, also, in connection with other rules applicable to the relation of master and servant. The duty is imposed upon the master to exercise caution and discretion in the selection of the servants who are to be 'fellows,' and mutually responsible to each other, and he must not retain in his service anyone found to be unfitted to discharge the duties assigned to him. In the due performance of this duty by the master, the employees, as a class, and the public at large, are deeply interested, and the effect of the rule is to make it to the interest of the employees to keep the employer advised as to the habits, character, and qualifications of the fellow servants." *Norfolk & W. R. Co.* v. *Nuckols* (1895) 91 Va. 193, 21 S. E. 342.

"Public policy requires that where the laborers are co-equals, and engaged in laboring in the same field or on the same railroad-train or in any other employment, that each should exercise proper care in the conduct of the business, and look to it that his co-laborer does the same thing; and when he is told that this care and prudence is his only remedy against danger from the negligence of those employed with him, it not only makes him the more careful, but stimulates him to see that others exercise the same caution." *Louisville, C. & L. R. Co.* v. *Cavens* (1873) 9 Bush, 565.

In *Russell* v. *Hudson River R. Co.* (1858) 17 N. Y. 134, the court refers to the theory that, "as the effects of the carelessness of one servant may frequently be obviated by the watchfulness of another, public policy requires the adoption of the rule as an incentive to superior vigilance."

See, to the same effect, *St. Louis, A. & T. R. Co.* v. *Welch* (1888) 72 Tex. 298, 2 L. R. A. 839, 10 S. W. 529; *Smoot* v. *Mobile & M. R. Co.* (1880) 67 Ala. 13, referring to Cooley, Torts, 541; *New Orleans, J. & G. N. R. Co.* v. *Hughes* (1873) 49 Miss. 258. See also the cases cited in the discussion of the consociation doctrine, §§ 501 *et seq.*, *post*.

[1] *Crispin* v. *Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521.

In the early Scotch case of *Dixon* v. *Ranken* (1852) 14 Sc. Sess. Cas. 2d series, 420, 1 Am. R. Y. Cas. 569, Lord Cockburn, in referring to the contention of counsel that the doctrine ought to be adopted on account of its own inherent justice said: "This last recommendation fails with me, because I think that the justice of the thing is exactly in the opposite direction. I have rarely come upon any principle that seems less reconcilable to legal reason. I can conceive some reasonings for exempting the employer from liability altogether, but not one for exempting him only when those who act for him injure one of themselves. It rather seems to me that these are the very persons who have the strongest claim upon him for reparation, because they incur danger on his account, and certainly are not understood, by our law, to come under any engagement to take these risks on themselves."

trine.[2] Some have impugned the position that it promotes the safety of the servants themselves.[3] Others have attacked the theory that it is advantageous to the members of the public who may be endangered by the negligence of persons in the position of servants.[4] Others have intimated that they are unable to perceive in what respect the grounds of public policy involved in cases where a servant is suing

[2] The earliest expression of judicial dissatisfaction in England is found in the remark of Jervis, C. J., that "there may be a doubt as to the policy of the law." *Tarrant* v. *Webb* (1856) 25 L. J. C. P. N. S. 261, 18 C. B. 797.

[3] In reply to the argument that it would lead to carelessness on the part of servants, if they knew that they could recover for any damage they might receive, the supreme court of Ohio observed: "In answer to this it may be remarked that it is only where the person has been careful himself that any right of action accrues in any case. Besides, we do not think it likely that persons would be careless of their lives and persons or property merely because they might have a right of action to recover for what damage they might prove they had sustained. If men are influenced by such remote considerations to be careless of what they are likely to be most careful about, it has never come under our observation. We think the policy is clearly on the other side. It is a matter of universal observation that in any extensive business where many persons are employed, the care and prudence of the employer is the surest guaranty against mismanagement of any kind. The employer would, we think, be more likely to be careless of the persons of those in his employ, since his own safety is not endangered by any accident, when he would understand that he was not pecuniarily liable for the careless conduct of his agents." *Little Miami R. Co.* v. *Stevens* (1851) 20 Ohio, 432.

"It may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one, or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant." *Chicago, M. & St. P. R. Co.* v. *Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184.

"It has also been doubted whether the law as it stands at present is not injurious, and is not calculated to induce carelessness in both masters and servants. The master does not care to know what careless acts are done by his servants, and the servants do not care if the master does not. When an accident happens no one is liable and nobody cares except the unfortunate man who is injured." Whittaker's Smith, Negl. 138.

The following caustic remark in a well-known text-book is as sensible as it is witty: "The theory that public policy requires that servants should have no remedy against their masters in such cases, because the absence of any remedy will make them more careful of their own safety than they would otherwise be, reminds us of nothing so much as the opinion of Chief Justice Ruffin, in the days of slavery, that the law denied any remedy for any amount of torture to a slave, short of immediate murder, out of humane regard to the best interests of the slaves themselves." 1 Shearm. & Redf. Negl. 4th ed. p. 303.

[4] "The defense of common employment has little of reason or principle to support it, and the tendency in nearly all jurisdictions is to limit rather than enlarge its range. It must be conceded that it cannot rest on reasons drawn from considerations of justice or public policy. . . . No consideration of public policy will sustain this defense, because the public are not at all interested in the question, as they are in questions concerning innkeepers and common carriers." *Ziegler* v. *Danbury & N. R. Co.* (1885) 52 Conn. 543.

"With respect to considerations of policy it is by no means certain that the public interest would not be best subserved by holding the superior, with his higher intelligence, his surer means of information, and his power of selecting, directing, and discharging subordinates, to the strictest accountability for their misconduct in his service, whoever may be the sufferer from it." *Burke* v. *Norwich & W. R. Co.* (1867) 34 Conn. 474.

his master are essentially different from those involved in cases where a stranger is the plaintiff.[5] Others have attacked the theory of an implied contract in language which, while it is directed primarily against the propriety of predicating the existence of such a contract with regard to the risks of a fellow servant's negligence, really cuts much deeper, and amounts to an arraignment of the rationale of the whole doctrine under which the servant's knowledge of any description of risk renders him chargeable with its acceptance.[6]

[5] "Now, it being conceded, as it must be, that the master is liable to third persons for the negligent acts of his servants, it is difficult to see how public policy has much to do with the question as to who shall be deemed fellow servants within the rule of exemption. The liability being admitted in case a third person is injured, but denied in case a servant is injured by another servant, the denial in the latter case must stand on some peculiar relation between master and servant. This peculiar relation cannot be simply the fact that the servants are in a position where one may be injured by the negligence of another, for third persons often occupy the same position: as where they become passengers." *Parker* v. *Hannibal & St. J. R. Co.* (1891) 109 Mo. 409, 18 L. R. A. 802, 19 S. W. 1119.

[6] "However plausible may be the theory, it is very doubtful whether, in fact, a spinner in a factory or a fireman on a railroad ever made an examination into the condition of the machinery, the mode of conducting the business, or the character and habits of the operatives, for the purpose of ascertaining the extent of his risk as an element in calculating the proper amount of his wages. A passenger in a railroad car may well be presumed to have a vivid consciousness of his risk, but it has never been understood that he contracts with reference to it when he buys his ticket, so as to be his own insurer. Again, a principal is responsible to an employee for his own negligence,—why should he not be liable for that of his agent, over whom the employee has no control, and of whom he may have no knowledge?" *Burke* v. *Norwich & W. R. Co.* (1867) 34 Conn. 474.

"I am free to admit that I think the explanation given of this limitation is a very unsatisfactory and artificial one—a supposed contract between master and servant that the latter shall not claim damages in such a case. Can anything be more artificial? I should say you might just as well presume that implied contract in the case of a contractor as in the case of a fellow servant, strictly so called." *Gregory* v. *Hill* (1869) 8 Sc. Sess. Cas. 3d series, 282, per Lord Benholme.

"This exception has been defended on various grounds; sometimes it has been said that the limitation of the master's liability is the consideration of the wages given, sometimes that the servant knows of his risk, and must be held to take it by his contract. These are not legal principles, but legal inferences. The wages form the consideration for the stipulated service, whatever that may be; and the fact that a person knows of the risk and voluntarily encounters it may or may not lead to the inference that he undertakes it, according to the nature of his relation to the wrongdoer or his master." *Woodhead* v. *Gartness Min. Co.* (1877) 4 Sc. Sess. Cas. 4th series, 469, per Lord Moncrieff.

"If the question were open, it might, perhaps, be doubted whether any such condition can be deduced from the contract of service, and whether the supposed obligation does not partake more of the nature of a legal fiction than that of a sound and just inference. The duty of a man to protect those whom he induces to enter his service is to the full as great as any he owes to the public." *Adams* v. *Glasgow & S. W. R. Co.* (1875) 3 Sc. Sess. Cas. 4th series, § 215.

"We confess that the reasoning upon which the rule has been adopted is not very satisfactory. It is said that when the servant accepts the employment of the master, he impliedly assumes the risk of the negligence of his fellow servants. The argument seems illogical. It amounts to saying that the law is that he cannot recover because he takes the risk, and that he takes the risk because the law is so. By a parity of reasoning we might assume that he takes the risk of his master's own personal negligence,

475. General discussion of the doctrine.— A perusal of the judicial arguments for and against the doctrine of common employment would seem to warrant the inference that, as a matter of ultimate analysis, it is taken for granted by the great majority both of its assailants and its vindicators that it is a necessary deduction from the general theory which charges a servant with the assumption of all the ordinary risks which are obviously incident to the work undertaken by him. It is somewhat singular that the unwarrantable character of this hypothesis has never been alluded to in any of the numerous disquisitions on the subject. Yet it needs very little reflection to see that, whether the risk of injury from a coservant's negligence is or is not properly classed among those which are described as "ordinary," the elements to be dealt with in determining whether the responsibility for such a risk shall be cast on the master or the injured person are, in one very important respect, different from those which have to be taken into account where the question to be settled is the extent of the right of recovery in relation to ordinary risks which exist independently of the acts or omissions of coservants.

In considering the propriety of imputing to a servant an assumption of an ordinary risk of the latter class, the essence of the situation is that the fact of the injury's having resulted from such a risk imports, *ex vi termini*, that the master was free from negligence in the premises. As none of the special grounds on which, in certain instances, a liability which approaches more or less nearly to that of an insurer is imposed by the policy of the law are present in the cases where a servant is claiming damages for injuries received in the course of his employment, there is no difficulty in arriving at the conclusion that the master ought not to be required to indemnify the servant under such circumstances. It may be readily

and that therefore the master would not be liable to a servant for such negligence." *St. Louis, A. & T. R. Co.* v. *Welch* (1888) 72 Tex. 298, 2 L. R. A. 839, 10 S. W. 529.

In this connection reference may be made to p. 47 of McFall's Pamphlet on Employers' Liability, where he quotes some strong criticisms made by Bramwell, L. J., and Brett, J., upon the doctrine of an implied contract, when they were under examination before the parliamentary committee, by which the subject of employers' liability was investigated before the English act of 1880 was passed. Attention should also be given to page 107, where a portion of a letter written by Lord Cairns not long afterwards to the London Times is quoted. The following extract is interesting when it is remembered that the writer had, as Lord Chancellor, concurred in the famous judgment rendered in *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Ca., 326, 19 L. T. N. S. 30, which applied the doctrine of common employment in its most extreme form (see § 529, *post*): "There cannot continue to be an implied term in contracts, where one of the parties to the contract distinctly repudiates the existence of any such term. That is now the position of the workmen."

conceded that, in view of the socialistic trend of public opinion at the present day in all civilized countries, it is far from improbable that the responsibility of a master to his servants may, by means of legislation, be assimilated to that of a common carrier or an innkeeper. In fact, the most recent of the English statutes have gone very far in that direction. See chapter XL., *post*. But it is manifest that, even under the most liberal theory that could be propounded as to the permissible limits of judicial law-making, the establishment of such a rule in connection with the contract of employment is not within the scope of the powers of a magistrate.

An essentially different situation is involved in those cases in which we have to deal with the ordinary risks which are created by the possibility that a coservant may be guilty of negligence. The inquirer is here confronted by a distinct antagonism of alternative juristic principles, inasmuch as it is necessary to decide whether the rights of the injured person shall be determined with reference to the conception that risks proceeding from this source are undertaken by every servant, or with reference to the conception which is embodied in the phrase, *Respondeat superior*. Since the necessity of reckoning with the latter of these conceptions introduces a new element into the problem, it does not, by any means, follow that, because of the propriety of denying a right of action for injuries caused by ordinary risks which are not produced by a coservant's negligence, no remedy should be allowed for ordinary risks which are produced by such negligence.

The essential difference which is thus shown to exist between the juridical factors involved in ordinary risks which do, and ordinary risks which do not, result from the possibility of coservants being negligent may reasonably be said to impair very materially the strength of the arguments habitually adduced in support of the doctrine of common employment. That those arguments are unsatisfactory, when analyzed from another standpoint, may also, we think, be demonstrated without any difficulty.

As has been stated in § 473, *supra*, the position taken by the courts simply amounts to this:—That on the ground of public policy, injuries resulting from a coservant's negligence should, as a general rule, and in the absence of some special reason to the contrary, be regarded as lying beyond the purview of the principle of *Respondeat superior*. It is a matter of paramount importance, therefore, that the elements of this public policy should rest upon considerations of such a clear and cogent character as to put their convine-

ing weight virtually beyond the reach of controversy. But it is not easy to admit that the considerations actually involved satisfy this high standard. The courts rely upon two theories, the sentence of which may be summed in these two propositions:

(1) That the abrogation of the doctrine of common employment would have a decided tendency to render servants less cautious and efficient in the performance of their duties,—a consequence prejudicial not only to the servants themselves, and their employers, but also, in no small degree, to that portion of the public which is directly affected by the manner in which the business which the servants and their employers are engaged in is conducted.

(2) That, if servants were allowed to maintain actions for injuries caused by the negligence of their fellow servants, the investment of capital in industrial enterprises would be curtailed to such an extent as to inflict serious damage upon the community.

These propositions have been enunciated in language which indicates that the courts deemed them to be axiomatic. At all events, they have never, so far as the writer has found, been sustained by any definite arguments deduced from scientific analogies, or from the teachings of experience. It would appear, therefore, that the doctrine of common employment stands in this singular predicament,—that it rests very largely, if not entirely, upon a basis of suggested facts which we are asked to accept upon the mere *ipse dixit* of a certain number of gentlemen who have attained greater or less distinction in a profession which, to say the very least, does not specially qualify them to form a reliable opinion in respect to the subject-matter.

This situation, which would, in any event, be extremely unsatisfactory, is reduced to something like an absurdity by the fact that the judicial theory as to the supposed inevitable consequences of allowing servants to recover for the negligence of their coemployees has long since been exploded by the logic of actual occurrences, the significance of which is unmistakable. In England and her colonies, as well as in America, statutes have been passed which have greatly restricted the operation of the doctrine of common employment. See chapters XXXVII.–XLI., *post*. No one would have the hardihood to maintain, in the absence of any specific evidence pointing to that conclusion, that, as a result of the legislation, servants have become in a marked degree less careful and efficient, or that industrial development has been crippled and retarded to an appreciable extent. The practical inference is manifest. If, in countries where the doc-

trine of common employment has been more or less circumscribed, none of the evil results which it is declared to have ob ted can be detected, it may be safely concluded that no harm would have been produced if the doctrine had never been applied, and that no harm will result if it should be entirely abrogated by the legislatures,—the only authority by which such a change in the law can now be effected.

In examining the efficacy of the considerations thus relied on, it is highly important to observe that no court has ever gone to the extent of holding that the principle of assumption of risks is invariably controlling, whatever may be the functions of the negligent employee. Under these circumstances it is apparent that the burden actually imposed upon this "unruly horse,"[1] public policy, is not simply that of supplying the determinative element which transfers to the territory of the doctrine of assumption of risks an entire class of cases which would otherwise fall within the domain of the law of agency, but rather that of furnishing a criterion by which to decide what particular portions of that class of cases shall remain on one side or other of the boundary line between the two areas. This state of things greatly aggravates the complexity of the questions involved, and brings into still plainer relief the very unsatisfactory nature of the test proposed.[2] The nebulous quality of

[1] A phrase used by Burrough, J., in *Richardson* v. *Mellish*, 1824, 2 Bing. 229, 9 Moore, 435, 1 Car. & P. 241, Ryan & M. 66.

[2] It is interesting, from a historical standpoint, to peruse the following passage from the opinion of Johnston, J., one of the judges who dissented in the earliest of the American cases in which the defense of coservice was sustained: "I presume no one will contend that the rule applicable to service in a railroad company is that the company is not liable to *one* agent, for *any* injury, provided the company can only show that another of its agents has inflicted it. Would it do to say, for example (and upon what principle could it be said?), —that a superintendent of the hands engaged in repairing the road may, with impunity to the company, abuse his authority, to the injury of their health? Or, if the cars were to be run at night, and through the neglect of hands set apart to watch the road and remove obstructions the whole train were lost, and any officer or hand on board were crippled, certainly no one means to assert that none of those could claim compensation from the company, but must look exclusively to the irresponsible agents (perhaps slaves) hired by the company, through whom the injury accrued. And yet, how is a rule to be laid down—I wish to hear the rule stated—which would include that case and exclude this? The fidelity of the hands detailed to superintend the road, in the case I have supposed, would be as essential to the common enterprise of running the cars as the fidelity of the hands on board to their respective duties. If the idea is indulged that there is, in any branch of this enterprise, an implied undertaking among the servants to do the work jointly, and to waive the neglect of each other, what will constitute such an understanding? Where are its limits? Does it arise from the intimate connection of the hands? Then, I wish to be informed what degree of intimacy, what strength of association, is demanded to raise the implication? Where is the line?" *Warren* v. *South Carolina R. Co.* (1841) 1 McMull. L. 385, 36 Am. Dec. 268.

such a test is sufficiently demonstrated by the remarkable conflict of judicial opinion with respect to the limits of the class of employees who are termed vice principals. See chapters XXVIII.–XXX., *post*.

Since it is not unreasonable to regard the suggested considerations of public policy as having been discredited by the course of events, and thus eliminated from the field of controversy, it remains to inquire whether there is any purely juristic element which will aid us in determining whether the master's liability should be gauged by the doctrine of *Respondeat superior*, or by the doctrine of an assumption of risks. Such an element may, in the opinion of the present writer, be found in the principle which has been summed up in the maxim, *Qui sentit commodum sentire debet et onus*. It would be unbecoming to dogmatize in regard to a matter in which it is practically impossible to obtain an entirely solid basis for a doctrinal superstructure; but we think that there is, at all events, a great deal to be said for the view that the characteristic "advantage" contemplated by this maxim may, not improperly, be held, in the case of an employment requiring the co-operation of several servants, to be enjoyed rather by the master than the individual servants. Without such co-operation the work which the master is supposed to have undertaken would, *ex hypothesi*, have been impossible. It may be conceded that the servants themselves also must profit by the arrangements in question, inasmuch as their admission to work in the concern carried on by the master is a condition precedent to their enjoying the opportunity of utilizing their manual or intellectual capacities. But the balance of the benefits received seems to be decidedly in favor of the master. If this is a correct account of the situation, it is clear that the master, and not the servants, should bear all the burdens that may be created by such occurrences as are normally incident to the co-operation of the servants in the undertaking. That it would be unreasonable to exclude from the class of occurrences thus described the occasional acts of negligence by which servants inflict injury upon each other can scarcely be denied. Indeed, this is virtually conceded by the courts which have adopted the phrase "ordinary risks" as a designation of the hazards which result from the ever-present contingency that such acts may be committed. The final step in the argument may not be quite so clear: but there is certainly no manifest impropriety in taking the position that this contingency should be treated as one of the drawbacks of the business, which should be borne by the master, as the party

to whom accrues the largest part of the advantage derived from the arrangements which render the contingency possible.[3]

If these views are correct, it is clear that not only does the doctrine of common employment rest upon a basis of hypothetical consequences which, as has been amply proved by events, do not follow in a large proportion of employments,—a proportion sufficiently large to justify the inference that the suggested consequences are purely imaginary,—but that it also contravenes a fundamental legal principle. That principle harmonizes so closely with the conditions which pervade the entire organic world that it may, without impropriety, be said to express in no ordinary sense a conception based on natural justice. Its weight, therefore, in respect to the present controversy may well be regarded as decisive.

476. Doctrine not applicable, where, at the time of the accident, the servant was not acting as such.—In an early case it was laid down that a master is not exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, where the servant injured was not, at the time of the injury, acting in the service of his master; and that, in such a case, the servant injured is substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant.[1] The circumstances under which this principle has been frequently applied by the courts are considered in chapter XXXIII., *post*.

If the delinquent servant was the person who, in respect to the negligence complained of, was not acting in the course of his employment, there can be no recovery, for the same reasons that prevent the maintenance of an action under similar circumstances by a stranger. See volume III. In such a case the master is exempted from liability on a ground which renders it unnecessary to take into account the doctrine of common employment.[2]

477. Doctrine not a material factor, unless negligence causing the injury is established.—(Compare § 536a, *post*.)—It is well settled that a servant cannot recover for injuries caused by the nonculpable act of a fellow servant.[1] This inability has been referred, in several

[3] The admirably lucid dissertation of Sir Frederick Pollock on employers' liability (Essays on Jurispr. p. 112) may fairly be said to represent the high-water mark of the attempts to obtain a rational foundation for the doctrine of common employment. But the learned author has omitted to deal with the particular aspect of the question which has been discussed in the text.

[1] *Hutchinson* v. *York, N. & B. R. Co.* (1850) 5 Exch. 343, 19 L. J. Exch. N. S. 296, 6 Railway Cas. 580.

[2] Thus, a natural-gas company is not liable for an injury to a servant from an explosion caused by the striking of a match by a fellow workman to light his pipe. *Allegheny Heating Co.* v. *Rohan* (1888) 118 Pa. 223, 11 Atl. 789.

[1] The risk of errors and mistakes by

of the cases in which it is recognized, to the conception that the hazard of such an act is one which is likely to happen in the ordinary course of the business.[2] But it is manifest that a more simple ground upon which to predicate the nonliability of the master under such circumstances is to be found in the consideration that, if the act which caused the injury was not a negligent one, the essential and primary condition precedent to the maintenance of the action is not satisfied.[3] If the evidence negatives culpability, there is obviously no occasion to proceed to the second stage of the investigation, which is concerned with the question whether the case is controlled by the general doctrine of common employment, or by one of its limitations. This obvious fact is sometimes lost sight of by trial courts.[4]

478. To what classes of acts the doctrine is applicable.—The general rule which is applicable to all cases except those in which the differentiating element is the fact that the negligent and injured servants were or were not engaged in different lines of work is that the defense of common employment is available whenever the negligent servant did the act complained of in his capacity of a servant, and not in his capacity of a representative of the master. Prima facie, every act done by a servant who is not a vice principal by virtue of his official position alone is regarded as being the act of a coservant.[1] Any attempt, therefore, which is made to subject the mas-

coservants in the performance of their duties is no less one of those assumed than the risk of essentially negligent acts. *Cole* v. *Rome, W. & O. R. Co.* (1893) 72 Hun, 467, 25 N. Y. Supp. 276.

[2] *Reusch* v. *Groetzinger* (1899) 192 Pa. 74, 43 Atl. 398 (injury caused by the manner—not alleged to be negligent—in which a fellow servant used his crowbar); *International & G. N. R. Co.* v. *Torrer* (1888) 72 Tex. 308, 11 S. W. 1043 (section hand injured while unloading rails, by act of fellow servant); *Glover* v. *Kansas City Bolt & Nut Co.* (1899) 153 Mo. 327, 55 S. W. 88 (servant injured by stumbling against a machine which the operator, whom he was assisting, had started just a couple of seconds before the accident).

A minor of sufficient age and intelligence to appreciate it assumes a risk so inseparable from the work of erecting a large building as that which arises from the possibility that some of the other workmen on the building may accidentally, or even carelessly, drop some object from the upper floors. *Lehmans* v. *Vogt & Bros. Mfg. Co.* (1893) 5 Misc. 330, 25 N. Y. Supp. 509.

[3] *Greenwald* v. *Marquette, H. & O. R. Co.* (1882) 49 Mich. 197, 13 N. W. 513, is an example of a case in which the right of a brakeman to recover for an injury caused by the act of a fireman was put upon this ground.

[4] See, for example, *Gartside Coal Co.* v. *Turk* (1891) 40 Ill. App. 22, holding that, where the evidence is conflicting as to whether the superior servant was guilty of any negligence contributing to the injury, it is error to instruct the jury that, if the plaintiff received his injury while endeavoring to comply with the superior servant's order, he is entitled to recover.

[1] Unless a superior servant is for general purposes, a vice principal, the consequence of his negligent orders is a risk as much assumed as those of his negligent acts. *Gulf, C. & S. F. R. Co.* v. *Blohn* (1889) 73 Tex. 637, 4 L. R. A. 764, 11 S. W. 867. See also §§ 515 *et seq.*, *post*.

Among the delinquencies which are

ter to liability for the defaults of a servant outside the category of vice principals thus indicated must take the form of a contention that, at the time the injury was inflicted, such servant was doing something which was incident to the performance of one of those duties of the master which are deemed to be personal and nonassignable. See chapters XXXI., XXXII., *post*.

Since the theory of an assumption of the risks of a fellow servant's negligence covers all kinds of acts, provided they were of the kind indicated at the beginning of this section, it is manifest that this defense is none the less available because the act in question was the direct result of the actor's unfitness for his position, and this unfitness was not known to the injured servant.[2]

The operation of the doctrine of common employment is in no way affected by the circumstance that the act of negligence committed by the fellow servant was one prohibited by law,[3] nor by the circumstance that, at the time the accident occurred, both the injured and the negligent servants were infringing the Sunday law.[4]

As it is the failure of a fellow servant to exercise reasonable care, and not his knowledge of a specific danger, that absolves the master from liability to a coemployee for injuries caused thereby, an instruction is erroneous which makes the applicability of the doctrine of common employment turn upon the fellow servant's knowledge of the conditions which became active for mischief as a result of what he did, and not upon his failure to exercise reasonable care.[5]

479. Defense not available where the dangerous conditions caused by the fellow servant's negligence were known to the master.—In some

independent of the particular functions of the servant, and which may be committed by any employee, is the failure to obey the specific directions of the master as to precautions calculated to secure the safety of his subordinates. *Anthony* v. *Leeret* (1887) 105 N. Y. 591, 12 N. E. 561 (trap door left open).

In one case it was said that a master is "not liable for the wilful misconduct of a fellow servant in making the place of work unsafe." *Healey* v. *New York, N. H. & H. R. Co.* (1897) 20 R. I. 136, 37 Atl. 676.

The fact that his work was dangerous does not entitle an employee to recover for injuries due to the negligence of coemployees. *Craven* v. *Smith* (1894) 89 Wis. 119, 61 N. W. 317.

The rule as to coservice is applicable where any mistake is made by a fellow servant, whether through negligence or otherwise. *Bradbury* v. *Kingston Coal Co.* (1893) 157 Pa. 231, 27 Atl. 400.

[2] *Louisville & N. R. Co.* v. *Kelly* (1894) 11 C. C. A. 260, 24 U. S. App. 103, 63 Fed. 407, where it was held error to refuse an instruction that, if the plaintiff was injured either by the carelessness or unskilfulness of the delinquent servant, the company was not liable, if it had used due care in employing the latter. An objection based on the ground that the instruction assumed that the plaintiff knew of the coservant's want of skill before the accident was overruled.

[3] *Lundquist* v. *Duluth Street R. Co.* (1896) 65 Minn. 387, 67 N. W. 1006.

[4] *Houston & T. C. R. Co.* v. *Rider* (1881) 62 Tex. 267.

[5] *Levene* v. *Standard Oil Co.* (1899) 64 N. J. L. 63, 44 Atl. 847.

cases in which the doctrine was declared to be a bar to the action, the fact is adverted to that the master had no knowledge of the risks created by the coservant's negligence;[1] and it is evident that this ignorance, whether explicitly mentioned or not, is always an implied condition precedent to the availability of the defense. See chapter x., *ante*. On the other hand, the omission of the master to remedy the abnormal conditions or see that the servant was not, without his knowledge, exposed to them, constitutes an independent breach of duty on his part which, upon general principles, renders him personally liable, quite irrespective of the fact that the original cause of the dangerous conditions was the act of a coservant. See, generally, the chapters of the previous volume, in which the duties of employers are discussed.

480. — nor where negligence in selecting the coservant is shown.— The doctrine that a servant cannot maintain an action for injuries caused by the negligence of a coservant has always been conceded to be subject to an exception in cases where negligence on the master's part in employing or retaining in his employ the delinquent coservant is shown.[1]

It follows, therefore, that a declaration is not demurrable which alleges that the plaintiff was injured by an incompetent and careless coservant, whom the defendant then knew to be incompetent and careless; and that a plea to the effect that the servants whose negligence caused the injury were fit and competent persons to perform the duties in question is good against a special demurrer, based on the ground that it was merely an argumentative denial of the causes of action alleged;[3] and that an instruction which states, without qualification, that a servant assumes the risk of being injured by the man-

[1] *Cunningham* v. *Washington Mills Co.* (1891: Mass.) 26 N. E. 235; *Howd* v. *Mississippi C. R. Co.* (1874) 50 Miss. 178; *Schaub* v. *Hannibal & St. J. R. Co.* (1891) 106 Mo. 74, 16 S. W. 924 (cars temporarily left on a side track, not such an obstruction as the company would be presumed to know of).

[1] This qualification of the doctrine was recognized in *Bartonshill Coal Co.* v. *Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 769. It has often been recognized in later decisions. See § 178, *ante*.

"All that can be required of the master in that regard is that his servants shall be prudently chosen, and that they shall not be retained in his service after unfitness or negligence has been discovered, and has been communicated to him." *Quincy Min. Co.* v. *Kitts* (1879) 42 Mich. 34, 3 N. W. 240.

[1] *Jenson* v. *Great Northern R. Co.* (1898) 72 Minn. 175, 75 N. W. 3.

[3] *Hutchinson* v. *York, N. & B. R. Co.* (1850) 5 Exch. 343, 6 Railway Cas. 580, 19 L. J. Exch. N. S. 296, "A master," said Alderson, B., "is not in general responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks. The servant, when he engages to run the risks of his service, including those arising from the negli-

ner in which a given appliance might be used by the coservant operating it, is erroneous, for the reason that it withdraws from the jury the question whether the master may not have been negligent as regards the employment of the servant.[4]

481. — nor where the wife of a servant is injured by the negligence of his coservants.— Where a married woman, not in the employment of her husband's master, is injured through the negligence of his fellow servants, an action by him for the consequential damages caused to him by the injury is not barred by the doctrine of coservice.[1] Still less will it bar the action of the married woman herself, when she is suing for her own benefit.[2]

It would seem that the analogy of the cases in which the defense

gence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care: and the object of the plea in this case is to show that the defendants had discharged this duty, the omission to discharge which might have made them responsible to the deceased."

[4] *Ryan* v. *Chicago & N. W. R. Co.* (1870) 60 Ill. 171, 14 Am. Rep. 32.

[1] In *Gannon* v. *Housatonic R. Co.* (1873) 112 Mass. 234, 17 Am. Rep. 82, Colt, J., said: "We are referred to no case where the rule which exempts the master from liability for injuries received through the negligence of a fellow-servant has been held to defeat the plaintiff's right to recover consequential damages for an injury to his wife. In the opinion of the court the rule is not to be so extended. The implied contract on the part of the servant by which he assumes the risk of the negligence of others has reference to those direct injuries to which he is exposed in the course of his employment. Those injuries which are incident to the nature of his employment he is presumed to have contempl .. and with reference to his exposure to them to have fixed the compensation agreed on. In other respects his relations to his employer remain unchanged. He may insist on the performance of all other duties, whether they are such as are imposed by him, or such as arise from independent contracts, express or implied. It is said that the general rule which exempts the master from liability to his servant has a tendency to insure the safety of the public by increasing his care and fidelity, and that the public policy of the rule is equally applicable here. But if it be conceded that this is the true foundation of the rule, its bearing is too remote to influence the result to which we come in this case."

[2] In *Campbell* v. *Harris* (1893) 4 Tex. Civ. App. 636, 23 S. W. 35, where the plaintiff's wife was injured while on one of the defendant's cars, by its permission and at the suggestion of its agent, under whose orders the husband was working, the court sustained the action, saying: "To deny the wife the right to recover damages for injuries resulting from the negligence of her husband's fellow servant is to bind her by a contract to which she is not a party. The wife is not bound by the husband's contract to assume all the risks of injury to his person resulting from the negligence of his fellow servants. The existence of the wife is not, with us, as at common law, merged in that of her husband. She has rights, and can maintain suit for their protection: and she can recover damages for wrongs done her, and the money recovered for such wrongs is not, as at common law, the exclusive property of the husband. And while it is true that the wife must generally sue in the name of her husband, he who has wronged her cannot justify under a contract made with her husband, to which she is in no wise a party. The husband, it is true, can by his contract convey the interest of the wife in the community estate, but we know of no law which would authorize the husband to make a contract binding upon the wife, which would exclude her from the right to recover for injuries to her person, inflicted by the wrong or negligence of another. The motion must be denied."

has been held to preclude a father from recovering for injuries received by a minor child in the service of the defendant (see § 488, *infra*), justifies the inference that a suit by the husband cannot be sustained, where the injured wife was herself a fellow employee of the person by whose negligence she was injured. But this point does not seem to have been determined by specific judicial authority.

482. Rule where a stranger is being sued for an injury partially caused by the injured servant's coemployees.— The right of action in cases where the action is brought against a stranger, and the defense is that the injury was partly caused by the negligence of the plaintiff's own fellow servants, is usually discussed with reference to the doctrine of imputed negligence, the accepted theory of late years being that the defense in question is not a bar to the action, for the reason that the negligent servant is not the agent of the injured servant in such a sense that the latter can be made responsible for the defaults of the former.[1] But a similar result has also been arrived at by reasoning which is quite similar to that employed in cases in which the availability of the defense of common employment is discussed.[2]

The existence of a right of action under these circumstances may also be deduced from the consideration that such cases come within

[1] *Adams* v. *Glasgow & S. W. R. Co.* (1875) 3 Sc. Sess. Cas. 3d series, § 215; *Chicago, St. P. & K. C. R. Co.* v. *Chambers* (1895) 15 C. C. A. 327, 32 U. S. App. 253, 68 Fed. 148; *Abbitt* v. *Lake Erie & W. R. Co.* (1895; Ind.) 40 N. E. 40; *Poor* v. *Sears* (1891) 154 Mass. 539, 28 N. E. 1046.

[2] In *Perry* v. *Lansing* (1879) 17 Hun, 34, where the pilot of a steamer, who was injured by its coming into collision with another steamer, owing to the negligence of both crews, was allowed to recover against the proprietor of the second steamer, we find the court saying: "The rule applicable, between servant and master, is well . . . The servant cannot recover of . . as . . injuries occasioned by a coserva. in the same general employment. That risk he assumes when he enters into the employment. But has this principle any application to an action for injuries against a third person not the master? Though the servant may not maintain an action against his master for an injury arising from the negligence of a fellow servant, does it follow that he may not have an action against a third person for an injury occasioned by such third person's negligence, because some co-servant has been guilty of negligence contributing to the injury? No such rule can be found so far as I have been able to discover. Between the master and servant there is an implied contract that the servant shall assume the risks of the employment. For this reason the liability does not exist. But there is no such relation between the servant and a stranger. As between them, the servant has not waived his remedy if a coservant has been guilty of contributory negligence. The proximate cause of the injury is the act of the stranger. Why should he be shielded from damages because some person, no way related to him, has failed to exercise the requisite care to prevent plaintiff's injury?"

In a Texas case it was held that the servant of a lessee railway company could not recover damages from the lessor company for injuries caused by the negligence of his own coservants, because (1) he took the risk of their negligence, and (2) because the lessor was not liable for the negligence of the lessee's servants.

See also *Schmidt* v. *Steinway & H. P. R. Co.* (1890) 55 Hun, 496, 8 N. Y. Supp. 664, 9 N. Y. Supp. 939 (evidence that the negligent servant was in the employment of the plaintiff's master, held to be immaterial).

the purview of the rule that a person whose negligence is an efficient cause of the injury complained of is not excused by the fact that the injury was partly caused by the negligence of a third party.[3]

483. Defense available against a servant beginning work after the commission of the negligent act.—That the operation of the doctrine is independent of the fact that the injured servant was not in the defendant's employ when the negligence of the fellow servant was committed, provided that negligence was still a potential source of injury at the time of the accident, is clear both on principle and authority.[1]

The new servant, that is to say, takes the risk of any existing negligence of his fellow servants, as well as that which may thereafter occur.[2]

483a. Ratification not inferred from retention of negligent servant.—The fact that a master retains a servant in his employment after an injury to a coservant by the former's negligence is not a rat-

[2] See *Busch* v. *Buffalo Creek R. Co.* (1883) 29 Hun, 112; *Ft. Worth & D. C. R. Co.* v. *Bell* (1893) 5 Tex. Civ. App. 28, 23 S. W. 922; *Chicago & A. R. Co.* v. *Harrington* (1901) 192 Ill. 9, 61 N. E. 622, Affirming (1900) 90 Ill. App. 638.

[1] In a leading English case it was held to be error to direct a jury that an employee in a mine, whose duty it was to see that it was properly ventilated, and another employee working in the mine, could not be fellow workmen if the imperfect system of ventilation which caused the death of the latter had been completed before he was hired. *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30. Lord Chelmsford said: "There is a little want of accuracy here in the learned Judge's language. If the negligence imputed to Neish is to be taken to have occurred at the time of the completion of the system of ventilation, the deceased could not have then stood in the relation of a fellow workman, for he was not a workman at all. I suppose the learned Judge meant to tell the jury that if the negligence which occasioned the accident was finished and completed before the deceased entered the service, the question of fellow workman did not arise. But, assuming this to have been the direction, it was open to exception. If the platform in the Pyotshaw seam was originally of improper construction for the purpose of ventilation, there was undoubtedly a complete act of negligence on the part of Neish at the moment of its erection. But as he was bound to take care that sufficient ventilation was maintained during the whole time of the workings, as long as he omitted to do so he was guilty of negligence, which continued down to the time of the occurrence of the accident. It was therefore incorrect on the part of the learned Judge to confine the act of negligence to the one period of the completion of the system of ventilation, and thereby to conclude the question as to Neish and the deceased being fellow workmen when the accident happened."

In another case where the defense of coservice was sustained, the fact that the date of employment of an injured employee was a day or two subsequent to that of the employment of other men was held not to affect the question of the employer's liability for the imperfect manner in which apparatus to be used by the employees was erected by themselves. *Burns* v. *Bennett* (1893) 99 Cal. 363, 33 Pac. 916.

In another, it was laid down that the rule that an employee assumes the risk from the negligence of coemployees in constructing a scaffold applies even if the negligent act was done before his employment, where he knew, or by reason of his experience was chargeable with knowledge, that the scaffolding was erected by such coemployees. *Olsen* v. *Nixon* (1898) 61 N. J. L. 671, 40 Atl. 694.

[3] *Butler* v. *Townsend* (1891) 126 N. Y. 105, 26 N. E. 1017.

ification. The doctrine of ratification, if applicable at all as between a master and servant, is applicable only when a wilful injury is inflicted by the servant upon a coservant.[1] Manifestly, however, if the act which caused the injury was one which showed the delinquent to be incompetent for his position, the fact of his being retained is indicative of culpability on the master's part.

484. Application of the doctrine in the case of seamen.—In one case it was argued that, as the plaintiff was a seaman, bound to obey the orders of his superior officers and liable to punishment by law if he refused obedience, he was removed from the operation of the doctrine of common employment. This contention did not prevail, though the court suggested that the peculiar relations of the common seaman to his superior officers might relieve him from being charged with contributory negligence in obeying an order which exposed him to peril.[1] See § 302, subd. *c*, § 315, *ante*.

This rule also prevails in admiralty suits *in rem;* but under such circumstances the injured servant is entitled by the maritime law to be cared for at the expense of the ship, and to be paid his wages to the end of the voyage.[2]

485. — of pilots.—The English merchant shipping act (17 & 18 Vict.) chap. 104, subjects a pilot to a penalty if he refuses to take charge of a ship, requires the master under a penalty to employ the pilot, prescribes that the rate of remuneration is to be neither more nor less than the fixed rate, although both parties should so agree, and declares that the ship owner is not to be liable to the pilot as his servant. It has been held that a pilot hired under these provisions does not take upon himself the risk of injury from the negligence of the shipowner's servants, the reason assigned being that he must conduct the ship on the terms fixed by the statute, and is therefore not in the position of an ordinary servant who has, theoretically, "the power of choosing whether he will enter into the employment of a person who does not agree to act personally in the management of his business, or, as an alternative, to be responsible for the negligence of those he employs."[1]

486. — of persons performing forced labor.—Before the abolition of slavery in the United States it was held by two courts that the

[1] *Smith* v. *Sibley Mfg. Co.* (1890) 85 Ga. 333, 11 S. E. 616.

[1] *Olson* v. *Clyde* (1884) 32 Hun. 425. The cases cited in § 520, note 1, subd. q, *post*, in which the only question argued was whether the negligent and injured employees were coservants in the technical sense of the doctrine, are impliedly authorities to the same point.

[2] *The City of Alexandria* (1883) 17 Fed. 390.

[1] *Smith* v. *Steele* (1875) L. R. 10 Q.

doctrine was not applicable where the owner of a slave was suing for injuries received through the negligence of another person employed by the man to whom the services of the slave had been rented, the decision being based on the fact that the conditions of such a service were so entirely different from those under which a free employee is presumed to contract, that the reasons commonly given for the rule were not applicable.[1] By another court the defense was sustained in an action by a master for injuries to his slave.[2]

The only cases which, under modern social conditions, bear any analogy to those in which a slave was the injured person are those in which an accident occurs to a convict whose services have been hired from the state. In one such case it has been held that a chain-gang boss is not a fellow servant of a chain-gang prisoner, so as to relieve the employer of such gang of responsibility for the death of the latter caused by the negligence or wrongful act of the former.[3]

487. — of employees of public bodies.—The doctrine of common employment is a bar to the action of a servant of the state,[1] or of a municipal corporation.[2]

Such a servant is also entitled, under appropriate circumstances, to the benefit of the various limitations to which that doctrine is subject in the jurisdiction where the accident occurred. Thus, recovery is

B. 125, 44 L. J. Q. B. N. S. 60, 32 L. T. N. S. 195, 23 Week. Rep. 388, per Blackburn, J.

[1] *White* v. *Smith* (1860) 12 Rich. L. 595 (hired slave injured by free coemployee); *Scudder* v. *Woodbridge* (1846) 1 Ga. 197. In a Georgia case the latter decision was said to have been based upon the theory that slaves, from their status, were incapable of influencing their associate employees in the common business. *Cooper* v. *Mullins* (1860) 30 Ga. 146, 76 Am. Dec. 638.

[2] *Ponton* v. *Wilmington & W. R. Co.* (1858) 51 N. C. (6 Jones L.) 245. *Jones* v. *Glass* ( ) 13 Ir. Rep. 305, was distinguished on the ground that the overseer whose negligence caused the injury was the representative of his master, who was, therefore, liable for his acts in respect to the chattel hailed.

[3] *Boswell* v. *Barnhart* (1895) 96 Ga. 521, 23 S. E. 414. The court said: "The ground upon which a master is relieved from liability to a servant for injuries resulting from the negligence of a fellow servant is that the servant, when he enters the employment of the master, impliedly contracts to assume the risk of such negligence, as one of the risks incident to the service, and that his compensation is fixed with reference to this; and clearly this reason cannot apply in the case of one not voluntarily in the service, but merely a prisoner serving out his sentence for a violation of the law. Indeed, it can hardly be seriously contended that a chain-gang 'boss' is in any sense a fellow servant of a prisoner working under him. The 'boss,' while acting in that capacity, is the *alter ego* of his employer, and the latter is responsible for any wrongful or negligent acts on the part of such employee by which a prisoner is deprived of his life."

[1] *Loughlin* v. *State* (1887) 105 N. Y. 159, 11 N. E. 371.

[2] *Hanna* v. *Granger* (1894) 18 R. I. 507, 28 Atl. 659 (conceded); *Dube* v. *Lewiston* (1891) 83 Me. 211, 22 Atl. 112 (applying the rule that a mere foreman is not a vice principal).

Many other cases in which this rule is taken for granted will be found in the following chapters.

allowed in cases where the negligent and injured servants were in different departments.[3]

See, generally, §§ 499–506, *post*.

488. — of minors.—*a. Generally.*—It is well settled that the mere fact of a servant's minority does not of itself preclude his master from relying on the defense of common employment.[1] In other words a master does not insure a minor servant against the consequences of a fellow servant's negligence.[2] But the authorities seem to leave it in some doubt, whether the availability of the defense is a rigid presumption of law, as in the case of adults, or merely a presumption of fact, subject to rebuttal by evidence showing that the servant did not comprehend the risk to which he was exposed, under the circumstances, by the possibility of a coservant's negligence.

In some decisions the language used is such that it is difficult to avoid the conclusion that the former of these theories was the one adopted.[3] In others an acceptance of the latter theory is more or less

[1] In *Turner* v. *Indianapolis* (1884) 96 Ind. 51, where a man engaged in driving the engineer of a fire department was injured by a defective street, the court said: "If the rule in any case can be made applicable to such officers and agents (*i. e.*, of municipal corporations), it cannot be made to apply when they are acting in entirely different departments of the municipal government. We cannot see wherein there is any coservice to be performed between members of the fire department and members of the street department, to which the rule could be applied to the case under consideration. A member of the fire department has no servitude connection whatever with the repairing of the streets, or the removal of obstructions therefrom, and we do not think he can in any sense be called a coservant with the street commissioner or any other officer or agent of the city having charge of the streets. They are, to each other, in so far as servitude is concerned, entire strangers, and a fireman, in assuming the duties of his position, takes upon himself no risks arising out of the negligence of those in charge of the streets."

A similar decision as regards a similar accident was rendered in *Coots* v. *Detroit* (1889) 75 Mich. 628, 5 L. R. A. 315, 43 N. W. 17. The point of view, in the judgment of Morse, J., seems to be the same as that in the Indiana case just cited. Champlin, J., based his conclusion on the ground that the relation of master and servant did not exist between the city and the employees of the fire department, and that the engineer was therefore one of the general public, so far as his right of action was concerned.

[1] This doctrine is taken for granted in all the numerous cases in which minors have been held unable to recover, and has been expressly affirmed in *Fisk* v. *Central P. R. Co.* (1887) 72 Cal. 38, 13 Pac. 144.

[2] *Houston & G. N. R. Co.* v. *Miller* (1879) 51 Tex. 270.

[3] In what is apparently the earliest decision bearing on the subject, it was held down that the fact that the injured servant was a minor did not at all affect his legal rights. *King* v. *Boston & W. R. Corp.* (1851) 9 Cush. 112.

In another case, in which a boy of eleven was thrown off a horse attached to a corn cutter, it was held error to give an instruction from which the jury would infer that a recovery might be had even though the injury was the sole result of a coemployee's negligence, and another instruction to the effect that the jury were to determine whether the accident was caused by the negligence of a fellow servant, but that this question did not arise, if it was found that the work was dangerous, and that the plaintiff did not comprehend the danger. *Crocker* v. *Smith* (1891) 80 Wis. 119, 61 N. W. 817.

In another, where a boy engaged in turning switches in a mine was run

strongly indicated by the phraseology of the opinion.[4] In others the servant's appreciation of the risk was a necessary inference from the testimony, and is referred to by the court; but it is not apparent whether this circumstance was actually viewed as a differentiating factor, the absence of which would have enabled the servant to maintain the action.[5]

over owing to the carelessness of coservants in operating a car, the court denied recovery, saying that it did not matter what his age was. *Harris* v. *McNamara* (1892) 97 Ala. 181, 12 So. 103.

A similar point of view is probably discernible in *Heffernon* v. *Northern P. R. Co.* (1891) 45 Minn. 471, 48 N. W. 1; *Jones* v. *Phillips* (1882) 39 Ark. 17, 43 Am. Rep. 263; *Pittsburgh, C. & St. L. R. Co.* v. *Adams* (1885) 105 Ind. 151, 5 N. E. 187; and the cases cited in notes 1 and 2, *supra*.

In two Illinois cases it has been laid down in unqualified terms that an infant is subject to the rule regarding coservice as long as he abstains from exercising his right to avoid the contract of employment. *Garland* v. *Toledo, W. & W. R. Co.* (1873) 67 Ill. 498; *North Chicago Rolling Mills Co.* v. *Benson* (1895) 18 Ill. App. 194.

In the former case the court said: "It is not denied that an express contract made with a minor is valid at his option. It is not void, but voidable only. The express contract by the minor in this case was to serve his employer on a railroad. So long as he did not avoid that contract, but remained in the employment of the railroad company, he was of necessity subject to all the hazards attending that kind of employment, one of which was the negligence of his fellow servants in the same line of duty. The minor, by so entering into this employment, came under the general rule prevailing, not only in this court, but in almost all the courts of the several states and in England, and took upon himself the natural and ordinary risks and perils incident to the service in which he engaged, among which was the carelessness of his fellow servants." See, however, the Illinois case cited in note 4, *infra*.

[4] In *Jones* v. *Florence Min. Co.* (1886) 66 Wis. 268, 57 Am. Rep. 269, 28 N. W. 207, the court, referring to the contention of counsel that infancy and inexperience do not modify the rule as to fellow servants, said that this statement only holds good when it appears that such employee has been properly instructed by his employer as to the dangers of his employment, or has acquired knowledge of such dangers from other sources. See, however, the Wisconsin case cited in note 3, *supra*.

In *De Graff* v. *New York C. & H. R. R. Co.* (1877) 76 N. Y. 125, the court recognized the rule that a minor assumes the risks of a fellow servant's negligence, but intimated that, if a child of unsuitable age should be employed in a hazardous business, or exposed to unsuitable risks, a different question might be presented.

In *Hinckley* v. *Horazdovsky* (1890) 133 Ill. 359, 8 L. R. A. 490, 24 N. E. 421, where a boy of twelve was injured while cleaning machinery in motion, the court held it error to charge the jury, without qualification, that, if they believed from the evidence that the plaintiff was injured by following the direction, or through the carelessness, of the fellow servant named, he could not recover, and said: "The reason why the common master is held liable for an injury caused by the negligence of a fellow servant is that it is one of the ordinary risks of the employment. But if the injured employee is a child, incapable of comprehending that risk, the rule ought not to apply."

In *Hamilton* v. *Galveston, H. & S. A. R. Co.* (1881) 53 Tex. 556, the following language was used: "The employment of a boy only fifteen years of age in the hazardous position of brakeman if without the consent of his mother and only parent, was a wrong done to that mother, and unless the boy had sufficient discretion to comprehend and guard against the dangers of the employment, when fully explained to him, as they should have been by the employer, such a contract would not place him in the position of an employee, or preclude a recovery for injuries suffered from the negligence of a coemployee."

[5] *Curran* v. *Merchants' Mfg. Co.* (1881) 130 Mass. 374, 39 Am. Rep. 457 (boy fourteen years old, who had cleaned machinery two years and a half in a

The theory which would permit a minor servant to recover in any case where it is not an inference in point of law from the testimony that he understood the risks to which he was exposed in the given employment, as a result of his being required to work in company with other employees, seems to be the more conformable to the general principle explained in § 291, *ante*. That the defense of common employment is not a bar to the action if the minor was injured in consequence of his compliance with the order of a superior to undertake new duties is well settled. See § 465, *ante*.

b. In actions by a parent for loss of services.—The defense of common employment is available as a bar to an action by a minor's parent for loss of services resulting from an injury caused by the negligence of a fellow servant of the minor.[6]

489. Master not liable to his servant for injuries caused by the negligence of servants of a stranger.— In two cases it has been held that the servant of a railway company assumes, as one of the ordinary perils of his employment, the risk of injury through the negligence of the servants of another company which is operating trains upon the same line under a lease.[1] But it is not apparent why the doctrine of assumption of risks should have been invoked at all under such circumstances. The fact that the defendant did not control, and had no power to discharge the negligent persons, was of itself a sufficient ground for declaring the action to be not maintainable.[2]

490. Common employment not a defense to an action against a third

mill, was injured by a fellow servant's carelessly starting the machinery while he was cleaning it). *Greenwald* v. *Marquette, H. & O. R. Co.* (1882) 49 Mich. 197, 13 N. W. 513 (brakeman, only seventeen years old, but experienced and competent, was run over); *Brazil C. Coal Co.* v. *Cain* (1884) 98 Ind. 282 (minor of nineteen injured by fall of unpropped roof of tunnel); *Evansville & R. R. Co.* v. *Henderson* (1893) 134 Ind. 636, 33 N. E. 1021 (minor of nineteen killed owing to train being run at excessive speed); *Hefferen* v. *Northern P. R. Co.* (1891) 45 Minn. 471, 48 N. W. 1 (side-rod used for cutting rails had become so battered that fragments were obviously liable to fly off when it was struck).

[6] *Ohio & M. R. Co.* v. *Hammersley* (1867) 28 Ind. 371; *Shields* v. *Yonge* (1854) 15 Ga. 349, 60 Am. Dec. 698. *Augusta Factory* v. *Barnes* (1884) 72 Ga. 217, 53 Am. Rep. 838.

[1] *Clark* v. *Chicago, R. & Q. R. Co.* (1879) 92 Ill. 43, followed in *Bauer* v. *St. Louis, I. M. & S. R. Co.* (1885) 46 Ark. 388.

[2] In one of the earlier Scotch cases it was held that, if a railway company leaves to the servants of another company using the same station the duty of carrying and placing articles on that part of the platform occupied by the former company, and looks no more after those articles, the former company makes those persons its servants, and is liable for their negligence causing injury to one of its own employees. *Hill* v. *Caledonian R. Co.* (1855) 17 Sc. Sess. Cas. 2d series, 569. It would seem that the court regarded the servants of the second company as discharging what would now be termed an absolute or non-delegable duty. But on the facts it is clear that the injury would, according to the more modern theory, be treated as one caused by negligence in carrying out the details of the work. See chapter XXXII., *post*. The decision doubtless reflects the

person to recover for his servant's negligence.— In cases where a third person is sued for injuries caused by the negligence of his servants, it is considered that the fact of their having been, at the time of the accident, engaged in the same general operation as the injured servant, is not a sufficient ground for putting him upon a footing different from that upon which any other stranger would stand in an action against the same defendant for injuries caused by the negligence of his servants. That is to say, as the mere general knowledge that the servants of a person with whom a stranger is brought into contact in the transaction of everyday life may act negligently has never been considered to involve the corollary that the latter accepted the risks of the situation, so the rule is now well settled, both in this country and in England, that "unless the person sought to be rendered liable for the negligence of his servant can show that the person seeking to make him liable was himself in his service, the common employment is not open to him."[1] In brief, the doctrine of common employment "applies only where the negligence is by one of an injury to a servant or agent against the principal by whom that servant was himself employed."[2]

original views of the Scotch courts which were adverse to the adoption of the doctrine of common employment.

[1] *Johnson* v. *Lindsay* [1891] A. C. 371, 65 L. T. N. S. 97, 55 J. P. 644, 61 L. J. Q. B. N. S. 90, 40 Week. Rep. 405, Reversing (1889) L. R. 23 Q. B. Div. 508, 58 L. J. Q. B. N. S. 581, 38 Week. Rep. 119. The decision in *Wiggett* v. *Fox* (1856) 11 Exch. 832, 25 L. J. Exch. N. S. 188, 2 Jur. N. S. 955, was disapproved in so far as it might be held to have countenanced a different doctrine, but was explained as being intended to rest upon the ground that the control exercised by the defendant over the plaintiff was such as to make the latter his servant. *Woodhead* v. *Gartness Min. Co.* (1877) 4 Sc. Sess. Cas. 4th series, 469 (see note t, *infra*), in which it had been categorically held that, in cases of common employment under different masters, each master is exempt from liability for injuries inflicted upon the workmen of other masters by the negligence of his servants, was overruled.

Inderman v. *Dames* (1856) L. R. 1 C. P. 274, 35 L. J. C. P. N. S. 184, 12 Jur. N. S. 432, 14 L. T. N. S. 484, 14 Week. Rep. 586, 1 Hurl. & R. 243, has also been said to have decided that, as between the owner of machinery and those who are sent by their masters to repair it, there is no implied contract that the workmen so sent take upon themselves the risk of injury from the negligence of the servants of the owner of the machinery. Blackburn, J., in *Smith* v. *Steele* (1875) L. R. 10 Q. B. 125, 44 L. J. Q. B. N. S. 60, 32 L. T. N. S. 195, 23 Week. Rep. 388.

Smith v. *New York & H. R. Co.* (1859) 19 N. Y. 127, 75 Am. Dec. 305, per Selden, J.

This principle was first noticed by Chief Justice Shaw *arguendo* in the leading case of *Farwell* v. *Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339, though not explicitly ruled upon. Since then it has been assumed, or formally stated, in a very large number of cases. As the question upon which nearly all these really turn is whether the relation of master and servant did, as a matter of evidence, exist between the plaintiff and the defendant, as well as between the defendant and the negligent servant, they will more appropriately be reviewed in the chapter which deals with that question. See volume III., *post*. In the present connection it will be sufficient to cite the following: *Chicago, St. P. & K. C. R. Co.* v. *Chambers* (1895) 15 C. C. A. 327, 32 U. S. App. 253, 68 Fed. 148; *Cleveland, C. C.*

The rationale of this rule is that a defense which, as already shown (§§ 472, 473, *ante*), is based upon the hypothesis that, as accessory to the contract of hiring, there is implied on the servant's part an agreement to assume the risk of being injured by the negligence of his co-employees, cannot properly be invoked, where he is suing a person with whom he has no contractual relations.[3]

& St. L., R. Co. v. *Kernochan* (1896) 55 Ohio St. 306, 45 N. E. 531; *Poor* v. *Sears* (1891) 154 Mass. 539, 28 N. E. 1046; *Morgan* v. *Smith* (1893) 159 Mass. 570, 35 N. E. 101; *Reagan* v. *Casey* (1894) 160 Mass. 374, 36 N. E. 58; *Swanson* v. *Atlantic Mail S. S. Co.* (1871) 57 N. Y. 108; *Gregory* v. *Hill* (1859) 8 Sc. Sess. Cas. 3d series, 282; *Swainson* v. *North-Eastern R. Co.* (1878) L. R. 3 Exch. Div. 341, 47 L. J. Exch. N. S. 372, 38 L. T. N. S. 201, 26 Week. Rep. 413; *Parker* v. *Hannibal & St. J. R. Co.* (1891) 109 Mo. 362, 18 L. R. A. 802, 19 S. W. 1119; *Union P. R. Co.* v. *Billeter* (1890) 28 Neb. 422, 44 N. W. 483; *Northern P. R. Co.* v. *Croft* (1895) 16 C. C. A. 175, 29 U. S. App. 687, 69 Fed. 124; *Zeigler* v. *Danbury & N. R. Co.* (1885) 52 Conn. 543; *Stewart* v. *Harvard College* (1866) 12 Allen, 58; *Swanson* v. *Atlantic Mail S. S. Co.* (1871) 1 Jones & S. 277, Affirmed in (1874) 57 N. Y. 108; *Kostl* v. *Wabash R. Co.* (1897) 114 Mich. 53, 72 N. W. 28; *Vary* v. *New York, O. & W. R. Co.* (1890) 29 N. Y. S. R. 630, 9 N. Y. Supp. 153.

By an oversight, cases of this type have sometimes been decided upon principles which are irrelevant until it has been decided that a common employment exists within the meaning of the doctrine stated in the text. Thus, in *Martin* v. *Louisville & N. R. Co.* (1894) 95 Ky. 612, 26 S. W. 801, the grounds on which it was held that the engineer of a train belonging to one company was not a fellow servant with a brakeman upon a train of another company, injured by the former's negligence, were (1) that they were in different grades of the service, and (2) that they were on different trains. As the case was plainly concluded in the plaintiff's favor by the fact that he and the negligent employee were not controlled by the same master, the consideration of the points here made was superfluous and erroneous.

In a recent New York case it was attempted to hold the owner of a building responsible for injuries received by a servant of one of the contractors engaged in making repairs and additions, owing to the negligence of the servants of another of the contractors in so placing the door of a vault before its completion, that it was liable to fall down upon him. *Murphy* v. *Altman* (1898) 28 App. Div. 472, 51 N. Y. Supp. 106. But it was held that whatever remedy the injured person might have must be sought from the employer of the negligent persons, and that the risk in question was one manifestly incident to the work.

The English employers' liability act of 1880 (see chapter XXXVII., *post*), being intended merely to remove a defense which is based on the assumption that the relation of master and servant exists between the plaintiff and defendant, has no application to a case where that relation does not exist, as between the employer of a contractor and the contractor's servants. *Robertson* v. *Russell* (1885) 12 Sc. Sess. Cas. 4th series, 634.

[3] In *Swainson* v. *North-Eastern R. Co.* (1878) L. R. 3 Exch. Div. 348, 47 L. J. Exch. N. S. 372, 38 L. T. N. S. 201, 26 Week. Rep. 413, Lord Bramwell said: "We must consider what obligations a servant takes upon himself. It is sometimes said that he contracts to take upon himself the risks of his service; but the proposition may also be stated as follows, namely, that he has not stipulated for a right of action against his master if he sustains damage from the negligence of a fellow servant. The two forms of the proposition seem to me substantially the same; in either case it is necessary to prove that a relation has been established between the person who complains and the master of the person who does the injury."

This passage was referred to with approval by Lord Herschell in *Johnson* v. *Lindsay* [1891] A. C. 371, 65 L. T. N. S. 97, 55 J. P. 644, 61 L. J. Q. B. N. S. 90, 40 Week. Rep. 405, whose point of view is further indicated by the following extract from his opinion: "It is obvious that, if the exception [*i. e.*, that created by the doctrine of common employment] results, as it does

For the purposes of the rule a workman who, at the time of the accident, did not know that he had temporarily passed into the service

according to the authorities I have cited, from the injured person having undertaken, as between himself and the person he sues, to bear the risks of his fellow servants' negligence, it can never be applicable when there is no relation between the parties from which such an undertaking can be implied. There are other considerations which point in the same direction. It must be remembered that whilst a servant contracts with his master to bear the risks of the negligence of his fellow servants, there is, as has been more than once laid down, a corresponding duty on the part of the employer to take due care to select competent servants. And it would be most unreasonable to hold that he is exempt from liability for his servant's negligence in any case where he is not under this obligation. But I do not see how such an obligation can arise otherwise than from some contractual relation. The obligation and the exemption appear to me to be correlative, and to be implied from the relation of master and servant created between the parties."

In the same case Lord Watson stated his views as follows: "I am also unable to assent to the legal doctrine which found favor with the divisional court, and was pressed upon us in the argument for the respondents. I do not agree with Baron Pollock, that the rule which exempts a master from liability to his servant for injuries negligently occasioned by a fellow servant in the course of their common employment rests upon the absence of an implied contract by the master to recoup such damage. The master's responsibility for his servant's acts has its origin in the maxim, *Qui facit per alium facit per se*, which has been construed as inferring his liability for what is negligently done by the servant acting within the scope of his employment. The immunity extended to a master in the case of injuries caused to each other by his servants whilst they are working for him to a common end is an exception from the general rule, and rests upon an implied undertaking by the servant to bear the risks arising from the possible negligence of a fellow servant who has been selected with due care by his master."

The following passages from the dissenting opinion in the Scotch case of *Woodhead* v. *Gartness Min. Co.* (1877) 4 Sc. Sess. Cas. 4th series, 469, are also worthy of notice, since, as already mentioned in note 1, *supra*, the judgment of the majority of the court was overruled by the House of Lords: "When servants work under the same master, they are working in one interest, and for the benefit of the same man. They are appointed and paid by the same man, and the same man is responsible for them. I take it that this element in a common contract of service lies at the root of the exception based on it. The same person is responsible for the conduct of the servants towards third parties, and he is also responsible to his own servants that each shall be chosen with reasonable care. In common service each servant represents the same master. But when two persons enter into a contract for the execution of work to be done either by the servants of both or by the servants of one, there is no such identity of relations or interest. Each party to the contract is liable for his own servants, but he is not liable for the servants of the other. The servants of each work for the interest of their own master, and represent him only. As neither selects the servants of the other, neither can have any responsibility as to their qualifications. And thus it is fixed, first, that neither is liable for the neglect of the servant of the other party to the contract, and, secondly, that each is liable for the neglect of his own servant if the servant of the other is thereby injured. . . . When two persons enter into a mutual independent engagement that a certain operation shall be performed either by both jointly, or by one on the premises of the other, and that for a valuable consideration, neither can complain against the other of the accidental consequences of the act, for they have both agreed that it shall be done. But each is bound to the other that his part of the contract shall be carefully and skilfully performed, and is, of course, liable for negligent and unskilful performance; and this liability is incurred to everyone who is lawfully engaged in the execution of the contract for the behoof of the other party to it. The negligence of one of the parties to the contract in its execution is not an incident of the contract, but a breach of it. The law on this head is clearly settled."

The American cases are to the same effect.

"The ground of exemption of the master in all these cases (*i. e.*, where the servant is suing his own master) is the privity of the contract between him and the person injured, from which the law presumes an agreement between them, for a compensation equal to the risk or peril of the service. If, therefore, the plaintiff in this case was not, in any legal sense, the servant or employee of the defendants, but was the servant or employee of another, and there was no privity between him and the defendants, the decisions referred to do not apply, and the defendants must be liable, upon the general rule, to the plaintiff, the same as to any other stranger. The defendants can claim no benefit or exemption from a contract made between the plaintiff and another party, whatever risks he may have assumed, as between himself and his employer." *Young* v. *New York C. R. Co.* (1859) 30 Barb. 229.

"The general rule is responsibility by the master for the negligence of his servant in the performance of his work from which injury results to another. This liability does not arise from contract, but springs from a breach of that duty which each member of the community owes to each other member. It may, it is true, be limited by contract; and where one enters into the service of another the contract of service is held to imply a release, under certain circumstances, of responsibility by the master for the negligence of fellow servants. But what room is there for the application of this rule as between parties who do not stand in any contractual relation? Or why should a fanciful and imaginary contract be made and supplied by the courts to relieve from liability? That an occupation is dangerous does not make it unlawful; nor is negligence lawful because occurring in a dangerous enterprise. If my business calls me to cross a dangerously crowded street, the circumstances under which I am placed demand a greater care and the exercise of greater watchfulness to avoid danger, failing in which I may be denied an action against another who has also been guilty of the same negligence. But suppose I do exercise all the prudence which my situation requires? Shall I then, who am innocent, be ridden down by one who is negligent, and when appealing to the law for redress be answered that I took the chances of injury? And if I may recover against the person by whom the injury is inflicted, why may I not hold to a like responsibility him whose servant inflicted it? It devolves upon those who advance this view to show some rule of law which relieves the master of the negligent servant, and if any such rule exists it has not been pointed out in a single case to which we have been referred. We understand the law to be that one who engages in a dangerous enterprise assumes the risk of such injuries as he may receive provided they are not caused by the negligent, and therefore unlawful, act of another. But dangerous occupations demand a correlatively greater care on the part of all persons engaged in them, and one guilty of a want of that care which the law imposes on him, and resulting in injury to an innocent person, cannot escape the obligation of making reparation to the innocent by showing that the service in which he was engaged was in itself of a dangerous character, for *non constat* that the injury would have resulted in the dangerous service if the defendant himself had used that care which the very danger required him to observe. But it is said, by engaging in a common work the servants of the employer and those of an independent contractor, or the servants of two independent contractors, become fellow servants. This is a pure, simple, and arbitrary assertion; a fanciful doctrine, invented to subserve some supposed public policy or to limit the operation of a well-recognized rule which judges have thought in particular cases it would result in some hardship to enforce. Suppose the plaintiff, Conroy, had gone to the defendant company and said to it: 'Your engineer is a careless and negligent man; I am unwilling to serve with him, and I ask you to discharge him?' Would not the reply have been 'We have nothing to do with you; we did not engage you; we cannot discharge you; you are not liable under any contract to us; we are not responsible for you nor to you?' The plaintiff would then have gone to McDonald, who had employed him, and made the same complaint. McDonald would have replied, and properly, 'I have nothing to do with the engineer; I did not select him; I cannot discharge him; I do not control him; I am not responsible for him.' The relationship seems to begin just where the master invokes it for his protection, and ends just where the servant invokes it for his

of the party from whom he is seeking an indemnity, is put upon the same footing as one who had always remained outside that service.[4]

491. Discussion of this rule.— The principle established by the cases cited in the last section may fairly be described as an arbitrary limitation upon a rule which is itself based on nothing more substantial than a purely fictitious implication. Considering the intolerable amount of injustice produced by the defense of common employment, it is far from being a subject of regret that the courts should have restricted that defense to cases where the negligent and the injured servants are hired by the same master. But it is impossible to deny that the situation would logically be far more satisfactory if the exception thus ingrafted on the main doctrine had been referred immediately to what seems to be, in the last resort, the only solid foundation which can be suggested for the doctrine itself, *viz.*, public policy. See § 473, *supra*. Even supposing that the theory of an implied agreement is inapplicable, simply and solely because the action is one between a plaintiff and a defendant between whom there is no privity of contract, there are no apparent reasons, apart from such as may be deduced from public policy, why the principle expressed in the maxim, *Volenti non fit injuria*, should not be allowed, under appropriate circumstances, to constitute a valid defense. It is a manifest inconsistency to allow that principle to operate as a bar in such cases as *Woodley* v. *Metropolitan Dist. R. Co.*[1], and to deny it that effect where the risk is as obvious as it was in *Johnson* v. *Lindsay* [1891] A. C. 371, 65 L. T. N. S. 97, 55 J. P. 644, 61 L. J. Q. B. N. S. 90,

It has no foundation in justice, reason, or the analogies of the law; it screens the guilty and denies to the innocent reparation for unlawful injury." *Louisville, N. O. & T. R. Co.* v. *Conroy* (1886) 63 Miss. 562, 56 Am. Rep. 835.

In *Zeigler* v. *Danbury & N. R. Co.* (1885) 52 Conn. 543, where it was contended that the servants of two railway companies used the same line, the court said: "No consideration of public policy will sustain this defense, because the public are not at all interested in the question as they are in questions concerning inn-keepers and common carriers. They are only interested to have the law justly and fairly administered. No considerations of justice will sustain it, because the plaintiff had no relation whatever to the negligent conductor. It was not his duty to observe his conduct, he had no opportunity to do so, and no opportunity to guard against the consequences of his negligence."

In Illinois the reason assigned for denying that the doctrine applicable to cases in which one servant is injured by the negligence of a coservant has any pertinence where the action is against a person other than the common employer of the two servants, is that, if the injury was caused by the coservant, that is simply equivalent to saying that he was not injured by the negligence of the defendant. *Chicago & E. I. R. Co.* v. *O'Connor* (1887) 119 Ill. 586, 9 N. E. 263. To the same effect, see *Pennsylvania Co.* v. *Backes* (1890) 133 Ill. 255, 24 N. E. 563 (servant of mill company loading freight on cars of railroad company), denying the significance, in this connection, of the fact that one of the risks of his employment was exposure to such injury.

[4] *Morgan* v. *Smith* (1893) 159 Mass. 570, 35 N. E. 101.

[1] (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521 (see § 376, *ante*).

40 Week. Rep. 405, Reversing [1889] L. R. 23 Q. B. Div. 508, 58 L. J. Q. B. N. S. 581, 38 Week. Rep. 119 (see last section, note 1), and in similar cases. In fact it seems to be not an unreasonable supposition that the principle now under discussion could hardly have been adopted in its present form, as a peremptory rule of law, if due account had been taken by the courts of the effect of the maxim, *Volenti non fit injuria*. The narrow ground taken is that, to let in the defense of common employment, there must be, not only a common employment, but a common master, and the language of the judges shows quite clearly that it has resulted from dealing with the assumption of risks, solely from the standpoint of an implied contract, and ignoring the possible applicability of the maxim which is obviously suggested by most cases of this type, inasmuch as the servant, whenever he is exposed to danger from this source, can scarcely ever be unaware of the fact. Here there is no difficulty in conceding that no implied undertaking to learn the risks arising from the negligence of the servants of the person can be imputed to an employee whose only contractual relations are with another person. But unless the pertinence of the maxim in such cases is to be wholly denied,—and there is no apparent reason why it should be,—the consideration relied upon is not necessarily conclusive. As long as cases like *Woodley* v. *Metropolitan Dist. R. Co.*[2] where the wider rule embodied in the maxim was permitted to defeat the action of a contractor's servant who claimed damages from the contractor's principal, the reason assigned being that the plaintiff continued to work with a full knowledge of the dangers to which he was exposed, are not explicitly disapproved, the law stands in this curious position—that, where a servant is injured by the negligence of one who, though a stranger, stands in such a relation to the servant's master that his negligence will not improbably augment the risks of the employment, the defendant is at least entitled to go to the jury on the issue whether the plaintiff's action is barred for the reason that he fully appreciated the perils to which the possibility of such negligence exposed him; while, on the other hand, it is a rigid rule that the most complete appreciation of the danger to which he is exposed by the negligence of the employees of that stranger will not debar him from recovering damages for injuries caused by the negligence of one of them. How little there really is to choose, upon purely logical grounds, between the accepted and rejected doctrines is shown in a very striking manner from the

[2] (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521.

subjoined extracts from the opinions of eminent English and Scotch judges.[3]

[3] In *Johnson* v. *Lindsay* (1889) L. R. 23 Q. B. Div. 508, 518, 58 L. J. Q. B. N. S. 581, 38 Week. Rep. 119, Fry, L. J., whose views differed from those of the other members of the court of appeal, but were those which prevailed in the House of Lords (see above), propounded the question, "What is the duty of a master who does not personally execute the work towards a workman not in his employ, but who, as the servant of another master, is to take part in the common enterprise?"—and proceeded thus: "I know of no authority which answers that question. But I find that in *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 332, 19 L. T. N. S. 30, Lord Cairns has indicated a difference between the duty of a master to the general public and to a servant. In the case of the workman there is the element of free will; in the public there is not. Lord Cairns says (at p. 332): 'At all events a servant may choose for himself between serving a master who does, and one who does not, attend in person to his business.' So, a man may choose between taking part in an enterprise in which there is the co-operation of masters who employ servants, and not taking part in such enterprise. If he do voluntarily take part in such an enterprise he cannot complain of the master who does all he can, who chooses competent servants, and supplies them with fitting materials and appliances. This view would have presented itself to me if there had been no decisions before me but *Wilson* v. *Merry*. But it is, so far as I know, to be found in no other authority, and it is obvious that to adopt it would have far-reaching consequences, and would, I think, overrule some old cases, such as *Bland* v. *Ross* (1860) 14 Moore, P. C. C. 210, Lush. 231. I do not, therefore, feel at liberty to adopt it."

In *Gregory* v. *Hill* (1869) 8 Sc. Sess. Cas. 3d series, 282, it was argued that the defense based on common employment should, on principle, be applied to circumstances where, though the parties are not fellow servants, their work is such that risk from injury to one from the negligence of the other is a natural and necessary consequence of the employment. This contention did not prevail, as the court felt itself bound by the authorities, and therefore not in a position to settle the question on purely scientific grounds. But the following extract from the opinion of Lord Moncrieff indicates clearly the trend of judicial thought in Scotland at that time. "In this case, the plea of the defender entirely repudiates the idea of contract between master and servant, as the ground of immunity. He says that the rule does not rest on an implied contract on the part of the servant, but on a wider principle, which renders the master in a much larger class of cases only liable for his own acts, and the selection of proper persons to do the work. Whatever I may think of the ground on which the rule has been rested, or however willing I might be to see the exemption of the master placed on a more general footing, I can find no authority which has laid down any such rule for our guidance. It might have been sounder to measure the liability of the master by the proper legal incident of his own position rather than by an artificial and rather fanciful implication of a tacit contract, which hardly affords a solid foundation for the result deduced from it. That a workman undertakes the risks of the employment is only true in the sense in which it is true that everyone who contracts takes the ordinary risks incident to the fulfilment of his contract. He does not thereby engage to liberate others from their legal liability to him. He does not engage to free the master from the consequences of his own neglect, nor is it easy to see why he should be supposed to intend to liberate him from the consequences of acts which the law assumes to be his. It is true also of the master in his contract with his workmen; and he who employs twenty workmen may be justly said to know and take the risk of his liability for the negligence of each of them. That is truly an ordinary risk of the employment of laborers. But under color of the phrase an "ordinary risk" there has been spelt out of the contract of service a special contract of liberation or indemnity under which the workman is held not so much to undertake a risk as to free from responsibility those whom otherwise the law would have made liable to him. But the more artificial the rule, the more necessary it is that we should strictly adhere to it; and if we were once to decide that this implied

491a. Rule where an independent contractor is suing the contractee.— In one colonial case it has been held that the fact of a workman's being an independent contractor does not make him any the less a coservant, in the technical sense, of those who are working for

contract was not the foundation of the rule, I do not see that we could stop short of what would be a more scientific rule, liberating the master in all cases in which he had been guilty of no personal neglect."

Eight years later came *Woodhead* v. *Gartness Min. Co.* (1877) 4 Sc. Sess. Cas. 4th series, 469, overruled by *Johnson* v. *Lindsay* [1891] A. C. 371, 65 L. T. N. S. 97, 55 J. P. 644, 61 L. J. Q. B. N. S. 90, 40 Week. Rep. 405 (§ 190, note 1, *supra*), and in the interval the judges had gathered sufficient courage to disregard the authorities and treat the question upon what they deemed a rational basis. The considerations which led the court to the conclusion that, in cases where the servants of different masters are co-operating in the execution of the same work, each master is exempt from responsibility for injuries inflicted upon the servants of other masters by the negligence of his servants, will be apparent from the following extracts from the opinions:

"As a result of the whole of the authorities," said Lord Ingles, "it appears to me that one of the conditions subject to which every man must become a member of one of these great organizations (for mining or manufacturing purposes) is that he shall take on himself all the perils naturally incident to the work he undertakes without looking to anyone else to guarantee him against or indemnify him for injury sustained from the occurrence of such peril. This does not interfere with the principle of personal liability for the consequences of personal wrong or negligence, but it excludes all notions of what, for the sake of distinction, I shall call secondary responsibility. . . . If two miners are employed and paid by the same master, and, while they are hewing at one working face, the one by negligence injures the other, the master is not answerable because it is said they are engaged in a common employment that is to say, they are engaged in the same work as servants of the same master. But if the legal principle were applicable to this case only, it would cease to be a principle, and degenerate into a mere artificial and arbitrary rule. It is not because the wrongdoer is in a technical sense the servant of the same master that the master is not answerable. It is of no moment to the injured workman whether his injury be caused by a servant of the same master or by one who has undertaken some function in the mine upon what is called an independent contract. The injury in either case is the same. The personal liability of the wrongdoer is the same. But the mine owner is freed from responsibility, not because the injured and injurer are both his own hired and paid servants, but because he is not personally in fault and has not warranted the injured workman against the perils of the work. . . . The whole persons engaged in a mine form one organization of labor for one common end (however different their functions may be), and are all subject to one general control, exercised by the mine owner or those to whom his authority is delegated. . . . To such a community as this, and to its individual members, the mine owner is under certain well-defined obligations, but to hold that his obligations and liabilities to the individual workmen depend on whether they are technically his servants employed by a contractor for piece work in some limited portion of the mine, while it would be inconsistent with legal principle, would also, I think, introduce great confusion where it is desirable that everything should be as clear as possible."

"If a committee of the British Association," said Lord Moncrieff in the same case, "choose to go down a mine, they must take the safeguards of the mine as they find them. It would be an entirely different thing if the owner had engaged, for ordinary professional remuneration, the services of a medical man to visit the pit periodically. The distinction manifestly lies in the element of contract and valuable consideration. I do not say, and the reverse has been held, that the moral obligation implied in invitation or encouragement may not amount in special cases to legal obligation. But that requires some element equivalent to a direct undertaking. It is apparent that the principle of presumed acceptance of the risk which ob

wages under the same master.[1] But the decision is essentially, though not in terms, inconsistent with those cited in § 490, *supra*. If there is no common employment as between the servants of an independent contractor and the servants of the contractee, it is clear that there can be no common employment as between the latter servants and the independent contractor himself.

tains in the case of fellow servants has a much wider application. But it has no place in cases of onerous contract."

This decision was followed in *Wingate* v. *Monkland Iron Co.* (1884) 12 Sc. Sess. Cas. 4th series, 91, where an apprentice of a firm of mining engineers was injured by an explosion due to the negligence of a servant of the mine owner; and in *Maguire* v. *Russell* (1885) 12 Sc. Sess. Cas. 4th series, 1071, overruled by the House of Lords in *Johnson* v. *Lindsay* (§ 490, note 1), where a workman in the employ of one who had contracted to do the plumbing work of a building, was held to be engaged in the same work, and therefore to be the fellow servant of a workman hired by a firm to lay the cement flooring in the same building. In the former of these two cases the court took the broad ground that the rule as to an implied assumption of a risk is not restricted in its application to the case of fellow servants, but is a bar to recovery in the case of a member of a master's family, or of a friend who may be driving with him, or of any person who places himself by contract or otherwise voluntarily, in such a relation to the master that he must be held to have taken upon himself the risks incidental to the position.

In *Michigan C. R. Co.* v. *Leahey* (1862) 10 Mich. 193, the court was equally divided on the question whether the servant of a contractor assumed the risk of the negligence of the servants of the contractor's employer. But there the agents of the company knew of the conditions which threatened to cause injury, and the contractor's servant did not.

[1] *Ford* v. *Oamaru* (1883) New Zealand L. R. 1 Sup. Ct. 97.

CHAPTER XXVII.

DEFENSE OF COMMON EMPLOYMENT IN CASES NOT INVOLVING THE QUESTION WHETHER THE NEGLIGENT SERVANT WAS A VICE PRINCIPAL.

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A. INTRODUCTORY.

492. Scope of chapter.— In all cases where the defense of coservice is relied upon, the primary question to be determined is whether the relative positions of the negligent and injured servants were such that there was, in the literal sense of the word, a "common employment." If that question is settled in the master's favor, the servant is debarred from recovery, unless he can show that, although there was

such common employment, the negligent servant was the representative or vice principal of the master.[1] The cases dealing with the former of these questions will be reviewed in the ensuing chapter.

493. General statement of what constitutes common employment.—There is a complete unanimity as to the point that in order to let in the defense of common employment, it must appear that, at the time of the accident in suit, the negligent and injured servants were not only under the control of the same master (see § 490, *ante*), but were also engaged in the discharge of duties which may be said, in a reasonable sense, to have been directed to the attainment of the same end.[1] The principle is, however, too vague to be of much assistance in litigation,[2] and it has been attempted to impart greater definiteness

[1] It must be admitted that, as a mere matter of terminology, the distinction taken in the text is not sustained by the authorities, the phrase "common employment" being frequently used to denote the situation which is the antithesis of that which exists where the negligent servant is a vice principal. See, for example, *Curley* v. *Hoff* (1899) 62 N. J. L. 758, 42 Atl. 731. This specialised and not very precise use of the words, which is explicable historically by the fact that the general conception of common employment, as constituting an exception to the doctrine of *respondeat superior*, antedates the partial restoration of that doctrine by means of the theory of vice principalship, cannot be avoided until some term appropriate to express the required concract has been devised. For the purposes of a logical classification, however, it is clearly necessary to discriminate between the two questions mentioned in the text, and in the present chapter the term "common employment" will be conceived of, as bearing the signification which presents the first of these questions only.

[1] "Where another servant has been employed for a purpose entirely other and different, it may be well said that they are not fellow servants of one master. Each is but a servant for the purpose for which he is employed, and as to any other duties or dangers, not resulting from such employment, he is not a servant, and, therefore, for injuries sustained, may hold the master responsible, upon the same ground that he would any stranger." *Ohio & M. R. Co.* v. *Hammersley* (1867) 28 Ind. 371.

[2] The subjoined table of extracts shows that, except so far as it may be explained by subsidiary principles and construed with reference to specific groups of facts, the extremely general phraseology which is employed by judges casts very little light upon the subject.

"The two servants must be men in the same common employment, and engaged in the same common work under that common employment." *Bartonshill Coal Co.* v. *McGuire* (1858) 3 Macq. H. L. Cas. 300, per Lord Brougham.

"Coemployees in the same common employment." *Cumberland & P. R. Co.* v. *State* (1875) 44 Md. 283.

"Engaged in the same common work, and performing duties pertaining to the same general business." *Baltimore Elevator Co.* v. *Neal* (1886) 65 Md. 438, 5 Atl. 338.

"Engaged in a common business which their joint efforts are required to accomplish." *Coulin* v. *Charleston* (1868) 15 Rich. L. 201.

"Engaged in a common work." *Sheehan* v. *Prosser* (1893) 55 Mo. App. 569.

"Engaged in common work" or in "the same general undertaking." *South Florida R. Co.* v. *Weese* (1893) 32 Fla. 212, 13 So. 436.

Engaged in the "same general undertaking." *Wilson* v. *Madison, etc., R. Co.* (1862) 18 Ind. 226.

"Engaged in the same general business." *Wonder* v. *Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143; *Quincy Min. Co.* v. *Kitts* (1879) 42 Mich. 34, 3 N. W. 240; *Houston & T. C. R. Co.* v. *Rider* (1884) 62 Tex. 267.

Engaged in the common "service of the same master in conducting and carrying on the same general business." *Jackson* v. *Norfolk & W. R. Co.* (1897) 43 W. Va. 380, 46 L. R. A. 337, 31 S. E. 258, 27 S. E. 278.

to the conception of an identity of object by formulating certain explanatory theories. As these theories, which may, for practical purposes, be reduced to two, represent fundamental differences of opinion as to the rationale of the defense of common employment, and have

"Engaged in a common enterprise with several duties directed to the same end." *Sullivan* v. *Mississippi & M. R. Co.* (1860) 11 Iowa, 421.

"Working to accomplish the same general end." *Neal* v. *Northern P. R. Co.* (1894) 57 Minn. 365, 59 N. W. 312.

Coservice said to exist, "if the services of each [servant] in his particular sphere or department are directed to the accomplishment of the same general end." *Columbus & I. C. R. Co.* v. *Arnold* (1869) 31 Ind. 174, 99 Am. Dec. 615.

"Co-operation, actively and personally exercised to the accomplishment of one common end." *Logrono* v. *Mobile & O. R. Co.* (1890) 67 Miss. 592, 7 So. 432 (phrase used as to all servants engaged in the operation of trains).

"Employed . . . in the accomplishment of the same common enterprise," and "the duties of each being directed to the same end." *Cayle* v. *Bangor & P. Canal & R. Co.* (1857) 43 Me. 269.

Employees whose "services have an immediate common object." *Randall* v. *Baltimore & O. R. Co.* (1883) 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *St. Louis, I. M. & S. R. Co.* v. *Gaines* (1885) 46 Ark. 555; *St. Louis, I. M. & S. R. Co.* v. *Rice* (1888) 51 Ark. 467, 4 L. R. A. 173, 11 S. W. 699; *Van Avery* v. *Union P. R. Co.* (1888) 55 Fed. 40.

"Engaged in the same common object." *Waller* v. *South Eastern R. Co.* (1863) 2 Hurlst. & C. 102, 32 L. J. Exch. N. S. 205, 9 Jur. N. S. 501, 8 L. T. N. S. 325, 11 Week. Rep. 731.

"Engaged in one common object." *Adams* v. *Iron Cliffs Co.* (1889) 78 Mich. 271, 44 N. W. 270.

"Engaged in promoting one common object." *Ohio & M. R. Co.* v. *Hammersley* (1867) 28 Ind. 371.

Co-operating to the same end." *McKay* v. *Buffalo Bill's Wild West Co.* (1896) 17 Misc. 601, 40 N. Y. Supp. 592.

"Engaged in the same undertaking or common work." *Camp* v. *Hall* (1897) Fla. 535, 22 So. 792.

"Performing duties for the same general purpose." *Spees* v. *Boggs* (1901) 198 Pa. 112, 52 L. R. A. 933, 47 Atl. 875.

"Engaged in promoting the same general object." *Foster* v. *Minnesota C. R. Co.* (1869) 14 Minn. 360, Gil. 277.

"Engaged in furthering the same general object." *Kuehtla* v. *Oregon Short Line & U. V. R. Co.* (1891) 21 Or. 136, 27 Pac. 91.

Doing work having the "same general object." *Robertson* v. *Terre Haute & I. R. Co.* (1881) 78 Ind. 77, 41 Am. Rep. 552.

"Employed for the same general purpose by the same master, and working to produce the same result." *Thom* v. *Pillard* (1894) 10 C. C. A. 352, 8 U. S. App. 597, 62 Fed. 232.

"Working to accomplish the same general purpose." *Snyder* v. *Viola Min. & Smelting Co.* (1891) 2 Idaho, 771, 20 Pac. 127.

"Working in the same place to subserve the same interests." *Chicago & A. R. Co.* v. *Murphy* (1870) 53 Ill. 336.

Two persons subject to control and direction by the same general master, in the same common object, are fellow servants. *Hamby* v. *Union Paper Mills Co.* (1900) 110 Ga. 1, 35 S. E. 297 (syllabus written by court).

An eminent English judge has expressed the opinion that the proper method of differentiation is to "look at the common object, and not at the common immediate object." Polbck, C. B., in *Morgan* v. *Vale of Neath R. Co.* (1865) L. R. 1 Q. B. 149, 35 L. J. Q. B. N. S. 23, 13 L. T. N. S. 564, 14 Week. Rep. 144, 5 Best & S. 736. This test may often be useful as a guide in doubtful cases, but the distinction suggested merely shifts the difficulty further back. Except as illustrated by specific instances, the expanded phrase is no more precise than the more general one.

A similar objection applies to a statement of the rule in this form,—that, to constitute coservice on the ground that the servants were engaged in the same common work, it is not necessary that they should have been engaged at the time of the injury in the same particular work. *New York, L. E. & W. R. Co.* v. *Bell* (1886) 112 Pa. 400, 4 Atl. 50.

produced two distinct lines of decisions, it will be necessary to review them separately.

494. Provinces of court and jury in determining whether there was a common employment.— (See also §§ 501, *infra*, 511, 591, *post*.)— What servants are in a common employment is not a question of fact exclusively, nor is it solely a question of law. It depends for solution upon both law and fact. But when the necessary facts for determining the question are undisputed, it is then simply a question of law.[1] The court, therefore, may nonsuit the plaintiff, or may direct a verdict for the defendant, or set it aside if rendered for the plaintiff, where the only negligence in evidence is that of a fellow servant acting in the performance of his duties, as a servant.[2] This course may be taken where there is sufficient evidence to show that the injury was such that it must have been caused by one of several coservants, although it does not appear which of them was the actual delinquent;[3] or where the only reasonable theory from the evidence is that the negligence which caused the injury must have been either that of the

[1] *McGowan* v. *St. Louis & I. M. R. Co.* (1876) 61 Mo. 528; *Veal* v. *Yazoo & P. R. Co.* (1894) 57 Minn. 365, 59 N. W. 312.

[2] As most of the cases cited in subtitle B, *infra*, assume this to be the true rule, it will be sufficient to mention a few pertinent decisions: *Quelch* v. *S. S. Co.* v. *Merchant* (1890) 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397; *Cagac* v. *Union P. R. Co.* (1889) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382; *Texas & P. R. Co.* v. *Patton* (1891) 9 C. C. A. 487, 23 U. S. App. 319, 61 Fed. 259 (accident caused by the failure of a coservant to report a defect); *Whitmore* v. *Boston & M. R. Co.* (1890) 150 Mass. 477, 23 N. E. 220; *Seaver* v. *Boston & M. R. Co.* (1850) 14 Gray, 466; *Commee* v. *Hobden* (1891) 152 Mass. 598, 26 N. W. 137 (injury received in taking down a building); *Russell* v. *Hudson River R. Co.* (1858) 17 N. Y. 134; *Burke* v. *Syracuse, B. & N. Y. R. Co.* (1893) 69 Hun, 21, 23 N. Y. Supp. 458 (fellow servant opened switch under a mistaken impression that it was set wrong); *Elwell* v. *Hacker* (1894) 86 Me. 416, 30 Atl. 61; *Combes* v. *Belleville Stone Co.* (1896) 59 N. J. L. 226, 36 Atl. 373; *Anderson* v. *Searle Elevator Co.* (1887) 37 Minn. 539, 35 N. W. 382; *Hennig* v. *Globe Foundry Co.* (1897) 112 Mich. 616, 71 N. W. 150 (error to refuse an instruction that if the accident was caused by the negligence of a coservant in regard to a certain act, the plaintiff could not recover; *Schaub* v. *Hannibal & St. J. R. Co.* (1893) 105 Mo. 74, 16 S. W. 924 (distinguishing the case of a car temporarily left on a siding from one in which the obstruction is a permanent structure).

An instruction in an action for personal injuries to an employee that recovery cannot be had if the injury were due to the negligence of one who was clearly a fellow servant with such employee, should be given upon request. *Chapman* v. *Reynolds* (1896) 23 C. C. A. 166, 33 U. S. App. 686, 77 Fed. 274.

[3] *Kennayer* v. *Manhattan R. Co.* (1891) 81 Hun, 444, 31 N. Y. Supp. 82 (collision caused by negligence of one of the men stationed on the track in a fog to pass signals along).

The question whether or not the facts found by a jury in a special verdict show that two persons were fellow servants is a question for the court. *Keller* v. *Gaskill* (1898) 20 Ind. App. 502, 50 N. E. 363.

A special finding which shows that the injury was caused by the negligence of a fellow servant will warrant a court in setting aside a general verdict for the plaintiff. *Chicago, B. & Q. R. Co.* v. *Howard* (1895) 45 Neb. 570, 63 N. W. 872.

plaintiff himself or of a fellow servant;[4] or where it is apparent that the efficient cause of the injury was either accident or the negligence of a coservant;[5] or where the evidence indicates that the injury was due to the concurrent negligence of the plaintiff himself and of his fellow servants.[6]

In far the largest number of instances this power of the court is exercised in favor of the employees, but if the finding of a jury should happen to be against the plaintiff, the verdict will be set aside if the evidence shows that the injury was due to the negligence of one who was not a coservant.[7]

B. Theory that community of employment depends solely on whether the delinquent servant's negligence was a risk contemplated by the injured servant.

495. Generally.— The theory adopted by one school of thought is a direct deduction from the bare legal principle by which an agreement on the part of a servant to assume the risks of injury from the negligence of his fellow workmen is implied for the reason that he

[4] *Berlick* v. *Ashland Sulphite & Fiber Co.* (1896) 93 Wis. 437, 67 N. W. 712; *Whitmore* v. *Boston & M. R. Co.* (1890) 150 Mass. 477, 23 N. E. 220; *Toms* v. *Buffalo Creek R. Co.* (1893) 70 Hun, 84, 23 N. Y. Supp. 1112; *Kelly* v. *Detroit Bridge Works* (1877) 17 Kan. 558; *Hammond* v. *Chicago & G. T. R. Co.* (1890) 83 Mich. 334, 47 N. W. 965; *Chicago, B. & Q. R. Co.* v. *Mercker* (1889) 36 Ill. App. 195; *Tinney* v. *Boston & A. R. Co.* (1872) 62 Barb. 218 (misplaced switch); *Whitmore* v. *Boston & M. R. Co.* (1890) 150 Mass. 477, 23 N. E. 220 (car inspector.—injury due either to his negligence in going into a space between cars without seeing that they were properly guarded, or to the negligence of a conductor in pushing up a car while he was there); *Piper* v. *Cambria Iron Co.* (1893) 78 Md. 249, 27 Atl. 939 (plaintiff and coemployees failed to place a light in a car which was being unloaded, and to put a toolboard in position to facilitate the passage from the car to the platform); *Garvey* v. *New York & C. Mail S. S. Co.* (1898) 26 App. Div. 456, 50 N. Y. Supp. 77 (fellow servant suddenly started a machine while plaintiff was in a dangerous position); *St. Louis, I. M. & S. R. Co.* v. *Peterson* (1898) 65 Ark. 126, 44 S. W. 1123 (servant attempted to board a pay car while upon a moving turntable, and was pushed off by a fellow employee who was alighting).

[5] *Yager* v. *Atlantic, M. & O. R. Co.* (1882) 4 Hughes, 192; *Soderman* v. *Kemp* (1895) 145 N. Y. 427, 40 N. E. 212, Reversing 70 Hun, 449, 24 N. Y. Supp. 401.

[6] *Keys* v. *Pennsylvania Co.* (1886; Pa.) 1 Cent. Rep. 893, 3 Atl. 15; *Brown* v. *Maxwell* (1844) 6 Hill, 592, 41 Am. Dec. 771; *Missouri P. R. Co.* v. *Texas & P. R. Co.* (1887) 31 Fed. 527; *Ward* v. *Chesapeake & O. R. Co.* (1894) 39 W. Va. 46, 19 S. E. 389 (brakeman and fellow servants failed to notice signal showing that a passing train was to be followed by another section); *Felch* v. *Allen* (1868) 98 Mass. 572 (injury caused by plaintiff's following the unauthorized suggestion of a coservant to use an elevator, not then in safe condition, for the purpose of the raising of materials from the basement to the attic of a factory); *Stephen* v. *Stevens* (1893) 19 N. Y. S. R. 850, 21 N. Y. Supp. 721 (plaintiff put his hand close to a circular saw at the direction of a fellow workman).

[7] *Tarrer* v. *Richmond & L. R. Co.* (1887) 81 Va. 192, 4 S. E. 339.

must be taken to have contemplated such risks as one of the ordinary incidents of his work. If the conception underlying this principle, that the master is relieved of responsibility because the danger of being thus injured is known by the servant to be a natural consequence of his entering the employment,[1] is followed out to its logical conclusions, and no account is taken of any of the extraneous factors which, from other points of view, may be conceived to have a bearing upon the question (see §§ 500 *et seq. infra*), we are manifestly conducted to the conclusion that, in determining whether or not there was a common employment, as between two servants, the necessary, and the only proper, question to ask is whether or not their duties were so related that each of them must have known himself to be exposed to the risk of being injured, in the event of the other's committing a negligent act; and that this risk was so normal, and so likely to eventuate in actual disaster, that it was presumably considered by each of them in fixing the amount of the compensation which they were willing to receive for their services.[2]

[1] "When the service to be rendered requires for its performance the employment of several persons, . . . there is necessarily incident to the service of each the risk that others may fail in the vigilance and caution essential to his safety." *Chicago, M. & St. P. R. Co.* v. *Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184.

[2] In the leading case of *Morgan* v. *Vale of Neath R. Co.* (1864) 5 Best & S. 570, 10 Jur. N. S. 1074, 33 L. J. Q. B. N. S. 260, 12 Week. Rep. 1032, where the point made was that plaintiff, who was employed to do carpenter's work on the station, and was injured through an engine's striking the scaffold on which he was, was not employed in the same work as those who were employed in working the railway traffic; and it was contended that it was essential that the servants should be in a common employment and working for a common object, Blackburn, J., said: "I quite agree that it is necessary that the employment must be common in this sense,—that the safety of the one servant must, in the ordinary and natural course of things, depend on the care and skill of the others. This includes almost, if not every, case in which the servants are employed to do joint work, but I do not think it is limited to such cases. There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which are to be considered in his wages. I think that, whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule." After referring to the view of Pollock, C. B., in *Waller* v. *South-Eastern R. Co.* (1863) 32 L. J. Exch. N. S. 205, 2 Hurlst. & C. 102, 9 Jur. N. S. 501, 8 L. T. N. S. 325, 11 Week. Rep. 731, that in deciding a case the judge should "consider what are the dangers which any servant engages to encounter, and look at the probable dangers attendant upon entering the engagement in question," the opinion proceeds thus: "Applying the same principle to the present case, I think that we ought to hold that the plaintiff, in accepting an employment to work in the station whilst the traffic was being carried on, and which must have brought him close to the traffic, accepted one which necessarily must have exposed him to danger from the negligent use of those conducting the traffic, and must be taken,

It is important to note that, for the purposes of this rule, the contemporaneity of the servant is material only in so far as it may be re-

as between himself and his employers, to have taken upon himself that risk."

Chief Justice Cockburn thought that the plaintiff and the negligent servants were not "fellow laborers engaged in a common work," but felt obliged to defer to the authority of *Hutchinson* v. *York, N. & B. R. Co.* (1850) 5 Exch. 343, 19 L. J. Exch. N. S. 296, 14 Jur. 837, and *Waller* v. *South Eastern R. Co.* (1863) 2 Hurlst. & C. 102, 32 L. J. Exch. N. S. 205, 9 Jur. N. S. 501, 8 L. T. N. S. 325, 11 Week. Rep. 731. By the exchequer chamber (1 B. & S. Q. B. 149, 5 Best & S. 736, 35 L. J. Q. B. N. S. 23, 13 L. T. N. S. 564, 14 Week. Rep. 144), the argument of Blackburn, J., was adopted as a whole. Pollock, C. B., merely adding: "It appears to me that we should be letting in a flood of litigation, were we to decide the present case in favor of the plaintiff. For, if a carpenter's employment is to be distinguished from that of the porters employed by the same company, it will be sought to split up the employees in every large establishment into different departments of service, although the common object of their employment, however different, is but the furtherance of the business of the master: yet it might be said, with truth, that no two had a common immediate object."

In *Hutchinson* v. *York, N. & B. R. Co.* (1850) 5 Exch. 343, 19 L. J. Exch. N. S. 296, 14 Jur. 837, it was contended that, even admitting the defendants would not be liable for any neglect on the part of those who were managing the train in one of the carriages of which the plaintiff was traveling, yet there could be no principle exempting them from liability for the acts of those who, though, equally with him, servants of the defendants, were not, at the time of the accident, engaged in any common act of service with him. But Alderson, B., said: "We do not think there is any real distinction between the two cases. The principle is that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both. The death of Hutchinson appears on the pleadings to have happened while he was acting in the discharge of his duties to the defendants as his master, and to have been the result of carelessness on the part of one or more other servant or servants of the same master while engaged in their service; and whether the death resulted from the mismanagement of the one train or of the other or of both, does not affect the principle: in any case it arose from carelessness or want of skill, the risk of which the deceased had, as between himself and the defendants, agreed to run."

Compare the language used by Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, as quoted in § 496 *infra*.

In *Charles* v. *Taylor* (1878) 1 C. P. D. 492, 38 L. T. N. S. 773, 27 Week. Rep. 32, the court held the defense of coservice to be applicable to a case where a servant of a brewer, whose duty it was to assist in unloading barges, was injured by the negligence of a servant who was shifting barrels in the brewery itself, and who had frequently been at the same spot where the barrels were being moved. Cotton, L. J., said: "In the case before us the plaintiff was employed in the business of the brewery, and it must be taken that the defendants, as masters, pointed out that they would engage other servants, whose acts, as between them and the plaintiff, were not to be considered as the defendants'. The plaintiff knew that other persons would be employed in carrying on the business of the brewery; barrels are used for the purposes of brewing, and the servant by whose negligence the injury was inflicted was, at the time of the accident, engaged in the work of the brewery. According to the authorities, in order to exempt the master from liability, it is unnecessary that the employment should be of the same nature, if there is a common object, and if it must be taken that for the purpose of effecting that object the master must employ other servants." Brett, L. J., said: "I shall now enunciate one principle relating to the question: I do not say there may not be more. It is this: When the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place

solved into an excusable incapacity to forecast the probability of injury from the particular servant who was guilty of the negligent act in question. The mere fact that the negligent act itself was one

and at the same time that the negligence of one in what he is doing as part of the work which he is bound to do may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other. This is a formula, though not the only one. Let me apply this formula to the facts before us: the service of the plaintiff would compel him to work at the same time and in the same place as the servant engaged in moving the barrels, so that the negligence of the latter in moving the defendants' barrels might injure the plaintiff whilst engaged in unloading the barge: the negligence of the one in his work might cause injury to the other whilst employed in his work. I think that Lopes, J., was right in holding that the defendants, who were the employers of both the plaintiff and the servant who was guilty of negligence, were not liable for the accident: it was not necessary, in order to exempt the defendants, that the two servants should be engaged in the same kind of work."

In *Lovell* v. *Howell* (1876) L. R. 1 C. P. Div. 161, 45 L. J. C. P. N. S. 387, 34 L. T. N. S. 183, 24 Week. Rep. 672, recovery was denied on a somewhat similar showing of facts, the court declaring that though it was no part of the plaintiff's duty to assist in the general work of a warehouse —as, for example, in the raising or lowering sacks to or from the upper floors, but that his duty was confined to the care and management of the craft coming to the premises,—yet the essential fact was that it was also a part of his duty to go to the office for orders, and that in the course of this duty he would have to pass through the warehouse and out into the street by the door at which the process of lifting the sacks from the wagon was carried on, where he would necessarily have to encounter the risk of injury from negligence of others in the same employ,—one of the contemplated risks of the service.

In *Randall* v. *Baltimore & O. R. Co.* (1883) 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322, the court, in summing up its reasons for refusing to allow the plaintiff to recover, said with respect to him and the negligent servant: "The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object, —the moving of the trains. Neither works under the orders or control of the other."

In *Northern P. R. Co.* v. *Hambly* (1894) 154 U. S. 357, 38 L. ed. 1013, 14 Sup. Ct. Rep. 983, the court said: "As a laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability."

Compare the language used in *Norfolk & W. R. Co.* v. *Nuckols* (1895) 91 Va. 193, 21 S. E. 342, as quoted in § 498, note 1, subd. (d), *infra*.

In another case the servants were described as being "engaged in duties which brought them to work at the same place, at the same time, under circumstances in which the carelessness of one might be fatal to the safety of the other." *Naylor* v. *New York C. & H. R. R. Co.* (1888) 33 Fed. 801.

In another they were said to be "engaged together at the same place in a work that required co-operation, and such associations as would bring them into frequent contact with each other." *Bier* v. *Jeffersonville, M. & I. R. Co.* (1892) 132 Ind. 78, 31 N. E. 471.

In another the court, in laying it down that the test of a master's liability for injury to one servant caused by the negligence of another is "whether the injury is within the risk ordinarily incident to the service undertaken," and that it was error to instruct a jury that, if they believe from the evidence in the case that the deceased was engaged in the business of repairing cars on a repair track, and was in no way connected with the running of cars, and had nothing to do with the cars being near, then he was not a fellow servant of those engaged in running the cars, said: The fact that Brown was in no way connected with the running of cars, and had nothing to do with the cars being near,

or that he was engaged in a separate department from that of those engaged in moving the cars, should not control the other facts, viz., that the track on which he was at work, and the tracks on which the duties of the switchman and engineer were being performed at the same time, were in close proximity to each other, converging with their switches near the same point, so that the negligence or inadvertence of the switchman in operating the switches and moving the trains was liable to endanger him. *St. Louis, I. & T. R. Co.* v. *Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266.

In a later decision by this court it is stated as a ground for predicating co service, that the risk was "natural and normal." *St. Louis S. W. R. Co.* v. *Henson* (1895) 61 Ark. 302, 32 S. W. 1079.

In holding that a founder in a blast furnace, in charge of the inside work of such furnace, assumes the risk of the negligent management of locomotives used by the same company in moving cars over crossings on its premises, his duty requiring him to use those crossings to a considerable extent, the court expressly rejected the contention "that there was nothing in the nature of his employment to subject him to such a risk." *Adams* v. *Iron Cliffs Co.* (1889) 78 Mich. 271, 44 N. W. 270.

Other passages illustrating the same conception as the above decisions are these: "Servants . . . are engaged in a common employment, when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting their employment, that it may probably expose them to the risk of injury in case he is negligent." *Baird* v. *Pettit* (1872) 70 Pa. 477. Compare *Hultan* v. *Philadelphia & S. Mail S. S. R. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2.

A servant assumes the risk of a fellow servant's negligence, even though the latter is "in a position of greater responsibility or a different line of employment, so long as both are in the same general business, so that the negligence of one may contribute to the danger of the other." *Quincy Min. Co.* v. *Kitts* (1879) 42 Mich. 34, 3 N. W. 240, per Cooley, J.

The servant's remedy is "restricted by the contract only as to the negligence of fellow servants engaged in the same general service, or those employed in the conduct of one common enterprise or undertaking, or those whose employment is such that, by their negligence in the usual line of their duty, he might reasonably expect to be endangered, or those whose negligence might be understood to be incident to his service." *Fifield* v. *Northern R. Co.* (1850) 42 N. H. 225.

Common employment is service of such kind that, in the exercise of ordinary sagacity, all who engage in it may be able to foresee, when accepting it, that, through the negligence of fellow servants, it may probably expose them to injury. *McAndrews* v. *Burns* (1876) 39 N. J. L. 117; *Ewan* v. *Lippincott* (1885) 47 N. J. L. 192, 54 Am. Rep. 148.

The following instruction has been approved: "A fellow servant is one engaged with another under a common master, and in the same common employment, so that they are brought in contact with each other, notwithstanding they are subject to the orders, and under the exclusive control, of separate bosses or foremen, and in different work in the same service." *Parrish* v. *Pensacola & L. R. Co.* (1891) 28 Fla. 251, 9 So. 659.

In *Coulia* v. *Charleston* (1868) 15 Rich. L. 201 (see § 499, note 1, subd. (a), *infra*) the court approved of the test propounded by Blackburn, J., in *Morgan* v. *Vale of Neath R. Co.* (1865) 5 Best & S. 736, L. R. 1 Q. B. 149, 35 L. J. Q. B. N. S. 23, 13 L. T. N. S. 564, 14 Week. Rep. 141, and held that an instruction was unduly restrictive by which the jury were told that the defense of common employment is available only where the two servants are engaged in a common business which their joint efforts are required to accomplish.

Prior to the definitive adoption of the "consociation" doctrine (see subtitle C, *infra*) a similar theory of common employment was sometimes propounded in Illinois.

In *Valter* v. *Ohio & M. R. Co.* (1877) 85 Ill. 500, it was said that "a proper test of the existence of this relation [of fellow servants] may be to inquire whether the negligence of the one is likely to inflict injury on the other.

When the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another, they must be supposed to have voluntarily taken the risks of such possible carelessness when they entered the service, and must be regarded as fellow servants within the meaning of this rule.

which could not have been reasonably foreseen does not take the case out of the operation of the general rule.[3]

496. Diversity of duties or departments not sufficient to exclude defense of common employment.— The principle laid down in the preceding section is accepted as the test of common employment by a large majority of the courts. See illustrative cases, § 498, *infra*. One of its corollaries is that the plaintiff is precluded from recovery wherever the functions which he and the negligent coemployee were discharging, although not identical, or even similar, in character, were yet such that the two servants were "contributing directly to the common object of their common employer" in that enterprise for which their services were engaged.[1] Or, to employ a terminology which is frequently found in the books, the injured servant's right to recover does not depend upon the fact that he may have been in a different department of the service from the delinquent.[2]

Chicago & A. R. Co. v. *Murphy* (1870) 53 Ill. 336, 339, 5 Am. Rep. 48.

[1] *Brodeur* v. *Valley Falls Co.* (1889) 16 R. I. 448, 17 Atl. 54.

[1] *Bartonshill Coal Co.* v. *Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, per Lord Cranworth. Compare the equivalent phrases quoted in § 493, note 2, *supra*). Compare also the language of Brett and of Cotton L. JJ., in *Charles* v. *Taylor* (1878) L. R. 3 C. P. Div. 492, 38 L. T. N. S. 773, 27 Week. Rep. 32, as quoted in § 495, note 2, *supra*.

"The question arises, Who are fellow servants in contemplation of law? To constitute such, they need not at the time be engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common work, to perform duties and services for the same general purposes." *Lehigh Valley Coal Co.* v. *Jones* (1878) 86 Pa. 439; Repeated in *Lewis* v. *Seifert* (1887) 116 Pa. 628, 11 Atl. 514.

"When there is one general object, in attaining which a servant is exposed to risk, if he is injured by the negligence of another servant whilst engaged in furthering the same object, he is not entitled to sue the master, and it does not matter that they were not engaged in the same kind of work." *Blake* v. *Maine C. R. Co.* (1879) 70 Me. 60, 35 Am. Rep. 297.

"A common employment upon the same identical work" is not necessary to let in the defense of coservice; it is sufficient if there is "a general community of employment." *M'Eniry* v. *Waterford & K. R. Co.* (1858) 8 Ir. C. L. Rep. 315, per Lefroy, C. J.

That the essential question is whether the services of the negligent and injured servant were "directed to the accomplishment of the same general end" was recognized in *Louisville & N. R. Co.* v. *Stuber* (1901) 54 L. R. A. 696, 48 C. C. A. 149, 108 Fed. 934, Reversing (1900) 102 Fed. 421.

[2] Examples of this form of expression are found in *Norfolk & W. R. Co.* v. *Nuckols* (1895) 91 Va. 195, 21 S. E. 342; *Farwell* v. *Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339; *New York & N. E. R. Co.* v. *Hyde* (1893) 5 C. C. A. 461, 5 U. S. App. 443, 56 Fed. 188; *Wonder* v. *Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143; *Brodeur* v. *Valley Falls Co.* (1889) 16 R. I. 448, 17 Atl. 54; *Collan* v. *Bull* (1898) 113 Cal. 593, 45 Pac. 1017; *Unfried* v. *Baltimore & O. R. Co.* (1890) 34 W. Va. 260, 12 S. E. 512; *Neal* v. 365, 59 N. W. 312; *Roberts* v. *Chicago, Northern P. R. Co.* (1891) 57 Minn. *St. P. M. & O. R. Co.* (1885) 33 Minn. 218, 22 N. W. 389; *Foster* v. *Minnesota C. R. Co.* (1869) 14 Minn. 360, Gil. 277; *Enright* v. *Toledo, t. I. & N. M. R. Co.* (1892) 93 Mich. 409, 53 N. W. 536; *New Orleans, J. & G. N. R. Co.* v. *Hughes* (1873) 49 Miss. 258; *Bogard* v. *Louisville, E. & St. L. R. Co.* (1881) 100 Ind. 491; *Snyder* v. *Viola Min. & Smelting Co.* (1891) 2 Idaho, 771, 26 Pac. 127; *Texas & P. R. Co.* v. *Harrington* (1884) 62 Tex. 597; *Trinity & S. R.*

If we have regard to the usual arrangement, which, in the case of a difference of departments, would place the servants in each under the control of different agents of the master, the above rule is usually susceptible of being also expressed in the form that the fact of the two servants receiving their orders from different superiors is ineffectual to exclude the defense of coservice, in any case in which the other elements of that defense are present.[3]

497. Contiguity, a material, though not decisive factor.—In numerous instances a servant's contemplation and inferential acceptance of the risk of his fellow servant's negligence are suggested by the fact that their duties, although diverse in kind, were obviously such that they might at any time be brought into close proximity to each other;[1] and the authorities show that this circumstance is almost decisive against the plaintiff. But the essence of his disability to recover being his imputed comprehension of the likelihood of injury, it is evident that the remoteness of the place where the negligent servant habitually works is not necessarily a circumstance which negatives an assumption of the risk of his negligence.[2]

Co. v. *Mitchell* (1889) 72 Tex. 609, 10 S. W. 698; *St. Louis, A. & T. R. Co.* v. *Welch* (1888) 72 Tex. 298, 2 L. R. A. 839, 10 S. W. 529; *Jenkins* v. *Richmond & D. R. Co.* (1893) 39 S. C. 507, 18 S. E. 182; *Louisville & N. R. Co.* v. *Stuber* (1901) 54 L. R. A. 696, 48 C. C. A. 149, 108 Fed. 934, Reversing (1900) 102 Fed. 421.

An instruction that where persons are engaged in the same department of work, and one is injured as the result of a fellow servant's negligence, he cannot recover if it is done in the ordinary employment, is not prejudicial to defendant, in an action by an employee for injuries, as limiting the doctrine of fellow servants to servants engaged in the same department of work. *Hicks* v. *Southern R. Co.* (1901) 63 S. C. 559, 38 S. E. 725, 41 S. E. 753.

[3] *Slater* v. *Jewett* (1881) 85 N. Y. 70, 39 Am. Rep. 627 (see § 498, note 1, subd. (a), *infra*); *Adams* v. *Iron Cliffs Co.* (1889) 78 Mich. 271, 44 N. W. 270; *Chicago & A. R. Co.* v. *Murphy* (1870) 53 Ill. 336, 5 Am. Rep. 48; *Knahtla* v. *Oregon Short Line & U. N. R. Co.* (1891) 21 Or. 136, 27 Pac. 91. It is not essential to render employees fellow servants that the same foreman have charge of them both. *Trcka* v. *Burlington C. R. & N. R. Co.* (1896) 100 Iowa, 225, 69 N. W. 422.

[1] This aspect of the situation is emphasized in several of the cases cited in note 2 to the last section. See, especially, *Morgan* v. *Vale of Neath R. Co.* (1865) 5 Best & S. 736, L. R. 1 Q. B. 149, 35 L. J. Q. B. N. S. 23, 13 L. T. N. S. 564, 14 Week. Rep. 144; *Charles* v. *Taylor* (1878) L. R. 3 C. P. Div. 492, 38 L. T. N. S. 773, 27 Week. Rep. 32 (opinion of Brett, L. J.); *Lovell* v. *Howell* (1876) L. R. 1 C. P. Div. 161, 45 L. J. C. P. N. S. 387, 34 L. T. N. S. 183, 24 Week. Rep. 672; *Northern P. R. Co.* v. *Hambly* (1894) 154 U. S. 357, 38 L. ed. 1013, 14 Sup. Ct. Rep. 983; *Randall* v. *Baltimore & O. R. Co.* (1883) 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Naylor* v. *New York C. & H. R. R. Co.* (1888) 33 Fed. 801; *Bier* v. *Jeffersonville, M. & I. R. Co.* (1892) 132 Ind. 78, 31 N. E. 471; *St. Louis, A. & T. R. Co.* v. *Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266; *Norfolk & W. R. Co.* v. *Nuckols* (1895) 91 Va. 193, 21 S. E. 342; *Parrish* v. *Pensacola & A. R. Co.* (1891) 28 Fla. 251, 9 So. 659.

[2] The law on this point was settled by the leading case of *Farwell* v. *Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339, where Chief Justice Shaw, in discussing the contention of counsel that the doctrine of coservice, whatever its scope, was at all events not applicable to the facts under review, said: "It was strongly pressed in the argument

498. Illustrative cases of common employment.—In the decisions cited below the principles developed in the preceding sections were held to require the conclusion that there was a common employment. The decisions are arranged under headings adapted to facilitate a comparison with the rulings (§ 506, *infra*) under the doctrine of consociated duties to be discussed below. Many other cases in which

that, although this might be so where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security, yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, How near or how distant must they be, to be in the same or different departments? In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice and yet acting together. Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of anyone but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow servant does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence, the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons, and strangers, for the negligence of a servant."

In *The Petrel* [1893] p. 320, Jenne, P., agreed with Chief Justice Shaw that physical contiguity does not afford a distinction on which a practical rule can be established, and said: "In all cases the immediate instrument of physical injury must be contiguous to the person injured, and in most cases the person who causes physical injury is not far from the person to whom it results. But I suppose that the signalman at one end of a rifle range is clearly in common employment with the marker at the other, when the two have a common master; and, to give a stronger instance, a servant who unskilfully packs dynamite in a factory, and another who in unpacking it at a distant warehouse is injured by its explosion, are clearly in common employment. On the other hand, mere contiguity, if unusual or accidental, would not be consistent with common employment."

The doctrine of common employment is not limited to those cases in which "there is a connection between the different grades of employment, bringing the servants into contact with each other." *International & G. N. R. Co. v. Ryan* (1891) 82 Tex. 565, 18 S. W. 219. This decision seems to overthrow the effect of the earlier *dictum* of the same court that, if public policy is to be taken as the true ground, "the rule should be confined to those serv-

the relation of a coservice was taken for granted, and in which the specific controversy was whether the negligence alleged constituted a breach of a non-delegable duty, are cited in chapter XXXII., *post*.[1]

ants whose duties bring them into such juxtaposition that one would be enabled to observe the negligence of his fellows." *St. Louis, A. & T. R. Co.* v. *Welch* (1888) 72 Tex. 298, 2 L. R. A. 839, 10 S. W. 529.

"If a servant cannot look to his employer for indemnity where, notwithstanding the exercise of due care on his part, he is injured by the carelessness of a fellow servant laboring near him in the same particular employment, why should he be permitted to do so when, with the same care on his part, he suffers injury by the negligence of another servant in the same general business, but at the time engaged equally near him, in some different duty? If proximity or remoteness of position is to have influence, where is the line? And what substantial difference is there between a case of injury from the negligence of a servant with superior authority, and one from like negligence of a servant of equal authority, employed at a distance from and without the immediate influence of the party injured? How could the latter better guard against the injury in the case last mentioned than in the former one? If distance is to have effect, what shall the distance be? It is manifest that no distinction or exemption as to liability of the principal, resting on the ability of the injured party to protect himself in the particular case, could be made without practically abrogating the entire rule." *Sherman* v. *Rochester & S. R. Co.* (1858) 17 N. Y. 153.

The most striking illustrations of the doctrine in the text are the cases in which telegraph operators have been held to be in a common employment with trainmen. See § 198, *infra*.

[1] (a) *Servants working in the office departments and operating trains.*—A station agent is a fellow servant of a brakeman. *Tower* v. *Chicago, M. & St P. R. Co.* (1887) 69 Wis. 188, 31 N. W. 101, 33 N. W. 433. The court said: "They were both certainly in the employ of the company, and were both engaged, in a sense, in operating train No. 26. True, the station agent was required to keep the main track free from all obstructions for all trains as well as No. 26; but this fact did not render him any the less a fellow servant of the plaintiff in the work in which both were engaged. They were both fellow servants within the rule; as much so as they would have been if the station agent had had no other duty to perform but to see that the main track was kept unobstructed for this train No. 26."

A station agent is a fellow servant of an engineer. *Brown* v. *Minneapolis & St. L. R. Co.* (1884) 31 Minn. 553, 18 N. W. 834 (cars negligently left standing at a place where the train on which plaintiff was engineer ran into them); *Lewis* v. *Seifert* (1887) 116 Pa. 628, 11 Atl. 514 (conceded). A baggage master is a coservant of engineers and brakemen. *Keaveny* v. *Baltimore & O. R. Co.* (1895) 166 Pa. 60, 30 Atl. 1014.

In the following cases a station agent has been held to be the fellow servant of a trainman, but the point taken was that the former was a vice principal, not that he was in a different department: *Lewis* v. *Seifert* (1887) 116 Pa. 628, 11 Atl. 514; *Brown* v. *Minneapolis & St. L. R. Co.* (1884) 31 Minn. 553, 18 N. W. 831; *Galveston, H. & S. A. R. Co.* v. *Farmer* (1889) 73 Tex. 85, 11 S. W. 156; *Dealey* v. *Philadelphia & R. R. Co.* (1886; Pa.) 3 Cent. Rep. 112, 4 Atl. 170; *Dana* v. *New York C. & H. R. R. Co.* (1881) 23 Hun, 473; *Byrnes* v. *New York, L. E. & W. R. Co.* (1889) 113 N. Y. 251, 4 L. R. A. 151, 21 N. E. 50; *Gates* v. *Chicago, M. & St. P. R. Co.* (1892) 2 S. D. 422, 15 N. W. 907.

In some cases it has been held generally that a telegraph operator at a wayside station is a fellow servant of the men operating trains. *Price* v. *Detroit, G. H. & M. R. Co.* (1891) 145 U. S. 651, 36 L. ed. 843, 12 Sup. Ct. Rep. 986 (mem. judgment; decision affirmed by a divided court); *Slater* v. *Jewett* (1881) 85 N. Y. 61, 39 Am. Rep. 627 (operator failed to comply with rule that orders regarding trains which were behind time should be communicated to conductors and engineers in the presence of each other). The court said: "Each of those agents, in doing their ordinary work for the defendant, were fellow servants of the intestate, in the same common employment. The conductor was engaged in the particular work in which the intestate was,—that of moving trains. The telegrapher was engaged in a work closely connected

therewith,—that of receiving and giving information of the whereabouts of trains, and communicating orders to those controlling them, for stopping or going on. This was a branch of the general business of the defendant, essential to the smooth and successful movement of the whole,—that branch of it in which the intestate was engaged as much as any other. The argument to sustain this position (i. e., that there was no coservice) consists, in part, in an effort to show that the duties of the operator were in no respect like to those of the intestate. They were not like, but they tended to the same end—that of the speedy, efficient, and successful carriage of passengers and freight over the railway. There are many kinds of servants of a great railway company. Their duties are not in all cases the same, nor always like, yet they are all done to bring one result, and it is their conjoint, simultaneous, and harmonious performance that does effect the finality, sought through the whole complex organism. If it be so that this operator sometimes received and sent messages that had naught to do therewith, still, on this occasion, the act required of him had direct connection with the acts of those engaged in moving the two trains. The position that the operator was hired and discharged by one superior agent, and the intestate by another, and that, therefore, they were not fellow servants, is not sound. The general authority to hire and to turn away was in the defendant. It did radiate from him through different chiefs of department in his general work. His, however, was the ultimate power. The heads of bureaus were not independent contractors, doing a branch of his work on their own responsibility, and free from his interference with their subordinates. He had the right to step into their spheres of duty and act for himself."

In other cases it has been conceded that the telegraph operator was in a common employment with trainmen, and the ground on which it was sought unsuccessfully to hold the master responsible was that the operator was a vice principal. *Baltimore & O. R. Co.* v. *Camp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952 (see § 611, note 1, *post*); *Oregon Short Line & U. N. R. Co.* v. *Frost* (1896) 21 C. C. A. 186, 41 U. S. App. 606, 74 Fed. 965; *Cincinnati, N. O. & T. P. R. Co.* v. *Clark* (1893) 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125; *Blessing* v. *St. Louis, K. C. & N. R. Co.* (1883) 77 Mo. 410; *Monaghan* v. *New York C. & H. R. R. Co.* (1887) 45 Hun, 113; *Dooley* v. *Philadelphia & R. R. Co.* (1886; Pa.) 3 Cent. Rep. 112, 4 Atl. 170; *Vehaag* v. *Northern P. R. Co.* (1889) 42 Fed. 288; *Norfolk & W. R. Co.* v. *Hoover* (1894) 79 Md. 253, 25 L. R. A. 710, 29 Atl. 994; *Reiser* v. *Pennsylvania Co.* (1892) 152 Pa. 39, 25 Atl. 175. In *Sheehan* v. *New York C. & H. R. R. Co.* (1883) 91 N. Y. 332 (regulations held insufficient), and *Sutherland* v. *Troy & R. R. Co.* (1891) 125 N. Y. 737, 26 N. E. 639 (incompetency alleged), the same doctrine was assumed, but the cases went off on the points noted.

In the latest and most authoritative rulings a distinction is taken between train despatchers and telegraph operators, the former only being regarded as vice principals. *Lewis* v. *Seifert* (1887) 116 Pa. 628, 11 Atl. 514; *Hankins* v. *New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. R. A. 396, 37 N. E. 466. See § 577, *post*. But in an early New York case both these functionaries seem to be placed on the same footing as mere fellow servants, the later distinctions not being adverted to. *Chapman* v. *Erie R. Co.* (1874) 55 N. Y. 579 (case really turned on allegation of incompetency). So, an employee who seems from the report to have been a divisional train despatcher has been held to be a fellow servant of a brakeman, the theory of vice principalship not being referred to; and nonliability was predicated simply on the ground that their duties related to the same general object. *Robertson* v. *Terre Haute & I. R. Co.* (1881) 78 Ind. 77, 41 Am. Rep. 552.

See also *Sullivan* v. *Toledo, W. & W. R. Co.* (1877) 58 Ind. 26, which seems, by implication, to uphold the same doctrine.

So, in an action for the death of the plaintiff's intestate while acting as a fireman, which occurred in a collision through the negligence of the defendant's train despatcher charged with the duty of "directing" the movements of trains, the court held that the train despatcher was the fellow servant of the intestate. *Billups* v. *Louisville, N. O. & T. R. Co.* (1891) 69 Miss. 423, 13 So. 696.

In *Norfolk & W. R. Co.* v. *Hoover* (1894) 79 Md. 253, 25 L. R. A. 710, 29 Atl. 994, the court, in holding that an engineer could not recover for injuries caused by the negligence of a divisional train despatcher, said: "They were both engaged in the same common work,

employed by the same agent of the common master, and were performing duties pertaining to the same general business; and unless the whole current of the Maryland decisions is to be reversed, they were fellow servants."

(b) *Servants engaged in handling the same train.*—In the absence of evidence showing vice principalship, all servants of a common master employed in running, operating, and rendering service with a train of cars, are fellow servants. *Blessing* v. *St. Louis, K. C. & N. R. Co.* (1883) 77 Mo. 410; *McGowan* v. *St. Louis & I. M. R. Co.* (1876) 61 Mo. 528.

These employees are plainly engaged in services necessary to the accomplishment of a single purpose,—the movement of trains. *Pittsburgh, C. C. & St. L. R. Co.* v. *Ramey* (1882) 37 Ohio St. 665.

Hence, the following employees are coservants:

A conductor and the engineer. *Eckles* v. *Norfolk & W. R. Co.* (1896) 96 Va. 69, 25 S. E. 545; *Michigan C. R. Co.* v. *Dolan* (1875) 32 Mich. 510; *Dillon* v. *Union P. R. Co.* (1874) 3 Dill. 319, Fed. Cas. No. 3,916.

A conductor and a fireman. *Jenkins* v. *Richmond & D. R. Co.* (1893) 39 S. C. 507, 18 S. E. 182 (negligence in signaling); *Eckles* v. *Norfolk & W. R. Co.* (1896) 96 Va. 69, 25 S. E. 545; *Summerhays* v. *Kansas P. R. Co.* (1875) 2 Colo. 484.

A conductor and a brakeman. *Pease* v. *Chicago & N. W. R. Co.* (1884) 61 Wis. 163, 20 N. W. 908 (train was started while brakeman was under a car); *Hoover* v. *Beech Creek R. Co.* (1893) 154 Pa. 362, 26 Atl. 315 (negligence in signaling); *Sherman* v. *Rochester & S. R. Co.* (1853) 15 Barb. 574, Affirmed in (1858) 17 N. Y. 153 (train allowed to attain a dangerous speed); *La Pierre* v. *Chicago & G. T. R. Co.* (1894) 99 Mich. 212, 58 N. W. 69 (car placed so that a long plank had to be used for a gangway, and this broke under the weight of the heavy parcels which the conductor required the servant to carry); *Robinson* v. *Houston & T. C. R. Co.* (1877) 46 Tex. 540 (ordering brakeman to cut a train while in motion); *Norfolk & W. R. Co.* v. *Honchins* (1897) 95 Va. 308, *sub nom. Norfolk & W. R. Co.* v. *Swain*, 40 L. R. A. 859, 25 S. E. 578; *Woodson* v. *Western V. V. & P. R. Co.* (1895) 117 N. Y. 508, 42 N. E. 999, Reversing (1893) 5 Misc. 457, 25 N. Y. Supp. 977.

A conductor and an employee hired to do "any and all kinds of labor," including coupling. *Wilson* v. *Madison etc. R. Co.* (1862) 18 Ind. 226.

See also the cases cited under subd. (d), *infra*, and those cited in the next chapter, in which the relation of coservice, as between the conductor and the other employees on his train, is assumed to exist, and the question discussed is merely whether he is a vice principal. §§ 520, note 1, subd. (b), 524, note 2, subd. (c), *post*.

Engineer and brakeman. *McDonald* v. *Norfolk & W. R. Co.* (1897) 95 Va. 98, 27 S. E. 821; *Central Trust Co.* v. *East Tennessee, V. & G. R. Co.* (1895) 69 Fed. 357; *Sherman* v. *Rochester & S. R. Co.* (1853) 15 Barb. 574, Affirmed in (1858) 17 N. Y. 153; *East Tennessee, V. & G. R. Co.* v. *Smith* (1890) 89 Tenn. 111, 14 S. W. 1077; *South Florida R. Co.* v. *Price* (1893) 32 Fla. 46, 13 So. 638; *Boatwright* v. *Northeastern R. Co.* (1886) 25 S. C. 128; *Hagins* v. *Cape Fear & Y. Valley R. Co.* (1890) 106 N. C. 537, 11 S. E. 590 (complaint demurrable which alleged that at the time of the injury the locomotive was temporarily abandoned by the engineer in charge, and with his consent and by his direction was moved and operated by a boy of inexperience and careless habits, who was incompetent, reckless, careless, and negligent, which was the proximate cause of the plaintiff's injury); *Evans* v. *Chamberlain* (1893) 40 S. C. 101, 18 S. E. 213; *Moseley* v. *Chamberlain* (1861) 18 Wis. 706 (Overruling *Chamberlain* v. *Milwaukee & M. R. Co.* [1860] 11 Wis. 239 by a majority of two judges to one); *Pittsburgh, C. & St. L. R. Co.* v. *Ramey* (1882) 37 Ohio St. 665; *Mason* v. *New York C. & H. R. R. Co.* (1874) 67 Barb. 493; *Wallis* v. *Mongan's L. & T. R. & S. S. Co.* (1886) 38 La. Ann. 15; *Hoover* v. *Beech Creek R. Co.* (1893) 154 Pa. 362, 26 Atl. 315, *South Florida R. Co.* v. *Reese* (1893) 32 Fla. 212, 13 So. 436; *Chaddick* v. *Lindsay* (1897) 5 Okla. 616, 49 Pac. 940; *Indiana R. & W. R. Co.* v. *Dacka* (1886) 110 Ind. 75, 10 N. E. 631, *Summerhays* v. *Kansas P. R. Co.* (1875) 2 Colo. 484 (cars started without a signal); *Fowler* v. *Chicago & N. W. R. Co.* (1884) 61 Wis. 159, 21 N. W. 10 (train was run again[st] [illegible]); *Alabama & T. R. Co.* v. *Waller* (1872) 48 Ala. 459; *Hoard* v. *Lake Shore & M. S. R. Co.* (1882) 49 Mich. 495, 13 N. W. 832 (engineer obli[illegible] signals).

Engineer and fireman. *Hobbs* v. *At-*

lantic & N. C. R. Co. (1890) 107 N. C. 1, 9 L. R. A. 838, 12 S. E. 124; *Murray v. South Carolina R. Co.* (1841) 1 McMull. L. 385, 36 Am. Dec. 268; *Gulf, C. & S. F. R. Co. v. Bloha* (1889) 73 Tex. 637, 4 L. R. A. 764, 11 S. W. 867; *New Jersey & N. Y. R. Co. v. Yonay* (1892) 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. 723; *Henry v. Lake Shore & M. S. R. Co.* (1892) 49 Mich. 495, 13 N. W. 832; *South Florida R. Co. v. Price* (1893) 32 Fla. 46, 13 So. 638; *Parrish v. Pensacola & L. R. Co.* (1891) 28 Fla. 251, 9 So. 696; *South Florida R. Co. v. Weese* (1893) 32 Fla. 212, 13 So. 436; *Mulligan v. Montana Union R. Co.* (1897) 19 Mont. 135, 47 Pac. 795. (That the engine is running without any train attached makes no difference in this instance.) *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

Fireman and brakeman. *Louisville & N. R. Co. v. Kelly* (1894) 11 C. C. A. 260, 24 U. S. App. 103, 63 Fed. 407; *Galveston, H. & S. A. R. Co. v. Faber* (1885) 63 Tex. 344; *Kersey v. Kansas City, St. J. & C. B. R. Co.* (1883) 79 Mo. 362; *Greenwald v. Marquette, H. & O. R. Co.* (1882) 49 Mich. 197, 13 N. W. 513; *South Florida R. Co. v. Price* (1893) 32 Fla. 46, 13 So. 638.

Two brakemen. *Young v. West Virginia, C. & P. R. Co.* (1890) 42 W. Va. 112, 24 S. E. 615; *Cole v. Rome, W. & O. R. Co.* (1893) 72 Hun, 467, 25 N. Y. Supp. 276 (in the performance of their ordinary duties); *Hayes v. Western R. Corp.* (1849) 3 Cush. 270 (here the negligent brakeman was acting as conductor); *Chicago, B. & Q. R. Co. v. Howard* (1895) 45 Neb. 570, 63 N. W. 872.

Trainmen and engine wipers. *Ewald v. Chicago & N. W. R. Co.* (1888) 70 Wis. 420, 36 N. W. 12; *Spencer v. Ohio & M. R. Co.* (1892) 130 Ind. 184, 29 N. E. 915 (engine negligently started).

Engineer and fireman and man "staking" cars. *Watts v. Hart* (1893) 7 Wash. 178, 34 Pac. 423, 774.

Trainmen and expressman hired for the trip to act as brakeman. *Chamberlain v. Milwaukee & M. R. Co.* (1860) 7 Wis. 425. Upon the second appeal, (1860) 11 Wis. 248, the servant was held entitled to recover, the doctrine of common employment being repudiated. But the law in Wisconsin afterwards became what it was declared to be on the first appeal, the repudiated doctrine having been reinstated by the case of *Chamberlain* (1861) 18 Wis. 167.

A conductor, coupler, switchman, pin puller, and engineer, all engaged in drilling cars in a railroad yard, are fellow servants. *Central R. Co. v. Keegan* (1897) 27 C. C. A. 105, 51 U. S. App. 489, 82 Fed. 174. So laid down on the authority of the Supreme Court ([1895] 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269), to which the case had been certified for an opinion.

The engineer of a locomotive engaged in shifting, and one of the shifting crew. *Crosscell v. Wilmington & A. R. Co.* (1899) 2 Penn. (Del.) 210, 43 Atl. 629.

An engine driver and a laborer engaged in uncoupling cars. *Robertson v. Linlithgow Oil Co.* (1891) 18 Sc. Sess. Cas. 4th Series, 1221 (engine driven, without warning, against cars between which plaintiff was. Action at common law dismissed; issue allowed under employer's liability act).

(c) *Servants working on different trains*.—In an early English case Pollock, C. B., expressed a doubt, *obiter*, whether the drivers of the engines of different trains are engaged in a common object. *Wather v. South Eastern R. Co.* (1863) 2 Hurlst. & C. 102, 9 Jur. N. S. 501, 32 L. J. Exch. N. S. 205, 11 Week. Rep. 731, 8 L. T. N. S. 325.

But this doubt has long since been resolved against the servant, and it is now settled that trainmen, although engaged on different trains, are fellow servants. *Norfolk & W. R. Co. v. Honchins* (1897) 95 Va. 398, *sub nom. Norfolk & W. R. Co. v. Swaine*, 46 L. R. A. 359, 28 S. E. 578; *Pittsburgh, Ft. W. & C. R. Co. v. Ruby* (1874) 38 Ind. 294; *Cooper v. Mullins* (1860) 30 Ga. 146, 76 Am. Dec. 638, and the cases cited below.

The assumption of the risks of one another's negligence is predicated on the obvious ground that they are "aware that many other trains must pass over the same track as their own train." *Thoa v. Pittard* (1894) 10 C. C. A. 352, 8 U. S. App. 597, 62 Fed. 232. Compare the extract from the opinion in *Howard v. Denver & R. G. R. Co.* (1886) 26 Fed. 837, *infra*.

This rule has been applied in the case of a conductor of one train and the employees on another. *Oakes v. Mase* (1897) 165 U. S. 363, 41 L. ed. 746, 17 Sup. Ct. Rep. 345. Affirming *Northern P. R. Co. v. Mase* (1894) 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. 114. *Baltimore & O. R. Co. v. Andrews* (1892) 47 L. R. A. 100, 1 C. C. A. 630, 6 U. S. App. 59, 50 Fed. 728 (disregarding *Chicago, M. & St. P. R. Co.*

v. *Ross* [1884] 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, on the ground that the brakeman was not subject to the authority of the conductor or engineer of the other train); *Austin* v. *Chicago, P. & St. L. R. Co.* (1892) 50 Fed. 185, Limiting *Chicago, M. & St. P. R. Co.* v. *Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184; *Northern P. R. Co.* v. *Poirier* (1895) 15 C. C. A. 52, 29 U. S. App. 583, 67 Fed. Rep. 881. Following *Randall* v. *Baltimore & O. R. Co.* (1883) 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *St. Louis, I. M. & S. R. Co.* v. *Needham* (1894) 25 L. R. A. 833, 11 C. C. A. 56, 27 U. S. App. 227, 63 Fed. 107 (switch negligently left open in breach of rules); *Becker* v. *Baltimore & O. R. Co.* (1893) 57 Fed. 188; *Pleasants* v. *Raleigh & A. Air-Line R. Co.* (1897) 121 N. C. 492, 28 S. E. 267; *Baltimore Trust & Guaranty Co.* v. *Atlanta Traction Co.* (1895) 69 Fed. 358 (a case of the crews of two different street cars); *Michigan C. R. Co.* v. *Dolan* (1875) 32 Mich. 510; *Pittsburgh, Ft. W. & C. R. Co.* v. *Ruby* (1871) 38 Ind. 294 (rule conceded—case actually turned on negligence *vel non* in retaining the conductor); *Chicago, St. L. & N. O. R. Co.* v. *Doyle* (1883) 60 Miss. 977; *Denver & R. G. R. Co.* v. *Sipes* (1896) 23 Colo. 226, 47 Pac. 287; *Enright* v. *Toledo, A. A. & N. M. R. Co.* (1892) 93 Mich. 409, 53 N. W. 536 (injured person in this case was the conductor).

The theory that the conductor of one train should be regarded as belonging to a different department from the men on another train (see subtitle C, *infra*) has been explicitly repudiated in Virginia and Mississippi. *Norfolk & W. R. Co.* v. *Donnelly* (1892) 88 Va. 853, 14 S. E. 692 (misconstrued right of way order caused collision); *McMaster* v. *Illinois C. R. Co.* (1887) 65 Miss. 264, 4 So. 59.

Coservice has also been held to exist between a brakeman on one train and a fireman on another. *Randall* v. *Baltimore & O. R. Co.* (1883) 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322 (engineer ran engine too fast, and gave no notice of its approach at a switch); *Whatley* v. *Philadelphia, W. & B. R. R. Co.* (1894) 1 Marv. (Del.) 305, 30 Atl. 650 (brakeman did not signal the other train). And between two engineers, *Van Avery* v. *Union P. R. Co.* (1888) 35 Fed. 40; *Chicago, St. L. & N. O. R. Co.* v. *Doyle* (1883) 60 Miss. 977. And between the engineer of a "wild engine" and a brakeman on another train, *Healey* v. *New York, N. H. & H. R. Co.* (1897) 20 R. I. 136, 37 Atl. 676. And between a fireman on a passenger train and the engineer of a light engine of the same company, *Howard* v. *Denver & R. G. R. Co.* (1886) 26 Fed. 837.

In the last case the reasoning of Brewer, J., was as follows: "Neither can it be said that Ryan and decedent were engaged in a different class of work. Both were employed in the movement of trains,—the same kind of service. True, they were on different trains, and at the time of the accident had no opportunity of noticing the conduct of each other until too late to prevent the collision. But, being engaged in the same kind of service and on the same division, they must naturally have often been thrown into contact and had ample opportunities for mutual supervision. To subdivide beyond the class of service, into the place of work, would carry the exception beyond well-recognized limits. It would make the trainmen on one train not fellow servants with those on another; the carpenters and machinists in one room strangers in service to those of another; one gang of section men not coemployees with another, and all because, at the time, their places of work happened to be different. In *Garraby* v. *Kansas City, St. J. & C. B. R. Co.* (1885) 25 Fed. 258, Mr. Justice Miller carefully notes the complete separation in the class of service of the two employees, while in *Randall* v. *Baltimore & O. R. Co.* (1883) 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322, to be considered hereafter, the Supreme Court treated the fact that the employees were working on different trains as entirely immaterial. He who engages in train service knows that other trains besides his will be running, and may fairly be considered as contracting to take the risk of the negligence of the employees managing such trains. He must expect to be employed now on one train and now on another, to be thus thrown into contact with the other employees in that service, to know, himself, what is proper care in such work, and to be able to detect any evidence of carelessness on the part of those in like service. Every consideration which exempts the master from liability for the negligence of a coemployee seems to bind those in the same class of service together as fellow servants."

See also *Grand Trunk R. Co.* v. *Cummings* (1882) 106 U. S. 700, 27 L. ed.

256, 1 Sup. Ct. Rep. 493, where the engineer of one train was assumed to be a coservant of all the employees on another; and *Jenkins* v. *Richmond & D. R. Co.* (1893) 39 S. C. 507, 18 S. E. 182 where the departmental rule was expressly rejected as not applicable to servants on different trains.

(d) *Servants handling ordinary trains, and servants employed in the repair or construction of the permanent way and its appurtenances.* From one point of view these servants are in a common employment because they are "engaged in the same common object,—the safe conveyance of passengers to the end of their journey." *Wallace* v. *South Eastern R. Co.* (1863) 2 Hurlst. & C. 401, 32 L. J. Exch. N. S. 205, 9 Jur. N. S. 591, 8 L. T. N. S. 325, 11 Week. Rep. 731 (per Pollock, C. B. during the argument of counsel, p. 406). Or, as other cases put it, "the common purpose of the service is the movement of trains." *Elliot* v. *Chicago, M. & St. P. R. Co.* (1889) 5 Dak. 523, 3 L. R. A. 363, 41 N. W. 750. Or they are "engaged in the common enterprise of maintaining and operating the road." *Boldt* v. *New York C. R. Co.* (1858) 18 N. Y. 432.

In *Coon* v. *Syracuse & U. R. Co.* (1849) 6 Barb. 231, the supreme court pointed out that the great object and business of the company was to "transport passengers and freight," and proceeded thus: "To facilitate this business and to render the road capable of performing the business required of it by the public as well as by the interests of the stockholders, a great many different agents and workmen are necessarily employed. To these are assigned various duties; to some are assigned the duty of examining the track of the road, to others the keeping the road in repair; some are engineers and some brakemen; some are conductors and some switchmen; but they are all necessary and indispensable for carrying out the primary object, to wit, the safe and speedy transportation of passengers and freight over the road. They are all engaged in one general business and common enterprise." This decision was Affirmed (1851) 5 N. Y. 492.

From [illegible] point of view the same result follows from the fact that "the conduct of one necessarily affects the duty of the other." *Elliot* v. *Chicago, M. & St. P. R. Co.* (1889) 5 Dak. 523, 3 L. R. A. 363, 41 N. W. 750. That is to say, though they are in different departments they are, "by the very nature of their employment, brought into frequent contact, and the risk of negligence by the one must therefore be considered to have been in the contemplation of the other when service under the common master was accepted." *Norfolk & W. R. Co.* v. *Nickels* (1895) 91 Va. 105, 21 S. E. 342. See also *Northern P. R. Co.* v. *Hambly* (1891) 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Boldt* v. *New York C. R. Co.* (1858) 18 N. Y. 432.

The following employees are therefore held to be coservants:

Track repairers and trainmen generally. *Gormley* v. *Ohio & M. R. Co.* (1880) 72 Ind. 31; *Gillshannon* v. *Stony Brook R. Co.* (1854) 10 Cush. 228; *Whalen* v. *Ind. Rock & I. R. Co.* (1858) 8 Ohio St. 249. *Ryan* v. *Cleveland & T. R. Co.* (1859) 11 Ohio St. 417, 425, 426 (*approved*). *Toledo & S. R. Co.* v. *Mitchell* (1889) 72 Tex. 609, 10 S. W. 598; *Pennsylvania R. Co.* v. *Wachter* (1887) 60 Md. [illegible] (breach of rule to have a headlight [illegible] posed in fog); *Fuller* v. *Grand Trunk R. Co.* (1865) Quebec 1 L. C. L. J. 68 (derailment). Laying down doctrine of common employment without any qualifications [illegible] it is in the common law, and rejecting the rule of the French law. See, however, chapter XLVII., *post*.

Conductors and track repairers. *Northern P. R. Co.* v. *Hambly* (1891) 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983 (Diss. Fuller, Ch. J., and Field and Harlan, JJ.); *Martin* v. *Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603, Affirming *Atchison, T. & S. F. R. Co.* v. *Martin* (1893) 7 N. M. 158, 34 Pac. 536; *Wallace* v. *South Eastern R. Co.* (1863) 9 Jur. N. S. 501, 32 L. J. Exch. N. S. 205, 11 Week. Rep. 731, 8 L. T. N. S. 325, 2 Hurlst. & C. 102; *Coon* v. *Syracuse & U. R. Co.* (1849) 6 Barb. 231, Affirmed (1851) 5 N. Y. 492; *Elliot* v. *Chicago, M. & St. P. R. Co.* (1889) 5 Dak. 523, 3 L. R. A. 363, 41 N. W. 758. A section man is a fellow servant of a conductor under whose direction he is engaged in removing an obstruction from the track, and the company is not liable for injuries to one occasioned by the negligence of the other, though a rule of the company provides that the section men shall always assist the passage of trains, and, in case of accident or delay, obey the orders of the conductor. *Stevens* v. *Northern P. R. Co.* (1899) 38 C. C. A. 151, 97 Fed. 255.

Conductor and a laborer employed to remove snow and other obstructions

from the track, and under the immediate control of a roadmaster. *Fagundes* v. *Central P. R. Co.* (1889) 79 Cal. 97, 3 L. R. A. 824, 21 Pac. 437, diss. Paterson, J.

Brakeman and track repairers. *Connelly* v. *Minneapolis Eastern R. Co.* (1887) 38 Minn. 80, 35 N. W. 582; *Lovenger* v. *Lake Shore & M. S. R. Co.* (1895) 104 Mich. 80, 62 N. W. 137; *Slattery* v. *Toledo & W. R. Co.* (1864) 23 Ind. 81.

Brakeman and servant making repairs in a pit between the tracks. *Filbert* v. *Delaware & H. Canal Co.* (1890) 121 N. Y. 207, 23 N. E. 1104 (pit was left uncovered and brakeman fell in).

Brakeman and servant employed to nail on the bridges, boards inscribed with the number thereof. *Austin & N. W. R. Co.* v. *Beatty* (1894) 6 Tex. Civ. App. 650, 24 S. W. 634.

Engineers and track repairers. *Burrell* v. *Gowen* (1893) 134 Pa. 527, 19 Atl. 678 (assumed in decision); *Connelly* v. *Minneapolis Eastern R. Co.* (1887) 38 Minn. 80, 35 N. W. 582; *Northern P. R. Co.* v. *Handley* (1894) 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Walker* v. *Boston & M. R. Co.* (1879) 128 Mass. 8 (roadmaster misplaced a switch); *Van Buskirk* v. *Manhattan R. Co.* (1886) 32 Fed. 278, 23 Blatchf. 422 (engine was run at excessive speed, and injured trackman); *Gigard* v. *Old Colony R. Co.* (1886) 141 Mass. 504, 6 N. E. 751; *Northern P. R. Co.* v. *Charless* (C. C. A.) 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848 (approach of train not duly signaled by engineer). Reversing (1892) 2 C. C. A. 380, 7 U. S. App. 359, 51 Fed. 562; *White* v. *Kennon* (1889) 83 Ga. 343, 9 S. E. 1082; *M'Enery* v. *Waterford & K. R. Co.* (1858) 8 Ir. C. L. Rep. 315 (demurrer sustained); *Hastings* v. *Manitou Union R. Co.* (1896) 18 Mont. 493, 46 Pac. 264 (train not stopped soon enough to avoid running over a laborer); *New Orleans, J. & G. N. R. Co.* v. *Hughes* (1873) 49 Miss. 258; *Harrison* v. *Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1031; *Dale* v. *Delaware & H. Canal Co.* (1891) 27 Jones & S. 367, 14 N. Y. Supp. 630; *Ellington* v. *Beaver Dam Lumber Co.* (1893) 93 Ga. 53, 19 S. E. 21 ("the work of both, when regularly carried on, conducing to the accomplishment of the common object for which they were engaged by the company, viz., the transportation of its own [the defendant's] supplies and products"):

Norfolk & W. R. Co. v. *Nuckols* (1895) 91 Va. 193, 21 S. E. 342; *Koehler* v. *Oregon Short Line & U. N. R. Co.* (1891) 21 Or. 130, 27 Pac. 91 (the fact that the section man was working under the direction of the roadmaster was expressly held to make no difference); *Robback* v. *Pacific R. Co.* (1869) 43 Mo. 187. Overruled, so far as Missouri is concerned, by *Sullivan* v. *Missouri P. R. Co.* (1888) 97 Mo. 113, 10 S. W. 852.

Engineer of a train and track inspector hired to pass over a section of track in front of that train. *Sullivan* v. *Mississippi & M. R. Co.* (1860) 11 Iowa, 421.

Engineer and bridge foreman or his subordinates. *St. Louis, S. W. R. Co.* v. *Beason* (1895) 61 Ark. 302, 32 S. W. 1079 (train managed by engineer ran into the car in which the foreman lived); *International & G. N. R. Co.* v. *Ryan* (1891) 82 Tex. 565, 18 S. W. 219 (same accident as in last-cited case); *St. Louis, I. & T. R. Co.* v. *Hedrick* (1888) 72 Tex. 298, 2 L. R. A. 839, 10 S. W. 529.

Section hand and fireman. *Harrison* v. *Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1031; *Lovenger* v. *Lake Shore & M. S. R. Co.* (1895) 104 Mich. 80, 62 N. W. 137; *Whalan* v. *Red River & L. E. R. Co.* (1858) 8 Ohio St. 249 (fireman, while passing wood from the tender, allowed a stick to fall and strike the trackman).

A yardman engaged in sweeping snow from the tracks, and an engineer and brakeman. *Corcoran* v. *New York, N. H. & H. R. Co.* (1899) 36 App. Div. 201, 61 N. Y. Supp. 672 (cars kicked without warning).

A roadmaster and fireman. *Walker* v. *Boston & M. R. Co.* (1879) 128 Mass. 8 (road master misplaced switch).

A machinist employed to keep the pumps, tanks, wells, etc., of a railway company in good working order, and the engineer of a train on which he was being conveyed in the course of employment. *Louisville & N. R. Co.* v. *Stuber* (1901) 54 L. R. A. 696, 48 C. C. A. 149, 108 Fed. 934, Reversing (1900) 102 Fed. 121.

The crew of a train, to which a car containing a bridge builder and repairer, with his assistants and their tools, is attached for the purpose of conveying them to the place where their work is to be done, are fellow servants of the men so conveyed. *Tomlinson* v. *Chicago, R. & Q. R. Co.* (1899) 38 C. C. A. 148, 97 Fed. 252 (train broke apart).

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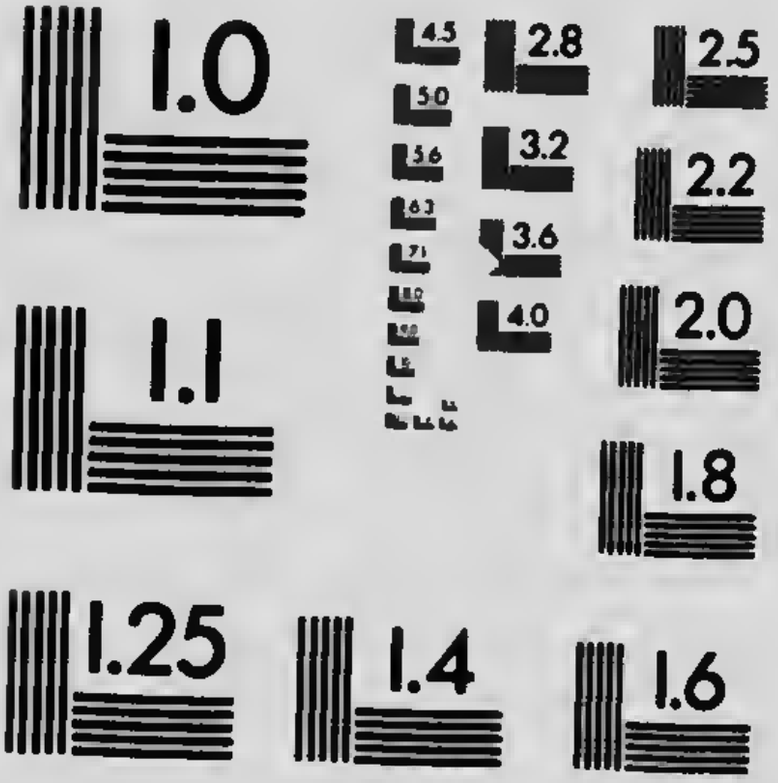

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Fireman and employee having duty to keep switches in order. *King* v. *Boston & W. R. Corp.* (1851) 9 Cush. 112.

Track repairer and servants whose duty it is to light the headlights. *Collins* v. *St. Paul & S. C. R. Co.* (1882) 30 Minn. 37, 14 N. W. 60 (track repairer injured).

Trackmen and switchmen. *Michigan C. R. Co.* v. *Austin* (1879) 40 Mich. 247 (switchman thrown off of the engine by jolt on uneven track); *Cincinnati, N. O. & T. P. R. Co.* v. *Mealer* (1892) 1 C. C. A. 633, 6 U. S. App. 86, 50 Fed. Rep. 725 (switchman stumbled on a piece of coal which the section man should have removed).

A track walker engaged in traveling on a railroad velocipede for the purpose of summoning a section crew to assist in clearing away a wreck, and an engineer in charge of an engine traveling over the same road, in the same direction, for the purpose of reaching the nearest turntable, so as to turn his engine and return to assist at the wreck. *Stephani* v. *Southern P. Co.* (1899) 19 Utah, 196, 57 Pac. 34. This decision seems to mark the abandonment of the consociation doctrine which, as is shown by the cases cited in § 507, *post*, had previously prevailed in Utah. Its basis was that both the servants were engaged in a service having the same common object, *viz.*, that of clearing the track, and in department not "so far removed from each other but that the possibility of coming in contact and incurring danger to each other from their negligent acts must have been in contemplation of the plaintiff when he entered the defendant's service."

Motorman on street car and track repairer. *Rittenhouse* v. *Wilmington Street R. Co.* (1897) 120 N. C. 544, 26 S. E. 922 (laying down rule with a view to new trial); *Lundquist* v. *Duluth Street R. Co.* (1896) 65 Minn. 387, 67 N. W. 1006.

Where a section foreman is injured by the negligence of the crew of a freight train and a station agent in loading a car so carelessly that a piece of timber projects outside the track, it is error to submit the case to the jury on the theory that the negligent employees were not fellow servants of the injured one. *Miller* v. *Michigan C. R. Co.* (1900) 123 Mich. 374, 82 N. W. 58.

In *Boldt* v. *New York C. R. Co.* (1858) 18 N. Y. 432, it was held to be immaterial, so far as regards the application of the principle controlling the above cases, whether a laborer was working on a new track laid parallel to an existing one, or on the old one. The court said: "If the plaintiff had been engaged in repairing the old track, and the injury had occurred to him while digging gravel for that purpose, on the site of the new track, by the cars being thrown from the track and falling upon him, his case could not, in principle, have been distinguished from that of a switch tender or other person employed in the company's service about the track, and injured in such service. Nor can I conceive that a different principle would apply in case the same accident occurred while the injured person was employed in preparing a new track on the site of the gravel pit, instead of digging gravel to repair the old track. In each case the liability to injury would be incident to the employment. In accepting service on such a new track, in the case supposed, he must be taken to have known that his employers were engaged in running cars on the old track, and that he was therefore to incur such hazard as might be occasioned by the negligence of their employees. So, in the case at bar, he must be taken to have contracted with reference to the possibility of cars being run on the new track, whenever it became so nearly finished as to render such running practicable."

In one Federal case it was held that trackmen are not fellow servants with trainmen on the same road. *Howard* v. *Delaware & H. Canal Co.* (1889) 6 L. R. A. 75, 40 Fed. 195. The decision was put on the ground that the trainmen "acted for the defendant in the exercise of the control given them over the movements of the train." Wheeler, J., considered that the effect of the *Ross Case* (see § 532, *post*) was that a railroad company is liable to the trainmen of one train for the negligence of those whom it has placed in charge of another train. "If the company," said the learned judge, "is responsible to trainmen for the negligence of those in charge of the track, that it should be held responsible to trackmen for the negligence of those in charge of its trains would seem to directly follow." The present writer ventures to think that the effect of the *Ross Case* is misstated, and that, even if it were correctly stated, there is a distinct *non sequitur* in the further conclusion drawn. The doctrine that a conductor is not a coservant of his subordinates on the train does not by any means involve the corollary that either

he or the other trainmen represent the company as to another class of servants over whom they have no control.

(e) *Servants handling work trains, and servants employed on the permanent way in connection with such trains.*—There is a common employment between the men engaged upon a railroad work train and section hands engaged upon a hand car, in keeping the roadbed in order, although the two bodies of employees are under separate foremen. *Thom* v. *Pittard* (1894) 10 C. C. A. 352, 62 Fed. 232, 8 U. S. App. 597 ("employed for the same general purpose by the same master, and working to produce the same result"). And between a section master, a trackman, and a trainman, where all three are engaged in looking after and removing obstructions upon a railroad due to a storm. *Wellman* v. *Oregon Short-Line & U. N. R. Co.* (1892) 21 Or. 530, 28 Pac. 625.

A fortiori, where a train under the control of a single superintending officer is used for the purpose of facilitating the repair or construction of a railway track, bridges, etc., the servants operating the train are regarded as being in the same general service with the servants who actually do the work of repair or construction, and the master is not liable for injuries received by the latter class of employees owing to the negligence of the former.

This principle bars the action of the servant, both when he was actively engaged, at the time of the injury, in the performance of his work (*Evansville & R. R. Co.* v. *Henderson* [1893] 134 Ind. 636, 33 N. E. 1021 [laborer injured by a derailment while he was throwing ties from a moving train]; *St. Louis, I. M. & S. R. Co.* v. *Shackelford* [1883] 42 Ark. 417 [train started without warning while plaintiff was shifting a rail from one car to another]; *Corona* v. *Galveston, H. & S. A. R. Co.* [1891; Tex.] 17 S. W. 384 [laborer injured by omission of conductor of work train to protect it by a flag while the men were at work on the track]; *Houston & T. C. R. Co.* v. *Rider* [1884] 62 Tex. 267 [section hand was in a flat car, stationary on a siding, when it was run into by a construction train in connection with which he was working]; *Parrish* v. *Pensacola & A. R. Co.* [1891] 28 Fla. 251, 9 So. 696 [engineer put an unskilful man in charge of the engine, and a ...cer was injured in consequence— ...backed against car which plaintiff was unloading]), and when he was being simply transported from one point on the line to another, provided he was still on duty and subject to the control of the master's representative. See cases cited in chapter XXXIII., *post*, where the general question of the position of servants on duty but not engaged in active work is discussed.

(f) *Servants engaged in handling trains and in giving signals.*—A brakeman and a flagman are coservants. *Cooper* v. *Milwaukee & P. du Ch. R. Co.* (1869) 23 Wis. 668. So are a flagman and a switch tender. *Sammon* v. *New York & H. R. Co.* (1875) 62 N. Y. 251 (misplaced switch allowed train to run over flagman).

(g) *Servants belonging to regular train crews, and switchmen.*—There is common employment between switchmen and trainmen. See *Miller* v. *Southern P. Co.* (1892) 20 Or. 285, 26 Pac. 70 (negligence complained of was that of a switchman, or of the employees upon another train charged with the duty of switchmen, in failing properly to close a switch after the passage of the latter train, or to discover and report that the switch was out of repair).

Coservice exists between a switchman and an engineer. *Satterly* v. *Morgan* (1883) 35 La. Ann. 1166; *Farwell* v. *Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339; *Memphis & C. R. Co.* v. *Thomas* (1875) 51 Miss. 637; *Naylor* v. *New York C. & H. R. R. Co.* (1888) 33 Fed. 801 (switch left open); *Gulf, C. & S. F. R. Co.* v. *Warner* (1896; Tex. Civ. App.) 36 S. W. 118; *St. Louis, A. & T. R. Co.* v. *Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266; *East Tennessee, V. & G. R. Co.* v. *Gurley* (1883) 12 Lea, 46 (common object said to be that "of keeping the train on the main track and bringing it to its destination"); *Bartonshill Coal Co.* v. *Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, per Lord Colonsay, *arguendo*.

A switchman is a fellow servant of a fireman. *Hudson* v. *Charleston, C. & C. R. Co.* (1893) 55 Fed. 248 (in charge to jury); *Parker* v. *New York & N. E. R. Co.* (1895) 18 R. I. 773, 30 Atl. 849 (switch left open).

A switchman and a conductor are coservants. *Harvey* v. *New York C. & H. R. R. Co.* (1890) 32 N. Y. S. R. 817, 10 N. Y. Supp. 645 (conductor injured).

A switchman is a fellow servant of a brakeman. *Ponton* v. *Wilmington & W. R. Co.* (1858) 51 N. C. (6 Jones L.)

245; *Slattery* v. *Toledo & W. R. Co.* (1864) 23 Ind. 81, quoting from *Wright* v. *New York C. R. Co.* (1862) 25 N. Y. 562. And of a baggage master. *Roberts* v. *Chicago, St. P. M. & O. R. Co.* (1885) 33 Minn. 218, 22 N. W. 389 (cooperation of a switchman necessary to the successful management of trains). And of a horse-car driver. *Donnelly* v. *New York & H. R. Co.* (1896) 3 App. Div. 408, 38 N. Y. Supp. 709 (misplaced switch caused car to turn suddenly, and driver was thrown off); *Boudeau* v. *Grand Trunk R. Co.* (1866; Quebec) 1 L. C. L. J. 186 (misplaced switch), adopting rule of English law.

A switchman and a fireman are coservants in such a sense that the latter cannot recover for the negligence of the former in using a defective link. The court declined to accept the contention that the switchman was a vice principal merely because the inspection of the appliance was incidental to his duty. *St. Louis, I. M. & S. R. Co.* v. *Brown* (1899) 67 Ark. 295, 54 S. W. 865.

In *Nashville, C. & St. L. R. Co.* v. *Foster* (1882) 10 Lea, 351, the cause of action having arisen in Alabama, the court held that a car inspector and a brake repairer were fellow servants of a brakeman, citing *Thomas* v. *Mobile & O. R. Co.* (1868) 42 Ala. 672. For the Tennessee doctrine, see subtitle C, *infra*.

(h) *Servants handling cars and servants inspecting or repairing them.*—That the defense of common employment is available when car inspectors or car repairers are injured by the negligence of servants operating trains is well settled.

They are held to be fellow servants of a conductor. *Whitmore* v. *Boston & M. R. Co.* (1890) 150 Mass. 477, 23 N. E. 220 (cars "kicked" back after car inspector had notified conductor to leave a space open between the cars); *St. Louis, I. M. & S. R. Co.* v. *Rice* (1888) 51 Ark. 467, 4 L. R. A. 173, 11 S. W. 699.

Of a yard master and head brakeman employed in moving cars to and fro in the yards for the purpose of having them repaired. *Bessel* v. *New York C. & H. R. R. Co.* (1877) 70 N. Y. 171 ("engaged in the same common work and for the same common purpose"); *Gulf, C. & S. F. R. Co.* v. *Kizziah* (1893) 86 Tex. 81, 23 S. W. 578 (failure to set brakes on cars which rolled against one which plaintiff was repairing); *Campbell* v. *Pennsylvania R. Co.* (1886; Pa.) 2 Cent. Rep. 46, 2 Atl. 489,

Of a yard or switch engineer. *Unfried* v. *Baltimore & O. R. Co.* (1890) 34 W. Va. 260, 12 S. E. 512; *St. Louis, A. & T. R. Co.* v. *Triplett* (1891) 51 Ark. 289, 304, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266; *Chicago & I. R. Co.* v. *Murphy* (1870) 53 Ill. 336, 5 Am. Rep. 48; *Valtez* v. *Ohio & M. R. Co.* (1877) 85 Ill. 500 (car repairer bound to know that he might be called on to make repairs on a track, and thus be exposed to the risks of the acts of engine-drivers and others whose business called them to the same track. In Illinois the two cases just cited seem to be still law as regards switch engineers, but not as to engineers of ordinary trains. See § 506, note 1, subd. (f) *infra*. In a case where a car repairer was injured owing to the fact that a brakeman dropped a larger train of cars than he could control onto the inclined track where the car under repair was standing recovery was denied on the ground that plaintiff was fully cognizant of the danger to which he was exposed, from negligently dropping in cars on the tracks where he was from time to time at work, and the precautions which were taken to avert such danger. He knew that his safety depended on the care that was exercised by his fellow employees. *Campbell* v. *Pennsylvania R. Co.* (1886; Pa.), 2 Atl. 489. And of a switchman. *Corcoran* v. *Delaware, L. & W. R. Co.* (1891) 126 N. Y. 673, 27 N. E. 1022 (car allowed to run against one under repair).

The cases in which the delinquent servants were the inspectors or repairers, and in which, conceding the existence of common employment, the question arises whether they were discharging a nonassignable duty of the masters, are discussed in chapter XXXI., *post*.

(i) *Servants handling trains and servants performing miscellaneous duties in yards.*—Coservice has been held to exist between the following classes of employees:

The general yard master and a yard foreman. *Cincinnati, N. O. & T. P. Ry. Co.* v. *Gray*, 50 L. R. A. 47, 41 C. C. A. 535, 101 Fed. 623 (negligence was in regard to directing operation of train).

The engineer of any locomotive used on the road and one whose duties are to take the number of each car coming into a station. *Bynhring* v. *Chesapeake & O. R. Co.* (1892) 37 W. Va. 502, 16 S. E. 437. "There was," said the court, "a natural and necessary connection between the classes of the service they rendered, bringing them into contact with

ach other in the same place, in the exe
ution of the master's business; . . .
nd it is no matter that the work was
ssimilar."

The engineer of a freight train, and a
ard clerk engaged in his duty of tak-
g a record of the seals of the cars in
e yard. *New York & N. E. R. Co.* v.
yde (1893) 56 Fed. 188 (injury caused
backing of train).

An engineer and an engine wiper.
uth Florida R. Co. v. *Weese* (1893) 32
la. 212, 13 So. 436 (engineer was negli-
nt in shifting the trains in the yard).

A brakeman and the servant whose
uty it was to fill the sand-box on the
gine. *Louisville, A., O. & T. R. Co.* v.
tly (1889) 67 Miss. 255, 7 So. 351
sand-box insufficiently filled).

An engineer and an employee whose
uties partly consist in coupling and un-
oupling cars. *Wilson* v. *Madison, etc.
Co.* (1862) 18 Ind. 226.

Any workman employed in an engine
rd, and an engineer. *Texas & P. R.
o.* v. *Harrington* (1884) 62 Tex. 597.

(j) *Servants engaged solely in the construction or maintenance of the permanent way and its appurtenances.*—The following classes of servants have been held to be in a common employment:

A tracklayer and a servant engaged
ballasting the road. *Lovegrove* v.
London, B. & S. C. R. Co. (1864) 16 C. B. N. S. 669, 10 Jur.
. S. 879, 33 L. J. C. P. N. S. 329, 12
eek. Rep. 988, 10 L. T. N. S. 718 (non-
uit approved in case of accident caused
y the insufficiency of the number of
eepers laid). "It is clear," said Erle,
h. J., "that the platelayer whose negli
ence caused it [the damage] was a fel-
w workman of the plaintiff, and that
oth were engaged in one common occu-
ation. The thing to be done was to
arry the ballast from the pit to the
ompany's line, and the co-operation of
he platelayers and the laborers was nec
ssary to bring about that result." This
ase is reported with *Gallagher* v. *Piper*,
6 C. B. N. S. 669, 33 L. J. C. P. N. S.
29, involving the same facts.

Two section hands. *International & G. N. R. Co.* v. *Tarver* (1888) 72 Tex.
08, 11 S. W. 1043.

A trackwalker and a la[illegible] removing
now. *Fagundes* v. *Central P. R. Co.* (1889) 79 Cal. 97, 3 L. R. A. 824, 21
Pac. 437.

A member of one section gang and the
ection boss of another gang, employed
y the same railway company. *Clarke*
v. *Pennsylvania Co.* (1892) 132 Ind. 199, 17 L. R. A. 811, 31 N. E. 808 ("engaged in the same general service and the same line of duty").

A laborer blasting rock to obtain materials for riprapping and a telegraph lineman repairing poles broken down by the fragments detached by the shots. *Neal* v. *Northern P. R. Co* (1894) 57 Minn. 365, 59 N. W. 312.

A stone mason and a carpenter employed at the common task of constructing a bridge, though they are under different foremen. *Bier* v. *Jeffersonville, M. & I. R. Co.* (1892) 132 Ind. 78, 31 N. E. 471.

The members of a gang of laborers loading rails on a car. *Coyne* v. *Union P. R. Co.* (1889) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382.

Section men working on a railroad track and other employees of the same company employed on bridge work. *Brunell* v. *Southern P. Co.* (1899) 34 Or. 256, 56 Pac. 129.

All the workmen on a grade, consisting of team drivers drawing dump cars, men working in a cut filling the cars, and men unloading them, and the foreman assisting the man injured to work on a trestle the fall of which injured him,—are fellow servants. *Lindrall* v. *Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020 (see § 520, note 1, subd. (f), *post*, as to this case in the Federal courts). The court said: "The work which the defendants were engaged in was grading a railroad, and they employed various servants in different departments of labor on that work, but all liable to be called, upon the orders of the foreman, from one department to another. All those engaged in these different departments bore to each other the relation of fellow servants. They were all serving the same master, under the same control, and all engaged in the same general work. The thing to be done was the building of the road, and the co-operation of all the employees in each department of the work was necessary to bring about that result."

(k) *Servants loading cars and servants handling them.* — These were held to be fellow servants in *Bailey* v. *Delaware & H. Canal Co.* (1898) 27 App. Div. 305, 50 N. Y. Supp. 87. The court said: "The car is furnished for the express purpose of being loaded and run over the road, and the brakeman is one of the employees, and the man who loads and inspects the loading is another, whose duty it is to carry out that

purpose. Each uses, within his own sphere, the car furnished by the master, and both are engaged in carrying out the purpose for which it is furnished."

In an early Illinois case, where a contractor was to deliver wood to a railroad company, the company to furnish the equipment to move it, and the men on the train to be subject to the direction and control of the contractor, who could stop them at any time, one of the servants employed by him to load wood upon the car was thrown off and killed. It was held that no recovery could be had by the administratrix for his death, as the parties were all servants of the company. *Illinois C. R. Co.* v. *Cox* (1878) 21 Ill. 20, 71 Am. Dec. 298. It was doubtless proper to absolve the railway company under such circumstances, but not on the ground stated. If anyone was liable, it was the contractor, whose servants, for the time being, all the parties clearly were, upon the facts as stated. The contractor, under the later Illinois doctrine as to consolidation (§ 506, note 1, subd. (i), *infra*), would not have been protected by the defense of common employment; but apart from that doctrine, there could be no recovery, as the New York case last cited shows.

(l) *Servants engaged in loading cars, and trackmen.*—In one case, on the specific ground that distinction of departments will not prevent exoneration of the master, recovery has been denied where the plaintiff was engaged in repairing a track, and the injury was caused by the negligence of another servant of the company, in so piling wood upon a tender and in so running the train that a stick of wood was thrown from the tender, striking the plaintiff. *Foster* v. *Minnesota C. R. Co.* (1869) 14 Minn. 360, Gil. 277.

In another case involving similar facts, the distinction of departments was not referred to, and, merely on the ground that the servants were in the same grade of employment, it was held that coal heavers, or firemen who load coal upon tenders, are fellow servants of a trackwalker. *Schultz* v. *Chicago & N. W. R. Co.* (1887) 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. 321.

(m) *Servants employed in the mechanical departments of railways.*—The following employees have been held to be coservants:

A workman in the repair shop and another workman employed to bring materials to the shop. *New York, L. E. & W. R. Co.* v. *Bell* (1886) 112 Pa. 400, 4 Atl. 50.

A man employed as a sweeper in a roundhouse and other employees working therein. *Manning* v. *Burlington, C. R. & N. R. Co.* (1884) 64 Iowa, 240, 20 N. W. 169.

Two car repairers. *Gulf, C. & S. F. R. Co.* v. *Kizziah* (1893) 86 Tex. 81, 23 S. W. 578 (failure to set brake on a car caused it to roll against one which plaintiff was repairing).

Foreman of gangs in railroad department shops, and those running cars in and out of the shops to take in supplies. *New York, L. E. & W. R. Co.* v. *Bell* (1886) 112 Pa. 400, 4 Atl. 50.

A founder in a blast furnace in charge of the inside work of such furnace is a fellow servant of an engineer of a locomotive used in moving cars on the premises of the company, although such founder's department and the department in which the engineer works are separate and under the charge of different foremen. *Adams* v. *Iron Cliffs Co.* (1889) 78 Mich. 271, 44 N. W. 270 (plaintiff injured by obstruction of crossing and sudden starting of cars without blowing whistle).

In an early case it was held that an engine driver and an engineer whose duty it is to keep locomotives in repair are fellow servants. *Hubgh* v. *New Orleans & C. R. Co.* (1851) 6 La. Ann. 496, 54 Am. Dec. 565. But under the modern doctrine as to the nonassignability of certain of the master's duties (not here referred to), the master would now be held liable under these circumstances. See § 568, *post*.

(n) *Servants of municipal corporations.*—Whether a steepleman in the employ of a city council was a fellow servant of a carpenter engaged to do repairs in the steeple was left undecided in *Conlin* v. *Charleston* (1868) 15 Rich. L. 201 (carpenter left trap door open,—the case, in this particular point of view, being made to turn upon the correctness of the instruction given to the jury).

(o) *Servants in stores.*—(See also subd. (b), *supra*.) Porters employed in a store are fellow servants. *Beyer* v. *Victor* (1893) 51 N. Y. S. R. 83, 22 N. Y. Supp. 392.

(p) *Servants working on stage coaches.*—The driver and guard of a stage coach are coservants. *Bartonshill Coal Co.* v. *Reid* (1854) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, per Lord Colonsay, *arguendo*.

(q) *Servants in mills, factories, and similar establishments.* — A woodcutter and a locomotive engineer in charge of

a train used for the purpose of hauling timber to a sawmill, and of transporting employees to their respective places of work, are fellow servants. *Bailey* v. *Garbutt* (1900) 112 Ga. 288, 37 S. E. 360.

An engineer in a sawmill and the night watchman therein are coservants. *McCosker* v. *Hilton & D. Lumber Co.* (1900) 110 Ga. 328, 35 S. E. 369.

An engineer in a sawmill is a fellow servant of an employee whose duty it is, during the noon hour, to go down into the box of the lower band-saw wheel, and clean out the sawdust. *Bergstrom* v. *Staples* (1890) 82 Mich. 651, 46 N. W. 1035 (engineer started machinery while the other servant was in the box).

The head carpenter at a mill, although engaged in making repairs on his master's vessel, which is close by, is still a fellow servant with a mill hand, at least while the carpenter is engaged in the mill sawing lumber for such repairs. *Sapperd* v. *Carlson* (1890) 1 Wash. 29, 23 Pac. 830.

Employees in and about a flouring mill, engaged in precisely the same business by the same employer for the accomplishment of a common object, none of whom have any control or authority over the others, are co-servants. *Schmidt* v. *Leistekow* (1889) 6 Dak. 386, 43 N. W. 820.

Employees in charge of flour rolling mills are fellow servants with another employee engaged in operating a feed mill on the same floor; and this relation continues when the employees in charge of the flouring mill are detailed to exchange the rollers in the feed mill for those that are sharper. *Frazer* v. *Stott* (1899; Mich.), 6 Det. L. N. 325, 79 N. W. 896.

An engineer in a rolling-mill is a coservant of an operative engaged in heating nail-iron. *Caldwell* v. *Brown* (1866) 53 Pa. 453 (explosion). And of a workman engaged on the rollers. *Philadelphia Iron & S. Co.* v. *Davis* (1886) 111 Pa. 597, 56 Am. Rep. 305, 4 Atl. 513 (engineer continued to work with fly wheel which he knew to be in a dangerous condition—plaintiff was struck by a fragment of one of the clamps which broke).

A chemist employed in a paper mill, without authority or control over the employees or machinery, and himself under the authority of a general superintendent, is a fellow servant with an employee engaged in working at the machinery. *Wilson* v. *Hudson River Water Power & Paper Co.* (1893) 71 Hun, 292, 24 N. Y. Supp. 1072 (water gates opened by chemist).

A second hand or second foreman under the regular foreman of the machine shop department of a cotton factory, who takes his orders from his immediate foreman or the general superintendent, is, while employed about his work in the machine shop, and while passing across a yard on the ground, a fellow servant with the overseer of the slashing and dressing room, in the upper part of the factory. *Brodeur* v. *Valley Falls Co.* (1889) 16 R. I. 448, 17 Atl. 54 (injury caused by throwing down of empty barrel).

An engraver and printer is a fellow servant of an engineer in charge of an engine furnishing heat and power to the same establishment. *Purling* v. *Hoskins* (1890) 132 Pa. 617, 19 Atl. 301 (injury sustained by falling through a trap door carelessly left unfastened by the engineer, to whom it served as a regular means of access to the engine room).

An engineer and an employee directed to clean the engine are coservants. *Spencer* v. *Ohio & M. R. Co.* (1892) 130 Ind. 181, 29 N. E. 915 (machinery started without warning).

The man who draws the red hot iron from the forge, and the one who hammers it into shape, are coservants. *Bartonshill Coal Co.* v. *Reid* (1854) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, per Lord Colonsay, *arguendo*.

Employees engaged in cleaning out a gearing pit in a factory are fellow servants of an employee engaged in feeding a machine on the same floor. *Burke* v. *National India-Rubber Co.* (1897) 21 R. I. 446, 44 Atl. 307 (plaintiff's contention was that the delinquents were not engaged in the ordinary work of the factory).

A machinist placing shafting in a shop and a workman operating one of the machines are coservants. *Treka* v. *Burlington, C. R. & N. R. Co.* (1896) 100 Iowa, 205, 69 N. W. 422.

The members of a gang engaged in moving a large grindstone were held to be coservants in *Sullivan* v. *Nicholson File Co.* (1900) 21 R. I. 540, 45 Atl. 549.

Two employees engaged in operating a paper winder in a paper mill are coservants while the paper is being wound. *Kreider* v. *Wisconsin River Paper & Pulp Co.* (1901) 110 Wis. 645, 86 N. W. 662.

(r) *Employees in lumber yard.*—A

person employed to pile lumber in a yard is a fellow servant of one whose duties are to assort and scale such lumber, where the duties of both are but steps in preparing the lumber for sale. *Fraser* v. *Red River Lumber Co.* (1891) 45 Minn. 235, 47 N. W. 785.

The foreman of a lumber yard and a repairer of the trucks are both fellow servants of a laborer who is injured while being conveyed from one part of the yard to another. *McFarlane* v. *Gilmore* (1884) 5 Ont. Rep. 302.

(s) *Servants working in quarries.*—Two employees engaged in blasting are coservants. *Wiskie* v. *Montello Granite Co.* (1901) 111 Wis. 443, 87 N. W. 461 (blast improperly prepared). A servant engaged in blasting rocks is a fellow servant of one hauling the rock. *Bogard* v. *Louisville, E. & St. L. R. Co.* (1884) 100 Ind. 491.

(t) *Servants working in or about mines, and similar work.* (See also subd. (z) *infra*).—Coservice has been held to exist in the following cases: *Hall* v. *Johnson* (1865) 3 Hurlst. & C. 589, 11 Jur. N. S. 180, 34 L. J. Exch. N. S. 222, 13 Week. Rep. 411, 11 L. T. N. S. 779 ("underlooker" whose duty it was to see that roof was propped and the miners); *Kielley* v. *Belcher Silver Min. Co.* (1875) 3 Sawy. 500, Fed. Cas. No. 7,761 (servants breaking down the ore with picks and by blasting, held to be coservants of others, at the same time loading and wheeling out the ore so broken down—engaged in different stages of the same work of removing ore from the mine); *Troughear* v. *Lower Vein Coal Co.* (1883) 62 Iowa, 576, 17 N. W. 775 (roadman is a fellow servant with a miner). Beck, J., dissented, but merely on the ground that the evidence justified the jury in finding that the injury was caused by the negligence of the superintendent). *Coal Creek Min. Co.* v. *Davis* (1891) 90 Tenn. 711, 18 S. W. 387 (engineer of mine engine, and tender of ventilating furnace); *Quincy Min. Co.* v. *Kitts* (1879) 42 Mich. 34, 3 N. W. 240 (timberman charged with duty of looking after a bridge over a chasm, and a miner); *Snyder* v. *Viola Min. & S. Co.* (1891) 2 Idaho, 771, 26 Pac. 127 (blacksmith employed on the surface to sharpen tools for miners and the miners under ground); *Cerrillos Coal Co.* v. *Deserant* (1897) 9 N. M. 49, 49 Pac. 807 (miner paid according to the quantity of coal mined by him is a fellow servant with men employed by the operator of the mine to assist in getting out coal without actually drilling holes or aiding in blasting with powder,—room full of fire damp entered with naked lamp); *Browne* v. *King* (1900) 40 C. C. A. 545, 100 Fed. 561 (helper of operator of drilling machine injured by failure of one of the drilling crew to search for "missed" shots).

(u) *Servants engaged in building or equipping ships.*—Workmen employed to fix sheets of metal on the hull of a vessel and workmen employed to caulk the seams therein are fellow servants. *Butler* v. *Townsend* (1891) 126 N. Y. 105, 26 N. E. 1017, Reversing 32 N. Y. S. R. 1055, 10 N. Y. Supp. 809. The court said: "Assuming, then, that the lumpers were servants of the defendant, acting under the direction and orders of their foreman, they were also the fellow servants of the caulkers. Both were working at the same time under a common master, upon the same vessel and engaged in the same general employment. That to some extent their trades were different, and one might not be skilled in the work of the other, is immaterial where all were working on the hull of the vessel, for one general purpose, to accomplish one common result, and under one control. *Swanson* v. *Atlantic Mail S. S. Co.* (1874) 57 N. Y. 108. Their labor was more closely and clearly related to the general purpose than that of a car repairer, a head brakeman, and a yard master, who were held in a given instance to have been fellow servants. *Besel* v. *New York C. & H. R. R. Co.* (1877) 70 N. Y. 171."

A scaffold builder and a rigger employed on a steamboat in port are fellow servants. *Pickett* v. *Atlas S. S. Co.* (1884) 12 Daly, 441.

The carpenter who prepares a scaffold for the workmen engaged in constructing a ship and the workmen are fellow servants. *Beasley* v. *F. W. Wheeler & Co.* (1894) 103 Mich. 196, 27 L. R. A. 266, 61 N. W. 658.

(v) *Crews of ships and boats.*—All the members of a ship's crew, including officers, are coservants. *The Queen* (1889) 40 Fed. 694; *The Ravensdale* (1894) 63 Fed. 624; *The Victoria* (1882) 13 Fed. 43; *The Sachem* (1890) 42 Fed. 66; *Stevens* v. *San Francisco & N. P. R. Co.* (1893) 100 Cal. 554, 35 Pac. 165 (engineer and fireman of ferryboat); *Grimsley* v. *Hankins* (1891) 46 Fed. 400 (cook and engineer); *The City of Alexandria* (1883) 17 Fed. 390

(steward and chief cook of steamer); *Red River Line* v. *Cheatham* (1894) 9 C. C. A. 124, 23 U. S. App. 19, 60 Fed. 517 (deck hand and man tending the fall of the landing-stage); *Quebec S. S. Co.* v. *Merchant* (1889) 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397 (porter and carpenter of a steamship held to be coservants of the stewardess). In the last case the court said: "As the porter was confessedly in the same department with the stewardess, his negligence was that of a fellow servant. The contention of the plaintiff is that, as the carpenter was in the deck department and the stewardess in the steward's department, those were different departments in such a sense that the carpenter was not a fellow servant with the stewardess. But we think that, on the evidence, both the porter and the carpenter were fellow servants with the plaintiff. The carpenter had no authority over the plaintiff, nor had the porter. They and the plaintiff had all signed the shipping articles; and the division into departments was one evidently for the convenience of administration on the vessel, and did not have the effect of causing the porter and the carpenter not to be fellow servants with the stewardess."

The owners of a pilot boat are not liable for the death of men in a yawl which has been lowered to take a pilot from an outgoing vessel, and which is struck by the vessel, where the accident was caused by the failure of the man in charge of the stern painter of the yawl to swing the yawl around by it so as to enable it to be rowed away, and by the negligence of another seaman in prematurely giving the report that the yawl was gone, since such men are fellow servants of those [illegible]et. *Carlson* v. *United Ves[illegible] Hook Pilots Asso.* (1899) [illegible].

(w) *Servants engaged in [illegible]ling and unloading ships.* — [illegible]an is a fellow servant of [illegible]man handling the goods which are being loaded or unloaded by the hoisting machinery under his control. *The Peninsular* (1897) 79 Fed. 972 (tub fell on man in hold); *The Bolivia* (1893) 59 Fed. 626 (box allowed to descend so quickly that it bounded off the deck and fell into the hold); *Garvey* v. *New York & C. Mail S. S. Co.* (1898) 26 App. Div. 456, 50 N. Y. Supp. 77 (assumed in case); *The Scrapis* (1892) 2 C. C. A. 102, 8 U. S. App. 49, 51 Fed. 91, Reversing (1891) 49 Fed. 393.

An engineer and a guy-tender are fellow servants of a longshoreman working in the hold. *The Scrivia* (1891) 44 Fed. 943.

A person placed to attend the hatchway of a vessel, and to give warning to those below, employed to assist in loading the vessel, is a coemployee with the latter. *Ocean S. S.* [illegible] v. *Cheeney* (1890) 86 Ga. 278, 12 S. E. 351.

A laborer loading cargo in the hold of a vessel, and another laborer above, are fellow servants. *Kenny* v. *Cunard S. S. Co.* (1885) 20 Jones & S. 434 (laborer above carelessly handled load, so that it fell).

Employees loading a vessel with coal, and a coal hoister, are coservants. *The Islands* (1886) 28 Fed. 478.

One employed by the owner of a shipyard in operating a steam winch supplying power with which to unload lumber from a ship by means of a rope and tackle running from the wharf to the ship, and a workman also employed by the owner of the yard in piling the lumber as it is unloaded, are fellow servants. *Olsen* v. *Starin*, 43 App. Div. 422, 60 N. Y. Supp. 134.

(x) *Servants employed on works of construction.*—A mason engaged in constructing the brick work of a structure and a carpenter engaged in constructing the wooden part of the same structure are fellow servants. *Keith* v. *Walker Iron & Coal Co.* (1888) 81 Ga. 49, 7 S. E. 166. Brick masons and carriers of brick and mortar on the same building are fellow servants. *Blazinski* v. *Perkins* (1890) 77 Wis. 9, 45 N. W. 947.

A mason and a hod-carrier are coservants. *Bannon* v. *Sauda* (1896) 68 Ill. App. 164; *Maher* v. *McGrath* (1896) 58 N. J. L. 469, 33 Atl. 945 (masons constructed a defective scaffold).

A painter upon a new house, who uses a scaffold erected by carpenters in building the house, is a fellow servant of the carpenters. *Hoar* v. *Merritt* (1886) 62 Mich. 386, 29 N. W. 15 (carpenters here, not independent contractors—"all employed in a common pursuit, in carrying out a common enterprise").

A servant in charge of a derrick and a servant posted on a building are fellow servants. *Fox* v. *Sandford* (1856) 4 Sneed, 36, 67 Am. Dec. 587 (plaintiff struck by timbers hoisted by the derrick, and thrown to the ground).

A common laborer employed in building a bridge and an engineer operating the hoisting machinery for its construc

tion are fellow servants where both belong to the same force under the same foreman's orders. *Ryan* v. *McCully* (1891) 123 Mo. 636, 27 S. W. 533.

A workman engaged in receiving pieces of lumber in a building, and an engineer in charge of an engine by which such lumber is hoisted, are prima facie fellow servants. *Sheehan* v. *Prosser* (1895) 55 Mo. App. 569.

A workman employed in the building of a house, having knowledge that fellow servants are clearing away rubbish on the upper floor, assumes the risk incident to his employment. *Sauer* v. *Harrison* (1887; Pa.) 8 Cent. Rep. 136, 8 Atl. 799.

A carpenter engaged in the construction of a building cannot recover against his employer for injuries received by being struck by rubbish thrown from an upper floor by a laborer employed by their common master to remove such rubbish. *Spillane* v. *Eastman Co.* (1900) 33 Misc. 403, 67 N. Y. Supp. 867, Reversing (1900) 32 Misc. 235, 65 N. Y. Supp. 668.

A bricklayer engaged in building a sewer and the workmen who excavate and sheathe the trench are fellow servants. *Cuchy* v. *Hoff* (1899) 62 N. J. L. 758, 42 Atl. 731. (Citing *Laughlin* v. *State* [1887] 105 N. Y. 159, 11 N. E. 371; *Wilson* v. *Merry* [1868] L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30).

Members of different crews engaged in constructing a trestle are coservants. *Callan* v. *Bull* (1896) 113 Cal. 593, 45 Pac. 1017.

Where a foreman had charge of men working on a part of the work, and also of an engineer on another part of the work, and plaintiff, who was one of the servants employed in the first work, was injured while helping to adjust the engine, under orders of the foreman, the foreman, engineer, and plaintiff were fellow servants. *Daley* v. *Brown* (1899) 45 App. Div. 428, 60 N. Y. Supp. 840.

(y) *Servants engaged in repairing plant.*—The cases as to servants of this class are collected in § 622, *post*. See also subd. (m), *supra*.

(z) *Servants operating hoisting apparatus and other servants in the same establishment.*—(See also subds. (s), (w), (x), *supra*.) "The man who lets the miners down into the mine in order that they may work the coal, and afterwards brings them up, together with the coal which they have dug, is certainly engaged in a common work with the miners themselves. They are all contributing directly to the common object of their common employer in bringing the coal to the surface." *Bartonshill Coal Co.* v. *Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 707, per Lord Cedonsay; *Bradbury* v. *Kingston Coal Co.* (1893) 157 Pa. 231, 27 Atl. 100 (reverse lever, pulled too far, caused the cage to shoot up rapidly); *Wulhern* v. *Lehigh Valley Coal Co.* (1891) 141 Pa. 270, 28 Atl. 1087; *Spring Valley Coal Co.* v. *Perring* (1898) 30 C. C. A. 168, 58 U. S. App. 575, 86 Fed. 433; *Trecatha* v. *Buchanan Gold Min. & Mill. Co.* (1892) 93 Cal. 495, 28 Pac. 571, 31 Pac. 561; *Stoll* v. *Daly Min. Co.* (1899) 19 Utah, 271, 57 Pac. 295 (doubtful, perhaps, whether this case was decided under the theory now being illustrated, or under that of consociation, but the result is the same in either case); *Buckley* v. *Gould & C. Silver Min. Co.* (1882) 8 Sawy. 394, 14 Fed. 833. The court said in the latter case: "We do not think it makes any difference whether he was running an engine, or working with a wheel and axle, a pulley and bucket, or carrying the material up and down a ladder upon his shoulders. He was doing the same work, but doing it by different means. Every man below performed his part of the work in sinking the shaft—the work in which they were all engaged. They were working together in the same department in excavating this shaft. The fact that the engine runner as he is called, was using a different instrument in carrying the material up and supplies down makes no difference. It was work done in a common employment, to accomplish a common end—the sinking of a shaft. One servant performed one part, and another, another part."

A mechanic employed in a factory is a fellow servant of the servant employed to operate, and of the engineer in charge of, the hoisting machinery of an elevator. *Wolcott* v. *Studebaker* (1887) 34 Fed. 12.

A servant operating hoisting machinery for a tunnel and a workman engaged in excavating the tunnel are coservants. *McAndrews* v. *Burns* (1876) 39 N. J. L. 117.

An engineer operating an elevator on a farm and a farm hand conveyed thereon are coservants. *Stringham* v. *Stewart* (1882) 27 Hun, 562. Reversed (1885) 100 N. Y. 517, 3 N. E. 575, but merely on the ground that there was evidence that the machinery was defect-

ive. On the Second Appeal (1888) 111 N. Y. 188, 1 L. R. A. 483, 18 N. E. 870, a verdict for the plaintiff was reversed on the ground of coservice. The injury occurred through the elevator being started in the wrong direction.

One placed in charge of an apparatus for raising and moving stone out of a quarry is a fellow servant with a quarryman in the quarry. *Chapman* v. *Reynolds* (1896) 23 C. C. A. 166, 33 U. S. App. 686, 77 Fed. Rep. 274.

A servant whose duty it is to apply power for drawing cars loaded with rock up an incline to the top of cement kilns, on receiving a signal from a coemployee charged with the duty of attending to the drawing up of the car and dumping the rock into the kilns, is a fellow servant of the latter. *Clark County Cement Co.* v. *Wright* (1897) 16 Ind. App. 630, 45 N. E. 817 (power applied without proper signal).

An engineer operating hoisting machinery and a man tending the crank are coservants. *Wood* v. *New Bedford Coal Co.* (1876) 121 Mass. 252.

A carpenter engaged in inclosing an elevator shaft within a frame is a coservant of an employee who is operating the elevator. *Mann* v. *O'Sullivan* (1899) 126 Cal. 61, 58 Pac. 375.

Two persons employed by the same person, and under the same general control, one in the tailoring department of a dry-goods store, the other to run an elevator set apart for the use of the employees in going to and from their work, are fellow servants. *Speer* v. *Boggs* (1901) 198 Pa. 112, 52 L. R. A. 933, 47 Atl. 875 (boy allowed elevator to run down to basement).

(aa) *Servants engaged inside and outside of warehouses, factories, etc.* — A waterman helping to moor and unmoor barges which bring goods to a warehouse is a coservant of one engaged in lifting those goods to the upper floors. *Lovell* v. *Howell* (1 L. R. 1 C. P. Div. 161, 45 L. J. C. N. S. 387, 24 Week. Rep. 672, 3 ... T. N. S. 183 (as to this case, see also § 495, note 2, *supra*,— injury occurred while plaintiff was proceeding to the office in compliance with orders).

A servant working inside a brewery is a coservant of one whose duty it is to unload barrels outside from the barges which bring them to the brewery. *Charles* v. *Taylor* (1878) L. R. 3 C. P. Div. 492, 38 L. T. N. S. 773, 27 Week. Rep. 32 (the latter servant had gone into the brewery and was injured by the former, who was shifting a barrel; as to this case, see also § 495, note 2, *supra*).

A demurrer is properly sustained where evidence shows accident to have resulted from the negligence of the drivers of a cart and a wagon at a foundry where plaintiff was employed as a helper. *Hogan* v. *Central P. R. Co.* (1874) 49 Cal. 129.

An employee of a tramway company having charge of the boilers in its power house and a teamster employed to haul coal to such power house are fellow servants. *Denver Tramway Co.* v. *O'Brien* (1896) 8 Colo. App. 74, 44 Pac. 766.

A founder in charge of the inside work of a blast furnace is a coservant of the engineer operating a locomotive used to move cars on the premises. *Adams* v. *Iron Cliffs Co.* (1889) 78 Mich. 271, 44 N. W. 270.

A laborer in a grain elevator is a coservant of the captain of a tug used to tow grain vessels to the elevator pier. *Baltimore Elevator Co.* v. *Neal* (1886) 65 Md. 438, 5 Atl. 338 (yards, not being properly braced, struck the building and knocked off some slating).

(bb) *Employees of showmen* — A watchman employed by an itinerary show company is a fellow servant of one employed to maintain discipline among the employees of the company, and the company is not liable for the destruction of personal property of the latter by the negligence of the former in kicking over a stove in a car used for the accommodation of the employees, as, while the services differed in kind and both differed from the services of other employees, they are co-operative to the same end,—the conduct and maintenance of the defendant's business in and about which they were particularly employed. *McKay* v. *Buffalo Bill's Wild West Co.* (1896) 17 Misc. 601, 40 N. Y. Supp. 592.

(cc) *Employees in restaurants.*—The head waiter at a restaurant and a boy employed to do odd jobs were held to be coservants. *Smithurhite* v. *Moore* (1898) 14 Times L. Rep. 461 (window pane which boy was ordered to clean gave way so that his hand went through it).

(dd) *Employees of company engaged in the production of electricity.*—An engineer in the power house of an electric light company is a coservant of a lineman. *Brush Electric Light & Power Co.* v. *Wells* (1900) 110 Ga. 192, 35 S. E. 365.

499. Disconnection of duties, when so great as to negative implied acceptance of the risk of a fellow servant's negligence.—The theory enunciated in § 495, *supra*, clearly does not involve the consequence that all the servants of one master are in a common employment, for there may be a disconnection of duties so great that it would be wholly unreasonable to infer that the risk of the negligent servant's act was one which the injured servant contemplated and accepted.[1]

Some of the cases under this head present no difficulty. It is obvious, for example, that none of the reasons assigned for the rule are properly applicable where the master is carrying on two different kinds of business, and the plaintiff was working in one establishment and the negligent servant in the other. Common employment is not necessarily constituted by the fact that the "common object" is that of making money for the master.[2] So, also, the courts have refused

[1] "If the contract implied on the part of the servant is to bear the risks only of the business in which he is engaged, and not the risks of other business, he would not be prevented by his contract from maintaining an action against the master, if he were injured by the negligence of another servant of the same master, engaged in other business." *Fifield* v. *Northern R. Co.* (1860) 42 N. H. 225.

"If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply." *Northern P. R. Co.* v. *Hambly* (1894) 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983.

"The principle underlying those decisions which hold a master liable to a servant for the negligent acts of another servant in a separate and distinct department of the service is that a servant only assumes the risk from the negligence of those so closely associated with him that he is presumed to have contracted with reference to such risk." *Louisville & N. R. Co.* v. *Stuber* (1901) 54 L. R. A. 696, 48 C. C. A. 119, 108 Fed. 934, Reversing (1900) 102 Fed. 421.

The test is, Were the departments so far separated from each other as to exclude the probability of contact and of danger from the negligent performance of their duties by employees of the different departments? If they were so separated, then the servant is not to be deemed to have contracted with reference to the negligent performance of the duties of his fellow servant in such other department. *Norfolk & W. R. Co.* v. *Nuckols* (1895) 91 Va. 193, 21 S. E. 342.

That the carelessness of persons engaged in business having no connection with that about which the party himself is to be employed cannot be regarded as an ordinary risk was also recognized in *Russell* v. *Hudson River R. Co.* (1858) 17 N. Y. 134.

See also the cases cited in the following notes.

One judge has gone to the length of declaring that the departmental doctrine "can be maintained only by overthrowing the rule that the implied contract of the master ends with indemnity against his own negligence and does not extend to that of employees engaged in the same enterprise." *Beesley* v. *F. W. Wheeler & Co.* (1894) 103 Mich. 196, 27 L. R. A. 266, 61 N. W. 658, per Hooker, J. But this statement is too sweeping, if regard be had to the weight of authority; for unless the words "same enterprise" are here used in an unusually narrow sense, the essential antagonism the predicated does not exist, as the cited hereafter show quite clearly.

The Petrel [1893] P. 320, 325, per Jenne, Pr. Persons employed by the same master, one as a blaster for the purpose of removing rocks, and the other as wood-workman in the foundry

to attach to the phrase "common employment" a meaning so wide as to bar the action, where one servant was hired for business purposes, and the other to perform duties which have no connection with the occupation by which the master makes his livelihood;[3] and where one of the servants was hired for household duties and the other for work entirely dissociated from the domestic establishment,— as, the preservation of game.[4]

But it is scarcely feasible, as the authorities stand, to fix with a satisfactory degree of precision the dividing line between liability and nonliability in cases where the servants are working in the same establishment, or for the furtherance of the same industrial enterprise. Some of the earlier *dicta* and rulings as to the extent of the servant's right of recovery under such circumstances seem to have tended in the direction of a doctrine which, in its practical results, would have differed but little from that discussed in the following subtitle. But the law in the jurisdictions from which these emanated has now been settled on another footing.[5]

of the master, are not fellow servants. *Bain* v. *Athens Foundry & Mach. Works* (1885) 75 Ga. 718.

"If a person carried on the occupation of a banker and a brewer in different localities, and his bill clerk was run over by his drayman, it would be strange to say that the two were servants in common employment." Bramwell, B., in *Waller* v. *South Eastern R. Co.* (1863) 2 Hurlst. & C. 102, 112, 32 L. J. Exch. N. S. 2, 5, 9 Jur. N. S. 501, 8 L. T. N. S. 325, 11 Week. Rep. 731.

[3] Neither a domestic servant nor a coachman of a manufacturer is engaged in a common employment with an operative in his factory. *Relyea* v. *Kansas City, Ft. S. & G. R. Co.* (1892: Mo.) 19 S. W. 1116.

"If one employed to drive the private carriage of his master should, by his careless manner of driving, injure another servant of the same master, engaged in some mechanical employment, it may well be doubted whether the rule we are considering would apply." *Russell* v. *Hudson River R. Co.* (1858) 17 N. Y. 131.

A driver of a wagon used by his employer in the meat business is not a fellow servant with a hod carrier engaged in the erection of the walls of an addition to the employer's premises. *McTaggart* v. *Eastman's Co.* (1899) 57 N. Y. Supp. 222, 27 Misc. 181. Affirmed in (1899) 28 Misc. 127, 58 N. Y. Supp. 1111 (wagon driven against ladder on which hod carrier was—servants said to be "employed under different capacities, and on different classes of work").

[4] In *Battonshill Coal Co.* v. *Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, Lord Cranworth quoted with approval a remark made by Lord McNeill in *Gray* v. *Brassey* (1852) 15 Sc. Sess. Cas. 2d series, 135, that "if a gentleman's coachman were to drive over his gamekeeper, the master would be just as liable as if the coachman had driven over a stranger." Such servants are not engaged in "the same work."

[5] In *Gilhespeater* v. *Madison & I. R. Co.* (1851) 5 Ind. 339, 61 Am. Dec. 101 the court, in holding a bridge carpenter not to be a fellow servant of the engineer of the train which was conveying him to the place of work, with reference to the plaintiff said: "His business of house-carpenter, as applied to the erection of a railroad bridge, did not even remotely link him with the careless management of that particular train. He had no participation in the duties, the neglect of which contributed to the injury complained of. Though in some sense a servant of the company, he was not a coservant of the engineer and conductor, within the meaning of *Farwell* v. *Boston & W. R. Co.* (1842) 4 Met. 49, 38 Am. Dec. 339. He clearly belonged to a distinct department of duty. As to the company, therefore, on the par-

Some Federal court cases, even if we take the most liberal view of the circumstances under which a servant may be heard to allege that

ticular occasion, Gillenwater stood clothed with all the rights of passenger and stranger. . . . If the bridge builder of the company be regarded as a coservant of the engineer, within the meaning of the *Priestley* and *Farwell Cases*, the principle becomes alike vicious and absurd, by the very extent of its application. Every person in the service of the company is brought within its range. Even the position of the legal adviser of the railroad is included. He, too, is, in some measure, the company's servant. He derives his compensation and authority from the same source as the engineer, conductor, and bridge builder. Like them, though in a fainter degree, he contributes to the ultimate objects of the company. Had he been on the train by the side of Gillenwater and injured by the same negligence, in a suit against the company he would have been summarily dismissed by the same argument. He would be told that his action was of new impression, that he contracted with reference to the risks of the employment and reserved a compensation in fees with an eye to these risks. He would, therefore, be denied redress, because he was a quasi coservant of the careless engineer. It would be difficult to imagine upon what principles, either of justice or public policy, such ruling could be supported. For the basis of implied contract and increased compensation, with reference to such risks, on the part of the carpenter and legal adviser, is wholly visionary."

This decision was followed in *Donaldson* v. *Mississippi & M. R. Co.* (1865) 18 Iowa, 280, 87 Am. Dec. 391 (holding that a bridge builder's duties are so entirely in another department, and wholly disconnected with operating the road, that his relation to the employees managing a train which ran over him is not that of a coservant). But, so far as Indiana itself is concerned, it was, in effect, overruled by *Slattery* v. *Toledo & W. R. Co.* (1864) 23 Ind. 81 (brakeman held to be coservant of section foreman), and later cases noted under § 498, *supra*; and the above extract is inserted chiefly for the purpose of showing the difficulties involved in testing the existence or absence of common employment solely by the servant's supposed contemplation of the risk.

Another early recognition of the consequences of a disconnection occurs in the judgment of Lord Chelmsford in a leading case: "Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him." *Bartonshill Coal Co.* v. *McGuire* (1858) 3 Macq. H. L. Cas. 300, 7 Jur. N. S. 773. He thought that the Scotch case, *McNaughton* v. *Caledonian R. Co.* (1857) 19 Sc. Sess. Cas. 2d series, 271, where the company was held liable for the death of a car repairer caused by the negligence of an engine driver and a switchman, might be reconciled with the English authorities, on the ground that the deceased and the other servants were engaged in totally different departments of work. But this suggestion is inconsistent with the general effect of the later authorities in England where the "departmental doctrine" has been entirely repudiated (see subtitle C, *infra*), (§ 495, *supra*), except, perhaps, in the recent case of *The Petrel*, *infra*, and the decisions cited in the subjoined note. The cases where a servant has recovered on the ground of a disconnection of duties are too few to be the subject of generalizations.

The master, officers, and crew of a vessel sunk in collision with another belonging to the same owners, through the fault of the latter, are entitled to claim against the fund arising in proceedings to limit liability, in respect of their lost effects. *The Petrel* [1893] P. 320, Jenne, Pr., said: "The consideration that the risk of injury to the one servant is the natural and necessary consequence of misconduct in the other implies that the skill and care of the one is of special importance to the other by reason of the relations between their services. Tried by this principle, can it be said that the safety of the captain of one ship of a company is, in the ordinary and natural course of things, dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other? In some cases it might, perhaps,—for ex-

the risk was not contemplated, seem not to be sustainable under the theory by which such contemplation becomes the test of common em-

ample, it might if all the ships of the company were in the habit of meeting in the same dock and the safety of each thus became, in the ordinary course of things, dependent on the skill with which the other was navigated. But in regard to navigation on the high seas or in the estuary of the Thames, would a captain of one ship of the General Steam Navigation Company have more reason to be interested in the skill of a captain of another ship of the company than in that of the masters of the myriad other craft in whose vicinity it might happen to navigate? By no reasonable supposition can it be imagined that he would. I think, therefore, that these two captains were not in common employment." The test suggested by Blackburn, J., in *Morgan* v. *Vale of Neath R. Co.* § 495, note 2, *supra*, was approved.

The crew of one river steamer were held not to be coservants of the crew of another, although the defendant was a partner in the business of operating both vessels. *Connolly* v. *Davidson* (1870) 15 Minn. 519, 2 Am. Rep. 154, Gil. 428 (boiler burst on one steamer).

The court said: "Plaintiff and those navigating the John Ramsey cannot be said either to be engaged in the same common enterprise, or employed to perform duties and services tending to accomplish the same general purposes, as that language is used in the case of *Wright* v. *Milwaukee & St. P. R. Co.* (1869) 25 Wis. 46 (relied on by defendant), as synonymous with 'the same general business;' nor are the examples there given of maintaining and operating a railroad, 'operating a factory,' 'working a mine,' or 'erecting a building,' at all analogous to the case at bar. If (and we think the test a good one, as illustrated by the case of *Abraham* v. *Reynolds* [1860] 5 Hurlst. & N. 143, 6 Jur. N. S. 53, 1 L. T. N. S. 330, 8 Week. Rep. 181), the question in each case is, as the court of appeals states that it is, whether the alleged coemployees are under the same general control, the rule clearly cannot be claimed by defendant to apply here, for he swears that he and Ramsey had each the exclusive control and management of his own boats and hands. Each boat, in fact, was doing a separate business in every respect, (though of the same sort) as much so as any two independent railroads separately owned and managed, but run for the joint profit of the owners; in which easily conceivable case, while the owners of the railroads might be partners as to third persons in the business of running each, the employees on each, though they were engaged in the common enterprise of maintaining and operating that road on which they were respectively employed, and assumed the risks incident to that business, could no more be said to assume the risks incident to the business of maintaining and operating the road upon which they are not employed, than in the instance put in the leading case on this subject in this country, of *Farwell* v. *Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339.

Trainmen and car repairers are not coservants. *Norfolk & W. R. Co.* v. *Nuckols* (1895) 91 Va. 195, 21 S. E. 342 (see the extract given in note 1, *supra*).

The doctrine of the negligence of coemployees was held to not apply where an open well, into which a servant hired to assist in putting up telegraph poles fell on a dark night, had been dug by other employees of the same employer. *Indiana Pipe Line & Ref. Co.* v. *Neusbaum* (1899) 21 Ind. App. 361, 52 N. E. 471 (negligent servants said to be "not in the same line of work." But this case should rather have been made to turn on the nonassignability of the duty of furnishing a safe place of work).

The engineer and fireman of a gravel train are not fellow servants of a boiler maker in the repair shop of a railway company. The former have no more business in and about the shop than if the shop belonged to some other company or individual. *Pennsylvania & N. Y. Canal & R. Co.* v. *Leslie* (1885) 42 Phila. Leg. Int. 267.

A draftsman in locomotive works has been held not to be in a common employment with a man who was employed in "jobbing" in any part of the building where he might be needed, and whose negligence in regard to the excavation of a cellar below the office was the cause of the accident. *Baird* v. *Pettit* (1872) 70 Pa. 477 (here there was the additional feature in the plaintiff's favor, that the injury was received after he had left his work).

In one case it has been held that a

ployment, and to require for their support the theory discussed in subtitle C, *infra*. Upon the facts, these decisions are clearly in conflict with the decisions of the Supreme Court, cited in the foregoing sections.[6]

longshoreman employed in unloading a ship, and the servants aboard ship, having charge of the ship's supplies, are not fellow servants. *Sansol* v. *Compagnie Generale Transatlantique* (1900) 101 Fed. 390. (Trap door left open). The rationale of this decision is not indicated very clearly by the language used.

But it would seem to represent an adoption of the same point of view as that exemplified in a Pennsylvania case, where a laborer was injured by a defective rope, while working under the head stevedore of the defendant company, to whose authority he was wholly subject, by whom he was paid, and who had power to discharge him; and the evidence went to show that the defect was due to the negligence of the mate of the ship which was being unloaded. It was held error to rule, as a matter of law, that the laborer and the mate were coservants. Whether that defense was available "would depend on what should be ascertained to be their relations to each other, the extent to which they were brought into contact, and to which they were engaged in the common employment, and the connection of the duties of each with the other." *Mullan* v. *Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2.

In *Sell* v. *Charles Rietz & Bros. Lumber Co.* (1888) 70 Mich. 479, 38 N. W. 451, the court was equally divided upon the question whether the employees operating the elevator in the warehouse of a salt works were fellow servants of a laborer who used to do light work in the mill yard, in loading blocks of salt, and in gardening, but who had never been employed in the warehouse.

A common laborer employed in various kinds of work about a mine, but not himself a miner, was held not to be a fellow workman of the miners in such a sense that he cannot recover of the mine owner for injuries caused by the mining operations. *James* v. *Emmet Min. Co.* (1884) 55 Mich. 335, 21 N. W. 361. But here the right of action seems to be sustained partly on the ground of an imperfect knowledge of the conditions, as it was said that he was not "bound to know the condition or fully understand the exigencies of the underground works, so far as he was not in contact with them, with means of passing judgment upon them."

A laborer engaged in constructing a railway for transportation of coal from a mine is not a fellow servant with a miner at work outside the mine, handling lumber to be used in the mine in timbering up, in the absence of further facts showing them to be engaged in a common employment. *Evans* v. *Carbon Hill Coal Co.* (1881) 47 Fed. 437 (overruling demurrer based on theory that complaint showed coservice).

Common employment is not an available defense where the plaintiff was hired by the defendant to carry wheat from the latter's mill to another place, and was injured by the negligence of a millhand while his cart was being loaded. *Bellis* v. *Maxfield* (1875) Australian Jur. Rep. (Victoria) 35.

It seems impossible, however, to lay down any rigid rule regarding cases of the type of the last three cited, for even if the servant were hired merely for the purposes specified, yet, if he should appear to have been regularly under the immediate control of the same superior as the other servants, and habitually brought into contact with them, it is hard to see how he could be allowed to maintain the action merely on the ground that the risk of injury from their negligence was not within his contemplation.

* *Garraby* v. *Kansas City, St. J. & C. B. R. Co.* (1885) 25 Fed. Rep. 258 (employee operating an engine engaged in other business than that of relaying the track, not a fellow servant of laborer distributing rails along the track). *Hall* v. *Galveston, H. & S. A. R. Co.* (1889) 39 Fed. 18 (telegraph operator at a way station not coservant of brakeman).

The former of these rulings was based on *Chicago, M. & St. P. R. Co.* v. *Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, which is wholly irrelevant; and, as the latter ruling was made in an oral instruction, without any citation of authorities, it is impossible to say what the grounds of it really were.

In another case, the principle that, whenever the negligence of another em-

C. Theory that common employment depends on identity of departments of work or consociation of duties.

500. Identity of department as a test, generally.—The passage quoted in § 497 *supra*, from the opinion in *Farwell* v. *Boston & W. R. Corp.*[1] shows that the significance of an identity or difference of the departments of duty to which the negligent and injured servants belonged, has, from the very earliest period in the evolution of this branch of law, been a subject of discussion. The phrase "departmental doctrine," or some similar combination of words is now not as frequently met with in reports and treatises.[2] The choice of this terminology, however, and the prominence given to the conception which it represents, are rather unfortunate. The conflict between the cases reviewed in the preceding sections and those which now demand our notice is a clear proof, if any were needed, of the inherent impossibility of fixing, upon grounds that will be deemed generally satisfac-

ployee of the same master can be considered an ordinary risk,—one which he might reasonably anticipate at the time of making his contract,—the servant accepts the perils liable to happen through such negligence, has been thought to involve, from the converse point of view, the corollary that those only are fellow servants for whose negligence the master is not answerable, who serve in such capacity and in such relation to the master and each other that the means of the servants to protect themselves are equal to, or greater, than those of the master to afford them protection. This doctrine does not seem to be materially different from that of associated duties, as developed in subtitle C, *infra*. *Kielley* v. *Belcher Silver Min. Co.* (1875) 3 Sawy. 436, Fed. Cas. No. 7,760, where it was held, by Field, J., and Hillyer, D. J., that a complaint which alleges that a laborer in a mine was injured by the negligence of the defendant coporation in failing to perform its duty of notifying him that a blast was about to be exploded by certain miners at a place which he was approaching is not demurrable on the ground that it shows upon its face that the injury was due to the negligence of servants, who though in a different branch of the service, were in a common employment with the plaintiff. But one of the grounds on which Hillyer, J., based his decision was that the master's duty to select his servants carefully requires him at least to see that those who labor in one department of his business are not injured by those in another, a mode of connecting the theory of nonassignable duties and the separate department theories which has not, so far as the present writer knows, been suggested elsewhere.

In *Northern P. R. Co.* v. *Hambly* (1894) 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983, the court seems, in its argument, inclined to approve of the cases which hold that persons whose duty it is to keep railroad cars in good order and repair are not engaged in a common employment with those who run or operate them, for the reason that their departments are so far distinct that contemplation of the risk is negatived. But the point was not directly ruled upon, and the theory most commonly applied by the Supreme Court in such cases is that of a nonassignability of duties. See § 568, *post*.

[1] (1842) 4 Met. 49, 38 Am. Dec. 339. See also several of the cases cited under § 495, note 2, *supra*.

In *Clarke* v. *Pennsylvania Co.* (1892) 132 Ind. 199, 17 L. R. A. 811, 31 N. E. 808, the court speaks of the "departmental doctrine."

The title of chapter V of Mr. McKinney's work on Fellow Servants is, "The Different Department Limitation."

The "separate department" doctrine is referred to in *Norfolk & W. R. Co.* v. *Nickels* (1895) 91 Va. 195, 21 S. E. 342.

tory, the meaning which, for juristic purposes, should be attached to the word "department." While it is agreed on all hands (see § 499, *supra*), that, under some circumstances, a difference of department is a ground for allowing recovery, there is a radical and irreconcilable divergence of opinions as to what the circumstances are which will, in this point of view, exclude the defense of common employment. Neither doctrinal precision nor doctrinal harmony are feasible when the same word may be and is used to describe predicaments which are in some essential respects quite distinct.

But the drawbacks of this terminology do not end here. Even if exactness in the definition of the word "department" were attainable, —and, so far as can be seen, it is not attainable,—there would still remain the objection that, as is now declared in the states which have most thoroughly worked out the so-called "departmental doctrine" (See the cases cited in § 503, *infra*), neither a difference nor an identity of department are necessarily decisive of the injured servant's ability or inability to recover; and, in fact, if it is admitted that the ultimate issue is whether the negligent and injured servants were or were not co-operating in the sense already explained (§ 495, *supra*), this theory as to the nonconclusive effect of proof that they were in different or the same departments is, from a logical standpoint, the only possible one. Only confusion can result from the use of language which, so far from indicating the elements on which the solution of the problems in this class of cases actually depends, is misleading to the extent of suggesting that difference or identity of department, instead of being merely probative facts raising at the most a presumption for or against the servant, may be finally determinative of the existence or absence of a common employment.

The terminology criticised is doubtless convenient, as a means of roughly labeling the nature of the controversy between two schools of opinion. But this is scarcely an adequate justification for its retention in discussions which purport to go below the surface of the subject. In the ensuing discussion, therefore, the cases will be reviewed under a classification which will take due account of the merely evidential character of the facts of identity or difference of department.

As will be seen from the illustrative cases tabulated in § 507, *post*, the so-called "departmental doctrine" has obtained a foothold in comparatively few jurisdictions. The decisions which actually turn upon it seem to be confined to Georgia, Illinois,[3] Missouri,[4] Nebraska,

[3] There is some wavering apparent in the rulings prior to *Chicago & N. W.* the views of the courts, as disclosed by *R. Co.* v. *Miranda* (1879) 93 Ill. 302.

Indiana, Louisiana, Virginia, Washington, West Virginia, Kentucky, Utah, Arizona, and such Federal courts as have avowedly followed the local rule.[5] In some of these jurisdictions its application is modified by the operation of doctrines which possess a merely local force.[6] In others it has been explicitly or virtually abandoned in the more recent decisions.[7]

Most of the courts which apply the so-called "departmental doc-

34 Am. Rep. 168. In that decision the earlier cases were extensively reviewed and collated, and the opinion is now regarded as the fountain of law upon this subject in the state where it was delivered, as well as in the others which have adopted the same doctrine. It overruled some in which the view was adopted that the fact of one servant's being necessarily exposed, by reason of the nature of his duties, to the risk of injury through the carelessness of another, justified the inference of coservice. *Chicago & A. R. Co.* v. *Murphy* (1870) 53 Ill. 336, 5 Am. Rep. 48; *Valtez* v. *Ohio & M. R. Co.* (1877) 85 Ill. 500.

[4] In *Corbett* v. *St. Louis, I. M. & S. R. Co.* (1887) 26 Mo. App. 621, it was held, rejecting the department rule, that a track repairer and trainmen were fellow servants. Under that rule, these servants are certainly not, as matter of law, in a common employment. See § 506, note 1, subd. (j), *infra*.

[5] An instance of such a decision is *Pike* v. *Chicago & A. R. Co.* (1890) 41 Fed. 95 (decided in a Missouri district). Other cases in which the influence of the theory is also apparent to some extent are those cited at the end of note, § 499, *supra*.

[6] *Kentucky.*—One of the special factors to be taken into account in noting the results of the decisions in this state is the provision in Gen. Stat. chap. 57, § 3, that "punitive damages may be recovered by the widow, heir, or personal representative of any person or persons killed by the wilful neglect of another person, company, or corporation, or their agents." Another is the extreme doctrine which the court has adopted respecting the effect of any inequality of rank in excluding the defense of coservice. Another is the distinction drawn between gross or wilful neglect and ordinary neglect, so that a dereliction of the former kind by a fellow servant will sometimes render a master responsible where, if it had been of the latter kind, he might successfully have pleaded common employment. The effect of the decisions, as a whole, is summarized, in § 549, *post*.

Tennessee.—In this state the application of the doctrine is restricted to railway companies. *Coal Creek Min. Co.* v. *Davis* (1891) 90 Tenn. 711, 18 S. W. 387, a distinction which, in view of the great diversity of work which results from the enormous extent of many mining and manufacturing concerns at the present day, it seems quite impossible to sustain on rational grounds.

[7] *Georgia.*—The language used in the early case in which the doctrine was first propounded (*Cooper* v. *Mullins* [1860] 30 Ga. 146, 76 Am. Dec. 638) was thought by the same court, in *Ellington* v. *Beaver Dam Lumber Co.* (1893) 93 Ga. 53, 19 S. E. 21, to be too broad. There is a decided tendency manifested in the latter case to approximate to the doctrine received by the majority of the courts; and the actual decision—that a track repairer while being transported to and from his work is a fellow servant of the driver of the engine, the vehicle not being used for work on the permanent way at the time the injury was received—cannot, it would seem, be reconciled with the Illinois doctrine. See § 506, note 1, subds. (j), (k), *post*.

Indiana.—*Madison & I. R. Co.* v. *Bacon* (1855) 6 Ind. 205, seems to be no longer law. See *Gormley* v. *Ohio & M. R. Co.* (1880) 72 Ind. 31, where the conflict in the earlier rulings is discussed.

Virginia.—In this state the doctrine was at one period accepted. *Torian* v. *Richmond & A. R. Co.* (1887) 84 Va. 192, 4 S. E. 339; *Moon* v. *Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401 (both holding that a track repairer is not a fellow servant of a brakeman); *Richmond & D. R. Co.* v. *Normont* (1887) 84 Va. 167, 4 S. E. 21, ("overhauler of cars," not a fellow servant of a conductor and engineer of a moving train, by whose negligence he was injured). But in *Norfolk & W. R. Co.* v. *Donnelly* (1892) 88 Va. 853, 14 S. E. 692, a decided disposition was shown to

trine" refer it to the conceptions explained in the next section. But in some of the cases there is no formal adoption of the theory of consociation, and it would seem that, in at least a portion of these, the decision is independent of that theory, and based upon the simple notion that the duties of the servants were so related in respect to closeness or remoteness, that it was or was not proper to impute to each of them an acceptance of the risks arising from the other's negligence. See § 499, *supra*. Since, however, the inferences drawn from like groups of facts are practically identical, whichever of these forms of the "departmental doctrine" may be applied to the solution of the case, it is not deemed worth while to attempt any discrimination between the two classes of decisions. Indeed the line of demarcation between them is so obscure that the task of segregation would be extremely difficult, if not impossible.

But, in view of the fact that the doctrine antagonistic to that of associated duties grew up, and was steadily adhered to by nearly every court, long after the development of many of the great railway systems, it would seem that no great importance can be properly attached to this consideration. The reasons of the rule, in this point of view, have not undergone in recent times any such material change as would justify a change in the rule itself.

501. Consociation of duties, as a test of common employment.—In §§ 495–498, *supra*, are set forth the results of construing, from one standpoint, the general proposition—as to which there is no disagreement among the authorities—that, as all servants of the same master are prima facie in a common employment, a servant who is injured by one of his coemployees is necessarily debarred from recovery against the master, unless this presumption is overcome by evidence

revert to the doctrine received by the majority of the courts, and the reversion seems to be completed in *Norfolk & W. R. Co.* v. *Nuckols* (1895) 91 Va. 195, 21 S. E. 342, which virtually overrules the earlier decisions, so far as they rest upon the theory of consociated duties, though, upon the facts, they are, perhaps, sustainable as applications of the rule that a master is liable where his own negligence concurs with that of a fellow servant. The latest case bearing upon the question is *Eckles* v. *Norfolk & W. R. Co.* (1896) 96 Va. 69, 25 S. E. 545, but it simply decides that a freight conductor cannot recover for injuries due to the acts of the engineer or fireman—a conclusion which would clearly follow under either theory of common employment. In this state, therefore, it would seem that difference of department is now material only in so far as it tends to negative contemplation of the risk. See *Norfolk & W. R. Co.* v. *Nuckols* (1895) 91 Va. 195, 21 S. E. 342, and compare §§ 495, 498, *supra*.

Utah.—Here the cases cited in § 507, *post*, do not seem to have been formally overruled, but they are certainly irreconcilable with the recent decision in *Stephens* v. *Southern P. Co.* (1899) 19 Utah. 196, 57 Pac. 34 (facts stated in § 498, subd. (d), *supra*), which distinctly embodies the theory that the servant's contemplation of the risk is the sole test of common employment.

showing that the relation between the duties of the injured and the delinquent servants was such as to render it improper to infer an implied stipulation on the part of the former to accept the risks of injury from the acts of the latter. According to the cases there cited, the propriety or impropriety of such an inference is determined solely by inquiring whether, under the circumstances, the carelessness of a servant whose regular functions were those discharged by the delinquent was so likely to be harmful to the plaintiff that the latter must have understood that the peril to which he might at any moment be exposed by such carelessness was a natural and normal incident of his employment.[1]

[1] Under this theory, it will be observed, the fact that there was a certain intimate consociation of duties may be important, not as a starting point for an inquiry on the same lines as that in the cases to be presently discussed, but as indicating that the negligent servant was one of those whose negligence was likely to be injurious to the plaintiff. Such consociation is sometimes noted by courts which have rejected the "departmental doctrine." *St. Louis S. W. R. Co.* v. *Henson* (1895) 61 Ark. 302, 32 S. W. 1079. The negative aspect of this conception is observable in such cases as *Northern P. R. Co.* v. *Hambly* (1894) 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983, where the departments of the two servants were said to be so far apart that the risk of injury from each other's negligence was not contemplated. It will become obvious, moreover, if we compare the specific rulings referred to in the following sections with those already reviewed, that in many instances the plaintiff's inability to recover is equally unquestionable whether his relation to the delinquent servant is determined by the test of consociation, as explained below, or by the test of contemplation of the risk. The terms by which the position of servants in a common employment is described in the opinions of courts which apply the doctrine of consociated duties are, in fact, often so general as to give no intimation of the characteristic and distinctive conceptions underlying that doctrine. Compare, for example, the following phrases with those quoted in § 3 *ante*:

"Directly co-operating with each other in the same line of employment." *Chicago & A. R. Co.* v. *O'Brien* (1895) 155 Ill. 630, 40 N. E. 1023.

"Directly co-operating in the particular business." *Chicago & A. R. Co.* v. *Hoyt* (1887) 122 Ill. 369, 12 N. E. 225.

"In the same line of employment." *Chicago, B. & Q. R. Co.* v. *Young* (1887) 26 Ill. App. 115.

"In the same line of employment, and directly co-operating in the particular business then in hand." *Illinois C. R. Co.* v. *Swisher* (1897) 74 Ill. App. 164.

Compare also *North Chicago Street R. Co.* v. *Conway* (1898) 76 Ill. App. 621, where a servant is said to be a fellow servant of other employees whose labors "directly co-operate" with his own in the particular work in which they are engaged.

"Co-operation" in the "particular business in hand" was also deemed to let in the defense, in *Card* v. *Eddy* (1894) 129 Mo. 510, 36 L. R. A. 806, 28 S. W. 979.

Of the fact that the two doctrines cover this common ground an illegitimate dialectic use seems to have been made, where the court, in what is believed to be the earliest reported case in which the doctrine of consociated duties was adopted, lays stress upon the fact that in *Priestley* v. *Fowler* (1837) 3 Mees. & W. 1, 1 Murph. & H. 305, 1 Jur. 987, the plaintiff and "his coservant, the conductor of the van, were intimately associated in the business intrusted to them by the common employer." *Gillenwater* v. *Madison & I. R. Co.* (1851) 5 Ind. 339, 61 Am. Dec. 101. The rationale of the case cited was wholly different from what this comment seems to intimate. It may be noted, moreover, that the influence of the doctrine of consociated duties upon judicial language and reasoning is sometimes traceable even in the opinions of courts in which it has not been formally adopted or even definitively re-

But by the courts with whose decisions we are now concerned, this comprehension by the plaintiff of the likelihood of injury is not regarded as being of itself sufficient to preclude him from maintaining the action. The dialectic starting-point of the so-called "departmental doctrine," as explained in what may be considered the leading case on the subject, is that, as the principle of *respondeat superior* "is founded on the expediency of throwing the risk upon those who can best guard against it,"[2] the question how far that principle should be qualified in the case of injuries caused by the negligence of fellow servants "must turn upon the proper consideration, in each class of cases, of what ruling will in fact throw the risk upon those who can best guard against it,—of what is demanded to promote in the highest degree the well-being of society."[3] Under such a theory the servant's

jected. In Mississippi where the departmental doctrine does not prevail (*McMaster* v. *Illinois C. R. Co.* [1887] 65 Miss. 264, 4 So. 59), the court once remarked that the safety of employees is more effectually secured by making it the interest and the duty of each one to observe the conduct of the others, so as to be associated as far as practicable with the prudent and the cautious. *New Orleans, J. & G. N. R. Co.* v. *Hughes* (1873) 49 Miss. 258.

When a court speaks of servants in separate departments not having "contracted to be associated with each other by reason of their employment," it is apparently meant that one did not contemplate the risk of the other's negligence. *Nashville & C. R. Co.* v. *Carroll* (1871) 6 Heisk. 347.

[2] Shaw, Ch. J., in *Farwell* v. *Boston & W. R. Corp.* (1841) 4 Met. 49, 38 Am. Dec. 339.

[3] *Chicago & N. W. R. Co.* v. *Moranda* (1879) 93 Ill. 302. The court said: "The best interests of society demand that all business should at all times be so conducted that the least possible harm shall be caused thereby; that all servants, and especially all servants controlling dangerous instrumentalities, shall constantly use due care. The position that the well-being of society in early days demanded in such cases the rule *respondeat superior* was sustained upon the view then taken of the usual subordination of servants to the will of the master, and the usual devotion of the servant to the interest of the master. It seems to have been wisely thought that it would induce greater caution in servants to avoid injury to others, if servants knew that the master must answer for such injury; and also that the responsibility of the master in such case would usually incite him to greater vigilance in promoting the desired constant caution in his servants. Where servants are habitually consociated in their daily duties (as most servants were at an earlier day in England), they may well be supposed to have an influence over each other, and a power to promote in each other caution, by their counsel, exhortation, and example, at least equal to that of the master, and perhaps greater. In such case the well-being of society does not seem to demand that the master should be made to answer, in cases where he had done all that he ought to do, and the injury was to one such servant and from the negligence of another. The vigilance of such servants in such case may well be supposed to have a greater stimulant to constant exercise if each one knows that neither he nor his comrades can have any redress for injury to one by the negligence of the other. But where servants of a common master are not consociated in the discharge of their duties,—where their employment does not require co-operation, and does not bring them together, or into such relations that they can exercise an influence upon each other promotive of proper caution,—in such case the reason of the rule holding the master responsible for damages resulting from the negligence of one of his servants seems reasonably to apply with as great force as if a stranger were the party injured. The influence of one servant upon another in the encouragement of caution cannot be relied

capacity for self-protection necessarily becomes the ultimate controlling consideration upon which the servant's right to recover depends and the existence of common employment resolves itself into the inquiry, whether there was such a relation between the duties of

upon in such case, for that can only operate where they are co-operating, or are brought together by their usual duties, or where there is habitual consociation. Then, indeed, in cases where they cannot be supposed to have it in their power in any way to promote caution in each other the well-being of society, if it is to have any such security, must depend entirely upon the vigilance of the master in promoting constant caution in each of his servants, and upon the desire of servants to protect the master from liability. Hence the master must in such case be held responsible for the neglect of his servant. . . . The line of argument, briefly stated, is this: The ancient common-law rule which holds a master (even in cases where he is guilty of no fault) responsible for the neglect of his servant where a third person suffers damage from the negligence of such servant rests entirely upon consideration of its practical effect upon society,—upon considerations of policy; and these considerations of policy rest upon the idea that the subordination of the servant to the will of the master and his devotion to the interests of the master give him, under that rule, incentives to caution he would not otherwise have; and upon the idea that the rule will incite the master to greater vigilance in the selection of prudent servants, and to greater zeal in the exercise of his influence over his servant to secure the exercise of care in all cases. When the reason of the rule ceases, the application of the rule ought also to cease, and especially is this true of a rule which rests, not upon its own justice, but solely upon considerations of policy. Where servants of the same master are directly co-operating with each other in a particular business at the time of the injury, or are, by their usual duties, brought into habitual consociation, it may well be supposed that they have the power of influencing each other to the exercise of constant caution in the master's work (by their example, advice, and encouragement, and by reporting delinquencies to the master), in as great and in most cases in a greater, degree than the master. If, then, each such servant knows that neither he nor his fellow servant, if injured by the other's negligence, can have redress against the master, he has such incentive to constant care, and such incentive to the exercise of his influence upon his fellow to incite him to constant care, that the well-being of society in such case does not demand that the master be made to answer. The same considerations of policy which, to avoid injuries to third persons, usually demand that the master be held responsible, seem plainly not to demand it in the case of such coservants. But though servants are employed by the same master, and are engaged in doing parts of some great work carried on by the master, still, unless either their duties are such that they usually bring about personal association between such servants, or unless they are actually co-operating at the time of the injury in the business in hand, or in the same line of employment, they have generally no power to incite each other to caution by counsel, exhortation, or example, or by reporting delinquencies to the master; and the well-being of society in such case must depend upon the devotion of the servant to the interests of the master, and the zeal of the master to promote a constant exercise of due care by his servant; and to bring these instrumentalities into action it becomes necessary (as in the case of an injury to a stranger) to adhere to the general rule that the master must answer for the neglect of his servant, and this, as already suggested, because the facts are such that society cannot, in such case, avail itself of the mutual power and influence of one servant upon another for want of the necessary opportunity for its exercise, and hence must depend for inducements to caution which are supposed to follow the general rule of the master's liability."

The effect of the doctrine embodied in this case is that the master's liability is tested with reference to the answer to one or other of these two questions: (1) Whether the servants are directly co-operating with each other in particular business in the same line of employment; or (2) whether their duties are such as to bring them into habitual association, so that they may exercise a mutual influence upon each other pro-

the negligent and delinquent servants, such consociation and co-operation in the performance of the work which was being done when the injury was received, — that such self-protection was reasonably feasible by one or other of the means noted in the cases cited in the following section.[1]

501a. Same subject continued.— An examination of the cases shows that the elements upon the existence or nonexistence of which the applicability or nonapplicability of the doctrine of consociation depends are those indicated by the following paragraphs:

1. The fact that the injured servant had or had not an opportunity of observing the extent to which the negligent servant was competent for the performance of his duties and the manner in which he habitually conducted himself.

2. The fact that the injured servant was or was not able to take appropriate measures to ward off the danger which should be created by an act already committed or on the point of being committed by the negligent servant, while the work was actually in progress.

3. The fact that the injured servant was or was not able to lessen

motive of proper caution. *Chicago & A. R. Co.* v. *Stallings* (1900) 90 Ill. App. 609; and the cases cited, *infra*. If the jury believed that the men in another gang were not actually co-operating with the plaintiff and his crew, or that their duties were not such as to bring them into habitual association, etc., the disjunctive "nor" should have been used. *Chicago & A. R. Co.* v. *Stallings* (1900) 90 Ill. App. 609. For the same reason it is error to instruct a jury that, if the servants are not directly co-operating with each other in a particular business in the same line of employment, they are not fellow servants. *Ibid.*

The omission of the clause in brackets has been held erroneous in giving an instruction to the effect that to constitute fellow servants they must either directly co-operate in the particular business [so that they may exercise an influence on each other promotive of proper caution], or their duties must be such as to bring them into habitual association so that they may exercise an influence on each other promotive of proper caution. *Pagels* v. *Meyer* (1899) 88 Ill. App. 169. Such an instruction is liable to the construction that, in order to be fellow servants, it is only necessary that they direct[ly] co-operate in the particular bus[iness] in hand, without their duties bein[g] such as to promote proper caution. In *Chicago & A. R. Co.* v. *Swan* (1898) 176 Ill. 428, 52 N. E. 916, it was laid down, in reference to the two tests of the master's liability, which are here referred to, that the qualifying words, "so that they may exercise an influence on each other promotive of proper caution," have no application to the first, but are limited entirely to the second.

[1] The doctrine, it may be remarked in passing, has also been justified by the broad consideration specified in the subjoined passage. "When the law of fellow servants was first announced, business enterprises were comparatively small and simple. The servants of one master were not numerous. They were all engaged in the pursuit of a simple and common undertaking. Now things have changed. Large enterprises are conducted by persons or by corporations employing vast numbers of servants, divided into classes, each pursuing a different portion of the work, and each practically independent of the other. The old reasons do not apply to the new conditions." *Union P. R. Co.* v. *Erickson* (1894) 41 Neb. 1, 29 L. R. A. 137, 59 N. W. 347. The simple character of operations in the industrial enterprises of early times is also referred to in *Hammarberg* v. *St. Paul & P. Lumber Co.* (1898) 19 Wash. 537, 53 Pac. 727.

the risk of injury, by exercising upon the negligent servant an influence calculated to promote caution and diligence on the part of the latter.

4. The fact that the injured servant was or was not able to protect himself against the peril of future repetitions of some particular act of negligence, of an employee, by reporting that act to a superior employee, and thus insuring that the delinquent will be more carefully supervised, or, in extreme cases, discharged.

It will be found that the whole of these elements are seldom adverted to in any single case. As a general rule the courts content themselves with a reference to that particular one which happens to be suggested by the special aspect of the evidence under which the case has been submitted.[1] But in the formal and more lengthy dis-

[1] Sometimes the possession or lack of an opportunity to observe the coemployee's conduct is alone adverted to, and no allusion is made to the means of self-protection which such an opportunity confers on the servant. Thus, in *Moon* v. *Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401 (overruled in Virginia. See § 500, note 6, *supra*), recovery was allowed simply on the ground that the two servants "were not coemployees, thrown together in a common duty, and having opportunity to observe and judge of the habits and qualifications of each other." In *Illinois C. R. Co.* v. *Pilliard* (1896) 99 Ky. 684, 37 S. W. 75, coservice was negatived on the ground that the servants "acted in different spheres, and neither could or was required to know whether the other was properly doing his duty." But it is clear that the ultimate conception which was here present to the mind of the court was that the lack of opportunity for observation deprived the servant of those means of self-protection which are indicated by the other elements enumerated in the text. Ordinarily, one or other of these elements is explicitly referred to.

In *Klees* v. *Chicago & E. I. R. Co.* (1896) 68 Ill. App. 244, the existence of common employment was predicated upon the fact that, as between the servants, there was a necessary dependence on each other's care and vigilance for their mutual safety.

In *Hammarberg* v. *St. Paul & P. Lumber Co.* (1898) 19 Wash. 537, 53 Pac. 727; *Uren* v. *Golden Tunnel Min. Co.* (1901) 24 Wash. 261, 64 Pac. 174, coservice was negatived on the ground that the servants had "no opportunity to use precautions against each other's negligence."

The doctrine has been said to have no application where there is no right or opportunity of supervision, and no right or opportunity to avoid the negligent acts of another, without disobedience to the orders of his immediate superior. *North Chicago Rolling Mill Co.* v. *Johnson* (1885) 114 Ill. 57, 29 N. E. 186.

It is said the doctrine "rests upon the theory that the vast extent of the business of railway companies has led to the division of their business into separate and distinct departments; that by reason of this division a servant in one branch or department has no sort of association or connection with one in another department; that this absence of association gives such servant no opportunity of observing the character of a servant in another department of labor and no opportunity to guard against the negligence of such servant." *Coal Creek Min. Co.* v. *Davis* (1891) 90 Tenn. 711, 18 S. W. 387. This passage seems to indicate some shifting of ground when it is compared with an earlier opinion of the same court in *Nashville & C. R. Co.* v. *Carroll* (1871) 6 Heisk. 347, where the court reasoned thus: "The rule, we hold, cannot be held to apply as between an employee in one department of the work of a railroad company, separate, distinct, and apart from the work of the other employee by whom he is injured, who has no immediate or necessary connection with the work in which the injured employee is engaged, further than being in

employment on the same road and by the same company where the injury is caused by the negligence or carelessness or want of skill of such employee or agent of the company in the performance of the work of such company. . . . We can see no principle of connection between employees of different grades and in different departments and kinds of labor, separate from each other, upon a railroad, upon which the exception can fairly stand. This case very well illustrates the rule we have laid down. Hinton was a trackman or 'boss,' as he is called, employed by the company in keeping in order and repair a section of the road. As such, he had no necessary connection or association with the conductors and employees who were engaged in running the passenger trains under the direction of the general superintendent of the company. They were separate and distinct in their employments and the one had in no wise contracted to be associated with the other by reason of their employment."

In an early Georgia decision, apparently the second explicit recognition of the doctrine, the impossibility of their exercising a corrective influence over each other's conduct was put forward, as the ground upon which the court denied the negligent and injured servants to be in a common employment. *Cooper* v. *Mullins* (1860) 30 Ga. 146, 76 Am. Dec. 638, where the court, referring to the exception to the rule of *respondeat superior* created by the doctrine of common employment, said: "Such an exception has been recognized in some modern cases, but when confined within the reason on which it is founded, it can have no application to this case. That reason is one of public policy to secure to the public a more faithful service from employees on railroads, steamboats, and other branches of business wherein the safety and property of the public are involved, by making it the interest of each one of such employees to look after and encourage the carefulness and fidelity of all the rest. This reason can have no application to employees whose situations allow them no corrective influence over each other. The exception operates as a penalty, and to impose the penalty when there is no opportunity of exercising that supervising care which it is intended to enforce is sheer cruelty. . . . Nor can it be extended to other employees who from any cause are not in a situation to exert such an influence on their fellows. It follows, therefore, that the cases to which this exception applies are only those where the servant receiving the injury is engaged, with the servant inflicting it, in a common business where he has an opportunity to exercise a preventive care over his negligence." This case is perhaps overruled. See § 590, note 7, *supra*.

In Illinois, also, the same conception is the one which is ordinarily emphasized in the sloctor enumerations of the doctrine. In several recent cases it is held down that, in order that one shall be the fellow servant of another, their duties must be "such as to bring them into habitual association, so that they may exercise a mutual influence on each other, promotive of proper caution." *Joliet Steel Co.* v. *Shields* (1890) 134 Ill. 209, 25 N. E. 569; *Chicago & A. R. Co.* v. *Way* (1884) 108 Ill. 288; *Chicago & E. I. R. Co.* v. *Geary* (1884) 116 Ill. 383; *North Chicago Rolling Mill Co.* v. *Johnson* (1885) 114 Ill. 57, 29 N. E. 186; *Edward Hines Lumber Co.* v. *Ligas* (1898) 172 Ill. 315, 50 N. E. 225, Affirming (1896) 68 Ill. App. 523; *Chicago & A. R. Co.* v. *Hoyt* (1887) 122 Ill. 369, 12 N. E. 225; *Joliet Steel Co.* v. *Shields* (1893) 146 Ill. 603, 34 N. E. 1108; *Chicago & A. R. Co.* v. *Kelly* (1889) 127 Ill. 637, 21 N. E. 203.

A superintendent and a subordinate workman engaged in putting out a fire in their employer's factory are not fellow servants, so as to prevent the subordinate from recovering of the employer for injuries caused by the negligence of the superintendent, unless their relations were such that the subordinate could "exercise an influence" upon the superintendent "promotive of proper caution." *Hubbold* v. *Chicago Sugar Ref. Co.* (1892) 44 Ill. App. 418.

As another case puts it, mere co-operation is not enough to back the servant's action, if there was no opportunity to exercise this mutual influence. *Chicago & E. I. R. Co.* v. *Knittrim* (1894) 152 Ill. 158, 39 N. E. 324, adopted in *Chicago & A. R. Co.* v. *Swan* (1897) 70 Ill. App. 331, holding that a baggageman and engineer are not, as matter of law, fellow servants simply because they co-operate in the transportation of the passengers and their baggage.

When the servant "is told that this care and prudence is his only remedy against danger from the negligence of those employed with him, it not only makes him the more careful, but stimulates him to see that others exercise the

cussions of the doctrine the evidential significance of each and all c the various elements involved is duly recognized.[2]

Personal acquaintance between persons employed by the same

same caution." *Louisville, C. & L. R. Co.* v. *Carcus* (1873) 9 Bush, 559.

In a case where coservice was negatived, it was remarked that the servants had "no control over the other servants; no opportunities of judging of their efficiency." *Union P. R. Co.* v. *Erickson* (1891) 41 Neb. 1, 29 L. R. A. 137, 59 N. W. 347.

See also *Card* v. *Eddy* (1894) 129 Mo. 510, 36 L. R. A. 800, 28 S. W. 979; *Madden* v. *Chesapeake & O. R. Co.* (1886) 28 W. Va. 610, 57 Am. Rep. 695.

Common employment has been predicated from the fact that the servants in question were "engaged in a common work, and were so situated that they could observe the conduct and delinquencies of each other and report to a common master." *Sheehan* v. *Prosser* (1893) 55 Mo. App. 569.

A case in which this aspect of the servant's capacity to protect himself will naturally present itself to the exclusion of the others arises where the negligent and injured servants were working under different supervising officers. The inability of the latter servant to protect himself by complaining of delinquencies committed is then apt to be put forward as the most prominent feature in the relations between the servants. Thus, in *Dixon* v. *Chicago & A. R. Co.* (1891) 109 Mo. 431, 18 L. R. A. 792, 19 S. W. 412, we find Barclay, J., arguing thus: "In the case in ban[illegible] master had seen fit to place the d[illegible]ased quarryman and the trainman under supervision and management totally apart from each other. They were not 'acting under the same immediate direction.' *Missouri P. R. Co.* v. *Mackey* (1887) 127 U. S. 208, 32 L. ed. 108, 8 Sup. Ct. Rep. 1161. Each looked to a different individual as the master's representative for directions in his work, and had no practical connection with the superior who guided and supervised the acts and conduct of the other. If Dixon, instead of being killed, had merely noticed repeated acts of negligence by the trainmen in omitting to signal its approach, what could he have done to correct such course of conduct, and insure his own safety? Complain to his foreman? The foreman directing his work had no power to discharge or to control the trainmen referred to. The theory that a servant entering employment may fairly be considered to assume the risks (among others) of possible injury from the negligence of his fellow workmen (now most frequently mentioned as the groundwork of the exemption) can have no just or logical application where the supposed fellow servants are so widely severed by the division of the employer's business that neither can have a ready appeal to any common superior, having power to require, and, if need be, to enforce, correct and careful conduct on the part of the other. Such an appeal furnished to the servant the means to avert, or at least to diminish the dangers arising from incompetency or carelessness on the part of his fellows. But when that appeal is impossible, by reason of the total severance of their fields of labor and of the control to which they severally are subject, we apprehend there is little left of recognizable principle upon which servants so situated can be supposed to have mutually assumed the risks of each other's negligence. Workmen so distantly related to each other in the master's service as the quarrymen and the train operatives here are scarcely more nearly allied, for all practical purposes of mutual observation, vigilance, and protection, than are the servants of different independent contractors, engaged in separate branches of labor upon a common enterprise (though we do not mean to imply that the legal relations between them are identical). Employees of the latter class are universally held not fellow servants within the rule under discussion."

[2] Speaking of the prior decisions in Missouri, the court said, in *Reiley* v. *Kansas City, Ft. S. & G. R. Co.* (1892) 112 Mo. 86, 18 L. R. A. 817, 20 S. W. 480: They "reject the rule of exemption. . . . that all are coservants who are engaged by the same master in carrying on some general enterprise, no matter how different and disconnected the work may be. They assert the more reasonable and just rule that they are coservants who are so related and associated in their work that they can observe and have an influence over each other's conduct and report delinquencies to a common correcting power; and they

master is not necessary to create the relation of fellow servants.[3] Nor does the mere fact that the association of the negligent and ignorant servants was brief and temporary exclude the inference of coservice, provided that there was a necessary dependence on each other's care and diligence for their mutual safety.[4] But a relation

are not coservants who are engaged in different and distinct departments of work."

In *Parker* v. *Hannibal & St. J. R. Co.* (1891) 109 Mo. 362, 18 L. R. A. 802, 19 S. W. 1119, where it was held, by a majority of four judges to three, that a trackman engaged in ballasting a track was in a common employment with the men handling the ballast train, the court said: "The real and only point of distinction [i. e., contrasting their position with that of strangers], it seems to us, arises out of the fact that the servants are so associated and related in the performance of their work that they can observe and influence each other's conduct, and report any delinquency to a correcting power. To say a clerk engaged in an office making out pay rolls for a railroad company is a fellow servant, within the rule of exemption, with those engaged in operating trains, is out of all reason. Guided by the real reason for the rule it seems to us it should be applied and applied only in those cases where the servant injured and the one inflicting the injuries are so associated and related in their work that they can observe and have an influence over each other's conduct, and can report delinquencies to a common correcting power or head. In short they should be fellow servants in fact, and not simply in dialectic theory. If in separate and distinct departments, so that the circumstances just stated do not and cannot exist, then they are not fellow servants within any just or fair meaning of the rule." A good deal of the language used in this case seems to carry the court very close to the confines of the doctrine explained in the preceding subtitle.

"The reason of the rule, when applicable, is that each servant engaged in the same department of business, for the safety of all, shall be interested in securing a faithful and prudent discharge of duty by his fellow servants, or that they shall report to the master any delinquencies of those engaged with them in the performance of duty." *Ryan* v. *Chicago & N. W. R. Co.* (1871) 60 Ill. 171, 14 Am. Rep. 32. "The object of the rule is to make each servant vigilant in seeing that the others are careful, prudent, and faithful in the discharge of their duty, and, if not, that it shall be to their interest to report all derelictions that occur." *Pittsburg, Ft. W. & C. R. Co.* v. *Powers* (1874) 74 Ill. 341.

In *Daniels* v. *Union P. R. Co.* (1890) 6 Utah, 357, 23 Pac. 762, the rule is laid down as follows: "In order to constitute servants of one master fellow servants, within the rule *respondeat superior*, they must be engaged in the same line of work, be under the control of the same foreman, be employed and discharged by the same head of the department in which they work; that they labor together in such personal relations that they can exercise an influence upon each other promotive of proper caution in respect of their mutual safety; that they shall be, at the time of the injury, directly co-operating with each other in the particular business in hand, or that their mutual duties shall bring them into habitual consociation, as that they may exercise an influence upon each other promotive of proper caution; and to be so situated in their labor, to some extent, to supervise and watch the conduct of each other as to skill, diligence, and carefulness." See also the quotation from the opinion in *Chicago & N. W. R. Co.* v. *Moranda* (1879) 93 Ill. 302, 34 Am. Rep. 168, in § 11, *ante*.

[3] *World's Columbian Exposition* v. *Bell* (1898) 76 Ill. App. 591, Following *Chicago & A. R. Co.* v. *Hoyt*, Affirmed in (1887) 122 Ill. 369, 12 N. E. 225.

[4] "An engineer of switching crew, although under a temporary employment, is a fellow servant with the engineer and brakeman of a road train, through whose negligence the former is injured while making up a train. *Klees* v. *Chicago & E. I. R. Co.* (1896) 68 Ill. App. 211.

A yard hand in the employ of a railroad company was directed by the foreman to assist B, another employee, in removing a heavy piece of machinery from an engine, the same having been detached by B, whose business it was to take engines to pieces for repairs. While engaged in removing the same, a plank on which they were standing broke, by

between the duties of the negligent and injured servants which merely enables them to observe how each did his work, and does not furnish either with an opportunity of influencing the other's conduct, is not one of which coservice can be predicated.[5]

502. Relation between the theories of nonassignable duties and consociation of duties.— It is obvious that, wherever the duties of the negligent servant relate to the providing or maintaining of safe instrumentalities, and those of the injured servant to the use of those instrumentalities, the master may usually be held liable either on the ground of a difference of department or on the ground that the delinquent was a vice principal, in the sense explained in §§ 567, 568, *post*.[1]

reason of an unseen defect, and the machinery fell on A and injured him. Held that A and B were fellow servants. *Chicago & N. W. R. Co.* v. *Scheuring* (1879) 4 Ill. App. 533.

The fact that the head blacksmith of a railway is only associated for a single day with the members of a wrecking crew will not prevent his being regarded as their fellow servant. *Ubend* v. *Terre Haute & I. R. Co.* (1884) 111 Ill. 203, 53 Am. Rep. 616. The court said: "The evidence shows that a wrecking force is always made up, in the hurry of the moment, out of the employees and servants of the company who happen to be within convenient reach, without regard to the particular line of service in which they are employed. The removing of obstructions from the tracks in case of a collision is, as shown by the proofs in this case, a distinct branch of service, to which all the laboring force of the company are liable to be called, without any reference to their ordinary calling or duties; and when a force thus made up goes aboard the wrecking train and starts to the scene of disaster, they are all, including conductor, engineer, fireman, and brakeman, just as much in a common branch of service while on the way, as they are after their arrival, and the work of clearing the tracks has actually commenced. It is an error to suppose that a force of men cannot be engaged in a common service unless all are contemporaneously working at the same time and engaged in doing precisely the same kind of work. It is sufficient if all are actually employed by the same master, and that the work of each, whatever it may be, has for its immediate object a common end or purpose sought to be accomplished by the united efforts of all. The skill of a carpenter, blacksmith, or other mechanic, might be very useful in removing a wreck, and when thus working together in such a service, though each one in his own particular way, they are all, within the meaning of the rule, engaged in a common employment, notwithstanding in their ordinary employment they have no connection with each other, and consequently when so engaged are not fellow servants."

[5] In *North Chicago Rolling Mill Co.* v. *Johnson* (1885) 114 Ill. 57, 29 N. E. 186, the court, in approving of the refusal of the trial judge to find for the appellant if the duties of the negligent and injured servants were so related that they could observe how each did his work, said: "The idea is that the relations between the servants must be such that each, as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against its consequences; and, of course, where there is no right or no opportunity of supervision, or where there is no independent will, and no right or opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of his immediate superior, the doctrine can have no application. How can the laborer be profited by a knowledge of the usual manner of doing work in another department, if he is unable, in any reasonable way, while engaged in the proper discharge of his duties, and without disobedience to his immediate superiors, to influence the conduct of the laborers in that department?"

[1] Such cases are those in which the injury was caused by the first-mentioned of each pair of employees mentioned in the subjoined list:

Servants who furnish rolling-stock and those who use it. *Chicago & N. W. R. Co.* v. *Jackson* (1876) 55 Ill. 492, 8 Am. Rep. 661; *Pittsburg, Ft. W. & C.*

The fact that this particular type of cases admits of a double solution has led to some confusion in the arguments of the courts. This is apparently the earliest decision in Illinois which is based distinctly on the ground that the servants were not in the same line of employment, and the court relies to some extent on the doctrine of a nonassignability of duties, and sustains its conclusions by rulings which avowedly rest upon that doctrine;[2] and the same tendency to a wavering between two theories is also noticeable in some later cases.[3] Such overlapping of doctrines is not an uncommon situation in jurisprudence, and is especially frequent in the law relating to employers' liability. In the present instance it need not produce any embarrassment if court and counsel realize adequately the distinction between the alternative theories, and state plainly that it is intended to rely upon one or other, or on both of them.

It is scarcely necessary to point out that, if the second servant of the pairs enumerated in note 1 of this section were the delinquent, there would be no recovery except under the doctrine of associated duties.

503. Difference or identity of department not necessarily conclusive under the consociation doctrine.— In some recent cases, full effect is given to the principle that common employment is essentially a matter which hinges on the question whether there was a consociation of duties, and all that such consociation brings with it; and the conclusion is adopted that, although the negligent and injured servants may have been employed by their master to assist in transacting what are undeniably different and distinct branches or departments of his business, this fact will not necessarily negative the existence of a common employment. Under such circumstances, if their usual duties bring them into habitual association, so that they may exercise a mutual influence upon each other, promotive of proper caution, such persons may still be fellow servants.[1]

R. Co. v. *Powers* (1871) 74 Ill. 341 (*arguendo*); *Toledo, W. & W. R. Co.* v. *Ingraham* (1875) 77 Ill. 309.

A car inspector and a conductor. *Illinois C. R. Co.* v. *Hilliard* (1896) 99 Ky. 684, 37 S. W. 75.

A boiler manufacturer and a fireman. *Nashville & D. R. Co.* v. *Jones* (1871) 9 Heisk. 27.

Track repairers and trainmen. *Torian* v. *Richmond & A. R. Co.* (1887) 84 Va. 192, 4 S. E. 339; *Moon* v. *Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401.

[2] *Chicago, B. & Q. R. Co.* v. *Gregory* (1871) 58 Ill. 272.

[3] *Toledo, W. & W. R. Co.* v. *Moore* (1875) 77 Ill. 217; *Toledo, W. & W. R. Co.* v. *Ingraham* (1875) 77 Ill. 309. Compare *Central Trust Co.* v. *Wabash, St. L. & P. R. Co.* (1888) 34 Fed. 646. See § 520, note 1, subd. (e), *post.*

[1] *Joliet Steel Co.* v. *Shields* (1893) 146 Ill. 603, 34 N. E. 1108, Affirming (1892) 45 Ill. App. 153 (disapproving instruction limiting fellow servants to persons in the same line of employment); *Chicago & A. R. Co.* v. *Kelly*

The converse of this doctrine is that servants working in the same department are not fellow servants within the rule as to the master's liability, unless they directly co-operate with each other in the same line of employment, or by their usual duties are brought into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution.[2] But in the nature of

(1889) 127 Ill. 537, 21 N. E. 203; *Cleveland, C. C. & St. L. R. Co.* v. *McLaughlin* (1894) 56 Ill. App. 53.

An instruction has been approved to the effect that a section foreman who sustained injuries alleged to be due to the negligence of an engineer in failing to observe a signal flag placed on a bridge upon which he was working is not a fellow servant of such engineer, if they were "employed in different departments" and were "wholly separated and disconnected from each other in the performance of their respective duties." *Peoria, D. & E. R. Co.* v. *Rice* (1893) 144 Ill. 227, 33 N. E. 951. The objection was made that this instruction permitted a recovery where there was simply a difference of departments, but the court said that the concluding clause evented this construction.

These decisions overrule, *pro tanto*, *Pittsburg, Ft. W. & C. R. Co.* v. *Powers* (1874) 74 Ill. 341, where it was distinctly laid down that the "only" case in which the defense of common employment is available is "where they are engaged in the same department of business."

In *Card* v. *Eddy* (1895) 129 Mo. 510, 36 L. R. A. 806, 28 S. W. 979, *in banc*. Overruling (1894) 28 S. W. 753, this aspect of the doctrine is thus discussed: "From these rules, and the reasons for them, it is manifest that the mere general employment in different departments of service, and under different immediate heads, are not absolute tests of the relationship the servants of the departments bear to each other as it affects the liability or exemption of the master. If the servants were, at the time of the injury, actually co-operating together in the particular business in hand, they would be fellow servants for the time being, notwithstanding they may have been regularly employed, and their ordinary duties required them to work, in different departments. Indeed, while co-operating in the same work the servants would be engaged in the department in which the work was required, and under the direction of the agent of the master in charge of it. It might be, and doubtless often is, the case that the duties in distinct departments are so blended as to make it difficult, if not impossible, to determine in which the work is done. Should the employees of a freight train be engaged in assisting trackmen in unloading a carload of ties or rails, the two sets of men could not but be regarded as fellow servants in respect to the particular work in which they are engaged, though their general employment was in different departments, and under different superintendents, and though the work may have been directed by one or both. They would have equal opportunity of observing and influencing the conduct of each other, as though their general work brought them into habitual association. . . . Now it seems to me perfectly clear that in the act of the fireman, which resulted in the injury to plaintiff, the two servants were co-operating together. In respect to the performance of the act a duty devolved upon each. One was required to deliver, and the other to receive, the message. Though the respective duties were very simple, that fact did not change the relationship of those performing it. Not only that, but the evidence shows it was one of the ordinary duties of the service, often performed. Each understood by signals from the other, what was required of him."

[2] *Chicago & A. R. Co.* v. *O'Brien* (1895) 155 Ill. 630, 40 N. E. 1023. Affirming (1893) 53 Ill. App. 198 (section hand and member of fence gang held not to be coservants, as matter of law). The theory of plaintiff's case was that, while returning from work, the hand car upon which he was riding was run down by the other car on which were the members of the other gang. There was evidence that the fence gang was subject to the supervision of the section boss while at work on his section, but no proof that the two gangs of men worked together or that their duties were the same. There was also evidence tending to show that the two

the case, the instances in which the conditions of common employment would not be present, as between servants in the same department, must be rather rare; and there are not wanting Missouri and Illinois cases in which there is laid down a doctrine which is practically indistinguishable from a rule which would make identity of department absolutely conclusive against the servant.[3]

forces, in going to and returning from their daily labor, were more or less frequently thrown together: but this occurred only casually, and rather by accident, than necessarily in the performance of their duties. It was held "too clear for argument that from these facts the jury might properly find that at the time of the alleged injury the plaintiff was not co-operating with the other servants, and that his duties in no way brought him into habitual association with them in such a way that he might exercise an influence upon them or they upon him, promotive of proper caution for their personal safety." The opinion then proceeds thus: "It is, however, said that the law of this state is, 'that servants working in the same department or in the same line of duty, when no question of vice principal arises, are fellow servants.' The law is not so stated in any of the cases above referred to, nor is our attention called to any to that effect. Mr. Justice Scholfield, in *North Chicago Rolling Mill Co.* v. *Johnson* (1885) 114 Ill. 57, 29 N. E. 186, stated the rule to be, from [illegible] cases there cited, 'that the servants of the same master, to be exempt [illegible]es, so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business,—*i. e.*, the same line of employment,—or that their usual duties shall bring them into habitual association so that they may exercise a mutual influence upon each other promotive of proper caution.' The expression, 'the same line of employment,' is here expressly given the same meaning as the preceding words, 'in a particular business,' in which the servants must 'be directly co-operating with each other.' To hold, broadly, that all 'servants working in the same department' are fellow servants would practically abolish the rule of this court, as distinguished from that at common law and held by other courts."

In *Parker* v. *Hannibal & St. J. R. Co.* (1891) 109 Mo. 362, 18 L. R. A. 802, 19 S. W. 1119, Thomas, J., in commenting on an earlier case (*Sullivan* v. *Missouri P. R. Co.* (1888) 97 Mo. 113, 10 S. W. 852) said: Sullivan was a track walker, and was killed by the negligence of the employees in charge of a passenger train. It was held they were not fellow servants. Upon what theory? Upon the theory alone that the conductor and those employed with him in running the train represented the master and stood in his stead. It is said Sullivan's duty was to keep the track clear, and hence he was not performing the same kind of work the trainmen were performing. He and the trainmen were engaged in the same general work, that is, in operating traffic on a railroad. He kept the track clear while the trainmen ran the train on the same track. They were all employed and paid by the same master to aid in carrying on commerce on the same road, and, hence, it is illogical to predicate a right to recover in such case upon the ground that Sullivan and the trainmen were engaged in different kinds of work. And the learned judge goes on to point out that the true ground of the decision was that the servants were not "consociated" in their work.

[3] In Missouri the fact that the two employees were working together under one common directing superior seems to be conclusive as to common employment. *Foster* v. *Missouri P. R. Co.* (1893) 115 Mo. 165, 176, 21 S. W. 916. Compare *Ryan* v. *McCully* (1894) 123 Mo. 636, 27 S. W. 533.

The situation thus deemed to be decisive must obviously exist wherever the two servants were in the same department, unless it is intended to confine the words "directing superior" within extremely narrow limits. But the remarks in the *O'Brien Case*, commented on in note 2, *supra*, show that, in Illinois, at all events, this inference will be drawn only where it appears that accident occurred while the controlling authority was actually being exercised. "Were it not for the explanations in [illegible] case, the principle that an identity of

This doctrine as to the non-conclusive effect of proof that the departments were different or identical is a necessary corollary of the theory that consociation is the appropriate test of common employment. In courts which do not refer common employment directly to that test (see § 500, *supra, ad finem*), such difference or identity is naturally decisive, as, when they are once established, there is no further question of fact to be determined. Only one deduction of law can be drawn from a given predicament, and as the deductions in the present instance must be antithetical and complementary, it follows that, as a matter of law, a difference of department will negative coservice,[4] and that identity of department lets in that defense.

It will be noticed that so far as regards the power of the court to make a peremptory ruling the same situation arises when the evidence clearly shows the existence or absence of consociation. See § 504, *infra*. But the ruling is then made with respect to the further

department bars the servant's action, as matter of law, might also be deemed deducible from the earlier statements of the same court, that employees of the same master, to be fellow servants so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, must be directly co-operating in the particular business, or their usual duties must bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution. *Chicago & A. R. Co.* v. *Hoyt* (1887) 122 Ill. 369, 12 N. E. 225; *North Chicago Rolling Mill Co.* v. *Johnson* (1895) 114 Ill. 57, 29 N. E. 186; *Chicago & N. W. R. Co.* v. *Snyder* (1886) 117 Ill. 376, 7 N. E. 604. The direct co-operation here spoken of must now be taken to mean something distinct from co-operation in the same department. That the negligent and injured servants were under different "directing superiors" will, of course, still less exclude the defense of common employment than a difference of department. That defense will still prevail if they were engaged in the same line of employment, such as necessarily brought them into frequent contact with each other in the prosecution of their work. *Chicago & A. R. Co.* v. *O'Bryan* (1884) 15 Ill. App. 134, where the question was whether gangs employed in a car shop and a machine shop, between which cars were constantly being moved, were co-servants. It was held misleading to charge the jury that men are not fellow servants, where "they are not co-operating with each other in any particular business or work," since a jury would probably understand these words as requiring the parties to be engaged in doing exactly the same work at the same place and under the same foreman.

Since the question whether or not two persons are fellow servants must be determined from a consideration of all the evidence concerning the respective duties performed by them, and their respective relations to the business generally and toward each other in the performance of their respective duties (*Lebanon Coal & Mach. Asso.* v. *Zerwick* [1898] 77 Ill. App. 486) it is error to give an instruction that to constitute coservice, it is essential that the servants shall be, at the time of the injury, directly co-operating with each other in the particular business in hand.

[4] *Nashville & C. R. Co.* v. *Carroll* (1871) 6 Heisk. 347; *Stucke* v. *Orleans R. Co.* (1898) 50 La. Ann. 188, 23 So. 342, following *McNaughton* v. *Caledonian R. Co.* (1857) 19 Sc. Sess. Cas. 2d series, 271; *Louisville & N. R. Co.* v. *Filbern* (1869) 6 Bush, 574, 99 Am. Dec. 690. *Fort Hill Stone Co.* v. *Orm* (1886) 84 Ky. 183; *Volz* v. *Chesapeake & O. R. Co.* (1893) 95 Ky. 188, 24 S. W. 119; *Louisville & N. R. Co.* v. *Robinson* (1868) 4 Bush. 507; *Edmonson* v. *Kentucky C. R. Co.* (1898) 20 Ky. L. Rep. 1256, 49 S. W. 200; *Louisville, C. & L. R. Co.* v. *Cavens* (1873) 9 Bush. 565.

fact of consociation, as distinguished from identity of department.

504. Consociation primarily a question of fact for the jury.—A theory of common employment which makes the availability of this defense turn upon the determination of the several questions of fact indicated by the statement at the beginning of the last section, with regard to the elements involved, necessarily entails the consequence that the general question, whether the negligent and the injured servant in any given case were coservants, is primarily for the jury.[1] Hence, whenever different deductions might be reasonably drawn from the evidence as to either of the alternative issues upon which this ultimate fact depends, it is error to take the case from the jury.[2] According to the Illinois decisions it would seem that there is always deemed to be, within the meaning of this rule, a possibility of diverse opinions in respect to those issues, if the servants were working in what would be styled, in popular parlance, different departments, and the court should not assume to control or review a verdict, unless it would be a clear abuse of terms to predicate such a difference under the circumstances.[3] On the other hand the question whether the

[1] *Chicago & A. R. Co.* v. *Swan* (1898) 176 Ill. 424, 52 N. E. 916, Affirming (1897) 70 Ill. App. 331; *Mobile & O. R. Co.* v. *Massey* (1894) 152 Ill. 144, 38 N. E. 787; *Louisville, E. & St. L. Consol. R. Co.* v. *Hawthorn* (1893) 147 Ill. 226, 30 N. E. 534; *Chicago & A. R. Co.* v. *House* (1898) 172 Ill. 601, 50 N. E. 151; *Lake Erie & W. R. Co.* v. *Middleton* (1892) 142 Ill. 550, 32 N. E. 453; *Toledo, W. & W. R. Co.* v. *Moore* (1875) 77 Ill. 217; *Westville Coal Co.* v. *Schwartz* (1898) 177 Ill. 272, 52 N. E. 276, Affirming (1897) 75 Ill. App. 468; *Illinois Steel Co.* v. *Bauman* (1898) 78 Ill. App. 73, Affirmed (1899) in 178 Ill. 351, 53 N. E. 107.

After this question has been determined by the court of appeals in Illinois, which is the highest one competent to pass upon the facts, its decision is not subject to review. *Chicago & A. R. Co.* v. *Kelly* (1889) 127 Ill. 637, 21 N. E. 203; *Indianapolis & St. L. R. Co.* v. *Morgenstern* (1883) 103 Ill. 216; *Chicago & A. R. Co.* v. *O'Brien* (1895) 155 Ill. 630, 40 N. E. 1023.

In *Chicago & N. W. R. Co.* v. *Snyder* (1889) 128 Ill. 655, 21 N. E. 520, the jury returned a negative answer to the following question: "At the time of the accident causing Snyder's death did the usual duties of said Snyder and Torrence, the semaphore attendant, bring them habitually together, so that they could exercise a mutual influence upon each other promotive of proper caution, *so as to make them coemployees in the same line of employment, as explained in defendant's instruction?*" (embodying rule laid down in earlier Illinois cases). The italicised clause was added to the question by the court, and this modification of the question by the court was complained of as error. It was held that the defendant company was not prejudiced by thus referring the jury to its own instruction prepared by its own counsel, since they were not required by the modification to pass upon the law, but were merely told to answer the question of fact propounded to them, in accordance with the principles of law laid down in the instruction.

[2] *Chicago & A. R. Co.* v. *Kelly* (1889) 127 Ill. 637, 21 N. E. 203; *Mobile & O. R. Co.* v. *Godfrey* (1895) 155 Ill. 78, 39 N. E. 590.

[3] *Louisville, E. & St. L. Consol. R. Co.* v. *Hawthorn* (1893) 147 Ill. 226, 35 N. E. 534, Affirming (1892) 45 Ill. App. 635; *Chicago & E. I. R. Co.* v. *Kuciria* (1892) 48 Ill. App. 243, (1894) 153 Ill. 458, 39 N. E. 324; *Chicago & N. W. R. Co.* v. *Snyder* (1886) 117 Ill. 376, 7 N. E. 604; *Chicago & N. W. R. Co.* v. *Moranda* (1879) 93 Ill. 302, 34 Am. Rep. 168; *Cleveland, C. C. & St. L. R. Co.* v. *McLaughlin* (1894) 56 Ill. App. 53; *Chicago & E. I. R. Co.* v. *Shannon*

relation of fellow servants existed is, in the same state, one of law for the court, where the evidence for the plaintiff is absolutely conclusive, and reasonable minds would not differ as to the proper inference to be drawn.[4]

The question whether servants are in a common employment has also been termed a mixed question of law and fact.[5] This mode of describing it does not, of course, imply a relation between the court and jury at all different from that stated above.

505. General discussion of the doctrine of consociation.—The view that common employment may depend on mere contiguity or distance, or on a more or less intimate association between the duties of the negligent and injured servants was, as we have seen (§ 6, *ante*), discussed in the leading case of *Farwell* v. *Boston & W. R. Corp.*[1] Chief Justice Shaw's arguments against this view, which have been restated, and to some extent expanded, in later opinions, have been regarded as completely convincing, except by the few courts whose

(1892) 43 Ill. App. 540; *Chicago & W. I. R. Co.* v. *Flynn* (1894) 54 Ill. App. 387. Affirmed in (1895) 154 Ill. 448, 40 N. E. 332; *Chicago & A. R. Co.* v. *Hoyt* (1887) 122 Ill. 369, 12 N. E. 225. See also *Webb* v. *Denver & R. G. R. Co.* (1891) 7 Utah, 363, 26 Pac. 981.

In a case where the plaintiff had been temporarily placed under the control of a foreman in another department, the question whether he [plaintiff] and the workman through whose negligence he was injured were fellow servants was held to be a question for the jury. *Supple* v. *Agnew* (1901) 191 Ill. 439, 61 N. E. 392, Reversing (1898) 80 Ill. App. 457.

[4] *Meyer* v. *Illinois C. R. Co.* (1899) 177 Ill. 591, 52 N. E. 848, Affirming (1895) 65 Ill. App. 531; *Chicago & E. I. R. Co.* v. *Driscoll* (1898) 176 Ill. 330, 52 N. E. 921, Reversing (1897) 70 Ill. App. 91; *Swadley* v. *Missouri P. R. Co.* (1893) 118 Mo. 268, 24 S. W. 140; *Relyea* v. *Kansas City, Ft. S. & G. R. Co.* (1892) 112 Mo. 86, 18 L. R. A. 817, 20 S. W. 480; *Parker* v. *Hannibal & St. J. R. Co.* (1891) 109 Mo. 362, 18 L. R. A. 802, 19 S. W. 111, per Gantt, J., and Barclay, J., (assenting and dissenting judges); *Gerraby* v. *Kansas City, St. J. & C. B. R. Co.* (1885) 35 Fed. 258.

The rule that it is for the court to state what constitutes the relation of fellow servants, and for the jury to determine whether or not that relation exists, cannot be construed to mean that the trial court is bound to submit the case to the jury, even when the evidence shows conclusively that the relation of fellow servants exists, and there is no evidence to show the contrary. *O'Leary* v. *Wabash R. Co.* (1893) 52 Ill. App. 641; *Springfield Iron Co.* v. *Gould* (1880) 11 Ill. App. 439 (rails left in dangerous position by plaintiff and co-servants).

The definition of fellow servants is a question of law; whether a given case falls within that definition is a question of fact. *Chicago & I. R. Co.* v. *Swan* (1898) 176 Ill. 424, 52 N. E. 916; *Springside Coal Min. Co.* v. *Grogan* (1897) 169 Ill. 50, 48 N. E. 190; *Pittsburg Bridge Co.* v. *Walker* (1897) 170 Ill. 550, 48 N. E. 915; *Chicago City R. Co.* v. *Leach* (1898) 80 Ill. App. 354.

In a case where the supreme court of Wisconsin was applying the Illinois doctrine it was laid down that, where there is no dispute as to the respective duties of servants employed by the same master, the question whether they are fellow servants is for the court. *MacCarthy* v. *Whitcomb* (1901) 110 Wis. 113, 85 N. W. 707.

[5] *Chicago, B. & Q. R. Co.* v. *Fitzgerald* (1890) 40 Ill. App. 476.

[1] (1841) 4 Met. 49, 38 Am. Dec. 339.

decisions have just been discussed.[2] Yet they are not altogether satisfactory.

Two separate positions, it will be observed, are taken. One of these is that the doctrine of associated duties is "incorrect in prin-

[1] In *Brodeur* v. *Valley Falls Co.* (1889) 16 R. I. 448, 17 Atl. 54, the court, after quoting from this opinion, said: "The reasons here set forth are a strong answer to the position taken in the Illinois cases. They show an obvious impracticability in trying to gauge the liability of an employer, in a complex business, by the independence of its different branches, or by the intercommunication of those employed. Not only would it be almost impossible, in many cases, to separate the work into distinct departments and to discern their dividing lines, but incidental duties, changing the relations of workmen to each other, would also vary the master's liability. He would thus be liable for the negligence of a servant at one time or place, and not at another. Without a personal supervision of all his help in all their work he could not know when he was responsible and when he was not. Moreover, such a rule would govern the liability of a master when the groundwork upon which the rule is founded did not exist. For, if the test of liability be that of the separate and independent duties of the servants, they may, nevertheless, be so near each other as to be able to exert a mutual influence to caution; or, if it be that of association, they may still be in the same department, but unable, from their duties or positions, to exert such influence. But, aside from these considerations, we do not think the rule is correct in principle. The principle upon which the determination of *Farwell* v. *Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339, proceeded is the same that has been generally followed in England and in this country,—namely, that the rights and liabilities of both master and servant are those which grow out of their contract relation. The master impliedly agrees to use due care for the safety of his servant, in providing suitable places and appliances for work; and, as is universally conceded, the servant agrees to assume the ordinary risks of his employment. The most common risks of service spring from the negligence of fellow servants. When one works with others, he knows that his safety depends on the exercise of care by those around him, as their safety depends also upon his own caution. No man can enter into an employment without a thought of this. Negligence, therefore, among workmen [illegible] breach of the duty which each [illegible] the others, and not a breach of t[illegible]ter's duty, if he has exercised the ca[illegible] that is required of him. For his own negligence the master must answer, but for that of others, which is a risk incident to every employment, he has not agreed to be responsible, but on the contrary the servant has impliedly agreed to assume it upon himself. The contract relation, therefore, puts them outside of the rule which makes a master liable to a stranger for the negligence of his agent, for *respondeat superior* is based upon considerations of public policy which are not called for in the relation between master and servant."

See also the following passage in *Ross* v. *New York C. & H. R. R. Co.* (1875) 5 Hun, 488: "The rule exempting the master from responsibility to one servant for injury sustained by him from the negligence of another servant does not rest or depend upon the intimacy of their relations to each other in their particular work, respectively. It extends to all employees of a common master engaged in carrying on any general work or enterprise. It rests upon the single ground above stated, that the master impliedly contracts with each and every employee to subject them, respectively, to no unreasonable risks from the incompetency of any of their fellow workmen. If workmen are employed together in any particular branch of labor, and their knowledge of each other, and of the state of the machinery or implements furnished for their common use, is as well known to them as to their master, this fact may furnish another element of exemption from responsibility on the part of the master, if they consent to continue to work with incompetent fellow servants, or with defective or insufficient implements or machinery. . . . These cases [i. e., in Illinois and other states where a similar theory is adopted], it seems to me, overlook or mistake the

ciple,"[3] or based on "an erroneous theory."[4] The other is that there are insuperable practical difficulties in the way of testing the existence of a common employment by the independence of the different branches of the business, or by the intercommunication of those employed.

As regards the former of these positions, it seems sufficient to point out that there is a clear *petitio principii* committed when a court assumes to condemn, as radically and inherently incorrect, one of two opposing theories which, in their ultimate analysis, are, it is evident, based upon no more solid foundation than mere postulates, incapable of demonstration, and expressing simply the opinions of various judges as to matters concerning which a lawyer is no more likely to be in the right than any other person of intelligence and good education.

On the one hand it is assuredly not self-evident that servants are made more cautious and diligent by being deprived of the right of recovering for injuries caused by the negligence of all coemployees except vice principals,—which is practically the result of the rule applied by the majority of the courts.[5] Still less is it self-evident that, if the rule does operate in the manner supposed, the increase of caution and diligence thus secured is so considerable that its enforcement is justifiable on so broad a ground as that of public policy.

On the other hand, it is equally impossible to assert that there is anything essentially fallacious and unsound in the idea of the other school of thought,—that it is illogical to throw the responsibility to which a rule deduced from such premises subjects the servant upon any employees except those who possess the opportunity and means for that self-protection which it is one of the principal, if not the principal, object of the rule to secure. The proposition that a doc-

true principle upon which the master's liability in such cases rests. All the servants of a common master stand to him in the same relation: they severally undertake to work for the same master, and take and assume on their part the risk of all dangers ordinarily incident to their employment. The master impliedly undertakes on his part to exercise ordinary care to protect them from all unreasonable risks and dangers pertaining to such work, resulting from the employment of incompetent servants in other departments of his work."

[3] See the Rhode Island Case cited in the last note.

[4] So expressed in *Neal* v. *Northern P. R. Co.* (1894) 57 Minn. 365, 59 N. W. 312.

[5] See subtitle B, *supra*.

Extremely expressive in this connection are the common-sense remarks of Field, J., in *Chicago, M. & St. P. R. Co.* v. *Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, as to the extreme questionableness—to use no strange term—of the soundness of a doctrine which simply amounts to an assertion that the instinct of self-preservation is not a motive power sufficiently strong to make servants as careful as their character and temperament will permit.

trine which, when reduced to its simplest terms, merely amounts to the statement that the law should imply a contract to assume the risks of a fellow servant's negligence, because it is expedient on grounds of public policy (see § 162, *ante*), is intrinsically less correct than another doctrine, the essence of which is that in certain classes of cases it would be unreasonable to imply such a contract, cannot be satisfactorily established by a mere dogmatic assertion. Under this head, therefore, the utmost that can be affirmed is that the doctrine of associated duties is the doctrine of the minority; and in judicial, as in other kinds of legislation, this fact is, for practical purposes, conclusive.

The other objections made to the Illinois doctrine,—the extreme vagueness of the test supplied by the conception of association or dissociation of duties, and the immense difficulties which the constantly changing relations of servants would, in practice, create,—are unquestionably serious; but, properly viewed, they seem to be not so much objections which are fatal to the doctrine itself, taken in the abstract, as objections which tend to discredit the doctrine in the form in which it is actually applied by courts which shrink from carrying it out to its proper conclusions. A judge who takes his stand on the broad ground that a servant is not in a common employment with any fellow employee against whose negligence he is incapable of protecting himself cannot, it is submitted, find any logical halting place short of a theory which will enable the injured servant to recover in every case where the particular act which caused his injury was done at such a distance that his senses could give him no intimation of the peril which menaced him, or under such circumstances that, although he may have been aware of the peril, he was unable to ward it off or escape from it. The means of self-protection upon which the Illinois doctrine lays most stress, *viz.*, that associated servants can exercise an influence upon each other's conduct, and report any delinquencies which they may observe, must evidently be, in many instances, wholly inadequate to secure them. If the theory that the capacity for self-protection is the final test of common employment is once accepted, there seems no reason whatever why this relaxation of the general rule should stop at the point at which the courts of that and other states have chosen to arrest it.[6] The servant can receive the

[6] There is only too good reason for the following complaint of Thomas, J., in a case which is one of the most remarkable illustrations of the hair-splitting distinctions of which the doctrine of consociation has been so prolific. "The embarrassment the courts encounter in the discussion of the law of fellow service grows out of the difficulty in adopting and adhering to some general prin

legitimate benefit of this principle only by a doctrine which will permit his action to be maintained except in cases where the relation between his duties and those of the delinquent coemployee were such that he had a reasonable chance of protecting himself by his own personal efforts.[7] The doctrine in its present shape is a mere arbitrary compromise which can scarcely be said to have any higher justification than its effect in mitigating the severe consequences of a rule which so often operates in a manner revoltingly harsh and oppressive.

506. Illustrative cases.—In the subjoined note are collected the cases in which the rights of the parties were determined with reference to the identity or difference of departments, or the doctrine of consociation. For the purpose of facilitating comparison, they are tabulated under headings similar to those employed in § 498, *supra*.[1]

ciple upon which to proceed. When the principle announced in the earlier cases—that all servants employed and paid by the common master to perform common service were fellow servants—was abandoned, the courts were left apparently with no sound principle by which they could be guided and controlled in concrete cases." *Parker* v. *Hannibal & St. J. R. Co.* (1891) 109 Mo. 362, 403, 18 L. R. A. 802, 19 S. W. 1119.

[7] The futility of attempting to base a theory of consociation on any other grounds but this is well brought out in the following remarks of the court, in *Hamilton* v. *Cleveland & T. R. Co.* (1860) 11 Ohio St. 417: "In this use of the term common duty or common service, applied to the employees of a railroad company, in conducting the active business upon the road, servants somewhat disconnected in their respective duties are necessarily included. But this want of immediate connection in their respective duties will be found to obtain even if the use of the term should be restricted so as to embrace only the operatives upon the same train. The respective duties of those assigned to different positions upon the train will be found, to a great extent, necessarily independent of each other; and yet the carelessness of any one may often be fatal to other servants on the same train, having no control over the delinquent, and in full discharge of their own duties. And yet the most limited application of the rule must necessarily embrace such cases."

[8] It is of some interest to note in the present connection that if, as is asserted by the authorities, the absence of any traces of the doctrine of common employment in the reports prior to the decision of *Priestley* v. *Fowler* (1837) 3 Mees. & W. 1, 1 Murph. & H. 305, 4 Jur. 987, is due to the fact that it was considered so indisputable as to be beyond the reach of attack, this unquestioning acceptance may possibly be explained by the small size of most of the industrial concerns in early times, and the character of the work usually done in those which were larger than the average. Owing to the conditions which prevailed, accidents must have been quite rare in which the negligent and injured servants did not occupy, in the discharge of their duties, such local relations that each could protect himself to some extent against isolated acts of negligence; and to the sturdy, self-reliant Anglo Saxon artisan or laborer there might well have seemed nothing unfair, under such circumstances of physical contiguity, in expecting him to assume the risk of his fellow worker's negligence. The existence of such a feeling, coupled with the extremely undeveloped condition of the law of negligence, was, it may be, the reason no attempts were made to hold the employers responsible. If this surmise be well-founded, it is apparent that the theory of associated duties may be regarded as representing the results of a tendency to revert to what may have been the original rule.

[1] (a) *Servants engaged in office work and in handling trains.* There is no common employment between a conductor and a station agent. *Chicago & V.*

W. R. Co. v. *Snyder* (1886) 117 Ill. 376, 7 N. E. 604.

A station agent is not the fellow servant of a car repairer or inspector having supervision of the condition of car brakes, although the agent is required to set the brakes of cars left at his station. *Chicago, R. ... Co.* v. *Kellogg* (1898) 51 Neb. ... 74 N. W. 451 (modified on rehearing in 76 N. W. 462, but above ruling not touched).

The conductor of a freight train, who also assists in switching cars at stations, is not a fellow servant of a station agent. *Louisville & N. R. Co.* v. *Jackson* (1901) 61 S. W. 771, 106 Tenn. 438 (agent left pinch bar lying on the track).

In *Pittsburg, Ft. W. & C. R. Co.* v. *Powers* (1874) 74 Ill. 341, it was assumed, *arguendo*, for purposes of illustration, that a clerk keeping books in the office was not a coservant of trainmen.

In *Madden* v. *Chesapeake & O. R. Co.* (1886) 28 W. Va. 610, 57 Am. Rep. 695, the same conclusion was reached as regards an operator and an engineer, on the two grounds that they were not so situated as to control or influence each other's conduct, and that the operator was the superior servant.

In *East Tennessee, V. & G. R. Co.* v. *De Armond* (1887) 86 Tenn. 73, 5 S. W. 600, a telegraph operator was held not to be a fellow servant of a conductor, both because he is in a separate department, and also a vice principal, as being the mouthpiece of the superintendent. The ruling in *Hall* v. *Galveston, H. & S. A. R. Co.* (1889) 39 Fed. 18, that a telegraph operator was not a fellow servant of a brakeman is possibly based on the same principle as the above cases. But as it was made in an oral charge, and the judge gives no reasons and cites no authorities, its precise rationale is doubtful.

It is held that a fireman and a telegraph operator are engaged in different departments or "about a different piece of work," within the meaning of the Mississippi Constitution of 1890, § 193. *Illinois C. R. Co.* v. *Hunter* (1892) 70 Miss. 471, 12 So. 482.

(b) *Servants working on the same train.*—There is a common employment between an engineer and brakeman. *Illinois C. R. Co.* v. *Keen* (1874) 72 Ill. 512 (engine exploded); *Chicago & I. R. Co.* v. *Brandau* (1895) 65 Ill. App. 150; *Louisville & N. R. Co.* v. *Martin* (1889) 87 Tenn. 398, 3 L. R. A. 282, 10 S. W. 772; *Dysart* v. *Kansas City, Ft. S. & M. R. Co.* (1898) 145 Mo. 83, 46 S. W. 751 (not disputed; theory of plaintiff was negligence in selecting the engineer).

Between an engineer and fireman. *Chicago & I. R. Co.* v. *Brandau* (1895) 65 Ill. App. 150 (engine exploded).

Between two brakemen. *Chicago & I. R. Co.* v. *Rush* (1877) 84 Ill. 570; *Chicago, R. & Q. R. Co.* v. *Howard* (1895) 45 Neb. 570, 63 N. W. 872 (special finding held to override general verdict for the plaintiff).

Between a conductor and his coemployees on the train. *Chicago & N. W. R. Co.* v. *Snyder* (1886) 117 Ill. 376, 7 N. E. 601; *Heyer* v. *Illinois C. R. Co.* (1899) 177 Ill. 591, 52 N. E. 818.

For Kentucky case, see § 549, *post*.

(c) *Servants handling different trains.*—Under the coassociation doctrine in Illinois it is a mixed question of law and fact, whether these servants are in a common employment, and their relations should therefore be submitted to the jury under proper instructions. *Lake Erie & W. R. Co.* v. *Middleton* (1892) 142 Ill. 550, 32 N. E. 453.

An engineer in charge of an engine on the main track is not, as matter of law, a fellow servant of a brakeman at the rear of a train on a side track. *Chicago & W. I. R. Co.* v. *Flynn* (1891) 51 Ill. App. 387. Affirmed (1895) 151 Ill. 448, 40 N. E. 332.

So it has been held to be a question for the jury, whether the crews of a coal and an extra freight train were coservants. *Malott* v. *Crow* (1900) 90 Ill. App. 628.

In *Chicago & A. R. Co.* v. *House* (1896) 71 Ill. App. 147, affirmed in (1898) 172 Ill. 601, 50 N. E. 151 (switch left open), it was held that a jury were justified in finding that the conductor of a freight train and his subordinates were not fellow servants of the crew of a passenger train.

The gripman of one street car is not, as matter of law, a fellow servant of a conductor of another car injured by the former's negligence, where there are about a thousand persons employed as conductors or gripmen on the same line of road, and there is not necessarily any association between the men constituting the crews of two different trains, and the conductor injured had never worked upon the same train and was personally unacquainted with the negligent gripman. *Chicago City R. Co.* v. *Leach* (1898) 80 Ill. App. 354.

But in this state it has also been frequently ruled, as a matter of law, that employees on different trains were coservants. *Cincinnati, N. O. & T. P. R. Co.* v. *Roberts* (1901) 23 Ky. L. Rep. 264, 62 S. W. 901 (two engineers); *Wabash, St. L. & P. R. Co.* v. *Conkling* (1884) 15 Ill. App. 157; *Ohio & M. R. Co.* v. *Robb* (1886) 36 Ill. App. 327 (two engineers); *Clark* v. *Wabash R. Co.* (1893) 52 Ill. App. 104 (conductor of one train and engineer of another); *North Chicago Street R.* v. *Dudgeon* (1893) 69 Ill. App. 57 (two of two street cars); *Elgin, J. & E. R. Co.* v. *Maloney* (1894) 59 Ill. App. 111 (two switching crews); *Terre Haute & I. R. Co.* v. *Leeper* (1895) 60 Ill. App. 194 (crews of two sections of a train, who, it was contended, should be regarded as serving on two different trains;—ruling was based on the ground that "the duty of each relates to a joint enterprise, in the proper execution of which each is equally interested," and that the servants were put to constant care to avoid collisions); *Illinois C. R. Co.* v. *Swisher* (1897) 74 Ill. App. 134, Affirmed in (1899) 182 Ill. 533, 55 N. E. 555, Former Appeal (1893) 53 Ill. App. 411, (1895) 61 Ill. App. 611 (brakeman of a freight train standing on a side track, improperly turned a switch, so that a passenger train left the main track and collided with the freight train, to the injury of the fireman on the engine drawing the passenger train); *Klees* v. *Chicago & E. I. R. Co.* (1899) 68 Ill. App. 244 (engineer of switching crew, and engineer and brakeman of a road train).

In Wisconsin it has been held, with regard to an injury received in Illinois, that the conductor and brakeman on a freight train, who negligently leave the train standing on the track without displaying the proper signals, are fellow servants of a fireman on another train, who is injured by a collision resulting from such negligence. *MacCarthy* v. *Whitcomb* (1901) 110 Wis. 113, 85 N. W. 707.

In Missouri, coservice has been held to be a defense where a brakeman failed to set brakes on cars left on the main track while others were being switched on to a siding, and the unsecured cars got into motion and collided with another train, killing the fireman thereon. *Rehm* v. *Kansas City, Ft. S. & G. R. Co.* (1892, Mo.) 19 S. W. 1116. Affirmed in Banc (1892) 112 Mo. 86, 18 L. R. A. 817, 20 S. W. 480. The division court said: "In this case each servant was under the immediate command of his own conductor, it is true; but that fact does not constitute a decisive or controlling circumstance. Many cases may be instanced where different gangs of men, each gang under the orders of its own foreman, are clearly coservants within the rule of exemption. It does appear in this case that train 52 left Thayer and pursued its trip under the orders of the train dispatcher; and it is fair to presume that the other trains made their trips under orders emanating from the same source. The injured and offending servants were operating trains over the same section of the road. Though sometimes far apart, they were necessarily thrown into close relation in respect to the performance of their work and they were engaged in the same department of service. They were, in our opinion, coservants within the fair meaning of the rule of exemption, so that defendant is not liable for injuries inflicted by one upon the other." In the opinion delivered by the court in banc, stress was laid on the fact that both servants were under orders of the same train dispatcher.

Coservice has been denied to exist between the engineer of one ordinary train and the brakeman of another. *Louisville & N. R. Co.* v. *Robinson* (1868) 4 Bush, 507; *Louisville, C. & L. R. Co.* v. *Curran* (1873) 9 Bush, 559; *Kentucky C. R. Co.* v. *Lehlen* (1888) 87 Ky. 278, 8 S. W. 691 (no opportunity to exercise watchfulness over the negligent servant). In the last two cases the delinquent was a conductor. As to the Kentucky doctrine, see § 549, *post*.

In West Virginia it has been held that there is no coservice between an engineer and the conductor on another train. *Hudden* v. *Chesapeake & O. R. Co.* (1885) 28 W. Va. 610, 57 Am. Rep. 695.

(d) *Servants handling trains, and switchmen.*—A switchman has been held a fellow servant of the men operating an ordinary freight train. *Rutledge* v. *Missouri P. R. Co.* (1894) 123 Mo. 121, 24 S. W. 1053 (in banc), Affirmed in (1894) 123 Mo. 140, 27 S. W. 327 (by whole court without argument).

And a like ruling has been made in several Illinois cases where a switchman was injured by the negligence of a switch engineer. *Stafford* v. *Chicago, B. & Q. R. Co.* (1885) 114 Ill. 244, 2 N. E. 185; *Chicago, R. I. & P. R. Co.* v. *Hearn* (1880) 7 Ill. App. 322; *Chicago, R. I. & P. R. Co.* v. *Touhy* (1887) 26

Ill. App. 99; *Warmington* v. *Atchison, T. & S. F. R. Co.* (1891) 46 Mo. App. 159.

A tower switchman is a fellow servant of a fireman and an engineer. *Cleveland, C. C. & St. L. R. Co.* v. *Loerler* (1901) 94 Ill. App. 36.

In *Louisville & N. R. Co.* v. *Sheets* (Ky. 1890) 11 Ky. L. Rep. 781, 13 S. W. 248, a yard switchman was held not to be a fellow servant of an engineer of an ordinary train, but the decision was determined by difference of grade rather than difference of department. See § 549, *post*.

(e) *Servants handling trains, and express and baggage men.*—There is no coservice, as matter of law, between a baggageman and an engineer. *Chicago & A. R. Co.* v. *Swan* (1898) 176 Ill. 424, 52 N. E. 916. Affirming (1897) 70 Ill. App. 331 (declaration alleging facts not sufficient to show coservice). Nor between a baggageman and a brakeman. *American Exp. Co.* v. *Risley* (1898) 77 Ill. App. 476. Affirmed in (1899) 179 Ill. 295, 53 N. E. 558.

In *Central Trust Co.* v. *Wabash, St. L. & P. R. Co.* (1888) 34 Fed. 616, where it was held that an expressman and a baggageman of a passenger train were not fellow servants, the court quotes Illinois cases, but seems also to consider that the freight train employees represented the master at the time of a collision caused by running past a train, contrary to regulations. The latter conception is clearly erroneous.

(f) *Servants handling trains, and car inspectors, or car repairers.*—(See also § 502, note 1, *supra*.) Servants operating trains and car repairers have been denied to be coservants in *Renfro* v. *Chicago, R. I. & P. R. Co.* (1885) 86 Mo. 302 (train negligently backed by switching crew); *Richmond & D. R. Co.* v. *Vaiment* (1887) 84 Va. 167, 4 S. E. 211; *Illinois C. R. Co.* v. *Hilliard* (1895) 99 Ky. 684, 37 S. W. 75 (see § 549, *post*, for Kentucky doctrine); *Daniels* v. *Union P. R. Co.* (1890) 6 Utah, 357, 23 Pac. 762 (this case, in which the car inspector was the delinquent, was affirmed in *Union P. R. Co.* v. *Daniels* (1894) 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756, but on the ground of the nonassignability of the duty of inspecting cars); *Chicago & A. R. Co.* v. *Hoyt* (1887) 122 Ill. 369, 12 N. E. 225.

In the case last cited the circumstance which was regarded as conclusively negativing common employment was that the duties of the engine driver in connection with his train ceased at or before the time it was the inspector's duty to go upon it to begin his work of inspection. The court said: "In specting cars after they are delivered in the yards can have no relation or connection with the running of trains at distant points. . . . Plaintiff and the engine driver were not engaged in the same business at all. It was distinct and wholly different, and had each continued in his particular business for any indefinite period, it is hardly predicable they would have been brought into any relation where one might have exercised an influence over the other promotive of proper caution. In the very nature of the business each was engaged in, it was impracticable for one to have had any influence over the other promotive of proper caution, or otherwise. They were strangers to each other, and might have remained so for an indefinite time, so far as anything in their business relations would have brought them together. It is true they might have been fellow servants in the strictest sense, and yet they might not have been associated an hour before the happening of the injury. What is meant is, if the parties continue to be engaged in a common service they will be habitually associated, so that they may exercise any influence over each other promotive of common safety. That never could have occurred in this case, for the obvious reason the duties of the engine driver ceased at or before plaintiff's would begin, so that it would be impossible for one to exercise any influence whatever over the other."

This reasoning seems to suggest that there may be a distinction between ordinary engineers and those whose duties are confined to switching, and two earlier cases in Illinois expressly predicate coservice between switch engineers and car repairers. *Chicago & A. R. Co.* v. *Murphy* (1870) 53 Ill. 336, 5 Am. Rep. 48 (car repairer struck by switch engine while walking along the track); *Baltez* v. *Ohio & M. R. Co.* (1877) 85 Ill. 500 (same facts).

But in *Webb* v. *Denver & R. G. R. Co.* (1891) 7 Utah, 363, 26 Pac. 981, a directly opposite view was taken, and this agrees with the *Renfro Case* (1885) 86 Mo. 302.

In West Virginia also it has been held that a carpenter repairing cars and an engineer are coservants. *Unfred* v. *Baltimore & O. R. Co.* (1890) 34 W. Va.

260, 12 S. E. 512 (injury caused by mismanagement of locomotive).

The question as to the negligence of an engineer in putting the air brakes in motion and thereby causing an injury to an inspector who was under a car should be withdrawn from the jury, where the inspector in his hearing had just before expressed his satisfaction with the working of such machinery, but warned him to be "careful," which warning he supposed had reference to other duties of the inspector about the train. *Eckland* v. *Chicago, St. P. M. & O. R. Co.* (1897) 52 Neb. 729, 73 N. W. 224.

A switchman and a car repairer are not coservants. *McVaughton* v. *Canadaigua R. Co.* (1857) 19 Sc. Sess. C. 2d series, 271 (cited with approval by Field J., in *Chicago, M. & St. P. R. Co.* v. *Ross* [1884] 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184); *Pool* v. *Southern P. Co.* (1891) 7 Utah, 303, 26 Pac. 654 (the car repairer in this case usually worked in the shop, but occasionally made small repairs in the yard, and the switchman was under the direction of the yard master. At all events, they are not coservants, as matter of law); *Chicago & E. R. Co.* v. *Knerim* (1892) 48 Ill. App. 243 (1894) 152 Ill. 458, 39 N. E. 324. *Contra*, see *Corbett* v. *St. Louis, I. M. & S. R. Co.* (1887) 26 Mo. App. 621, where the "departmental doctrine" was rejected. But in view of the more recent decisions by the supreme court this ruling is, perhaps, no longer law in Missouri.

A car repairer is not a fellow servant of a motorman on a street car, by whose negligence he is injured. *Stucke* v. *Orleans R. Co.* (1898) 50 La. Ann. 188, 23 So. 342.

(g) *Servants handling trains, and watchmen.*—An engineer is not a coservant of a watchman at a bridge. *Pike* v. *Chicago & A. R. Co.* (1890) 41 Fed. 95. Here the watchman has nothing to do with the operation of the trains, and the disconnection of duties is obvious.

On the other hand, a watchman at a curve of a cable street railroad, whose duty is to signal approaching cars to stop and start, so that they will not meet upon the curve, is a fellow servant with the gripman. *Murray* v. *St. Louis, C. & W. R. Co.* (1889) 98 Mo. 573, 5 L. R. A. 735, 12 S. W. 252. Here both are employed in operating the car—the one from the car and the other from the ground—"engaged in the same department of work, and their common business was such that one could exercise a preventive care over the other."

So, the crew of a switching engine used in making up trains and a night watchman at a street crossing where such engine is constantly passing and repassing are deemed to be, as matter of law, in habitual consociation, and, therefore fellow servants. *Chicago & E. I. R. Co.* v. *Geary* (1884) 110 Ill. 383.

(h) *Switching crews in yards.*—The authorities are in conflict as to the relation which servants regularly attached to the different switching crews hold to other crews at the same yard.

In Illinois it is held that the members of two switching crews working in the same yard, and performing duties almost identical in character, are fellow servants, as matter of law, though under different foremen. *Chicago & E. I. R. Co.* v. *Driscoll* (1898) 176 Ill. 330, 52 N. E. 921, Reversing (1897) 70 Ill. App. 91; *Tierney* v. *Chicago Junction R. Co.* (1901) 92 Ill. App. 631; *Chicago & A. R. Co.* v. *Stallings* (1900) 90 Ill. App. 609; *O'Leary* v. *Wabash R. Co.* (1893) 52 Ill. App. 641 (where stress was laid on the fact that the two crews were under the direction of the same road master).

It has been said that the crews of different switch engines, frequently meeting each other in the discharge of their duties, running upon the same track, and brought into frequent association, so that "their movements with relation to each other are governed by a consideration of their mutual safety and convenience," are fellow servants, though all or any number of their hours of service are not the same. *Elgin, J. & E. R. Co.* v. *Malaney* (1894) 59 Ill. App. 114 ("in that service they were brought into frequent association, so that they might exercise mutual influence upon each other promotive of proper caution").

In Nebraska, also, the doctrine is that the foreman of one of two switching crews in a switch yard, though a vice principal of those of his own crew, is a fellow servant of the members of the other crew, where both crews are under the control and direction of the same yard master, and the foreman has no control or direction over the members of the other crew. *Missouri P. R. Co.* v. *Lyons* (1898) 51 Neb. 633, 75 N. W. 31 (instruction to opposite effect erroneous—members of both crews said to be "consociated" in the same depart-

ment, though three of the cases cited are Indiana decisions, and therefore emanate from a court which has rejected the "consociation" doctrine).

In Utah, on the other hand, a foreman of one of several switching crews in a yard is held not a fellow servant of a member of a crew other than his own. *Armstrong* v. *Oregon Short-Line & U. N. R. Co.* (1893) 8 Utah, 420, 32 Pac. 693.

Whether a switchman working sometimes in one of four crews, and sometimes in another, is consociated with other members of such crews is a question of fact. *Chicago, B. & Q. R. Co.* v. *Fitzgerald* (1890) 40 Ill. App. 476.

The foreman of a crew making up trains and a servant whose duty it is to watch and report his conduct are coservants. *Chicago & E. I. R. Co.* v. *Geary* (1884) 110 Ill. 385 (plaintiff could not perform his duty without constantly watching the train crews).

Two switching crews in the employ of different railroad companies, though using the same track for their trains, their duties not being such as to bring them into habitual consociation, and so cause them to exercise a mutual influence on each other promotive of proper caution, are not to be regarded as fellow servants. *Tierney* v. *Chicago Junction R. Co.* (1901) 92 Ill. App. 631 (cars slunted without anyone on them).

Two switchmen in the same crew are fellow servants. *Illinois C. R. Co.* v. *Stewart* (1901) 23 Ky. L. Rep. 637, 63 S. W. 596.

(i) *Servants handling trains and servants loading cars.*—A laborer engaged in unloading cars is not a fellow servant of the engineer of a locomotive which drives another train of cars against the one on which the laborer is working. *North Chicago Rolling Mill Co.* v. *Johnson* (1885) 114 Ill. 57, 29 N. E. 186.

A switchman and a servant engaged in loading freight cars are not coservants. *Chicago, R. I. & P. R. Co.* v. *Henry* (1880) 7 Ill. App. 322.

(j) *Servants handling ordinary trains and servants employed in the repair or construction of the permanent way and its appurtenances.*—(This and the three following subdivisions should be read in connection with § 502, *supra*). So far as regards servants handling a train and servants engaged in work upon the permanent way, which the operation of the train does not directly facilitate and further, the rule is that, under normal circumstances, these classes of employees are not fellow servants. This rule has been applied where the servants whose relation to the trainmen was in question were engaged in track repairing. *Sullivan* v. *Missouri P. R. Co.* (1889) 97 Mo. 113, 10 S. W. 852 (no proper lookout was kept;—this case seems to overrule *Rohback* v. *Pacific R. Co.* [1869] 43 Mo. 187, where a contrary decision as to the relations of the same servants was given, though Black, J., in *Parker* v. *Hannibal & St. J. R. Co.* [1891] 109 Mo. 362, 18 L. R. A. 802, 19 S. W. 1119, seeks to reconcile the two cases on the ground that in the earlier decision the men were all at work in the same yard, and for angle that appeared were under the same foreman, and in constant association); *Schlereth* v. *Missouri P. R. Co.* (1892) 115 Mo. 87, 21 S. W. 1110; *Swadley* v. *Missouri P. R. Co.* (1893) 118 Mo. 268, 24 S. W. 140; *McKenna* v. *Missouri P. R. Co.* (1893) 54 Mo. App. 161 (assumed *arguendo*); *Pittsburg, Ft. W. & C. R. Co.* v. *Powers* (1874) 74 Ill. 341; *Toledo, W. & W. R. Co.* v. *O'Connor* (1875) 77 Ill. 391 (hand car run into); *Chicago & N. W. R. Co.* v. *Moranda* (1879) 93 Ill. 302, 34 Am. Rep. 168 (trackman injured by a lump of coal which the fireman threw from an engine); *Chicago & A. R. Co.* v. *Calbu* (1900) 187 Ill. 523, 58 N. E. 455, Affirming (1899) 87 Ill. App. 374 (section foreman was struck by a defective car door which the trainmen allowed to swing out while the train was moving); *St. Louis & S. F. R. Co.* v. *Weaver* (1886) 35 Kan. 412, 11 Pac. 408 (section foreman and trainmen held to have no means of knowing anything of each other's qualifications); *Nashville & C. R. Co.* v. *Carroll* (1871) 6 Heisk. 347; *Louisville & N. R. Co.* v. *Filbern* (1869) 6 Bush, 574, 99 Am. Dec. 690; *Union P. R. Co.* v. *Erickson* (1894) 41 Neb. 1, 29 L. R. A. 137, 59 N. W. 347; *Omaha & R. Valley R. Co.* v. *Kraeuhuhl* (1896) 48 Neb. 553, 67 N. W. 447; *Chicago & E. I. R. Co.* v. *Shannon* (1892) 43 Ill. App. 540 (train was driven forcibly by switching engineer against a dead car behind which the track repairer had stepped to avoid another train).

Laborers unloading rails. *Peoria, D. & E. R. Co.* v. *Johns* (1892) 43 Ill. App. 83 (engineer failed to report defect in engine).

A servant working in a quarry operated by railroad and men in charge of passing train are not coservants. *Church* v. *Chicago & A. R. Co.* (1893) 119 Mo. 203, 23 S. W. 1056; *Dixon* v.

Chicago & A. R. Co. (1891) 109 Mo. 413, 18 L. R. A. 792, 19 S. W. 412.

In Kentucky an engineer and a section laborer temporarily engaged under him in getting a locomotive back on the track are not fellow servants. *Louisville & N. R. Co.* v. *Collins* (1865) 2 Duv. 114, 87 Am. Dec. 486, but the decision rests partly upon the superiority of the engineer's grade.

A sectionman is not a coservant of one employed to load tenders with coal. *Union P. R. Co.* v. *Erickson* (1894) 41 Neb. 1, 29 L. R. A. 137, 59 N. W. 347. A locomotive engineer and member of fence gang are not fellow servants, as matter of law. *Louisville, E. & St. L. Consol. R. Co.* v. *Hawthorn* (1893) 147 Ill. 226, 35 N. E. 534, Affirming (1892) 45 Ill. App. 635. A fireman on a running train has been held a fellow servant with a section foreman in delivering from the train, as it passes, a message for the latter tied around a piece of coal. *Card* v. *Eddy* (1894) 129 Mo. 510, 36 L. R. A. 806, 28 S. W. 979 (see an extract from the opinion in this case, § 503, *supra*).

A carpenter in a railway yard and an engineer are not coservants. *Egmann* v. *East St. Louis Connecting R. Co.* (1896) 65 Ill. App. 345.

A member of a bridge crew and the employees operating a train with which he has nothing to do are not coservants. *Freeman* v. *Illinois C. R. Co.* (1901) 107 Tenn. 340, 64 S. W. 1 ("duties and labors entirely distinct").

But upon both principle and authority, it is apparent that in spite of the prima facie disconnection of duties in these cases, the master may still escape liability if he can show that the servants were, as a matter of fact, so associated.

In *Cleveland, C. C. & St. Co.* v. *McLaughlin* (1894) 56 Ill. App. 53, it was left to the jury to say whether a road supervisor and an engine driver where fellow servants.

But evidence that a railway section foreman who sustained injuries on a bridge, alleged to be due to the negligence of an engineer in failing to observe a flag placed on the bridge, had a right to flag the train, that he was endeavoring to do so when he was injured, and that it was the engineer's duty to obey the signal, does not show such a cooperation as tends to establish the relation of fellow servants. *Peoria, D. & E. R. Co.* v. *Rice* (1893) 144 Ill. 227, 33 N. E. 951. Otherwise, it was pointed out, "all employees of one employer would be fellow servants within that rule, whenever it could be shown that one was, at the time of the injury, attempting to prevent another from committing it."

In two Virginia cases the master was held liable where trainmen were injured by the negligence of track repairers. *Torian* v. *Richmond & A. R. Co.* (1887) 84 Va. 192, 4 S. E. 339; *Hoon* v. *Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401. The same ruling would undoubtedly be made in any other state where the "consociation" doctrine prevails, but it is probable that in Virginia itself these cases would now be sustained only on the ground that the track repairers were vice principals as regards keeping the roadbed in safe condition.

(k) *Servants handling work trains and servants employed on the permanent way.*—So far as these servants are concerned it is clear that the principles applied in the preceding subdivision will negative common employment where the track laborers were not a part of the force attached to the work train.

This is one case where it was ruled that a section hand is not a fellow servant of men in charge of a construction train, unless they are together cooperating in furthering a particular business of the common master. *Chicago & A. R. Co.* v. *Kelly* (1887) 28 Ill. App. 655, Affirmed in (1889) 127 Ill. 637, 21 N. E. 203. The court laid it down that during the part of the day the plaintiff had been engaged in unloading rock from a train, he was a fellow servant of the trainmen, but not before or after.

In *Parker* v. *Hannibal & St. J. R. Co.* (1891) 109 Mo. 362, 18 L. R. A. 802, 19 S. W. 1119, where four out of seven judges were of opinion that section hands engaged in ballasting the track were not fellow servants of the men operating the material train which brought the stone with which the track was to be ballasted, the defendant sought to take the case out of the general rule on the ground that the train was hauling material for the sectionmen to use in constructing the roadbed. This contention did not prevail. Thomas, J., said, p. 405, 109 Mo., p. 816, 18 L. R. A., and p. 1133, 19 S. W.: "The train was, however, being operated on the road, and I cannot see why the trainmen's relation to the sectionmen could be changed, simply by what the former hauled. Such a distinction is arbitrary and artificial, and hence unsatisfactory

What did Parker know about the skill of the engineer or conductor in charge of the construction train? What right had he to inquire into the operation of that train? He and those in charge of that train were in no proper sense consociated in the performance of their respective duties."

But the employment of the person injured cannot be considered distinct, in the sense of the "consociation" doctrine, if it is of a character to make him a part of the force employed upon the train,—as, where the engineer of a construction train injured a laborer engaged in unloading iron, by starting the train without the usual signal. *Chicago & A. R. Co.* v. *Keefe* (1868) 47 Ill. 108 (instruction that departments were distinct, held erroneous).

A foreman of a gang of laborers hauling dirt with a train of flat cars is not a fellow servant of the conductor of the train. *Dobson* v. *New Orleans & W. R. Co.* (1900) 52 La. Ann. 1127, 27 So. 670 (derailment caused by conductor leaving the train in exclusive charge of the engineer, who was at the rear end of the train).

See also *Waller* v. *Ohio & M. R. Co.* (1887) 24 Ill. App. 326 (facts similar to those in case just cited); *Higgins* v. *Missouri & P. R. Co.* (1891) 104 Mo. 413, 16 S. W. 409 (demurrer sustained, where the plaintiff was a laborer on a train side-tracked to let another pass, and was injured by the engineer's starting it without a signal. "They were working," said the court, "under the same conductor, derived their authority and compensation from the same common source, and were engaged in the same general business, though in a different grade of the common service").

Compare also the cases cited in chapter XXXIII., *post*, many of which take the same doctrine for granted, though the question actually discussed was whether the injured servants were in the position of passengers at the time of the accident.

Where each of several laborers acts as brakeman, when occasion arises, upon truck cars used for the transportation of dirt, the laborer who actually performs that duty in any case is a fellow servant of the rest, as he does not thereby cease to be in the same field of labor and in the same grade of employment. *Casey* v. *Louisville & N. R. Co.* (1886) 84 Ky. 79.

A teamster who hauls ties in the construction of a railroad is not consociated with the engineer of the construction train, by whose negligence he is injured while being conveyed to camp at dinner time. *Hobson* v. *New Mexico & A. R. Co.* (1886; Ariz.) 11 Pac. 545. The conductor and engineer of a "wild" train are not coservants of a laborer on a gravel train. *Northern P. R. Co.* v. *O'Brien* (1889) 1 Wash. 599, 21 Pac. 32 (collision occurred while laborer was being carried on the train).

(l) *Servants engaged solely in the construction or maintenance of the permanent way.*—There is, of course, coservice where the negligent and injured employees are both members of the same working force, under the orders of the same foreman,—as, between a laborer belonging to a bridge gang and an engineer operating the machinery by which the timbers are hoisted. *Ryan* v. *McCully* (1894) 123 Mo. 636, 27 S. W. 533; *Lotz* v. *Chesapeake & O. R. Co.* (1893) 95 Ky. 188, 24 S. W. 119 (negligent and injured servants were in the same gang of pile drivers).

If they are controlled by the same superior, that circumstance is apparently decisive in the master's favor,—as, where two foremen of track repairers are working independently of each other, but under the same road master. *Sherwin* v. *St. Joseph & St. L. R. Co.* (1890) 103 Mo. 378, 15 S. W. 442.

Conversely, a section man is not, as matter of law, a fellow servant of the members of a fence gang temporarily working on the section, where they do not work together, and are only casually thrown together in going to or returning from their daily duties. *Chicago & I. R. Co.* v. *O'Brien* (1895) 155 Ill. 630, 40 N. E. 1023.

(m) *Servants in the mechanical and in other departments.*—There is no coservice between the following classes of employees:

A brakeman and those providing the car, by the defects of which he suffers injury. *Toledo, W. & W. R. Co.* v. *Ingraham* (1875) 77 Ill. 309.

Trainmen and those who furnish rolling stock and place it on the track. *Chicago & N. W. R. Co.* v. *Jackson* (1870) 55 Ill. 492.

An engineer and servants (master mechanic and master car builder) charged with the duty of building and keeping in repair locomotive boilers. *Toledo, W. & W. R. Co.* v. *Moore* (1875) 77 Ill. 217.

A boiler manufacturer and a fireman. *Louisville & D. R. Co.* v. *Jones* (1871) 2 Heisk. 27.

A laborer in the car shops of a rail-

road corporation and the foreman of the switchmen in the train department. *Pool* v. *Southern P. Co.* (1899) 20 Utah, 210, 58 P. 326.

A common laborer in the carpenter shop near the railroad track, and the engineer in charge of a passing train. *Ryan* v. *Chicago & N. W. R. Co.* (1871) 60 Ill. 171, 14 Am. Rep. 32.

Servants who place a "mail-catcher" too near the track and a fireman struck by it. *Chicago, B. & Q. R. Co.* v. *Gregory* (1871) 58 Ill. 272.

A gripman on a cable car and the crew of a wrecking train. *West Chicago Street R. Co.* v. *Dreyer* (1894) 57 Ill. App. 440.

See also *Pittsburg, Ft. W. & C. R. Co.* v. *Powers* (1874) 74 Ill. 341, where it was assumed, *arguendo*, for the purposes of illustration, that an employee in the car shop was not a coservant of the trainmen.

On the other hand a head blacksmith is a coservant of the members of a wrecking crew as long as he is associated with them in any particular job. *Ubsdell* v. *Terre Haute & I. R. Co.* (1884) 111 Ill. 203, 53 Am. Rep. 616. So, a yard hand may be a coservant of a mechanic in the repair shop if they are required by their foreman to co-operate in the same job. *Chicago & N. W. R. Co.* v. *Schoning* (1879) 4 Ill. App. 533.

(n) *Servants engaged in roundhouses and the various shops.*—Two car repairers are coservants. *Renfro* v. *Chicago, R. I. & P. R. Co.* (1885) 86 Mo. 302. So are an engine hostler and a helper in the roundhouse, who also has duties to perform in the care of the engines, coservants. *Chicago & W. I. R. Co.* v. *Massig* (1893) 50 Ill. App. 666.

Whether gangs employed under different foremen in a car shop and a machine shop, between which cars are constantly being moved, are fellow servants is a question for the jury. *Chicago & I. R. Co.* v. *O'Boyle* (1884) 15 Ill. App. 134.

(o) *Servants engaged in work on buildings in process of erection.*—A workman employed to build a scaffold and masons and bricklayers working thereon are coservants. *Stevens* v. *Howe* (1890) 28 Neb. 547, 44 N. W. 865.

Painters employed on the same building to do the same kind of work are coservants, although they are working on different scaffolds. *World's Columbian Exposition* v. *B.* (1894) 76 Ill. App. 591 (injury occurred through the negligence of one servant in adjusting a rope supporting one of the scaffolds).

A carpenter who constructs a scaffold and a mason who uses it are not coservants when working under separate foremen. *Chicago & I. R. Co.* v. *Harmon* (1896) 67 Ill. App. 618. Affirmed in (1897) 170 Ill. 520, 48 N. E. 953, but on the ground that the carpenter was discharging a nonassignable duty.

Operators of elevator in a building in the process of construction are not fellow servants with a gang of carpenters, one of whom is killed while at work by the counter weight of the elevator coming down on him. *Leiter* v. *Finnare* (1896) 68 Ill. App. 558 (approving of instructions assuming this).

Whether a carpenter working on an elevator shaft in a building in course of construction, and the boy running the elevator, in raising and lowering workmen and materials and persons inspecting rooms in the building, are fellow servants, is a question for the jury. *Hughes* v. *Fagin* (1891) 46 Mo. App. 37 (nonsuit held erroneous under the more recent decisions in Missouri; though it would have been proper under those prior to *Conroy* v. *Vulcan Iron Works* (1876) 62 Mo. 351.

(p) *Servants working on or about ships.*—A finding by the jury that plaintiff, who was master of one of several canal boats, was a "coemployee" with the captain of a steamboat employed to tow the canal boats, including the one of which plaintiff was master, and that plaintiff was "associated with" the steamboat captain and engaged in the same line of business at the time of the injury, in making up the tow,—does "not bring the plaintiff and the captain of the steamboat into the category of fellow servants." *Western Stone Co.* v. *Whalen* (1893) 51 Ill. App. 512, on appeal. Affirmed in (1894) 151 Ill. 472, 38 N. E. 241, where it was assumed that the servants were in a common employment, and the case was made to turn on the master's knowledge of the delinquent's incompetency.

In a case where defendant's lumber was being unloaded from a vessel into his dock, the evidence was that his yardmen were piling it up after it was passed out of the boat by another set of men; that plaintiff, belonging to the latter set, was injured by the falling of a pile of lumber, while he was passing from the vessel to the dock; and that his association with the former set of men ended with passing the lumber over

the vessel's rail. It was held that even if defendant were the common master of both sets of men—which was disputed—the verdict that plaintiff was not a fellow servant of the yardmen would be justified. *John Spry Lumber Co.* v. *Duggan* (1899) 182 Ill. 218, 54 N. E. 1002, Affirming (1898) 80 Ill. App. 394.

(q) *Servants employed in coal yards.*—Switchmen at work in a coal yard, engaged in switching the cars from place to place, are not in such direct co-operation with other employees of the same company engaged in loading the cars with coal, as to create the relation of fellow servant between them. *Wenona Coal Co.* v. *Holmquist* (1895) 51 Ill. App. 507.

(r) *Servants employed in iron works.*—A servant employed by a steel company to pour the molten steel into molds to be sent to the billet mill is not, as matter of law, a fellow servant of another employee, not within sight and separated from him by two walls, whose duty it is to chill the molds on delivery. *Illinois Steel Co.* v. *Bauman* (1898) 78 Ill. App. 73, Affirmed in (1899) 178 Ill. 351, 53 N. E. 107.

The foreman of a gang of men engaged in repairing the tracks in the works of a steel-converting mill, and employees engaged in the mill in making steel from iron, whose duties never bring them together in their discharge, are not fellow servants. *Joliet Steel Co.* v. *Shields* (1893) 146 Ill. 603, 34 N. E. 1108.

Whether an employee in a steel manufactory engaged in cooling and uncapping molds under the control of a yard foreman is a fellow servant of a "pourer" employed in the converting room under the control of a superintendent is a question of fact for the jury, where the evidence tends to show that the two employees were not stationed in the same building or within sight or hearing of each other, and that the usual duties of their respective employments did not bring them into habitual or even temporary association. *Illinois Steel Co.* v. *Bauman* (1899) 178 Ill. 351, 53 N. E. 107, Affirming (1898) 78 Ill. App. 73.

(s) *Servants employed in factories, etc.*—The foreman in the shipping department of an ice manufactory is not a fellow servant of carpenters who remove the cover of a hot-water tank under the floor in the factory, while placing a guard around the opening. *Musick* v. *Jacob Dold Packing Co.* (1894) 58 Mo. App. 322.

Where a machinist in a machine shop was injured by the bursting of an emery wheel which he was using, and which had just been set by three of the ordinary workmen in the shop, superintended and assisted by the foreman, it was held erroneous to instruct the jury that "workmen employed to set up machinery for use, and workmen using the machinery so set up, were not engaged in a common service," since it was a question of fact, and not of law, whether the two species of service formed two departments or one. This "depends upon whether the same servants are employed by the master to perform both lines of service." *Holton* v. *Daly* (1879) 4 Ill. App. 25.

(t) *Servants engaged in mining work.*—The engineer of the hoisting machinery is a fellow servant of a roadman and tracklayer. *Nuntic Coal & Min. R. Co.* v. *Leonard* (1886) 25 Ill. App. 95 (cage lowered too rapidly—Affirmed in [1888] 126 Ill. 216, 19 N. E. 294, on the ground of negligence in employing the engineer). And of a laborer in charge of mules, and doing general work. *Starne* v. *Schlothane* (1886) 21 Ill. App. 97 (crushed while working at the bottom of the shaft).

In Tennessee the doctrine of associated duties being applied only in the case of railway servants, the engineer of a mine engine, and tender of a ventilating engine, were held to be coservants, though not in the same department. *Coal Creek Min. Co.* v. *Davis* (1891) 90 Tenn. 711, 18 S. W. 387.

"Pushers" in charge of the several shifts of men operating a mine are fellow servants as respects their duty of notifying each other, at the time of changes of shifts, of unexploded holes in the shaft. *Anderson* v. *Daly Min. Co.* (1897) 16 Utah. 28, 50 Pac. 815.

Employees in charge of the fan furnishing air for a mine and gas testers are fellow servants of miners at work in the mine. *Hughes* v. *Oregon Improv. Co.* (1898) 20 Wash. 294, 55 Pac. 119 (fan stopped during fire).

An employee superintending the excavation of a mining tunnel in the side of a hill is not a coservant of a man working on another tunnel lower down under the directions of another superintendent. *Uren* v. *Golden Tunnel Min. Co.* (1901) 24 Wash. 261, 64 Pac. 174.

(u) *Servants employed in hotels.*—An

elevator boy and an electrician, and engineer employed in a hotel, both of whom are subject to the orders of the president of the hotel company, its general manager, and its chief clerk, are fellow servants. *McCarty* v. *Rood Hotel Co.* (1898) 144 Mo. 397, 46 S. W. 172.

A chambermaid in a hotel is a fellow servant of an elevator man employed therein. *Oriental Invest. Co.* v. *Sline* (1897) 17 Tex. Civ. App. 692, 41 S. W. 130.

(v) *Servants employed in mills.*—A millwright engaged in constructing an addition to a mill is not the fellow servant of one who operates a saw therein. *Hammarberg* v. *St. Paul & T. Lumber Co.* (1898) 19 Wash. 537, 53 Pac. 727 (millwright left a chisel on the beam over the saw, and it was shaken off by the vibration of the machinery).

An employee wheeling out hot cinders from a rolling mill is not a coservant of a workman employed to shovel the cinders, when cold, into a box car. *Western Tube Co.* v. *Polobinski* (1901) 94 Ill. App. 640.

An employer is not liable for an injury to an employee caused by the rolling of a log from a runaway on which it was being moved by means of a dolly, where the injury could have been avoided by blocking the log. *Ignew* v. *Supple* (1898) 80 Ill. App. 437.

(w) *Servants employed in quarries.*—There can be no recovery where a laborer in the hopper house over a stone crushing machine is killed by a loaded car which runs down the incline from the quarry, owing to the negligence of one of the hands engaged in loading it. *Fort Hill Stone Co.* v. *Orm* (1886) 84 Ky. 183.

CHAPTER XXVIII.

VICE PRINCIPALSHIP AS REFERRED TO THE TEST OF SUPERIORITY OF RANK.

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A. Introductory.

507. General statement.— None of the courts, even those which have applied the doctrine of common employment in its most rigorous and sweeping form, have gone to the length of asserting that it is absolutely and invariably controlling in all the cases in which a master is being sued for injuries caused by the negligence of a fellow servant of the injured person. It is conceded that a portion, at least, of those cases are governed by the rule embodied in the maxim, *Respondeat superior*.[1] But with regard to the precise extent of the domain which is covered by each of these two antagonistic principles, there is an extraordinary diversity of judicial opinion. The decisions on the subject, indeed, are conflicting to a degree which, it may safely be affirmed, is without a parallel in any department of jurisprudence. To attempt to reconcile these decisions, or even to suggest grounds upon which, as rulings with respect to specific facts, they may be reconciled, would be to attempt an impossible and un-

[1] The designation usually applied to those employees who represent the master in such a sense that he is liable to other servants for their negligence is "vice principal," or *alter ego*, the former term being the most frequently used. See the cases cited *passim* in this and the following chapters. The term "deputy master" is also found. *Hall* v. *Johnson* (1865) 3 Hurlst. & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 13 Week. Rep. 411.

fruitful task. The utmost that the commentator can aim at, with any hope of attaining success, is to group the authorities under categories which will enable the reader to comprehend, as nearly as may be, the extent to which the courts diverge from, or agree with, one another in regard to the various subsidiary issues through which an answer to the main question has been sought.

Broadly speaking, it will be found that the cases with which we have to deal may be divided into two classes: (1) The cases in which the contention has been that the doctrine of common employment was not applicable because the negligent servant was of a higher grade than the injured servant; (2) The cases which have turned upon the nature of the injurious act, as being one which was or was not incident to the discharge of functions which the master is absolutely bound to perform with reasonable care, whether he undertakes them personally or deputes them to an employee. In some instances these conceptions lead to the same results, as regards the liability or nonliability of the defendant, and it will be seen that, merely as a matter of abstract logical analysis, nearly all the rulings governed by the former conception are susceptible of being brought under the latter conception, provided a certain significance is attached to it. The theories underlying the two classes of cases have, however, been developed along independent lines, and, in their practical application by the courts, are still differentiated to an extent which renders it impossible to discuss them otherwise than separately.

508. Representative character of servant depends on the actual functions discharged by him.— Whether the employee whose negligence caused the injury was or was not a vice principal is determined by the nature of the functions which he was, as a matter of fact, discharging at the time when the injury was received, and not by the appellation by which he was designated.[1] His official denomination

[1] "Superintendents are not made by calling them such, but by the nature of their employment, their duties, and their work." *Greenway* v. *Conroy* (1894) 160 Pa. 185, 28 Atl. 692.

"It is the law, in the absence of express contract, that establishes the relation of the parties, creating him agent or representative of the master who performs duties which the law itself makes it incumbent on the master to perform." *Miller* v. *Southern P. Co.* (1891) 20 Or. 285, 26 Pac. 70.

In *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, **Lord Colonsay** remarked: "I agree with what has been said as to the terms 'fellow-workman' and 'collaborateur.' They are not expressions well suited to indicate the relation on which the liability or nonliability of a master depends, especially with reference to the great systems of organization that now exist. And these expressions, if taken in a strict or limited sense, are calculated to mislead. The same may be said of such words as 'foreman' or 'manager.' We must look to the functions the party discharges, and his position in the organism of the force employed, and of which he forms a constituent part. Nor is it of any consequence that the posi-

will not, if itself, determine whether or not he was a representative of the master.[2] Nor does a rule the effect of which is to cast upon him certain functions under the circumstances specified operate so as to alter the legal relations which would, apart from the rule, be held to exist between him and the other employees.[3] Nor is the fact that the injured servant believed the negligent employee to be a vice principal, and was not aware that he had been discharged in that capacity, a sufficient ground for allowing the action to be maintained.[4] Nor will the mere fact that the subordinate believed in good faith that he had been told by the employer to obey the directions of another employee enable the subordinate to recover for the negligence of that employee, if, as a matter of fact, no such instructions were given.[5]

The mere fact that a vice principal exercised his authority through an intermediary clearly cannot affect the extent of the employer's responsibility.[6] Nor is it material, in a case where injury was

tion he occupies in such organism implies some special authority, or duty, or charge, for that is of the essence of such organizations."

In *Dwyer* v. *American Exp. Co.* (1882) 55 Wis. 453, 13 N. W. 471, the court, in sustaining a demurrer to the complaint, said: "Designating Colvin as agent and manager does not convey any definite idea of the powers vested in such manager or agent. The court cannot presume from that designation that he had all the powers of the company and stood in its place for all purposes; and especially must this be so where the complaint itself shows that the only acts he did perform, and from which the injury resulted, were performed by him in the business of the defendant as a coemployee with the plaintiff."

[2] *See Dayharsh* v. *Hannibal & St. J. R. Co.* (1890) 103 Mo. 570, 15 S. W. 551 (*arguendo*); *Copper* v. *Louisville, E. & St. L. R. Co.* (1885) 103 Ind. 305, 2 N. E. 749.

[3] A rule of a railroad company that, where a train or engine is run without a conductor, the engineer shall be regarded as the conductor, does not change the general rule of law as to the liability of the company for injuries to an employee caused by the engineer's negligence, so as to make the company liable to a fireman for such negligence. *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

This decision was followed in Utah with respect to a rule which provided that, "in case an engine is run over any portion of the road, unaccompanied by a conductor, the engineer must perform the duties and make the reports of a conductor, in addition to his own." *Stephani* v. *Southern P. Co.* (1899) 19 Utah, 196, 57 Pac. 34.

A rule of a railroad company providing that conductors will be held responsible for the proper adjustment of switches used by their trains does not make a conductor the representative of the company. *Hiller* v. *Southern P. Co.* (1891) 20 Or. 285, 26 Pac. 70; *Guthrie* v. *Southern P. R. Co.* (1891; Or.) 26 Pac. 76.

[4] *Allen* v. *Goodwin* (1892) 92 Tenn. 385, 21 S. W. 760. This decision, however, seems to be inconsistent with the doctrine that persons who have dealt with a general agent, as such, may lawfully presume, in the absence of notice of a withdrawal of his authority, that he still represents the principal. See Mechem, Agency, § 224.

[5] *Newbury* v. *Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743.

[6] The liability of an employer for injuries to an employee through certain dangerous conditions resulting from a compliance with the express direction of the superintendent is not affected by the fact that such directions were given to the foreman in charge of the work. The foreman is but the defendant himself acting through another medium. *Donahoe* v. *Kansas City* (1895) 136 Mo. 657, 38 S. W. 571.

caused by following the directions of a vice principal, that he himself was temporarily absent when those directions were being carried out.[7]

509. Temporary vice principals.—Both on principle and authority it is manifest that a master is no less responsible for the negligence of an employee who is temporarily filling the position of an *alter ego*, than he is for the negligence of an employee who holds that position permanently.[1]

In determining the question whether the relation of temporary vice principalship existed between the negligent and injured persons at the time of the accident, the essential circumstance to be considered is the nature of the functions discharged by the alleged vice principal.[2] In some instances the exercise of those functions will

The acts of a servant done under the immediate supervision of a vice principal, who told him how to place the appliance which caused the injury, are, as regards another who is injured by such appliance, deemed to be the acts of the vice principal. *Benson* v. *Green Mountain Gold Min. Co.* (1880) 57 Cal. 20.

[7] In *Missouri P. R. Co.* v. *James* (1888; Tex.) 10 S. W. 332, an instruction to this effect was approved in a case in which the plaintiff, while working under the instructions of the section master, was ordered to do some special work by the road master, and was injured by a defective rail which the road master had promised to remove. The objection taken to the instruction is not stated.

[1] In the following cases recovery was allowed on the ground that the negligent persons were vice principals *pro tempore*: *Bergman* v. *Omaha & St. L. R. Co.* (1890) 41 Fed. 667 (a foreman of car repairers put in charge of a wrecking crew); *Baldwin* v. *St. Louis, K. & N. W. R. Co.* (1888) 75 Iowa, 297, 39 N. W. 507 (one upon whom the management of a timber yard devolved in the absence of the regular superintendent); *Ryan* v. *Los Angeles Ice & Cold Storage Co.* (1896) 112 Cal. 244, 32 L. R. A. 524, 44 Pac. 471 (engineer in sole charge of a refrigerating machine when the general manager was absent, and invested with equal power to control the workmen); *Steube* v. *Christopher & S. Architectural Iron & Foundry Co.* (1900) 85 Mo. App. 640 (workman left in charge of his coservants when superintendent was absent); *Colorado Midland R. Co.* v. *O'Brien* (1891) 16 Colo. 219, 27 Pac. 701 (general foreman of tracklayers in full control of work of construction when the general superintendent was absent).

A train despatcher to whom a general superintendent, while absent, deputes the operation of the trains, is a vice principal *ad hunc vicem*. *Losky* v. *Canadian P. R. Co.* (1891) 83 Me. 461, 22 Atl. 367.

Temporary conductors are treated as vice principals in any jurisdiction where a regular conductor is regarded as such. *Coultes* v. *Richmond & D. R. Co.* (1884) 84 N. C. 309, 37 Am. Rep. 620 (engineer in charge of train legally in same position as a conductor); *East Tennessee & W. N. C. R. Co.* v. *Collins* (1886) 85 Tenn. 227, 1 S. W. 883 (engineer in charge of train not fellow servant of brakeman); *Brown* v. *Central P. R. Co.* (1887) 72 Cal. 523, 14 Pac. 138; *Daniel* v. *Chesapeake & O. R. Co.* (1892) 36 W. Va. 397, 16 L. R. A. 383, 15 S. E. 162.

In *Murphy* v. *Smith* (1865) 19 C. B. N. S. 361, 12 L. T. N. S. 605, Erle, Ch. J., argues on the hypothesis that, if the evidence had actually shown that the negligent employee was a deputy to whom the regular representative of the master had delegated his powers, during his absence from work, the plaintiff might have recovered. But he considered that the employee in question was not shown to have filled any other position with relation to the plaintiff than that of a fellow servant.

[2] A conductor (in jurisdictions where he is a vice principal), although he is normally in a different department from a foreman of bridge builders, is a vice

have resulted from his compliance with the provisions of a rule, the effect of which was that, in a specified contingency, he was to exercise certain powers. In such cases the employer incurs no responsibility unless, at the time of the accident, the subordinate had actually passed under the control of the temporary vice principal.[3] Nor will the substitute be considered a vice principal if it is apparent that he was not exercising some power or function which was an essential attribute of the position held by the employee whose place he had taken.[4]

principal of that foreman, while the foreman is traveling on a work train controlled by the conductor. *Northern P. R. Co.* v. *Beaton* (1894) 12 C. C. A. 301, 29 U. S. App. 88, 64 Fed. 563.

An engineer of a shop who marks out work for other employees, and, when the employer, who acts as his own superintendent, is absent, takes charge of the shop, is a fellow servant of a boy over fourteen employed in the shop, and not a vice principal for whose negligence in giving an unreasonable order the employer is responsible, although the latter told the boy to go to such engineer, who would tell him what to do. Such a direction will be considered to have relation to the kind of work the boy has been accustomed to do, and does not amount to a delegation by the employer of his general authority over the plaintiff to another. *Greenman* v. *Conroy* (1891) 150 Pa. 185, 28 Atl. 692; *Duffy* v. *Oliver Bros.* (1889) 131 Pa. 203, 18 Atl. 872 (foreman taking general manager's place, when he was absent, not a vice principal—precise grounds of decision not stated).

[3] In a Tennessee case it was ruled that a brakeman on the forward end of a freight train which is uncoupled or broken in two, leaving the conductor on the rear end, although under the rules of the company the right to command thereupon devolves upon the engineer, is a fellow servant of the latter, until he avails himself of his right to take charge of the train, and does take charge, and assumes to direct and control the movements of the brakeman; and that the latter cannot recover where, acting without directions from the engineer, but in performance of his duty, under the rules of the company, he goes to the rear end of his fragment of the train, to act as lookout and give signals to the engineer, and by the latter's negligence in suddenly jerking the train, is thrown off and injured. *Louisville & N. R. Co.* v. *Martin* (1889) 87 Tenn. 398, 3 L. R. A. 282, 10 S. W. 772. An instruction was disapproved which told the jury that the company would be liable for the engineer's negligence to the same extent as if he had actually taken charge and been, at the time of the accident, engaged in the exercise of his authority. Upon the assumption that both the engineer and the brakeman knew of the rules which were to govern their conduct under the circumstances, it seems impossible to sustain this case on any rational ground. It is submitted that, in the absence of proof to the contrary, the implication should be that, where servants in such a case proceed to perform their duties precisely as they would perform them if the superior had formally announced his assumption of his new functions, they were acting with reference to the rule.

A brakeman sent forward by the conductor of a train which has broken apart, to signal the forward portion, which under the rules of the railroad company is under the control of the engineer, is a fellow servant of the latter, and cannot recover from the company for injuries sustained from the latter's negligence, for at the time of the accident he is not controlled by the engineer. *Newport News & M. Valley Co.* v. *Howe* (1892) 3 C. C. A. 121, 6 U. S. App. 172, 52 Fed. 382.

[4] A section foreman with authority to hire or discharge only the men employed on his section is not a vice principal, as being the head of a department (§§ 532, *et seq.*, *infra*), while temporarily taking the place of the road master, and superintending the unloading of ties from a work train, where he has no authority to direct when the train shall be made up and sent out, or where it shall go, except as he receives his instructions from the road master,

Since the powers of a temporary vice principal can in no case be greater than those of the permanent one, the master is not responsible if those powers are exceeded by the substitute.[5]

510. Sufficiency of a complaint based upon the vice principalship of the negligent servant.—(Compare § 562, *post.*) As all employees of the same master are prima facie coservants, a plaintiff who seeks to recover on the theory that a delinquent employee was a representative of the master in regard to the matters out of which the injury arose must make such allegations as will take the case out of the ordinary rule. What allegations will suffice for this purpose is a question which depends upon the theory the particular court where the action is brought has adopted as to the functions from which a representative capacity may be inferred. For detailed information as to the different theories entertained, the following chapters must be consulted.

In jurisdictions where the doctrine that there are no vice principals by virtue of their official rank, so far as regards the management of a going concern (see §§ 529, 530, *infra*), is accepted, even an averment implying that the delinquent was the general manager or superintendent is not proof against a demurrer.[1]

Worch v. *Toledo, S. & M. R. Co.* (1897, 113 Mich. 154, 71 N. W. 464 (injury alleged to have been caused by excessive speed of train from which the ties were dropped).

In jurisdictions where the possession or nonpossession of a power to employ and discharge subordinates is viewed as a crucial test of his representative character (see § 523, *infra*), a temporary foreman is not a vice principal, unless he is invested with that power. *St. Louis, A. & T. R. Co.* v. *Lemon* (1892) 83 Tex. 143, 18 S. W. 331; *Allen* v. *Logan City* (1894) 10 Utah, 279, 37 Pac. 496. In the latter case Bartch, J., dissented on the ground that the foreman left in charge had been notified by the vice principal of special circumstances which created additional hazards, and had failed to notify the laborer who was injured by the falling of the bank. This seems to be the more correct view. The duty to warn being absolute, the rank and powers of the servant to whom the duty was delegated ceased to be a material consideration.

[5] In one case it was held that an engineer given charge of the movement and management of cars, with the assent or knowledge of a temporary conductor acting in the absence of the regular conductor, has the authority of a conductor in giving directions to subordinate employees, and may waive a general rule and contract of the company: and a brakeman injured by going between the cars to place a bent link in position for coupling under the direction of such engineer, and exercising ordinary care in so doing, may recover for the injuries sustained, notwithstanding a written contract forbidding him to go between the cars, and requiring him to use a stick. *Finley* v. *Richmond & D. R. Co.* (1893) 59 Fed. 419. This decision was reversed in (1894) 12 C. C. A. 595, 25 U. S. App. 16, 63 Fed. 228, on the ground that even a regularly appointed conductor had no power to waive the rule.

[1] *Connolly* v. *Young's Paraffin Light & Mineral Oil Co.* (1894) 22 Sc. Sess. Cas. 4th series, 80 (averment that he had superintendence intrusted to him held not to be enough); *Albro* v. *Agawam Canal Co.* (1850) 6 Cush. 75 (action dismissed where injury alleged was due to superintendent).

In an early Missouri case a petition was held demurrable which alleged that

In jurisdictions where it is held that vice principalship is not inferable from the mere fact that the negligent servant was in a position of superiority, no cause of action is stated by a complaint showing only that he was a foreman.[2]

In jurisdictions where the negligence of a general manager is held to be imputable to the master, a complaint which describes the delinquent employee in terms which bring him within the scope of this rule is good.[3]

In jurisdictions where the superior servant doctrine (§§ 521 *et seq. infra*) is adopted, it is error for a trial judge to sustain a demurrer to a complaint which alleges facts indicating that the negligent employee controlled the injured plaintiff.[4]

511. Functions of court and jury in determining whether the negligent employee was a vice principal.—(Compare § 494, *ante*, and § 538, note 4, *post*.)—In one of the earlier English cases, Byles, J., expressed the opinion that it was for the jury to determine whether the negligent servant, the defendant's foreman, was a vice principal.[1] The doctrine thus adopted would seem to be the same as that which

the plaintiff was injured by the collapse of a bridge, that this bridge "was received by the chief engineer or superintendent of the road," and that "the company conducted themselves so negligently by their engineer, servants, etc., that, by reason of such negligence, the plaintiff received the injuries complained of." *McDermott* v. *Pacific R. Co.* (1860) 30 Mo. 115. But this petition would now undoubtedly be held good in Missouri itself, as well as in other American states, with the possible exception of Massachusetts.

[2] *McDonald* v. *Eagle & P. Mfg. Co.* (1881) 67 Ga. 761 (1882) 68 Ga. 639 (facts alleged showed negligent servant to be a mere foreman); *Gausior* v. *Minneapolis & St. L. R. Co.* (1877) 26 Minn. 385, 31 N. W. 515 (same grounds assigned for dismissing the action).

A complaint of which the gravamen is the negligent order of a superior servant who is not a vice principal is demurrable in the absence of an allegation that such servant was incompetent, or that the injured servant was sent, by the order, outside the scope of his employment. *Standard Cement Co.* v. *Minor* (1901) 27 Ind. App. 479, 61 N. E. 684.

[3] The complaint of an employee of a city is not demurrable where it alleges that the injury was caused by the negligence of a person appointed by the board of public works of the city, with the approval of the city council, to take charge of the work on the streets, with authority to employ and discharge men and control and direct the work in its entirety. *Hathaway* v. *Des Moines* (1896) 97 Iowa, 333, 66 N. W. 188.

In one Wisconsin case it was held that an allegation that the negligent employee was "agent and manager" does not convey any definite idea of the powers vested in him, as the court could not presume from this designation that he had all the powers of the company and stood in its place for all purposes. *Dwyer* v. *American Exp. Co.* (1882) 55 Wis. 453, 13 N. W. 471. Such a ruling could scarcely be made except in a court which still applies the strict standard of the older rules of pleading. It would doubtless be held, in most jurisdictions, that such an averment was sufficient to let in evidence tending to show the actual position of the agent in question. The case is useful, however, as suggesting the advisability of not confining the description to the mere official designation of the delinquent, but of expanding it in the manner indicated by the above-cited Iowa case.

[4] *Vix* v. *Texas P. R. Co.* (1891) 82 Tex. 473, 18 S. W. 571.

[1] *Gallagher* v. *Piper* (1864) 16 C. B. N. S. 669, 33 L. J. C. P. N. S. 329.

is not infrequently stated by American judges, *viz.*, that this question is one partly of law and partly of fact.[2] This doctrine involves the corollary that it is error to take the question from the jury, where there is a dispute as to the determinative facts, or those facts are such that more than one inference may be drawn from them.[3]

In other words the question whether the position of the delinquent employee was that of a vice principal is one for the jury, whenever the nature of his relations to his subordinates is left in doubt by the evidence.[4]

On the other hand it has frequently been explicitly declared, and is taken for granted in almost all the cases cited in this chapter, that it is for the court to say whether or not the negligent employee was a vice principal, in every case in which the facts are clearly established, and show precisely what were the respective duties of the plaintiff and the delinquent coemployee, and what relation they bore to one another.[5] Under such circumstances it is error to submit to

[2] *Union P. R. Co.* v. *Doyle* (1897) 50 Neb. 555, 70 N. W. 43; *Union P. R. Co.* v. *Erickson* (1894) 41 Neb. 1, 29 L. R. A. 157, 59 N. W. 347; *Wilson* v. *Charleston & S. R. Co.* (1896) 51 S. C. 79, 28 S. E. 91; *Potter* v. *Chicago, R. I. & P. R. Co.* (1877) 46 Iowa, 399; *Lake Erie & W. R. Co.* v. *Middleton* (1892) 142 Ill. 550, 32 N. E. 453, and cases cited in the following notes.

What a servant is employed to do is a question of fact: in what capacity he did the act complained of, whether as vice principal or fellow servant, is a question of law. *Johnson* v. *Boston Tow-Boat Co.* (1883) 135 Mass. 209, 46 Am. Rep. 458.

[3] *Pittsburgh Bridge Co.* v. *Walker* (1897) 70 Ill. App. 55; *Morris* v. *Pfeffer* (1898) 77 Ill. App. 516.

It is improper to grant a nonsuit where the evidence on behalf of the plaintiff tends to show that the negligent servant was a vice principal. *Brown* v. *Sennett* (1885) 68 Cal. 225, 58 Am. Rep. 8, 9 Pac. 74.

[4] *Mullan* v. *Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2 (for facts, see § 535, note 1, subd. (k), *infra*; *Consolidated Coal Co.* v. *Gruber* (1900) 91 Ill. App. 15, judgment affirmed in (1901) 188 Ill. 584, 59 N. E. 254 (finding upheld that the negligent employee was assistant mine manager, and not a fellow servant of a "shoveler").

[5] *Hall* v. *Johnson* (1865) 3 Hurlst & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 13 Week. Rep. 411 (verdict properly directed for the defendant where it was admitted that the negligent servant was the underlooker in his mine, and that the accident occurred because the mine was not propped as it should have been); *Stevens* v. *Cham[illegible]* (1900) 51 L. R. A. 513, 40 C. [illegible] 421, 100 Fed. 378 (citing several [illegible]ns of the Supreme Court); *Gar[illegible]* . *Durkee* (1898) 31 C. C. A. 30[illegible] S. App 587, 87 Fed. 302; *Neal* v. [illegible]*cthecu P. R. Co.* (1894) 57 Minn. 365, 59 N. W. 312; *Norfolk & W. R. Co.* v. *Houtz* (1894) 79 Md. 253, 25 L. R. A. 710, 29 Atl. 994 (citing *Yates* v. *McCullough Iron Co.* [1888] 69 Md. 382, 16 Atl. 280); *Norfolk & W. R. Co.* v. *Nichols* (1895) 91 Va. 193, 21 S. E. 342; *Callan* v. *Bull* (1896) 113 Cal. 593, 45 Pac. 1017; *Donnelly* v. *San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559; *Klees* v. *Chicago & E. I. R. Co.* (1896) 68 Ill. App. 244; *Stevens* v. *Chamberlin* (1900) 51 L. R. A. 513, 40 C. C. A. 421, 100 Fed. 378 (citing, as showing the practice of the supreme court, *New England R. Co.* v. *Conroy* [1899] 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85); *Central R. Co.* v. *Keegan* (1895) 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Northern P. R. Co.* v. *Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Hactin* v. *Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603; *Alaska Treadwell Gold Min. Co.*

the jury the question whether the defense of coservice is or is not available.[6]

512. Burden of proof.—(Compare § 563, *post.*)—From the principles stated in the preceding section it follows that the burden of proving that the negligent fellow employee was vested with such a measure of authority, or with such functions, as constituted him the representative of the master rests on the party alleging that he occupies that position, unless the vice principalship is a necessary implication from the nature of his agency or employment.[1]

No issue of fact as to the position of a servant can properly be said to be raised when the plaintiff brings forward no testimony but his own bare assertion that such servant is a superintendent, while the uncontradicted testimony of the defendant, resting upon tangible proofs, demonstrates that this assertion is erroneous.[2]

513. Scope of following subtitles.—In the remaining subtitles of this chapter only those decisions will be reviewed in which the essential question was whether the negligent employee was a vice principal by virtue of his official position, and the nature and extent of the control exercised by him over the fellow servant whose injury was caused by his negligence. The succeeding chapters will be devoted to a discussion of the cases in which the starting point of the investigation is the character of the particular act which caused the injury, and the master is held liable or absolved according as that

v. *Whelan* (1897) 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40.

[6] *Marshall* v. *Schricker* (1876) 63 Mo. 308; *Wilson* v. *Charleston & S. R. Co.* (1896) 51 S. C. 79, 28 S. E. 91.

Where, upon plaintiff's own statement of the facts, the delinquent employee was his fellow servant, the court should charge the jury that the action is barred on this ground, and leave the case to the jury upon such other contentions as may be raised by the declaration. *National Fertilizer Co.* v. *Travis* (1898) 102 Tenn. 16, 49 S. W. 832.

[1] *Patton* v. *Western North Carolina R. Co.* (1887) 96 N. C. 455, 1 S. E. 863. Where there is nothing to show what the duties of a train dispatcher are, it will be presumed that he was a fellow servant of an engineer. *Blessing* v. *St. Louis, K. C. & N. R. Co.* (1883) 77 Mo. 410 (plaintiff rightly nonsuited on the ground that it was shown merely that the train dispatcher controlled the movements of trains). In the absence of testimony showing what the power and duties of the conductor are, a railway company will not be held responsible for injuries resulting from his negligence in assuring a laborer that a piece of apparatus was safe. *McGowan* v. *St. Louis & I. M. R. Co.* (1876) 61 Mo. 528. The court said: "Prima facie all servants of a common master employed in running, operating, and rendering service with a train of cars are fellow servants. If there are facts which show that this relation does not really exist between all of such servants, the burden of showing such facts is on him who seeks to avail himself of the absence or nonexistence of such relation. This court cannot take judicial notice of the duties required of, or performed by, such servants, nor of the degrees of supremacy or subordination existing among them."

See also *Gilmore* v. *Oxford Iron & Nail Co.* (1892) 55 N. J. L. 39, 25 Atl. 707 (plaintiff nonsuited where nothing more is shown than that the negligent servant controlled the injured one).

[2] *Greenway* v. *Conroy* (1894) 160 Pa. 185, 28 Atl. 692.

act did or did not constitute a breach of some specific duty which the law regards as non-delegable. In some instances there is considerable difficulty in distinguishing these two classes of cases for purposes of classification (see the remarks in § 539, *post*); but usually the standpoint of the court is so unmistakable as to exclude all uncertainty with regard to the rationale of the decision. Wherever any doubt has been felt whether a particular case should be cited under this or the following chapter, it has been referred to in both of them.

In subtitles B-F of the present chapter, which contain the discussion of general principles, the writer has endeavored to show, as far as possible, the real value which the cases cited possess, as authorities, at the present time. But in order to lessen still further the danger of a misunderstanding on this point, it has been deemed advisable to append the summary, in chapter XXX., *post*, the main object of which is to indicate the fluctuations of opinion in the different jurisdictions. The practitioner is cautioned against relying on any particular decision, until he has ascertained from this summary how it stands with relation to other rulings of the same court.

B. Mere inequality of rank, significance of.

514. Usually held not to warrant inference that the superior servant is a vice principal.—So far as regards the jurisdictions in which the superior servant doctrine is rejected, it is sufficient to point out that, in most instances, the plaintiff's right of recovery on the mere ground of the negligent servant's higher rank is necessarily negatived by the fact that such higher rank, even when it is accompanied by the power of control, will not render him a vice principal.[1] In this group of

[1] In nearly all the very numerous instances in which the courts belonging to the class mentioned in the text have laid it down in general terms that the defense of common employment prevails, without respect to difference of grade or rank, the nature of the facts under discussion shows that the particular situation which the court had in view was that in which a superiority of rank is accompanied by a power of control. See, for example, *Columbus & I. C. R. Co.* v. *Arnold* (1869) 31 Ind. 174, 99 Am. Dec. 615; *Rogers* v. *Ludlow Mfg. Co.* (1887) 144 Mass. 198, 59 Am. Rep. 68, 11 N. E. 77; *O'Brien* v. *American Dredging Co.* (1891) 53 N. J. L. 291, 21 Atl. 324; *Blake* v. *Maine C. R. Co.* (1879) 70 Me. 60, 35 Am. Rep. 297; *Baltimore & O. R. Co.* v. *McKenzie* (1885) 81 Va. 71; *Norfolk & W. R. Co.* v. *Nuckols* (1895) 91 Va. 193, 21 S. E. 342.

"A master is not responsible to his servant for the negligent performance of some detail of the work intrusted to the servant, whatever may have been the grade of the [latter] servant." *Kimmer* v. *Weber* (1897) 151 N. Y. 417, 45 N. E. 860.

"There is no distinction as to the exemption of a common employer from liability to answer for an injury to one of his workmen from the negligence of another in the same employment in consequence of their being workmen of different classes." Lord Chelmsford, in

courts, therefore, it would seem that the significance of an inequality of grade cannot be of any practical importance except in those comparatively rare instances in which the control exercised was of such an extent and such a nature as to make the superior servant a head of department as regards his own subordinates, and his negligence proves injurious to a servant not under his control. This precise conjunction of circumstances so rarely arises that few specific authorities for the nonliability of the master in such cases are to be found in the books; but it has been distinctly recognized both by the Federal court of appeals and the Supreme Court of the United States that a conductor of a train, although a vice principal as to the men working under his orders, is a mere fellow servant as to men on other trains.[2]

In most of the courts which apply the doctrine that a servant is the

Wilson v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30.

The same remark may be made as to the language used in cases decided under statutes which are declaratory of common-law principles. Thus it has been laid down that the law of California "recognizes no distinction growing out of the grades of employment of the respective employees; nor does it give any effect to the circumstance that the fellow servant through whose negligence the injury came was the superior of the plaintiff in the general service in which they were, in common, engaged." *McLean* v. *Blue Point Gravel Min. Co.* (1876) 51 Cal. 255.

A chemist in a factory, having no direct authority over the other employees, is not a vice principal. *Wilson* v. *Hudson River Water Power & Paper Co.* (1893) 71 Hun, 292, 24 N. Y. Supp. 1072.

[2] *Northern P. R. Co.* v. *Poirier* (1896) 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741, Reversing on another point (C. C. A.) 15 C. C. A. 52, 29 U. S. App. 53, 67 Fed. 881, where the above doctrine was conceded. This decision overrules three others based upon the hypothesis that the doctrine of *Chicago, M. & St. P. R. Co.* v. *Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, has been supposed to involve the corollary that the conductor is a representative of the company, not only as to the men on his own train, but as to those on other trains also. *Northern P. R. Co.* v. *O'Brien* (1889) 1 Wash. 599, 21 Pac. 32; *Au* v. *New York, L. E. & W. R. Co.* (1886) 29 Fed. 72 (omission to see that brakemen were at their posts and brakes set on a steep grade—brakeman on another train injured by running away of train); *Ragsdale* v. *Northern P. R. Co.* (1889) 42 Fed. 383, is to the contrary.

In *Daniel* v. *Chesapeake & O. R. Co.* (1892) 36 W. Va. 397, 16 L. R. A. 383, 15 S. E. 162, the court was of opinion that a conductor, being a vice principal, as being in control of his own train, was also a vice principal as to a brakeman on another train. The *Ross Case* (§ 22, *ante*, and chapter XXX., *post*) was relied on, and as the decision of the Supreme Court of the United States just cited negatives that construction of its earlier ruling, it would seem that this West Virginia ruling must have lost its authority, even if it had not been overruled on the other grounds stated in subtitle H, *infra*.

Norfolk & W. R. Co. v. *Hoover* (1894) 79 Md. 253, 25 L. R. A. 710, 29 Atl. 994 (divisional train despatcher not vice principal as to engineer not employed by him, for the mere reason that he is of a superior grade) may also be cited as sustaining in some degree the general principle stated in the text, though here the difference of department was not alluded to by the court.

In *McMaster* v. *Illinois C. R. Co.* (1887) 65 Miss. 264, 4 So. 59, a conductor of one train was deemed to be a vice principal as to the employees on another. But such a decision is of no special significance in this state. See § 530, *infra*.

representative of the master in respect to any fellow servant over whom he exercises control (see subtitle C., *infra*), the rule is that, unless the higher rank of the negligent servant gave him the right of controlling the injured servant, the defense of common employment will prevail, even though the two servants are in the same department of the business.[3] In Kentucky alone it is held that the negligence of a servant who is higher in rank than the injured one will affect the master with liability even where the superiority of rank was not accompanied by a power of control (see chapter XXX., *post*).

For practical purposes, therefore, the courts are unanimous as to the doctrine that vice principalship is not to be inferred from the mere fact of superiority of rank. Very different is the situation

[3] In *East Tennessee, V. & G. R. Co.* v. *Rush* (1885) 15 Lea, 145, it was held that an engine driver and a servant employed to put danger signals on the track, though they are of different grades, are fellow servants. In *Nashville, C. & St. L. R. Co.* v. *Wheless* (1882) 10 Lea, 741, 43 Am. Rep. 317, the court, in holding a railroad company not liable to a brakeman for the negligence of the engineer, said: "Of course, in some cases a railroad company may be held liable to a brakeman for the negligence of an engineer,—as, where the former is in fact acting under the orders of the latter. We do not mean to hold that the relation of superior or inferior may not, in some cases, exist between them—only that it did not in this case, so far as the record shows. In this view we are of opinion that the facts do not show that the engineer was, in the sense we are considering, the superior of the plaintiff in this instance. They were engaged in a common service, each performing his particular part. They may both be said to have been acting under the orders, either express or implied, of the conductor. But the engineer did not assume any supervision of the work or give any orders in regard to it, and the plaintiff cannot, in any fair sense, be said to have been acting in this particular matter under the orders, either express or implied, of the engineer; and the mere fact that the engineer was the superior of the plaintiff in position, skill, intelligence, and pay, does not change the result." To the same effect is the language used, *arguendo*, in *Coal Creek Min. Co.* v. *Davis* (1891) 90 Tenn. 711, 18 S. W. 387. See also *Wright* v. *Northampton & H. R. Co.* (1898) 122 N. C. 852, 29 S. E. 100, holding that a section master who rides to and from his place of work on one of the railroad company's trains is a fellow servant with the engineer of such train, for whose negligence the former cannot recover, even though such engineer is also the conductor of the train. *Lincoln Coal Min. Co.* v. *McNally* (1884) 15 Ill. App. 181, denying recovery where a shift-boss in a mine injured a miner not under his control, by his carelessness in lowering a board down a shaft.

In *Pittsburg, Ft. W. & C. R. Co.* v. *Devinney* (1867) 17 Ohio St. 197, a brakeman of one train was held to be a fellow servant of the conductor of another. But this case seems to be in conflict on this point with a more recent one in the same state. *Dick* v. *Indianapolis, C. & St. L. R. Co.* (1882) 38 Ohio St. 389, where, in an action brought by a section man who was struck by a train, it was held error to take the question from the jury, inasmuch as the evidence tended to show that the train was run by the conductor at an unlawful rate of speed, and no warning signals were given. Compare also, to the same effect, *Daniel* v. *Chesapeake & O. R. Co.* (1892) 36 W. Va. 397, 16 L. R. A. 383, 15 S. E. 162, and the comments on it in note 2, *supra*. The principle applied in the last two cases has been embodied in the Ohio act of 1890, declaring that persons "having charge or control of employees in any separate branch or department" are not fellow servants of subordinate employees in other departments.

when the investigation begins to concern itself with the significance of the superior servant's right to control the inferior. The solvent and disturbing effect of the introduction of this element is strikingly indicated by the irreconcilable conflict of views disclosed in the cases cited in the following subtitles of this chapter. The boundaries between the dominions of each particular theory are so extremely obscure and ill-defined at their points of contact that it is often impossible to determine with certainty the principle to which a case should be referred, and the difficulty of classifying the cases on a satisfactory basis is enormously increased by the fluctuations of opinion in the same court. All that is possible, therefore, is to review the authorities under the broad categories into which the larger portion of them seem naturally to fall, and to note any instances in which the arrangement is necessarily defective, owing to an overlapping of theories or other causes.

C. Doctrine that vice principalship is not deducible merely from the possession of a power of control over the injured servant.

515. General statement of the doctrine.—The rule accepted by the great majority of the courts is that, for the purpose of determining whether the negligent employee is one of those for whose acts the master is responsible, the fact that one servant has control over another is immaterial, and that a master is not responsible for the negligence of a superior servant, even in giving orders whereby injury is sustained by the inferior servant.[1] This rule applies, whether the negligent order was given to the servant injured, or to another serv-

[1] *Moody* v. *Hamilton Mfg. Co.* (1893) 159 Mass. 70, 34 N. E. 185; *Howard* v. *Hood* (1892) 155 Mass. 391, 29 N. E. 630; *Mattise* v. *Consumers' Ice Mfg. Co.* (1894) 46 La. Ann. 1535, 16 So. 400; *O'Brien* v. *American Dredging Co.* (1891) 53 N. J. L. 291, 21 Atl. 324; *Indiana Car Co.* v. *Parker* (1884) 100 Ind. 181; *Foucs* v. *Phillips* (1882) 39 Ark. 17, 43 Am. Rep. 264 (reviewing instructions); *Blake* v. *Maine C. R. Co.* (1879) 70 Me. 60, 35 Am. Rep. 297 (*aranendo*); *Feltham* v. *England* (1866) L. R. 2 Q. B. 33, 7 Best & S. 676, 36 L. J. Q. B. N. S. 14, 15 Week. Rep. 151; and the cases cited in § 7, *post*.

"The common law of England is that, where fellow servants are engaged in a common employment, whether one is inferior to the other, whether one is bound to obey the other or not, the master is not liable for injury occasioned to the one through the negligence of the other. There has been some discussion how far the law of Scotland is the same, but it was long ago settled that the law of England is as I have stated." Lord Esher in *Hedley* v. *Pinkney & Sons S. S. Co.* [1892] 1 Q. B. 58.

"A servant who sustains an injury from the negligence of a superior agent, engaged in the same general business, cannot maintain an action against their common employer, although he was subject to the control of such superior agent, and could not guard against his negligence or its consequences." *Keenan* v. *New York, L. E. & W. R. Co.* (1895) 145 N. Y. 190, 39 N. E. 711. Citing

ant whose act in obedience to the order caused the injury,[2] and whether the control exercised was that incident to a more or less permanent relation, or merely temporary.[3]

For purposes of procedure the rule in question is treated as creating a presumption of fact, which, where the evidence is merely that the negligent servant controlled the injured one, requires the court to declare that the action is, as matter of law, not sustainable.[4]

Considered in its relation to the sufficiency of the pleadings, the rule entails the consequence that a complaint which alleges an injury resulting from the negligence of an employee whose designation indicates no more than that he was in control of the injured servant with respect to the work in progress is demurrable unless it also avers facts of which the legal effect is that the superior servant represented the master.[5]

Sherman v. *Rochester & S. R. Co.* (1858) 17 N. Y. 153; *Loughlin* v. *State* (1897) 105 N. Y. 159, 11 N. E. 371.

"The fact that the person whose negligence causes the injury is a servant of a higher grade than the servant injured, or that the latter is subject to the direction or control of the former, and is engaged at the time in executing the orders of the former, does not take the case out of the operation of the general rule stated, nor make the master liable." *Vitto* v. *Keogan* (1897) 15 App. Div. 329, 44 N. Y. Supp. 1.

"The rule [*i. e.*, as to the defense of common employment] is the same, although the one injured may be inferior in grade, and is subject to the control and direction of the superior whose act caused the injury, provided they are both co-operating to effect the same common object." *Lehigh Valley Coal Co.* v. *Jones* (1878) 86 Pa. 439.

In several of the states the opinions of the courts have undergone a change, the result being sometimes a departure from, sometimes an adoption of, the principle stated in the text. See the summary in chapter XXX., *post*.

[2] *Moody* v. *Hamilton Mfg. Co.* (1893) 159 Mass. 70, 34 N. E. 185. The following are a few of the numerous cases in which the order was given to a fellow servant of the injured person: *Huska Treadwell Gold Min. Co.* v. *Whelan* (1897) 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40; *Hussey* v. *Coger* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556; *Doughty* v. *Penobscot Log Driving Co.* (1884) 76 Me. 143; *McGinley* v. *Levering* (1893) 152 Pa. 366, 25 Atl. 824; *Benson* v. *Goodwin* (1888) 147 Mass. 237, 17 N. E. 517.

[3] *Hathaway* v. *Illinois C. R. Co.* (1894) 92 Iowa, 337, 60 N. W. 651.

[4] *White* v. *Fidlitz* (1897) 19 App. Div. 256, 46 N. Y. Supp. 184 (error to rule that a foreman represented the master, where there was no evidence tending to show that he had the requisite authority). A verdict should not be directed for the plaintiff where there is no evidence indicating special reasons for making an exception to the general rule that a mere foreman is not a vice principal. *Dube* v. *Lewiston* (1891) 83 Me. 211, 22 Atl. 112.

[5] *Flynn* v. *Salem* (1883) 134 Mass. 351. Compare *Lawler* v. *Androscoggin R. Co.* (1873) 62 Me. 463, 16 Am. Rep. 492 (road master ordered plaintiff to work in culvert known to be dangerous —demurrer sustained to complaint alleging merely that the road master carelessly managed the repairs of the culvert); *Brazil & C. Coal Co.* v. *Cain* (1884) 98 Ind. 882 (demurrer properly sustained where the only negligence alleged was that a "bank boss" in a mine sent a servant, a minor of nineteen years, who had been engaged in mining coal, to drive a bank car); *Peterson* v. *Whitebreast Coal & Min. Co.* (1879) 50 Iowa, 673, 32 Am. Rep. 143 (demurrer properly sustained to petition seeking to recover on the theory that the delinquent servant had "charge and control" of plaintiff).

See also *Robertson* v. *Chicago & E. R. Co.* (1896) 146 Ind. 486, 45 N. E. 655; *McDonald* v. *Eagle & P. Mfg. Co.* (1881) 67 Ga. 761 (1882) 68 Ga. 839.

The line which divides the cases controlled by this general rule and by the principle that the duty of giving instruction to servants who require it is nonassignable (see §§ 578, 579, *post*) is sometimes exceedingly thin,—as, where it was held that the fact that one employee has more experience than another and is authorized to give the latter directions in respect to their common work does not make him the vice principal of the employer.[6] All that would be necessary, under such circumstances, to convert nonliability into liability would be the introduction of evidence showing that the inexperience of the injured servant was an element in the accident, and that the master understood, or ought to have understood, the special danger arising from this source. In most instances, probably, the facts would readily bear this construction.

516. Rationale of the doctrine.— The theory upon which the rule stated in the last section rests is that the risk of a superior servant's negligence is as much an ordinary risk of the employment as is the risk of the negligence of a coequal or inferior servant.[1] The rea-

[6] *Rozelle* v. *Rose* (1896) 3 App. Div. 132, 39 N. Y. Supp. 363 (unsafe method of doing work adopted).

[1] "The same rule of liability must necessarily apply to the several grades of employments, where those in the inferior are subject to the direction and control of those in the higher grades, as to cases where all occupy a common footing and possess equal authority. . . . And what substantial difference is there between a case of injury from the negligence of a servant with superior authority, and one from like negligence of a servant of equal authority, employed at a distance from and without the immediate influence of the party injured? How could the latter better guard against the injury in the case last mentioned than in the former one? If distance is to have effect, what shall the distance be? It is manifest that no distinction or exception as to liability of the principal, resting on the inability of the injured party to protect himself in the particular case, could be made without practically abrogating the entire rule." *Sherman* v. *Rochester & S. R. Co.* (1858) 17 N. Y. 153.

"There is no principle which should make the employer liable to one of his common laborers for injuries sustained in consequence of the negligence of his foreman or overseer, which should not also make him liable for the negligence of another common laborer. There can not be any distinction of that kind. They all represent the principal, for certain purposes, and the principal is liable to a stranger for an injury received in consequence of the negligence of the former, as well as the latter." *Coon* v. *Syracuse & U. R. Co.* (1849) 5 Barb. 231.

In *Kalleck* v. *Deering* (1894) 161 Mass. 469, 37 N. E. 450, replying to the suggestion that the fact of ordering the servant to use an appliance which turned out to be defective was an act belonging to the superior servant as such, and might have the effect of taking the case out of the operation of the doctrine as to common employment, the court said: "Looking at the reason given for the exception to the general liability of masters for servants, the last suggestion cannot prevail. If the sailor takes the risk of a negligent injury to his person from a fellow sailor, there is equal reason to say that he takes the risk of a negligent command. A command is a transitory act which the employer has no chance to supervise. It is not like a permanent condition of land or machinery, or the abiding incompetence of an employee. See *Flynn* v. *Campbell* (1893) 159 Mass. 128, 35 N. E. 453. If the defendants have been guilty of no personal negligence, and the plaintiff does take the risk of the negligence of some persons with whom his work will bring him into contact,

sons of policy for extending the implication of a contract to assume this risk are necessarily the same as those by which the doctrine of common employment, as a whole, is sustained.[2]

This theory, if pushed to its strictly logical conclusions, lands us in a doctrine similar to that which, as will be explained below (§ 529, *infra*), was established in England by *Wilson* v. *Merry*.[3] But, as limited by the effect of the decisions which embody the conception of the nonassignability of certain duties of the master, and applied to the situations in which the effect of the mere element of control is commonly presented, it may be said to stand or fall with the correctness of the argument that, "if the servant is supposed to assume the risks which the master, with due care and diligence, cannot pre-

the question whether the negligence of one of those persons is within or outside of the risks assumed is not a matter of names or dignities. That is too well settled to need the citation of cases. *Moody* v. *Hamilton Mfg. Co.* (1893) 159 Mass. 70, 34 N. E. 185. The question is what he must be taken to have contemplated when he went into the employment. The chances of negligence on the part of a superior employed in the common business are as obvious as in the case of one of a lower grade, and, therefore, when the duty is not personal to the employer the same rule applies whatever the degree of the negligent employee. *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914."

In an article in 24 Am. L. Rev. 190, quoted with approval in *St. Louis, A. & T. R. Co.* v. *Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266; *Ell* v. *Northern P. R. Co.* (1891) 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222, and other cases, Judge Dillon remarks: "The real inquiry is, Was the injury caused by another servant one of the ordinary risks of the particular employment? If so, the mere grade, whether higher, lower, or co-ordinate, or the department of the faulty servant, is of no consequence. It is a condition of contract of service that the servant takes upon himself the risk of accidents in the common course of the business, all open and palpable risks, including the negligence of all fellow servants of whatever grade in the same employment. The true inquiry in each case is, Was the accident one of the normal and natural risks in the ordinary course of business? If so, then there is no common-law liability on the part of the employer; i. not, there is such liability; and the inquiry, except as it bears on the above, is not one of grades or departments. This is the final form the doctrine has assumed, and it is the correct one. It is plain, intelligible, and practical. It is founded upon just principles, viz., that it is precisely commensurate with the master's personal duties."

[2] "Sound policy seems to require that the law should make it for the interest of the servant that he should take care, not only that he be not himself negligent, but also that any negligence of others in the same employment be properly guarded against by him, so far as he may find it reasonably practicable, and be reported to his employer if needful." Cooley, Torts, 2d ed. 640, adopted in *Norfolk & W. R. Co.* v. *Houchins* (1897) 95 Va. 398, *sub nom. Norfolk & W. R. Co.* v. *Swaine*, 46 L. R. A. 359, 28 N. E. 578, and in *Jackson* v. *Norfolk & W. R. Co.* (1897) 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258.

"The fellow-servant rule is founded in wisdom, and any departure from it is dangerous to the prosperity and perpetuity of the enterprises of manufacturing, mining, railroading, and those industries requiring the services of many servants. More than this, it increases the dangers to such servants who may be so employed." *New Pittsburgh Coal & C. Co.* v. *Peterson* (1893) 136 Ind. 398, 35 N. E. 7, quoted with approval in *Jackson* v. *Norfolk & W. R. Co.* (1897) 43 W. Va. 381, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258.

[3] (1868) L. R. 1 H. L. Sc. App. 326, 19 L. T. N. S. 30.

vent, . . . he assumes the risks from negligence of those servants who may be placed over him as superior servants or overseers, as well as of those of equal grade with himself," for the reason that, "in respect to such overseers or superior servants, the master, when he has used due care in selecting them, cannot prevent their casual negligence, any more than he can prevent the casual negligence of those inferior in grade."[4] In other words, the function of giving directions as to the proper manner of performing the work is not one of those absolute, personal functions for the careful discharge of which a master is responsible, whatever agents he may employ.[5]

517. Qualification of the doctrine in cases where an order takes a servant outside the original scope of his employment.—As pointed out in § 465, *ante*, the effect of the decisions regarding the liability of a master for injuries received by a servant through his compliance with the order of a superior to incur risks not within the scope of the original contract of hiring is that, even in the courts which administer the doctrine now under discussion, the mere possession of a power of control is deemed to be a sufficient ground for letting in the operation of the rule of *respondeat superior*. The reasons assigned for this somewhat illogical qualification of the general rule are explained in the section referred to.

518. Power of hiring and discharging subordinates, significance of.—By all the courts which apply the above doctrine, it is held down or assumed that a mere foreman of a subordinate grade is not converted into a vice principal by the fact that, among his powers, is included that of hiring and discharging his subordinates.[1] No greater signifi

[4] *Brown* v. *Winona & St. P. R. Co.* (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484.

[5] See the language used in *Doughty* v. *Penobscot Log Driving Co.* (1884) 76 Me. 143; *Hofnagle* v. *New York C. & H. R. R. Co.* (1874) 55 N. Y. 608.

[1] *Abiskn Treadwell Gold Min. Co.* v. *Whelan* (1897) 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40; *Baleh* v. *Haas* (1896) 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. 974; *Cleveland, C. C. & St. L. R. Co.* v. *Brown* (1896) 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970; *Nowes* v. *Wood* (1894) 102 Cal. 389, 36 Pac. 766; *McLean* v. *Blue Point Gravel Min. Co.* (1876) 51 Cal. 255; *Ell* v. *Northern P. R. Co.* (1891) 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222; *Gilmore* v. *Oxford Iron & Nail Co.* (1892) 55 N. J. L. 39, 25 Atl. 707; *Schroeder* v. *Flint & P. M. R. Co.* (1894) 103 Mich. 213, 29 L. R. A. 321, 61 N. W. 663; *Hastings* v. *Montana Union R. Co.* (1896) 18 Mont. 493, 46 Pac. 264; *Lochbaum* v. *Oregon R. & Nav. Co.* (1900) 44 C. C. A. 220, 104 Fed. 852; *Casey* v. *Pennsylvania Asphalt Paving Co.* (1900) 198 Pa. 348, 47 Atl. 1128.

Averments that the superior officer whose negligence caused the plaintiff's injury was defendant's agent, with full authority "to control the work of, and to employ and discharge, the plaintiff from his employment, as well as other servants of said defendant," do not show that such officer was a vice principal in performing the act from which the injury resulted. *New Pittsburgh Coal & C. Co.* v. *Peterson* (1893) 136 Ind. 398, 35 N. E. 7. See also *Hanna* v. *Granger* (1894) 18 R. I. 597, 28 Atl. 659, cited at the end of the section.

cance will be attached to this power for the mere reason that the subordinate had special reasons for fearing that the result of disobedience would be the loss of his position.[2]

In the case of officials whose authority is so extensive as to constitute them general managers of an entire business or of a department of it (see sub-titles E, F *infra*), the evidential significance of this element is to be estimated with reference to the fact that such officials must always, as a matter of fact, possess the power of determining, either directly or through instructions to some intermediate foreman, what persons shall be employed or discharged.[3] Theoretically, therefore, wherever it is a matter of doubt whether a supervising employee stands above or below the line which separates mere foremen from departmental or general managers, proof that he possessed or did not possess the power of employing and discharging his subordinates probably is a material factor in the inquiry. In practice, however, the question or absence of such a power has very rarely been considered from this standpoint and in this connection, the judges naturally preferring to rest their conclusions on evidence of a more positive character. It would seem that, among the group of states with which we are now concerned, the only one in which any marked tendency has been shown to ascribe a really differentiating import to evidence that the delinquent co-employee possessed the power is Michigan.[4] In most of the judgments such evi-

[2] *Robertson* v. *Chicago & E. R. Co.* (1895) 146 Ind. 486, 45 N. E. 655 (superior was quick-tempered and passionate).

[3] In a Michigan case stress was laid on the fact that the assistant road master, who was held to be a vice principal, had control over the section master by whom the plaintiff was actually hired. *Palmer* v. *Michigan C. R. Co.* (1892) 93 Mich. 363, 17 L. R. A. 636, 53 N. W. 397.

[4] In one case it was laid down that the power of discharging was not a controlling factor, but an important one. *Palmer* v. *Michigan C. R. Co.* (1892) 93 Mich. 363, 17 L. R. A. 636, 53 N. W. 397. The ground of the dissent of two judges, in *Schroeder* v. *Flint & P. M. R. Co.* (1894) 103 Mich. 213, 29 L. R. A. 321, 61 N. W. 663, where the majority held that the boss or foreman of a gang of men unloading and leveling dirt on a railroad, who is under the immediate control of a railroad official who is often present, sometimes daily, directing the work, is a fellow servant of a member of the gang who is injured by the foreman's failure to give notice that the train is about to move, was that, admitting the act which was neglected—*viz.*, giving notice of the intention to move the engine—to be that of a mere fellow servant, the evidence showed the delinquent co-employee to have been in full control of a branch of the company's business with complete power to hire and discharge his subordinates. The cases relied upon were *Hunn* v. *Michigan C. R. Co.* (1889) 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502, and *Harrison* v. *Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034. As to the first of these, the possession of the power of discharge is merely mentioned as a cumulative fact. In the second it was certainly laid down, *arguendo*, that "whether or not the servant has power to employ and discharge other servants is also important in determining whether or not he is deemed to be a superior servant, for whose acts the master is held liable." But there the court did not refer to any other au-

dence is merely referred to as a fact of a corroborative character, rendering still more unquestionable a conclusion sufficiently justified on other grounds.[5] The absence of the power is, of course, conclusive against the inference that the delinquent employee was a vice principal, for it would be an abuse of language to apply that term to any official who is incapable of exercising a function so essentially characteristic of a master as that of deciding who shall or shall not work for him.[6]

cities but *Chapman* v. *Erie R. Co.* (1871) 55 N. Y. 579, and *Kansas P. R. Co.* v. *Salmon* (1873) 11 Kan. 83. These are merely to the effect that a servant invested with the power of employing and discharging other servants is a vice principal as regards the exercise of that particular power, and therefore do not sustain the theory in aid of which they are vouched; *viz.*, that a general agency may be implied from the possession of this power. The majority of the court in the *Schroeder Case* recognized the doctrine of departmental vice principal-ship, but did not discuss the evidence directly from the standpoint of the minority. It should be observed that this court holds section foremen to be mere servants (see summary of Michigan decisions in chapter XXX, *post*), a doctrine which shows that the possession of a power of discharge is not regarded by it as conclusively proving the possessor to be a vice principal.

[5] See, for example, *Gormly* v. *Vulcan Iron Works* (1876) 61 Mo. 492; *Denver, S. P. & P. R. Co.* v. *Driscoll* (1889) 12 Colo. 520, 21 Pac. 708; *Colorado Midland R. Co.* v. *Naylon* (1892) 17 Colo. 501, 30 Pac. 249; *Erickson* v. *Milwaukee L. S. & W. R. Co.* (1892) 93 Mich. 114, 53 N. W. 231; *Shumway* v. *Walworth & A. Mfg. Co.* (1894) 98 Mich. 411, 57 N. W. 251; *Babbitt* v. *St. Louis, K. & N. W. R. Co.* (1888) 75 Iowa, 297, 39 N. W. 507; *Brooks* v. *Lowell* (1894) 4 C. C. A. 37, 4 U. S. App. 49, 48 Fed. 62.

[6] Probably for the reason that the above principle is essentially incontestable, it has never, so far as the writer is aware, been discussed in any reported case. The absence of a power of employing and discharging subordinates is not infrequently mentioned among the facts which are deemed to negative vice principal-ship; but in all these instances the nonrepresentative character of the employee was indisputable for other reasons: *Peschel* v. *Chicago, M. & St. P. R. Co.* (1884) 62 Wis. 338, 21 N. W. 269; *Drovers* v. *Spencer* (1895) 17 C. C. A. 215, 25 U. S. App. 141, 70 Fed. 480; *Richmond Locomotive Works* v. *Ford* (1897) 94 Va. 527, 27 S. E. 509; *Delaware & H. Canal Co.* v. *Carroll* (1879) 89 Pa. 382; *Brown* v. *Winona & St. P. R. Co.* (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484; *Keystone Bridge Co.* v. *Newberry* (1880) 96 Pa. 246, 12 Am. Rep. 513; *Fox* v. *Chicago, R. I. & P. R. Co.* (1884) 61 Iowa, 611, 21 N. W. 121.

Sometimes the fact that a power of discharge was to be exercised by a foreman subject to the approval of a general superintendent or other higher official is mentioned as a reason by declaring him to be a mere coservant. *O'Brien* v. *American Dredging Co.* (1891) 53 N. J. L. 291, 21 Atl. 324; *Gagnon* v. *Davis* (1898) 31 C. C. A. 306, 52 U. S. App. 587, 87 Fed. 302. From our present point of view this situation is plainly the same as one in which the power cannot be exercised at all.

In one case it was denied that the nonpossession of the power deprived the supervising employee of the character of a vice principal, and it was laid down that "the most satisfactory evidence that one is, as to his coemployees, a vice principal is that his coemployees are under his supervision, his control, subject to his orders and direction." *Union P. R. Co.* v. *Doyle* (1897) 50 Neb. 555, 70 N. W. 43. But this ruling was made in a state where the "superior servant" doctrine prevails (subtitle D, *infra*), and it was not necessary to refer to the consideration which would undoubtedly have been deemed controlling in any of the states we are now concerned with,—*viz.*, that an official like the one in question, a head of a department, although he might not have exercised the power directly, could have exercised it by issuing the necessary orders to the foreman who had actually hired the injured person.

Where the alleged breach of duty was the employment or retention of unfit servants, the evidential significance of the power of hiring and discharging subordinates is considered from a standpoint quite different from that which is appropriate where the general agency of a delinquent employee is in question. The breach of such a duty by a person possessing such a power necessarily imports a breach of a non-delegable duty by one who is the master's agent for its performance, and if the possession of the power is proved, the master's liability is an unavoidable inference.[7]

519. Application of the doctrine to the various grades of supervising employees.— As will be seen from the general collection of authorities cited in the note to the following section, the most numerous illustrations of the doctrine now under discussion are furnished by the decisions absolving the master from liability for injuries caused by the negligence of employees appointed to direct the laborers of those small bodies of servants who, in every industrial concern of any considerable magnitude or complexity, must necessarily be intrusted with certain distinct duties, which are of such a nature as to segregate them into more or less independent groups, but which are commonly of a somewhat mechanical character, not requiring for their performance the exercise of any of the higher qualities of a superintending officer.[1] That is to say, the controlling conception in the

[7] "Undoubtedly the power to hire and discharge is the test of a vice principal when the question involved is that of selecting or retaining proper servants; for in this respect the servant would clearly represent the master. But in no other sense is it a test. The power to summarily discharge unworthy servants and to hire new ones is often a very necessary and beneficial power for the safety of other servants, for it gives a foreman authority to compel attention to duty. But it does not change the character of the foreman's duties from that of a servant to those of the principal, nor does it impose upon him the master's responsibility in other respects." *Houna* v. *Granger* (1894) 18 R. I. 507, 28 Atl. 659.

[1] In *O'Brien* v. *American Dredging Co.* (1891) 53 N. J. L. 291, 21 Atl. 324, the court said: "Whether the master retain the superintendence and management of his business, or withdraws himself from it and devolves it on a vice principal or representative, it is quite apparent that, although the master or his representative may devise the plans, engage the workmen, provide the machinery and tools, and direct the performance of work, neither can, as a general rule, be continually present at the execution of all such work. It is the necessary consequence that the mere execution of the planned work must be intrusted to workmen, and, where necessary, to groups or gangs of workmen, and in such case that one should be selected as the leader, boss, or foreman, to see to the execution of such work. This sort of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made use of in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow workman. The foreman or superior servant stands to him, in that respect, in that precise position of his other fellow servants."

In another case we find it remarked that an employee is a fellow servant with a foreman under whose direction

majority of cases is that, to justify imputing the negligence of an employee to the master, "he must be more than a mere foreman to oversee a batch of hands, direct their work under the supervision of the master, see that they perform their duty, and, in case of dereliction, report them."[2] Or, as it has also been put, "in order to constitute one a vice principal, he must have general power and control over the business, and not mere authority over a certain class of work or a certain gang of men."[3]

Under the rulings, as they stand, there is no warrant for the contention that evidence of the participation of such employees in the manual labor of their subordinates is at all necessary to establish that they are mere fellow servants; and it has been expressly laid down in at least one case that the fact of a foreman's not engaging in such labor is immaterial in this connection.[4] In the cases where it is mentioned, such evidence seems to be regarded as of merely cumulative force.[5] And the same may be said of evidence that the foreman received the same compensation as his subordinates.[6] From a purely logical standpoint these circumstances may be regarded as negativing the inference that the supervising employees were of sufficiently high rank to be general managers or heads of departments. But in all conceivable cases this inference would, in any event, be so clearly excluded on other grounds, where the delinquent employees were of the humble class indicated by such evidence, that its practical weight in the determination of their character and capacity would be very slight indeed.

he is at work, where the only judgment and discretion exercised by such foreman is that which "belongs to a co-worker in a superior grade." *Lavich* v. *Hoics* (1894) 18 R. I. 513, 28 Atl. 661 (where the work to be done was simply getting a load of sand).

[2] *Dobbin* v. *Richmond & D. R. Co.* (1879) 81 N. C. 446, 31 Am. Rep. 512. The principle thus laid down, however, has not been construed in the North Carolina court in the same sense or applied to the same classes of employees as in most of the courts which have expressed their views in similar terms. See § 549, note 1, *post*.

[3] *New York, L. E. & W. R. Co.* v. *Bell* (1886) 112 Pa. 400, 4 Atl. 50. Servants employed at the same kind of work, except that one has authority to give directions to the other as to the manner of doing the work, are fellow servants. *Postal Teleg. Cable Co.* v. *Hulsey* (1896) 115 Ala. 193, 22 So. 854. Compare the language used in *Ludre* v. *Winslow Bros. Elevator Co.* (1898) 117 Mich. 560, 76 N. W. 86, and the cases cited in § 536, *infra*, deciding that certain employees are not departmental vice principals.

[4] *Northern P. R. Co.* v. *Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

[5] See, for example, *Moore Lime Co.* v. *Richardson* (1897) 95 Va. 326, 28 S. E. 334; *Balch* v. *Haas* (1896) 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. 974; *Dearers* v. *Spencer* (1895) 17 C. C. A. 215, 25 U. S. App. 411, 70 Fed. 480; *Central R. Co.* v. *Keegan* (1895) 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Cates* v. *Huey* (1898) 104 Ga. 879, 30 S. E. 884; *Ludre* v. *Winslow Bros. Elevator Co.* (1898) 117 Mich. 560, 76 N. W. 86.

[6] *Griffiths* v. *New Jersey & N. Y. R.*

In some instances the specific ground upon which supervising employees have been declared to be mere servants is that they were not heads of departments.[7] But nothing is gained by the use of a test which gets rid of one difficulty by introducing another equally great. The conception of a "department" is one which, even after all the rulings which deal with the subject, remains too essentially vague to serve as an element of differentiation between the cases in which the master is liable and the cases in which he is not liable.[8] Besides, it is abundantly evident from a comparison of the rulings cited under the next section with those relating to vice principals in charge of departments, that even this unsatisfactory test would not supply a basis on which the decisions could be reconciled. Only in one class of cases does it seem to suggest a rule of evidence which can be of any practical service,—those, namely, in which the delinquent foreman was himself subject to a higher official, who was plainly the master's general agent, if there was one at all, as regards the work in progress. This subordinate position of foremen, denied to be vice principals, is frequently adverted to by the courts.[9] A

Co. (1893) 5 Misc. 320, 25 N. Y. Supp. 812. Affirmed in (1894) 8 Misc. 3, 28 N. Y. Supp. 75.

[7] See cases cited in § 536, *infra*. In *Mullan* v. *Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2, it was distinctly ruled that an agent of the employer is not a vice principal unless he has charge of the entire business, or a department of it.

[8] See § 521a, *infra*, and the remarks of the court in the recent case of *Grattis* v. *Kansas City, P. & G. R. Co.* (1900) 153 Mo. 380, 48 L. R. A. 398, 55 S. W. 108.

[9] *Richmond Locomotive Works* v. *Ford* (1897) 94 Va. 627, 27 S. E. 509 (gang boss under foreman of machine shop); *Cleveland, C. C. & St. L. R. Co.* v. *Brown* (1896) 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970. Reversing on rehearing (1893) 6 C. C. A. 142, 18 U. S. App. 16, 56 Fed. 804 (subordinate foreman having a departmental superior); *What Cheer Coal Co.* v. *Johnson* (1893) 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. 810 (a foreman in a mine, controlled by a pit boss, who was himself under the superintendent); *Gayuon* v. *Durkee* (1898) 31 C. C. A. 306, 52 U. S. App. 587, 87 Fed. 302 (general foreman of railway shops, who is himself under the control of the master mechanic—workmen ordered into unsafe place); *Dearers* v. *Spencer* (1895) 17 C. C. A. 215, 25 U. S. App. 411, 70 Fed. 480 (track foreman subordinate to a supervisor); *New York, L. E. & W. R. Co.* v. *Bell* (1886) 112 Pa. 400, 4 Atl. 50 (gang boss in railway repair shops under master mechanic); *McBride* v. *Union P. R. Co.* (1889) 3 Wyo. 247, 21 Pac. 687 (gang boss under control of the master mechanic's foreman); *Keystone Bridge Co.* v. *Newberry* (1880) 96 Pa. 246, 42 Am. Rep. 543 (gang boss under direction of a superintendent); *Johnson* v. *Ashland Water Co.* (1890) 77 Wis. 51, 45 N. W. 807 (foreman in exclusive charge of calking and laying pipes under the general superintendent of a water company); *Peschel* v. *Chicago, M. & St. P. R. Co.* (1885) 62 Wis. 338, 21 N. W. 269 (one of several foremen subordinate to a master carpenter); *Coulson* v. *Leonard* (1896) 77 Fed. 538 (foreman with supervision over several men in erecting the iron work of a building, subject to the supervision of a member of the corporation employing them—injury caused by improper signal); *Ibid.*; *Fordyce* v. *Briney* (1893) 58 Ark. 206, 24 S. W. 250 (foreman of car repairers who is under the foreman of the roundhouse); *McGinley* v. *Leering* (1893) 152 Pa. 366, 25 Atl. 824 (assistant foreman); *Murray* v. *Crimmins* (1895) 14 Misc. 466, 35 N. Y. Supp. 1023, (some facts); *Collins* v. *Crimmins* (1895) 11 Misc. 24,

like deduction is drawn, and for similar reasons, where the master was supervising the operation himself, and the superior servant was working under his directions. Here the very nature of the situation excludes the theory that he was a representative of the master.[10] Where this subjection to a general manager or to the master himself, as his own superintendent, is established, the mere fact that the manager or the master was not actually present in person and managing the operations when the injury was received, will not have the effect of converting the subordinate foreman into a vice principal.[11] In order that this result may follow from the absence of

31 N. Y. Supp. 860 (same facts); *Connolly* v. *Manver* (1893) 6 Misc. 98, 26 N. Y. Supp. 18 (foreman of men engaged under a general superintendent in the construction of a particular part of a building, having authority to tell the men when to work and when to stop, when their services are no longer needed, and when they are required—recently built arch gave way, from which the foreman had prematurely removed the centers); *Belfus* v. *New York, L. E. & W. R. Co.* (1883) 29 Hun, 556 (a wreck master taking his orders from an official in charge of the shops and yards); *Barringer* v. *Delaware & H. Canal Co.* (1879) 19 Hun, 216 (section foreman with two superiors, a track master and a superintendent, between him and the company); *O'Brien* v. *American Dredging Co.* (1891) 53 N. J. L. 201, 21 Atl. 321 (plaintiff's foot drawn into machinery of dredge set in motion by the "engineer" or foreman operating a dredge under the control of the general superintendent of the company); *Gilmore* v. *Oxford Iron & Nail Co.* (1892) 55 N. J. L. 39, 25 Atl. 707 (foreman of mine under a general superintendent); *Schroeder* v. *Flint & P. M. R. Co.* (1891) 103 Mich. 213, 29 L. R. A. 321, 61 N. W. 663 (foreman of gang of grabers under the immediate control of another official, who was frequently present directing the work); *McDermott* v. *Boston* (1882) 133 Mass. 349 (foreman of laborers in the service of a city, who was himself controlled by a general superintendent).

Many of the cases cited under the next section, especially those relating to foremen of section gangs and in mines, will serve to illustrate the same point of view, whether the control by a higher superior is explicitly referred to or not.

In *Belch* v. *Haas* (1896) 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. 974, a case where the negligent servant was the foreman of a gang engaged in excavation, the court reasoned thus: "Clausen was not charged with the superintendence and control of the entire business of his employers. He was not the manager or head of a department of a diversified business. Neither was he engaged at the time of the accident in the performance of a special duty which the law devolved upon his employers. On the contrary, he was simply an ordinary foreman, who had charge of a gang of laborers, and who usually worked with them. He did not even have full control of the particular job on which he was employed, for another foreman was engaged on the same work, who seems to have had equal authority, and both foremen were under the general supervision of the common master."

[10] See *Malone* v. *Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573, where (dissenting, Church, Ch. J., and Rapallo, J.) it was held erroneous to give an instruction framed on the theory that vice principalship was predicable of a mere foreman of carpenters,—one charged with the special duty of executing repairs in a building, "but performing them under general or special instructions from the principal, who retains and has the general supervision of the business and to whom and whose immediate direction, all [the employees] are subject." Similarly, a vice principal loses his representative character for the time being when the employer himself assumes control and directs him how to do the work in hand. *Percost* v. *Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88.

[11] *Dearers* v. *Spencer* (1895) 17 C. C. A. 215, 25 U. S. App. 411, 70 Fed. 480. See also *Bean* v. *Vail* (1881) 65 Iowa, 407, 21 N. W. 700, where the master was ordinarily absent. The immateriality of the fact that no vice principal was pres-

his superiors, it must be shown that, under the arrangements of the establishment, he was to be in sole charge and to wield the same powers of control as the manager himself, whenever that manager should be absent.[12]

If the negligent servant was, as a matter of fact, a mere foreman, the position of the plaintiff is in no wise improved by the circumstance that he was called a superintendent.[13]

520. Illustrative cases.— The supervising employees specified in the subjoined note have been held to be mere fellow servants of their subordinates. For brevity's sake, everything but the mere designation of the delinquent has been omitted in most instances, the nonliability of the master being understood to be the effect of the ruling, where nothing is stated to the contrary.

The facts, as indicated by the memoranda appended to the citations, should be compared with those involved in the cases to be discussed in the next two chapters, in which the master's nonliability is referred directly to the character of the act which caused the injury as being essentially that of a mere servant. In this connection it should be remarked that, in not a few instances, it is extremely difficult to say whether the court intends to rely upon the ground that the operation of the doctrine of common employment is not defeated by the fact that the delinquent controlled the injured servant or upon the ground that the delinquent was, in any event, a mere fellow servant as to the act which caused the injury, or upon both these grounds. In view of the uncertainty thus created, it has been deemed advisable to include in the following list a good many cases which might, with apparently equal propriety, have been reserved for the following chapters.

These rulings may also be advantageously contrasted with those which illustrate the superior servant doctrine in its application to employees holding similar or identical positions. See subtitle D, *infra*.[1]

ent at the time of the injury is evidently taken for granted in many of the decisions already cited, especially those respecting the foreman of track-repairing gangs, and similar bodies of men, who normally do their work under circumstances which preclude the exercise of a personal control by the higher agents of the master.

[12] See cases cited in § 509, *supra*.

[13] See § 508, *supra*.

[1] (a) *General and departmental managers.*— The consideration of the status of these functionaries is reserved for subtitles E, F, *infra*.

(b) *Employees in control of railway trains or parts thereof.*—As is apparent from the cases cited below, the regular conductor of a train is held to be a mere servant by all the courts outside those which reject the superior servant doctrine (subtitle D, *infra*), and those which, while not accepting that doctrine, hold conductors to be departmental vice principals (subtitle F, *infra*). It would seem that the Supreme Court of

the United States is no longer to be reckoned in the latter category. See § 535, note 1, subd. (b), *infra*.

Cosgrave v. *Southern P. R. Co.* (1891) 88 Cal. 360, 26 Pac. 175 (breach of rules in starting train before scheduled time); *McCosker* v. *Long Island R. Co.* (1881) 84 N. Y. 77 (signaled to engineer to back train while brakeman was in a dangerous position); *Thayer* v. *St. Louis, A. & T. H. R. Co.* (1864) 22 Ind. 26, 85 Am. Dec. 409 (brakeman fell into an open culvert, while obeying an order of the conductor to detach a car, and sought to recover on the ground that the conductor was negligent in not slackening the speed of the train after the order was given); *Louisville, N. A. & C. R. Co.* v. *Southwick* (1896) 16 Ind. App. 486, 44 N. E. 263 (conductor was helping a brakeman to unload a car); *Georgia P. R. Co.* v. *Davis* (1890) 92 Ala. 300, 9 So. 252 (orders given in the management of the train); *Dow* v. *Kansas P. R. Co.* (1871) 8 Kan. 642 (decided on demurrer); *Whitmore* v. *Boston & M. R. Co.* (1890) 150 Mass. 477, 23 N. E. 220 (backing cars in such manner as to crush car repairer); *Jarman* v. *Chicago & G. T. R. Co.* (1893) 98 Mich. 135, 57 N. W. 32 (did not reject an improperly loaded car from his train); *La Pierre* v. *Chicago & G. T. R. Co.* (1894) 99 Mich. 212, 58 N. W. 60 (not placing car on siding while being unloaded, and ordering excessively heavy packages to be carried across the plank that was needed to reach the platform. See, however, summary of Michigan decisions in subtitle II, *infra*); *McGowan* v. *St. Louis & I. M. R. Co.* (1876) 61 Mo. 528 (assurance that defective rope was safe), recently followed, after a long series of antagonistic rulings (see subtitle D, *infra*, and chapter XXX., *post*), in *Grattise* v. *Kansas City, P. & G. R. Co.* (1899) 153 Mo. 380, 48 L. R. A. 399, 55 S. W. 108 (signal to go ahead—held error to instruct a jury on the theory that a conductor was, as matter of law, a vice principal); *Criswell* v. *Montana C. R. Co.* (1896) 18 Mont. 167, 33 L. R. A. 554, 44 Pac. 525, Reversing (1895) 17 Mont. 189, 42 Pac. 767, on the ground that the territorial statute under which the earlier ruling had been made had been abrogated by a self-executing provision of the state Constitution; *Sherman* v. *Rochester & S. R. Co.* (1853) 15 Barb. 574 (1858) 17 N. Y. 153 (train was run at dangerous speed); *Woodlen* v. *Western N. Y. & P. R. Co.* (1895) 147 N. Y. 508, 42 N. E. 199, Reversing (1891) 43 N. Y. S. R. 218, 16 N. Y. Supp. 840 (1892) 46 N. Y. S. R. 77, 18 N. Y. Supp. 768 (exercise of discretion in not applying for more brakemen or to have some of the cars set off before descending a steep grade); *Robinson* v. *Houston & T. C. R. Co.* (1877) 46 Tex. 540 (order to get on moving train. See, however, summary of Texas decisions, subtitle H, *infra*); *Norfolk & W. R. Co.* v. *Hawkins* (1897) 95 Va. 398, *sub nom. Norfolk & W. R. Co.* v. *Swaine*, 46 L. R. A. 359, 28 S. E. 578 (directing trains onto track on which a train from the opposite direction is due), overruling earlier cases in this state (see § 524, note 2, subd. (c), *infra*, and chapter XXX., *post*); *Jackson* v. *Norfolk & W. R. Co.* (1897) 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258 (signaled to engineer to back a train before the plaintiff, a brakeman, was ready to make a coupling), overruling earlier decisions in this state. See § 524, note 2, subd. (c), *infra*, and chapter XXX., *post*; *Heine* v. *Chicago & N. W. R. Co.* (1883) 58 Wis. 525, 17 N. W. 420 (laborer was injured by the train's being started without warning).

The conductor of a construction train was held to be a mere servant. *Cassidy* v. *Maine C. R. Co.* (1884) 76 Me. 488 (laborer ordered to jump from moving train). The same ruling has also been made as to the fireman of a gravel train (*O'Connell* v. *Baltimore & O. R. Co.* [1863] 20 Md. 212, 83 Am. Dec. 549); the foreman of a material train (*St. Louis, I. M. & S. R. Co.* v. *Shackelford* [1883] 42 Ark. 417 [train set in motion without warning while laborer was shifting rails from one car to another]); and the foreman of a train crew unloading and leveling dirt on a railway (*Schroeder* v. *Flint & P. M. R. Co.* [1894] 103 Mich. 213, 29 L. R. A. 321, 61 N. W. 663 [failed to give notice that a train was about to move]).

The engineer of an engine not drawing a train, who has no subordinate except a fireman, is a mere servant. *Howard* v. *Denver & R. G. R. Co.* (1886) 26 Fed. 837 (disobeyed instructions as to running of engine). Even though the engineer in such case may be called a conductor, and has full charge of the engine. *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914 (running engine without orders—see further, as to this case, under § 535, note 1, subd. (b), *infra*).

Contrast the cases cited in the general list in subtitle D, *infra*, as to the status an engineer obtains by the "superior servant" doctrine under the same circumstances.

In *Hayes* v. *Western R. Corp.* (1849) 3 Cush. 270, the court declined to discuss the question whether a conductor was a vice principal, but held that, at all events, the company was not liable for the negligence of a brakeman acting as a conductor on a section of a train temporarily divided. The negligence alleged was that the brakeman neither went on the rear car himself, nor stationed another brakeman there, the result being that the train parted on a grade and the rear section ran into the forward one.

As to the status of conductors in South Carolina, see § 535, note 1, subd. (b), *infra*, and chapter XXX., *post*.

Under ordinary circumstances an engineer is a coservant of his fireman, though the latter is under his control. *Brigal* v. *Southern P. Co.* (1900) 39 C. C. A. 359, 98 Fed. 958.

(c) *Supervising employees in railway yards.*—A general yard master in full control of a yard. *Cincinnati, N. O. & T. P. R. Co.* v. *Gray* (1900) 50 L. R. A. 47, 41 C. C. A. 535, 101 Fed. 623. Affirming *Thomas* v. *Cincinnati, N. O. & T. P. R. Co.* (1899) 97 Fed. 215 (while handling an engine in the absence of the engineer, the yard master backed a train rapidly against a switch, which, being closed, derailed the car on which the plaintiff, a yard foreman, was, and dashed it against another car on an adjacent track); *McMahon* v. *Henning* (1880) 1 McCrary, 516, 3 Fed. 353 (ran cars together at excessive speed, injuring coupler). An employee commonly acting for a yard master. *Kirk* v. *Atlanta & C. Air-Line R. Co.* (1886) 94 N. C. 625, 55 Am. Rep. 621 (gave a signal which caused an engineer to drive his train against the car which plaintiff was repairing—functions said to be merely attending to details). See, however, the summary of North Carolina decisions, chapter XXX., *post*.

A foreman subject to the orders of a yard master. *Fraker* v. *St. Paul, M. & M. R. Co.* (1884) 32 Minn. 54, 19 N. W. 349 (directions as to the manner of removing a damaged car).

The foreman of a drill crew in a railroad yard, who is "a component part of the crew and active coworker in the manual work of switching, with the specific duty assigned to him by the yard master of turning the switches." *Central R. Co.* v. *Keegan* (1895) 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269 (moving detached cars without anyone on them to set the brakes).

A foreman of a switching crew. *Flanagan* v. *Chicago & N. W. R. Co.* (1880) 50 Wis. 462, 7 N. W. 337 (ordered plaintiff to mount a car with a defective jaw strap; verdict for him set aside, as there was no evidence that foreman was charged with the duty of inspecting the cars, or knew of the defect).

The foreman of one of several switching crews working under the general control of a yard master. *Harley* v. *Louisville & N. R. Co.* (1893) 57 Fed. 141 (signaled at improper time for the movement of a car).

A yard foreman. *Hunt* v. *Hurd* (1900) 39 C. C. A. 226, 98 Fed. 683 (failed to station brakeman on backing car to give notice of their approach to employees on the track).

(d) *Foremen of wrecking gangs on railways.*—A wreck master. *McGrath* v. *Texas & P. R. Co.* (1894) 9 C. C. A. 153, 23 U. S. App. 86, 60 Fed. 555 (wrecking car improperly placed, and no ropes used to keep the derrick in position).

The acting foreman of a wrecking car. *Flippin* v. *Kimball* (1898) 31 C. C. A. 282, 59 U. S. App. 1, 87 Fed. 258 (excessive strain on rope attached to a derrick broke it).

These two Federal decisions may probably be regarded as superseding one to the contrary effect. *Burgman* v. *Omaha & St. L. R. Co.* (1890) 41 Fed. 667. See § 535, note 1, subd. (e), *infra*. But, on the facts, it is just possible that, in the earlier case, the delinquent really occupied a position sufficiently high to make him a departmental vice principal.

The superintendent of removal of wrecks, taking his orders from the employee in charge of shops and yards. *Rollins* v. *New York, L. E. & W. R. Co.* (1883) 29 Hun, 556 (clasp holding derrick car to trestle while a wrecked car was being hoisted was ordered to be struck loose, the result being that the derrick car was pulled off the trestle).

(e) *Employees supervising track work on railways.*—An "inspector" apparently a roadmaster—and a railway laborer. *Macfarlane* v. *Caledonian R. Co.* (1867) 6 Sc. Sess. Cas. 3d Series, 102 (servant sent to watch a bridge, without being informed at what time

trains were to be expected was run over).

A roadmaster. *Lawler* v. *Androscoggin R. Co.* (1873) 62 Me. 463, 16 Am. Rep. 492 (declaration demurrable which alleges an order to work under a dangerous overhanging bank); *Brown* v. *Winona & St. P. R. Co.* 1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484; *O'Niel* v. *Great Northern R. Co.* (1900) 80 Minn. 27, 51 L. R. A. 532, 82 N. W. 1086 (bolt which had been left in the timber of a bridge which was being taken down struck the plaintiff); *Martin* v. *Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 14 L. ed. 1051, 17 Sup. Ct. Rep. 603, Affirming (1893) 7 N. M. 158, 34 Pac. 536 (train run so as to cause collision with hand car). In the first of these cases a mere divisional road master is apparently meant. In the second and third that was certainly his capacity. They were, therefore, not of that grade of road masters which, perhaps, constitutes an employee a head of a department (see § 535, note 1, subd. (c), *infra*).

An employee having the supervision of one half of a road, and, at the time of the accident, in charge of a repair train. *Mobile & M. R. Co.* v. *Smith* (1877) 59 Ala. 245 (negligent operation of a train).

A foreman of a section gang. *Martin* v. *Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603, Affirming (1893) 7 N. M. 158, 34 Pac. 536 (hand car run so as to collide with train); *Northern P. R. Co.* v. *Charless* (1896) 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848 (ran hand car without taking precautions to escape collision with trains); *Dowers* v. *Spencer* (1895) 17 C. C. A. 215, 25 U. S. App. 411, 70 Fed. 480 (jumped on a jack which was holding up the track and caused the rail to fall on plaintiff's foot); *Kansas & A. Valley R. Co.* v. *Waters* (1895) 16 C. C. A. 609, 36 U. S. App. 31, 70 Fed. 28 (failed to guard against collision of hand car with trains); *Wright* v. *Southern R. Co.* (1897) 80 Fed. 260 (tried to save hand car from collision with train); *Lochbaum* v. *Oregon R. & Nav. Co.* (1900) 44 C. C. A. 220, 104 Fed. 852 (failed to scrape the loose rocks off the side of a cut where work was being done); *Davis* v. *Southern P. Co.* (1893) 98 Cal. 19, 32 Pac. 708 (switch negligently left open); *Justice* v. *Pennsylvania Co.* (1891) 130 Ind. 321, 30 N. E. 303 (foreman allowed car to run at dangerous speed, the result being that the plaintiff lost his hold of the lever, and was struck by it); *Hoben* v. *Burlington & M. River R. Co.* (1866) 20 Iowa, 562 (hand car collided with train); *Clifford* v. *Old Colony R. Co.* (1886) 141 Mass. 564, 6 N. E. 751 (*carucada*); *Hammond* v. *Chicago & G. T. R. Co.* (1890) 83 Mich. 334, 17 N. W. 935 (failure to send ahead a lookout, when hand car is near a curve); *Timm* v. *Michigan C. R. Co.* (1893) 98 Mich. 226, 57 N. W. 116 (assumed); *Gaeigan* v. *Lake Shore & M. S. R. Co.* (1896) 110 Mich. 71, 67 N. W. 1097 (struck by a car pushed by his colaborers, while he was obeying an order to climb a stationary car to set brakes);

Olson v. *St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117, 35 N. W. 866 (no precautions to protect hand car against trains); *Lagrone* v. *Mobile & O. R. Co.* (1890) 67 Miss. 592, 7 So. 432 (injury received while holding a fish-bar for foreman to straighten); *Hastings* v. *Montana Union R. Co.* (1896) 18 Mont. 493, 46 Pac. 264 (laborer not warned of approach of a train); *Couch* v. *Charlotte, C. & A. R. Co.* (1884) 22 S. C. 557 (at all events as to orders relating to ordinary duties; but no negligence was, as matter of fact, established; see further, as to this case, § 519, *post*); *Hanley* v. *Grand Trunk R. Co.* (1882) 62 N. H. 274 (method of loading rails); *Brunell* v. *Southern P. Co.* (1899) 34 Or. 256, 56 Pac. 129 (failure to place a signal flag to warn approaching trains and hand cars that men were on the track); *Spancake* v. *Philadelphia & R. R. Co.* (1892) 148 Pa. 184, 23 Atl. 1006 (no warning as to approach of train was given).

The boss of a small gang of ten or fifteen men engaged in aiding the regular gang upon each section, as occasion requires. *Northern P. R. Co.* v. *Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843 (sudden application of brakes caused collision with following hand car); *Goodsell* v. *Montana C. R. Co.* (1896) 18 Mont. 293, 45 Pac. 210 (negligence in allowing a rail to fall on plaintiff's foot—injury caused by order to coldorers).

Whether, in the cases where the negligent orders relate to the use of appliances known to be defective, a foreman of a gang working on a railway track is a vice principal, is a question which essentially involves the inquiry whether he represents the employer in respect to the duty of furnishing appliances. It

is held that, under the normal arrangements of railway companies, he is not an agent of the employee for the purpose, the agency being vested in his superior officers. *Kinney* v. *Corbin* (1890) 132 Pa. 341, 19 Atl. 141 (laborer injured by the breaking of a chain which the foreman of the gang required him to use, when he knew it was defective); *Barringer* v. *Delaware & H. Canal Co.* (1879) 19 Hun, 216 (foreman failed to report defective hand car for repairs). The second of these being a typical case, it will be worth while to give the facts *in extenso*. The section "boss" had charge of about five miles of track, and was foreman of the men employed to keep such track in repair, working with them. He had charge of and was responsible for the tools and machinery used. He hired his men, or some of them. If he required machinery or tools, he applied to the track master therefor. If machinery gave out, or was defective, he was ordered to take it to the shop and have it repaired. Over him, and in a superior position, was the track master, who superintended the track, who employed the foreman of the section and other proper men, and furnished the tools and machinery necessary. To such track master or his assistant all reports were made. If repairs were necessary, or tools needed, notice was to be given by the section foreman to the track master, who supplied the tools or directed as to the repairs. The foreman was subject to the track master and bound by his orders. The court said: "Under such a state of facts, we think that the learned judge erred in holding that Brown represented the defendant and stood in its place. Brown was an employee just as plaintiff was. They were in the same circle of employment; they worked together for a common purpose. Each knew his relations to the other when the employment began, and each took the risks attending the same. The negligence of either was one of those risks. That Brown was foreman, and directed the action or hired the others, does not change the rule. Perhaps the track master did represent the defendant. We are not called upon to decide that. Possibly no one below the superintendent stood in the place of the defendant in respect to the matter in dispute. It is enough that two officers of a superior grade stood between Brown and the defendant, either of whom presumptively could have hired or discharged Brown at will. So Brown's position was that of an employee, and not a representative of the company."

(f) *Employees supervising various kinds of construction work.*—The chief engineer of a road. *McDermott* v. *Pacific R. Co.* (1860) 30 Mo. 115 (bridge collapsed). This case is no longer law in Missouri. See subtitle D, *infra*, and chapter XXX., *post*.

A division superintendent of depots and bridges. *Neubauer* v. *New York, L. E. & W. R. Co.* (1885) 101 N. Y. 607, 4 N. E. 125 (bridge carpenter injured).

An official called a "superintendent" under the general manager of a road (apparently a supervisor of structures). *Carney* v. *Curaquet R. Co.* (1890) 29 N. B. 425 (ordered engineer to cross a bridge while in a dangerous condition owing to a flood).

A superintendent of railway bridges. *Warner* v. *Erie R. Co.* (1868) 39 N. Y. 468, Reversing (1867) 49 Barb. 558 (bridge collapsed). This case is, in some degree, inconsistent with later New York cases. See § 530, *infra*, and chapter XXX., *post*.

An employee superintending the construction of a bridge, with gang foreman under him. *State, use of Hamelin* v. *Malster* (1881) 57 Md. 287 (plank used that was too short to afford a secure foothold).

The foreman in charge of the work of constructing an arch of a railway bridge. *Hofnagle* v. *New York C. & H. R. R. Co.* (1874) 55 N. Y. 608 (ordered centers to be taken out too soon, thus causing arch to fall).

A foreman of masons working on a railway bridge. *Weger* v. *Pennsylvania R. Co.* (1867) 55 Pa. 460 (train ran down the hand car on which the foreman and his gang were returning from work).

A foreman of a gang engaged in placing a bridge pier in position. *Ulrich* v. *New York C. & H. R. R. Co.* (1898) 25 App. Div. 465, 51 N. Y. Supp. 5 (selection of improper appliance and improper method of work).

A temporary boss of a bridge gang who is himself a laborer. *Texas & P. R. Co.* v. *Rogers* (1893) 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378 (ordered the hoisting of heavy timber with an inadequate force of workmen).

A division foreman of bridges on a railway, who labors with his subordinates. *Yager* v. *Atlantic, M. & O. R. Co.* (1882) 4 Hughes, 192 (bridge got out of the perpendicular and fell, owing to insufficient propping).

A foreman on the construction of a bridge, with two superiors over him. *Kelly* v. *Jutte & F. Co.* (1899) 98 Fed. 380 (negligent management of derrick; failure to inspect it for proper adjustment).

One of several foremen of bridge carpenters. *Lee* v. *Detroit Bridge & Iron Works* (1876) 62 Mo. 565 (unskilful adjustment of frame which was about to be lowered into a caisson caused it to tip up and throw plaintiff's intestate into the water). (This decision is not law under recent Missouri decisions; see subtitle D, *infra*); *Ludlow* v. *Groton Bridge & Mfg. Co.* (1896) 11 App. Div. 452, 42 N. Y. Supp. 343 (1895) 71 N. Y. S. R. 510, 36 N. Y. Supp. 452 (1896) 16 Misc. 222, 37 N. Y. Supp. 595 (failed to secure properly a heavy piece of iron which was being carried on a truck).

A foreman supervising the building of a boat (distinguished from an agent in full control). *Olsen* v. *Nixon* (1898) 61 N. J. L. 671, 40 Atl. 694 (scaffold gave way).

The superintendent of repairs to a ship. *Hussey* v. *Coger* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556 (direction to remove hatches).

A foreman of a pile-driving gang. *Ell* v. *Northern P. T. Co.* (1891) 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222 (pile not being blocked was shoved against the plaintiff); *Drew* v. *East Whitby Twp.* (1881) 46 U. C. Q. B. 107 (hammer of pile-driver fell on laborer through neglect of foreman to see that it was blocked properly).

The superintendent of the construction of a trestle. *Callan* v. *Bull* (1896) 113 Cal. 593, 45 Pac. 1017 (timber for cap negligently selected).

The foreman of carpenters under a corporation. *Dorcy* v. *Parke, D. & Co.* (1889) 76 Mich. 631, 43 N. W. 644 (temporary and movable platform, for use in taking down partitions, was so defectively constructed that a carpenter was injured).

A timber boss superintending repairs to a stairway beside the track on which lifting cars used in mining run. *Jenkins* v. *Mahopac Iron Ore Co.* (1890) 32 N. Y. S. R. 866, 10 N. Y. Supp. 484 (plaintiff ordered to do work which required him to stand on a track along which a car might at any moment come—foreman omitted to notify signal man not to start the cars).

A foreman of a gang of carpenters working on a building. *Malone* v. *Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573 (supports of mash tub were inadequate); *Jenkins* v. *Mahopac Iron Ore Co.* (1890) 32 N. Y. S. R. 866, 10 N. Y. Supp. 484 (foreman failed to warn laborer of the approach of a car running on the incline where he was repairing a track).

The foreman overseeing the construction of a building. *Summersell* v. *Fish* (1875) 117 Mass. 312 (derrick fell while being hoisted under superintendence of foreman, and injured a carpenter); *Duffy* v. *Upton* (1873) 113 Mass. 544 (careless operation of derrick in hoisting timber injured a mason).

A clerk of the works appointed by a company to superintend the construction of a building by an independent contractor. *Brown* v. *Accrington Cotton Spinning & Mfg. Co.* (1865) 3 Hurlst. & C. 511, 34 L. J. Exch. N. S. 208, 13 L. T. N. S. 94 (as to this case, see further §§ 531, *infra*, and 567 (a), *post*).

A foreman of workmen constructing a building. *Kiffin* v. *Wendt* (1899) 39 App. Div. 229, 57 N. Y. Supp. 109 (order to use a temporary contrivance).

A gang boss employed by a contractor engaged in the construction of a building and supervising the work himself. *Cates* v. *Huer* (1898) 104 Ga. 679, 30 S. E. 884.

An assistant foreman of a contractor for structural ironwork. *McGinley* v. *Lovering* (1893) 152 Pa. 366, 25 Atl. 824 (fellow servant of plaintiff was ordered to use a defective tool).

A general foreman of a contractor, who has charge of the work of putting in the foundation for a wharf and has full power to employ and discharge all the workmen. *McDonald* v. *Buckley* (1901) 48 C. C. A. 372, 109 Fed. 290.

One who has charge of a number of men for the construction of a particular piece of work, with authority to direct them therein. *Hughes* v. *Leonard* (1901) 199 Pa. 123, 48 Atl. 862 (ordered plaintiff into a place where he was exposed to danger if a rope belonging to another employee, who was jointly engaged in a certain piece of work, should happen to break).

A carpenter employed by the day by a contractor, and left by the latter in control of the construction of a house while he himself was absent. *Bean* v. *Null* (1884) 65 Iowa, 407, 21 N. W. 700 (defective scaffold).

A foreman subordinate to a master carpenter. *Peschel* v. *Chicago, M. & St. P. R. Co.* (1885) 62 Wis. 338, 21 N. W. 269.

The foreman of a squad receiving timbers on a scaffold, after they were hoist-

ed by a derrick, to be used in a house under construction. *Gunn* v. *Willingham* (1900) 111 Ga. 427, 36 S. E. 804 (derrick fell, being inadequately secured).

A workman engaged in constructing a dye-house, together with two or three other workmen, and having the direction of the work. *McDonald* v. *Eagle & P. Mfg. Co.* (1881) 67 Ga. 761 (1882) 68 Ga. 839 (timber fell while being hoisted by a derrick managed by the employee directing the work).

The foreman of a crew engaged in repairing a dam. *Doughty* v. *Penobscot Log Driving Co.* (1884) 76 Me. 143 (plank under a great strain was suddenly released, and swung against the plaintiff).

The foreman of masons employed on a building. *Jenkinson* v. *Carlin* (1894) 10 Misc. 22, 30 N. Y. Supp. 530 (derrick had no check rope and fell).

A mason working with a "tender" under his orders. *Kennedy* v. *Spring* (1893) 160 Mass. 203, 35 N. E. 779 (defective staging).

The foreman of bricklayers on a building. *White* v. *Eidlitz* (1897) 19 App. Div. 256, 46 N. Y. Supp. 184 (unauthorized order to use a defective elevator).

Whether a foreman in charge of a gang of masons engaged in the construction of a subway is a vice principal was left undecided in *Ricks* v. *Flynn* (1900) 196 Pa. 263, 46 Atl. 360.

A foreman in charge of the erection of a scaffolding. *Moore* v. *McNeil* (1898) 35 App. Div. 323, 54 N. Y. Supp. 956 (selection of materials).

A foreman supervising workmen putting in an elevator. *Andre* v. *Winslow Bros. Elevator Co.* (1898) 117 Mich. 560, 76 N. W. 86 (failed to take proper precautions with respect to the operation of the elevator, so as to prevent the workmen from being struck by the cage); *Whallon* v. *Sprague Electric Elevator Co.* (1896) 1 App. Div. 264, 37 N. Y. Supp. 174 (subordinate injured while obeying an order to take measurements on one of the upper floors).

The foreman overseeing the construction of a large iron gasholder. *McLaughlin* v. *Camden Iron Works* (1897) 60 N. J. L. 557, 38 Atl. 677 (failure to use proper appliances provided by the master for raising a heavy frame).

One in charge of a gang of men erecting poles and a telegraph line along a railroad. *Johnson* v. *Western N. Y. & P. R. Co.* (1901) 49 Atl. 794, 200 Pa. 314.

The "district manager" of a telephone company, in charge of a crew stringing wires. *Knutter* v. [illegible] *York & N. J. Teleph. Co.* (1902) 6[illegible] L. 646, 58 L. R. A. 808, 52 Atl.

A foreman of construction. *Frawley* v. *Sheldon* (1897) 20 R. I. 258, 38 Atl 370 (implement dropped).

Any workman supervising blasting operations. *Marshall* v. *Schricker* (1876) 63 Mo. 308 (plaintiff's horse killed by a large stone, while standing at a place to which the foreman had directed plaintiff to remove his team —foreman was said to be "as much engaged in the same general service, when blasting, as he would have been in detaching the material to be removed with a pick or shovel;" but it is questionable whether this case is law any longer in Missouri. See subtitle D, *infra*, and chapter XXX., *post*); *Perry* v. *Rogers* (1898) 157 N. Y. 251, 51 N. E. 1024, Reversing (1895) 91 Hun, 213, 36 N. Y. Supp. 208 (failure to notify workmen to pry off an overhanging fragment of rock, left after a blast); *Vitto* v. *Keegan* (1897) 15 App. Div. 329, 44 N. Y. Supp. 1 (order to remove unexploded blast, without warning of presence of dynamite in the hole); *Capasso* v. *Woodfolk* (1900) 163 N. Y. 472, 57 N. E. 760, Reversing (1898) 25 App. Div. 234, 49 N. Y. Supp. 409 (large piece of rock left in such a position that it fell). See also *Kenney* v. *Shaw* (1882) 133 Mass. 501, cited in subd. (h), *infra*.

A foreman controlling a gang in one of the tunnels of a cement company. *Ross* v. *Union Cement & Lime Co.* (1900) 25 Ind. App. 463, 58 N. E. 500 (removed a portion of the loose stones which had been thrown out by a blast, and so caused a large rock which they supported to fall on the plaintiff).

A foreman of a gang of laborers engaged in blasting upon a railroad track, whose duty it is to prepare, care for, distribute, and direct the explosion of the dynamite used. *Sullivan* v. *New York, N. H. & H. R. Co.* (1892) 62 Conn. 209, 25 Atl. 711 (improper management of use,—trial judge, on a hearing in damages after a default, sustained contention of defendant's counsel that the foreman and the laborers were fellow servants, and awarded merely nominal damages).

A foreman of blasting operations forming part of the general work of constructing a canal. *Wanzer* v. *Barrett Constr. Co.* (1895) 87 Hun, 519, 34 N.

Y. Supp. 273 (failure to search holes for unexploded charges).

The foreman of work at one of the shafts of the tunnel driven for the Croton aqueduct. *Riley* v. *O'Brien* (1889) 53 Hun, 147, 6 N. Y. Supp. 129 (failure to secure a pile of brick, to the shaky condition of which his attention was called).

A foreman of a gang of men employed in grading a railroad. *Lindvall* v. *Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020 (injury caused by the fall of a trestle constructed to carry the earth excavated from a cutting, to an adjoining embankment). See also, as to this case, § 498, note I, subd. (j), *ante*. The action being dismissed by the trial court in accordance with the judgment of the supreme court, another suit was subsequently brought in a Federal court, which ruled that this dismissal, not being a judgment on the merits, was no bar, and the plaintiff was finally declared by the court of appeals to be entitled to recover on the ground that the foreman was a vice principal. See chapter XXX., *post*.

A civil engineer superintending the construction of a railway for nonresident contractors, he himself being under the control of such contractors. *McBride* v. *Brogden* (1876) 3 New Zealand, C. A. 271 (laborer injured by the derailment of a ballast car which was being pushed in front of the engine,—a method of transportation authorized by the superintendent).

An assistant engineer superintending grading work. *Carmichael* v. *Eastern R. Co.* (1892) 50 Minn. 23, 52 N. W. 224 (dangerous method of withdrawing unexploded charge).

The overseer of a gang of laborers engaged in making an excavation. *Wilson* v. *Merry* (1868) L. R. 1 Sc. App. Cas. 326, 19 L. T. N. S. 30 (per Lord Cranworth; *arguendo*, p. 334, L. T. N. S. p. 34). *Daby* v. *Brown* (1899) 45 App. Div. 428, 60 N. Y. Supp. 840 (concealed,—injury was caused by dangerous method of getting an engine back into place); *Larich* v. *Mains* (1894) 18 R. I. 513, 28 Atl. 631 (negligent order); *Chicago & T. R. Co.* v. *Simmons* (1882) 11 Ill. App. 147 (injury caused by obeying order to work at a particular point,—but *quære*, as to this case, under later Illinois decisions. See subtitle D, *infra*).

The foreman of a gang of laborers employed by a contractor for the excavation of a tunnel. *Anderson* v. *Winston* (1887) 31 Fed. 528 (injury caused by earthslide, danger of which was seen by foreman).

A foreman of a job of excavating work, whose duty it is merely to report want of proper appliances to a vice principal. *Durst* v. *Carnegie Steel Co.* (1896) 173 Pa. 162, 33 Atl. 1102 (failure to inform superintendent of a circumstance creating danger).

A foreman in charge of men constructing a sewer, with authority to hire and discharge them, under the supervision of a superintendent of sewer construction, who is himself subject to the instructions of the city engineer, as general superintendent of all public works. *Minneapolis* v. *Linden* (1893) 7 U. C. A. 311, 19 C. C. A. App. 245, 58 Fed. 525 (sewer caved in, owing to inadequate shoring of sides).

A person superintending the digging of a trench or sewer. *Flynn* v. *Salem* (1883) 134 Mass. 351 (sewer caved in,—demurrer to complaint upheld); *Conley* v. *Portland* (1886) 78 Me. 217, 3 Atl. 658 (sides of sewer caved in); *O'Connor* v. *Roberts* (1876) 120 Mass. 227 (same facts); *Dube* v. *Lewiston* (1891) 83 Me. 211, 22 Atl. 112 (same facts,—master held not liable for failure of foreman to use materials furnished for shoring sewers); *Schott* v. *Onondaga County Sav. Bank* (1900) 49 App. Div. 503, 63 N. Y. Supp. 631 (assurance that place of work would be kept secure against transitory danger,—in this case the injury was caused by the act of a fellow laborer); *Zeigler* v. *Day* (1877) 123 Mass. 152 (similar accident, owing to want of proper planking,—here the superintendent's compensation was a certain proportion of the profits); *Coltons* v. *Crimmins* (1895) 11 Misc. 24, 31 N. Y. Supp. 859 (similar accident).

A foreman in a waterworks company, having exclusive charge of caulking and laying pipes, in the absence of the general superintendent. *Johnson* v. *Ashland Water Co.* (1890) 77 Wis. 51, 45 N. W. 807 (pipe rolled off blocks while plaintiff was assisting the foreman).

The foreman of a gang employed in the construction of a line of telegraph. *Postal Teleg. Cable Co.* v. *Hulsey* (1896) 115 Ala. 193, 22 So. 854 (negligent directions as to manner of performing work).

A superintendent of the work of removing a telephone pole. *Morgridge* v. *Providence Teleph. Co.* (1898) 20 R. I. 386, 39 Atl. 528 (premature order to workmen to let go their hold on the pole).

No employee having the direction of the actual work of removing a telephone and telegraph line, with authority to hire, pay, and discharge employees. *American Teleph. & Teleg. Co.* v. *Bonser* (1898) 20 Ind. App. 32, 49 N. E. 182 (climbed pole and loosened wires after the soil had been removed from around the bottom of the pole).

A foreman of a street railway company. *Dixon* v. *Winnipeg Electric Street R. Co.* (1897) 11 Manitoba L. R. 529 (allowed electric current to be turned on a wire which workmen were handling).

The foreman of a crew engaged in taking down a building. *Cleveland, C. C. & St. L. R. Co.* v. *Brown* (1896) 20 C. C. A. 137, 34 U. S. App. 759, 73 Fed. 970. Reversing on rehearing (1893) 6 C. C. A. 142, 18 U. S. App. 10, 56 Fed. 804, in consequence of the decision in the *Baugh Case* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914 (plaintiff was ordered to chop through a post, no sufficient precautions being taken to prevent the fall of the building while he was so engaged).

See also *Floyd* v. *Sugden* (1883) 134 Mass. 563, where a foreman in charge of the repairing of a mill property was held not to be a vice principal. See further § 530, *infra*.

(g) *Supervising employees in the mechanical departments of railways.*—The master mechanic of a railway company. *Shanck* v. *Northern C. R. Co.* (1866) 25 Md. 462 (defective engine—distinction between assignable and nonassignable duties not discussed); *Hard* v. *Vermont & C. R. Co.* (1860) 32 Vt. 473 (defective engine—Overruled in *Davis* v. *Central Vermont R. Co.* [1882] 55 Vt. 84, 45 Am. Rep. 590); *Columbus & I. C. R. Co.* v. *Arnold* (1869) 31 Ind. 174, 99 Am. Dec. 615 (defective engine. This case is no longer law in Indiana. See summary in § 549, *post*).

A machinist employed in repairing railroad engines, who occasionally calls in other employees of the railroad company to aid in work which he cannot do alone, is not the vice principal or superior of such employees. *Hathaway* v. *Illinois C. R. Co.* (1894) 92 Iowa, 337, 60 N. W. 651.

The foreman of locomotive shops. *Beaulieu* v. *Portland Co.* (1860) 48 Me. 291 (loose lumber fell on plaintiff).

The foreman at a roundhouse of a railroad. *Gonsior* v. *Minneapolis & St. L. R. Co.* (1887) 36 Minn. 385, 31 N. W. 515 (alleged negligence was in ordering servant to pull a car spring without any assistance, the evidence tending to show that two men were needed to do such work safely).

Contra.—Such a foreman was assumed to be a departmental vice principal in *Fordyce* v. *Briney* (1893) 58 Ark. 206, 24 S. W. 250.

One of several foremen in a railway machine shop. *Gaynon* v. *Darkee* (1898) 31 C. C. A. 300, 52 U. S. App. 587, 87 Fed. 302 (let steam into a boiler while a subordinate was inside it).

A gang boss in a railway shop, under a master mechanic. *McBride* v. *Union P. R. Co.* (1889) 3 Wyo. 247, 21 Pac. 687 (took a man away from work which could not be done safely without him).

A "boss wiper," who directs the engine wipers where to work and what to do. *Knox* v. *Southern R. Co.* (1898) 101 Tenn. 375, 47 S. W. 491 (negligent order as to moving of engine). As to this case, see §§ 521, note 8, *infra*, and 549, *post*.

An employee under whose directions an engine cleaner in a round house is to work until he has gained sufficient experience. *Spencer* v. *Ohio & M. R. Co.* (1892) 130 Ind. 181, 29 N. E. 915 (engine started while cleaner was under neath it).

A gang boss over forty or fifty men working in a railroad repair yard. *Keenan* v. *New York, L. E. & W. R. Co.* (1895) 145 N. Y. 190, 39 N. E. 711 (plaintiff was sent to take a spring from a car standing on a track other than that on which repairs were usually made, and was injured by other cars backing against the one from which he was taking the spring).

A foreman of car repairers. *Peterson* v. *Chicago & N. W. R. Co.* (1887) 67 Mich. 102, 34 N. W. 269 (failure of foreman to set signal flag to protect car repairers).

A foreman of car repairers, who cannot hire or discharge his men, and has no authority except to direct them about their work. *Foley* v. *Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 644, 21 N. W. 124 (here injury occurred while the foreman was assisting in manual labor—car not being blocked, moved forward and crushed plaintiff's foot).

(h) *Foreman supervising work in quarries.*—A foreman of a quarry. *Cullen* v. *Norton* (1891) 126 N. Y. 1, 26 N. E. 905 (workmen improperly placed); *Wiskie* v. *Montello Granite Co.* (1901) 111 Wis. 443, 87 N. W. 461 (improper preparation of blast).

The superintendent of blasting at a quarry. *Kenney* v. *Shaw* (1882) 133 Mass. 501 (workman injured by an explosion in consequence of his using iron drill in a hole in which the superintendent had previously placed some blasting powder, and had neglected to see that it had effectively exploded before giving the order to deepen the hole).

A member of a gang of men engaged in quarrying limestone and burning lime, who acts as foreman in the work of moving cars to the lime kilns, but at other times does the same work and receives the same pay as the rest of the gang. *Moore Lime Co.* v. *Richardson* (1897) 95 Va. 328, 28 S. E. 334 (failure to give notice of the approach of a car).

A foreman in a quarry, under the management of a superintendent. *Donovan* v. *Ferris* (1900) 128 Cal. 48, 60 Pac. 519 (failure to notify servant that a blast was about to be fired).

(i) *Employees supervising the loading of vehicles elsewhere than on railways.*—A foreman in charge of a derrick used to move stone on a truck. *Scott* v. *Sweeney* (1884) 34 Hun, 292 (injury caused by the fall of the boom, which was being lowered by the order of the foreman).

A foreman overseeing the loading of an elevator. *Dorenfeld* v. *Baumann* (1899) 40 App. Div. 502, 58 N. Y. Supp. 110 (negligence alleged was overloading).

(j) *Foremen of gangs loading or unloading ships.*—A gang foreman under direction of the chief stevedore. *Kenny* v. *Cunard S. S. Co.* (1885) 20 Jones & S. 434, S. C. (1888) 24 Jones & S. 558 (boards imperfectly secured in a sling fell out).

An under foreman controlling a gang of laborers loading a ship. *The Louisiana* (1896) 21 C. C. A. 60, 41 U. S. App. 324, 74 Fed. 748 (unprotected hatchway).

The foreman of a gang engaged in loading a ship. *McDonald* v. *Hazletine* (1878) 53 Cal. 35 (accident in this case not due to negligence of foreman, but of colaborer).

The foreman of a steamship company, under whom longshoremen are employed in loading a vessel. *Tully* v. *New York & T. S. S. Co.* (1896) 10 App. Div. 463, 42 N. Y. Supp. 29 (order to work in a certain place).

A foreman of stevedores. *The Kensington* (1898) 91 Fed. 681 (handled the load himself).

A master stevedore's foreman. *The Wm. F. Babcock* (1887) 31 Fed. 418 (hatch left open); *O'Connor* v. *Hall* (1901) 52 App. Div. 428, 65 N. Y. Supp. 136 (barrel insecurely fastened fell while it was being hoisted).

A foreman of a gang engaged in unloading a ship. *Dolan* v. *Boston & L. S. Co.* (1888) 147 Mass. 101, 16 N. E. 690 (negligence in selection of rope from a stock furnished).

It is error to rule, as a matter of law, that a head stevedore is a fellow servant of one of his subordinates, where there is evidence to the effect that he was in full control of the work, and invested with the duty of furnishing the appliances used. *Hallan* v. *Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2, Reversing (1872) 9 Phila. 16. See, further, as to the case under subtitle E, *infra*.

(k) *Supervising employees in smelting works.* A foreman supervising the silver-room department of smelting works. *Vaca* v. *Selby Smelting & Lead Co.* (1894) 102 Cal. 458, 36 Pac. 803 (extemporised a hose to conduct a hot acid—plaintiff, not knowing it to be defective, was injured).

(l) *Employee supervising farms.*—A foreman of a farm. *Vogel* v. *Wood* (1894) 102 Cal. 389, 36 Pac. 766 (presumably not in full control. See California decisions cited under § 17, *post*,—accident was due to a defective scaffold).

(m) *Employees in factories and other places where machinery is used* (see also subd. (g), *supra*).—A yard master supervising the outdoor work of a manufacturing company. *Woody* v. *Hamilton Mfg. Co.* (1893) 159 Mass. 70, 34 N. E. 185 (plaintiff injured in obeying order to handle a carboy of sulphuric acid, which proved to be broken).

A millwright in the employ of a manufacturing company, as regards a carpenter hired by him to assist in a special job. *National Tube Works Co.* v. *Bedell* (1880) 96 Pa. 175 (selection of appliances, but evidence here showed that those furnished had no flaw that could have been discovered by a reasonable inspection).

The superintendent and manager in charge of the machinery in a factory. *Boyce* v. *Fitzpatrick* (1881) 80 Ind. 526 (operative injured by recklessness of superintendent in passing straw to a flax-brake).

A workman employed in the packer-room of a factory with two other persons, and having the direction of the

work therein as foreman. *McGovern* v. *Columbus Mfg. Co.* (1888) 80 Ga. 227, 5 S. E. 492 (machine negligently started by foreman while it was being cleaned).

The foreman in charge of a room in a factory. *Findlay* v. *Russel Wheel & Foundry Co.* (1896) 108 Mich. 236, 66 N. W. 50 (set a drum in motion in the wrong direction while helping to place a car on its trucks).

A gang foreman in a factory. *Casey* v. *Pennsylvania Asphalt Paving Co.* (1900) 198 Pa. 348, 47 Atl. 1128 (plaintiff ordered into dangerous position).

The foreman in charge of a crew operating the grinders in a mill. *Cocan* v. *Umbagog Pulp Co.* (1897) 91 Me. 26, 39 Atl. 340 (alteration made in machinery rendered it dangerous—water pipe which supplied pressure was plugged).

A foreman in a woolen mill, sometimes called a "boss machinist" and sometimes "master mechanic," who had charge of the repairs of the machinery, but neither made any important alterations in it nor hired or discharged the gang under his control without consulting the general superintendent. *Stevens* v. *Chamberlin* (1900) 51 L. R. A. 513, 40 C. C. A. 421, 100 Fed. 378 (did not block up a heavy plate properly, and it fell on a subordinate).

One of several foremen in a sawmill, having authority, under the direction of the general manager, to employ and discharge workmen, and having general supervision of the mill, performing more or less manual labor therein. *Logan* v. *Hall* (1901) 128 Mich. 523, 87 N. W. 619 (load of logs run against workman while he was working with his back to the rollway).

The boss of a gang of reamers in a bridge shop of iron works. *Duncan* v. *A. & P. Roberts Co.* (1900) 194 Pa. 563, 45 Atl. 330.

The foreman of a woodshop in a car factory (except so far as he may be discharging the duty of providing proper machinery). *Indiana Car Co.* v. *Parker* (1885) 100 Ind. 181.

A foreman of an oil company. *Mahoney* v. *Vacuum Oil Co.* (1894) 76 Hun, 579, 28 N. Y. Supp. 196 (selection of plank to serve as a temporary support).

An engineer in charge of the engine room and freezing department of an ice company. *Provost* v. *Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88 (negligence in directing work to be done in an improper way).

An engineer of a steam roller used in repairing the streets of a city, as regards a flagman subject to his orders and liable to discharge by him. *Hanna* v. *Granger* (1894) 18 R. I. 507, 28 Atl. 659 (roller started without warning).

An engineer. *Watts* v. *Beard* (1897) 18 App. Div. 243, 45 N. Y. Supp. 873 (fireman was injured, while adjusting a pump under the engineer's control).

The foreman of a lathe. *Faber* v. *Carlisle Mfg. Co.* (1889) 126 Pa. 387, 17 Atl. 621 (counter balance, being left insecured, flew off and struck an apprentice).

An operator of a machine. *Hamby* v. *Union Paper Mills Co.* (1900) 110 Ga. 1, 35 S. E. 297 (helper injured).

The leader or boss of a gang of hands, himself under the direction and control of a foreman, and doing such work as the latter directs to be done. *Richmond Locomotive & Mach. Works* v. *Ford* (1897) 94 Va. 627, 27 S. E. 509 (heavy wheel which was being moved fell on plaintiff).

A foreman of a gang lifting heavy machinery. *Robertson* v. *Chicago & E. R. Co.* (1896) 146 Ind. 486, 45 N. E. 655 (foreman failed to assist in sustaining some heavy machinery, and plaintiff was ruptured).

(n) *Supervising employees in mines, without reference to statutes.*—A "fire boss," whose duty is merely to direct the miners to leave dangerous places at which gas accumulates, but who has no control over the work. *Morgan* v. *Carbon Hill Coal Co.* (1893) 6 Wash. 577, 34 Pac. 152, 772 (here the accident, an explosion, did not even occur while the boss was engaged in his duty of imparting information).

An underground boss, except as to nonassignable duties. *Russell Creek Coal Co.* v. *Wells* (1898) 96 Va. 416, 31 S. E. 614 (a mere fellow servant as to keeping the drifts in safe condition as the work progresses).

One of several in a mine, having direction of the work of eight or ten men himself controlled by the pit boss, who is subject to the direction and control of the superintendent or general manager. *What Cheer Coal Co.* v. *Johnson* (1893) 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. 810 (struck the top of a room with a pick, and brought down a piece of rock on the plaintiff).

A gang foreman. *Alaska Treadwell Gold Min. Co.* v. *Whelan* (1897) 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40

(gate of chute drawn without notice, the result being that the broken rock at its upper end ran through and injured a laborer).

A foreman of a mine (precise functions not stated). *St pleux* v. *Doe* (1887) 73 Cal. 26, 14 Pac. 378 (miner obeyed order to enter a chamber too soon after blast,—no recovery, though he had not experience to appreciate the danger).

An employee in a mine, whose regular duties were to take charge of the tools and keep the time of the men, and who, in the superintendent's absence, used to give occasional directions as to the work. *Wilson* v. *Dunreath Red Stone Quarry Co.* (1889) 77 Iowa, 429, 42 N. W. 360 (ordered to use appliances which proved to be defective, said appliances being constructed by the miners themselves).

The slate-picker boss in a coal mine. *McCool* v. *Lucas Coal Co.* (1892) 150 Pa. 638, 24 Atl. 350 (slate picker killed while complying with an order to perform a certain errand).

A top boss. *Hughes* v. *Oregon Improvement Co.* (1898) 20 Wash. 294, 55 Pac. 119 (ventilating fan stopped during fire).

A "bank boss." *Brazil & C. Coal Co.* v. *Cain* (1884) 98 Ind. 282 (complaint held demurrable which alleged that the plaintiff's intestate had been directed to undertake new duties, but failed to allege that the risks thereof were not understood by him).

A shift boss in a mine, who acts as foreman, and directs when and where blasts shall be put in and where the men shall work, and who is appealed to to settle claims arising as the work progresses. *Pehrja* v. *Aurora Iron Min. Co.* (1895) 106 Mich. 463, 32 L. R. A. 435, 64 N. W. 335. Affirmed on rehearing in 106 Mich. 469, 32 L. R. A. 438, 66 N. W. 951 (too large a space mined out before supports were put in).

A foreman supervising drilling in a mine, with authority to hire and discharge subordinates. *Gilmore* v. *Oxford Iron & Nail Co.* (1892) 55 N. J. L. 39, 25 Atl. 707 (loose fragment of ore fell on plaintiff).

An "underbooker." *Hall* v. *Johnson* (1865) 3 Hurlst. & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 43 Week. Rep. 411 (failure to see that roof of mine was propped safely).

A pit boss. *Desrosiers* v. *Cerrillos Coal R. Co.* (1898) 9 N. M. 495, 55 Pac. 290 (explosion occurred in a room into which workmen went with naked lights, either by the direction of the boss, or with him).

In *Somerville* v. *Gray* (1863) 1 Sc. Sess. Cas. 3d series, 768, it was held that the underground manager of a mine, invested more particularly with the duty of providing against danger from the roof of the pit, and having authority to hire and discharge men and to direct them where to work, was a representative of the mine owners in such a sense as to make them liable for his negligence in keeping a miner at work in a place where he knew there was such imminent danger of the fall of stones that he had actually promised the miner to have it propped after a few hours. To much the same effect, see *Hardie* v. *Oldie* (1858) 20 Sc. Sess. Cas. 2d series, 553.

But in *Wright* v. *Roxburgh* (1864) 2 Sc. Sess. Cas. 3d series, 748, it was held that an underground manager of a mine was a fellow servant of a workman killed by an explosion of fire damp in a seam at some distance from that in which the manager was carrying on certain operations, involving the temporary suspension of a system of ventilation which the evidence showed to be efficient and safe. *Somerville* v. *Gray* (1863) 1 Sc. Sess. Cas. 3d series, 768, was distinguished on the ground that the injury was caused directly by obedience to the orders of the defendant's foreman.

In *Wilson* v. *Stockton* (1866) 4 Sc. Sess. Cas. 3d series, 736, an underground manager was also held to be a mere servant, and this is now definitely settled to be the true doctrine so far as the United Kingdom is concerned. *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30. See §§ 529, 532, *infra*.

(o) *Supervising employees in mines—appointed under statutes.* A foreman appointed under the Pennsylvania acts, which require the employment of a mining boss who shall keep a careful watch over the ventilating apparatus and all things connected with and appertaining to the safety of the men at work in the mine (statute passed March 3, 1870, amended April 28, 1877, and June 30, 1885), is a fellow servant of his subordinates. *Lehigh Valley Coal Co.* v. *Jones* (1878) 86 Pa. 432 (explosion caused by defective ventilation); *Delaware & H. Canal Co.* v. *Carroll* (1879) 89 Pa. 374 (explosion of fire damp); *Haddell* v. *Simpson* (1886) 112 Pa. 567, 4 Atl. 725 (defective construction of

gangway); *Reese* v. *Riddle* (1886) 112 Pa. 72, 3 Atl. 813 (failure to use props furnished); *Redstone Coke Co.* v. *Roby* (1886) 115 Pa. 364, 8 Atl. 593 (explosion of fire-damp); *Haley* v. *Keim* (1892) 151 Pa. 117, 25 Atl. 98 (deadly gases penetrated through openings which should have been closed); *Lincoski* v. *Susquehanna Coal Co.* (1893) 157 Pa. 153, 27 Atl. 577 (roof collapsed); *Velas* v. *Patton Coal Co.* (1900) 197 Pa. 380, 47 Atl. 360 (negligent order); *Loshefskey* v. *Hillside Coal & I. Co.* (1897) 21 App. Div. 168, 47 N. Y. Supp. 386 (defective bumper on car).

The theory on which the master is absolved from liability in these cases will be apparent from the following extracts from some of the opinions:

"As the defendants had complied strictly with the 8th section of the act of 3d of March, 1870, in providing a practical and skilful inside overseer or mining boss, and as they had thus fulfilled the duty imposed upon them by the General Assembly, it is not for this or any other court to charge them with an additional obligation. . . . The act is one of great practical utility to the miner, and lays upon the proprietors of mines all the burthens they ought of right to bear. They must provide capable overseers for their works, and they must furnish what, by such overseers, is required for the safety and welfare of the men engaged in those works. More than this they cannot do, for upon the judgment and skill of these practical agents they must depend quite as much as any of the men who are engaged in their mines." *Waddell* v. *Simason* (1886) 112 Pa. 567, 4 Atl. 725.

"Nor do we think the liability of the company for the act of its mining boss is changed by the fact that he is appointed pursuant to a statute, where he has a general superintendent over him, who has power to direct and control him. We discover no sound reason for any distinction. In either case the company must appoint a competent and suitable person, and provide suitable and safe machinery. He is to 'carefully watch' and 'to see,' for the purpose of protecting from danger all men at work in the mines, says the statute. This, however, does not displace or supersede his superior, to whom he may be required to report." *Lehigh Valley Coal Co.* v. *Jones* (1878) 86 Pa. 432.

"There is no room for the allegation that a mining boss under the mine ventilation act of 1870 is an agent of the mine owner or a coemployer. He is clothed with no powers of engaging and discharging miners and laborers at pleasure. He is merely a fellow servant with the miner. He is nowhere in the act designated as the agent of the owner of the mines. His duties are specified in the same manner that the duties of the engineer are specified in the 16th section, and as the duties of other employees are defined in various other sections. He has no general power of control. His duties are confined to special matters. That they are different from those of others of his fellow colaborers, or even that they are of a higher grade, does not matter." *Delaware & H. Canal Co.* v. *Carroll* (1879) 89 Pa. 374.

"The mining boss is a creature of the legislature, selected by the mine owner in obedience to the command of the law, and in the interest and for the protection of the miners themselves." *Redstone Coke Co.* v. *Roby* (1886) 115 Pa. 364, 8 Atl. 593.

"These remarks are as precisely applicable to the act of 1885 as they were to the acts of 1870 and of 1877. The fundamental idea as to all of them is that properly qualified persons, as designated in the several acts, shall be employed by mine owners with prescribed duties relative to the care and inspection of mines, and where this is done, the mine owner has discharged his duty in this regard, and if, having done so, accidents occur which can be traced to the carelessness or negligence of these persons, the owners are not liable." *Lincoski* v. *Susquehanna Coal Co.* (1893) 157 Pa. 153, 27 Atl. 577.

In this last case the court denied that there was any force in the contention that, because, under the act of 1885, "the miner must give notice of any apprehended danger to the mine foreman," he is to be considered as the representative of the owner for all purposes, so as to charge the company with liability. "No such provision," it was said, "is found in the act, and the duty to give such information was just as great before the act as after. The act simply embodied what was already a legal duty of the miner into the provisions of the statute, making it more precise and emphatic, and bringing the performance of such duty more directly to the attention of the miner. The position of the mining foreman with relation to the owner was not changed by this provision. His duty was the same, with or

without this provision, to wit, to give immediate attention to the apprehended danger, and take all proper measures to prevent its occurrence. The effect of his negligence in not correcting the defects or dangers complained of would be precisely the same after as before the statute, and it would require a specific change of the law by statutory enactment, to impose liability upon the owner for his negligence when there was no such liability at the date of the passage of the act."

In *Hearer* v. *Iselin* (1891) 161 Pa. 386, 29 Atl. 49, the trial judge, in a charge declared to be correct, ruled that the possession of a power to employ and discharge workmen—this not being a statutory duty of a mine boss—placed him in the position of a vice principal, and enlarged the liability of the employer beyond that to which he is subject in the case of a mine boss employed under the provisions of the act, and performing only the duties prescribed therein.

The relation of the rule applied in these cases to that which declares a head of a department to be a vice principal (see subtitle F, *infra*), has apparently not been discussed, and there might seem to be some ground for considering such a foreman to be within the purview of the latter rule. But the differentiating element is clearly indicated by the remark in *Delaware & H. Canal Co.* v. *Carroll* (1879) 89 Pa. 374, that he "has no general power of control," and that "his duties are confined to special matters."

In other states a similar view has, on the authority of the above cases, been taken as to the capacity of foremen appointed under acts of the same tenor as that of Pennsylvania.

In West Virginia a mine boss employed according to the provisions of the Code of 1891, Append. p. 995, § 11, is held not to be a vice principal, as his duties are not delegated to him by his employer, but prescribed by statute. *Williams* v. *Thacker Coal & C. Co.* (1898) 44 W. Va. 599, 40 L. R. A. 842, 30 S. E. 107 (large fragment of rock fell from roof of drift), applying the principle that "where a person or corporation is compelled by law to employ an individual in a given matter, no liability attaches for his tortious or negligent acts."

In Colorado a mine boss vested with no authority other than that prescribed by the coal-mining act of 1885 is a fellow servant of employees in the mine. *Colorado Coal & I. Co.* v. *Lamb* (1895) 6 Colo. App. 255, 40 Pac. 251 (mass of rock fell in a drift). The court said: "The mine boss is an individual, so designated by the statute, who must be employed by the mine owner, and put in charge, with reference to its safety and security. He has entire supervision of the whole system of the ventilation of the mine, likewise of its entries, drifts and rooms, and all machinery and appliances which are used in its operations. He is bound to make his reports regularly to the mine inspector, and is subject to severe penalties for any violation of the act. Of necessity, this would include any failure on his part in the supervision, inspection, and care which the statute requires. Miners are likewise given the right to inspect the mine and machinery either in person or by committee, conjointly with the owner, or otherwise, as they may choose, and to take such steps as their prudence may dictate to secure their own safety and prevent accidents. In another section a right of action is given to certain designated parties in case they sustain damage by reason of any failure to comply with the provisions of the statute, or because of any violation of its requirements. . . . We are unable to see how it is possible to compel a company to employ a mine boss, upon whom is laid the responsibility and the duty by statute to attend to the mine and its safety, as a place to work in, clothe him with full authority and power in this respect, and subject him to punishments and responsibilities in case of failure, and then hold the master responsible for his acts. He is in no sense the representative of the master, from whom the statute attempts to take entire control of this part of his mining operations. The master may supervise him, and he may, so far as may be, direct such changes to be made as his judgment indicates to be necessary; but when the statute put the control of this particular matter into the hands of the boss, and left to his judgment both the question of safety and the means to be used to that end, we are unable to see how he is, in any sense, either as vice principal or otherwise, the representative of the master, or how he can stand in any other relation to his colaborer than that of a fellow servant."

(p) *Subordinate officers of ships.*—A chief engineer on a steamer is a fellow servant of the third engineer

(*Searle* v. *Lindsay* [1861] 11 C. B. N. S. 429, 31 L. J. C. P. N. S. 106, 8 Jur. N. S. 746, 5 L. T. N. S. 427, 10 Week. Rep. 89 [machinery out of order]); and of the second engineer (*Wyman* v. *The Duart Castle* [1899] 6 Can. Exch. 387).

A mate of ships. *The City of Alexandria* (1883) 17 Fed. 390 (hatchway left open); *The E. B. Ward* (1884) 20 Fed. 702 (hatchway left unprotected); *Malone* v. *Western Transp. Co.* (1873) 5 Biss. 315, Fed. Cas. No. 8,996 (same facts); *The Job T. Wilson* (1897) 84 Fed. 204 (here the mate was at the wheel and therefore performing the duties of a mere servant); *The Egyptian Monarch* (1888) 36 Fed. 773 (mate was superintending work of reeling in the hawser); *Carlson* v. *United New York Sandy Hook Pilot's Asso.* (1899) 93 Fed. 468 (navigation of pilot boat); *The Miami* (1899) 35 C. C. A. 281, 93 Fed. 218, Affirming (1898) 87 Fed. 757 (topmast fell, while the mate was attempting to cast off a turn of the chain from around the drum); *Buson* v. *Goodwin* (1888) 147 Mass. 237, 17 N. E. 517 (no evidence offered to take the case out of the general rule applicable to a superintendent of work and one working under his orders; accident was caused by order to slacken a rope, thus allowing a heavy object to fall on plaintiff's foot); *Olson* v. *Clyde* (1881) 32 Hun, 425 (ordered off, to other work, a seaman who was assisting plaintiff to pay out a hawser, the strength of two men being necessary for the due performance of the work); *Geoghegan* v. *Atlas S. S. Co.* (1895) 146 N. Y. 369, 40 N. E. 507 (assistant steward fell overboard through a gangway door which had been left open); *Scarff* v. *Metcalf* (1887) 107 N. Y. 211, 13 N. E. 796 (assumed in this case, exception being made as regards the performance of the nonassignable duty of giving medical aid to seamen); *Livingston* v. *Kodiak Packing Co.* (1891) 103 Cal. 258, 37 Pac. 149 (injured servant was a steward waiting at table, who fell through an open hatchway).

The status of these officers was elaborately discussed in a recent Massachusetts case, where it was held that an employee of a coasting vessel is a fellow servant with the mate who is in control of the vessel, with respect to the latter's negligence in constructing and ordering the employee to use a triangle, the breaking of which, while he was sitting on it, for the purpose of scraping a mast, caused the injuries in suit. *Kalbek* v. *Deering* (1894) 161 Mass. 469, 37 N. E. 450. Holmes, J., said: "As the case comes before us, we must take it that the defendants did their duty in furnishing materials for the construction of the triangle, that the mate was in control of the vessel at the time, and that the cause of the plaintiff's injury was some negligence on the mate's part in constructing the triangle and in ordering the plaintiff to use it. The question is whether the defendants are answerable for this conduct of the mate. By the common law, as understood in this state, the work of construction was not one of the matters which the defendants were bound at their peril to see done with reasonable care, and therefore, if those engaged upon it were fellow servants in their general standing and occupation, the plaintiff took the risk of their negligence. They were not removed from the class of fellow servants, for the time being, by the nature of their occupation, to adopt the mode of expression which has been used. *Johnson* v. *Boston Tow-Boat Co.* (1883) 135 Mass. 209, 46 Am. Rep. 458; *Moynihan* v. *Hills Co.* (1888) 146 Mass. 586, 16 N. E. 574; *Allen* v. *G. H. & F. Smith Iron Co.* (1894) 160 Mass. 557, 36 N. E. 581. But if the work had been done by the defendants in person, and they had done it negligently, they would have been liable, and it is argued that they are equally liable when the work is done by the master of the vessel, or by one who, for the time being, stands in his place. It is said that the master is not a fellow servant with the seamen, and therefore is not within the rule as to the risks assumed by the plaintiff, but that he is nevertheless an agent and representative of the owners, and that his negligence is their negligence. Even if it be said, as it has been said in some cases, that masters are not liable to servants for the negligence of others, except when the law, on grounds of policy, imposes a personal duty on them to see certain precautions taken or reasonable care used; and if it be admitted, therefore, that the defendants could not be liable for negligence in the construction of the triangle on the part of the master, whether a servant or not, any more than when the same work was done by the seaman (*Quinn* v. *New Jersey Light Co.* [1885] 23 Fed. 363; *The Queen* [1889] 40 Fed. 691; *Loughlin* v. *State* [1887] 105 N. Y. 159, 11 N. E. 371; *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 368, 37 L. ed. 772,

13 Sup. Ct. Rep. 911), still, ordering the plaintiff to use the faulty triangle was an act belonging to the superior officer as such, and it might be that, as to that, a different rule would apply. Looking at the reason given for the exception to the general liability of masters for servants, the last suggestion cannot prevail. If the sailor takes the risk of a negligent injury to his person from a fellow sailor, there is equal reason to say that he takes the risk of a negligent command. A command is a transitory act which the employer has no chance to supervise." The contention that a different doctrine obtains in the admiralty, and, that the court ought to follow the law which would be administered by the courts especially constituted for the affairs of seamen, was then discussed. It was pointed out that the case most relied on (*The* I. *Boaton* (1890) 43 Fed. 592, followed by *The Frank and Willie* (1891) 45 Fed. 494, and *The Julia Fowler* (1892) 49 Fed. 277) did not mean that the admiralty courts had worked out a different theory of the captain's liability from their own peculiar principles, but was really decided in deference to the *Ross Case* (§§ 532, 535, *infra*), which the judge himself did not agree with, and which has been explained away in later cases.

That the admiralty rule is the same as that of the common law was also declared in *Olson* v. *Oregon Coal & Nav. Co.* (1900) 44 C. C. A. 51, 104 Fed. 574, affirming 96 Fed. 109.

In *Benson* v. *Goodwin* (1888) 147 Mass. 237, 17 N. E. 517, the court said: "If we are asked to establish a special rule, applicable only to mates of vessels and common sailors, on the ground of the peculiar relations between them, the existence and particulars of those relations must be shown. The evidence in the case at bar discloses only facts which, under the decisions of this court show that the mate and the plaintiff were fellow servants of the defendant." In this case *Peterson* v. *The Chandos* (1880) 4 Fed. 645, 649; *Daub* v. *Northern P. R. Co.* (1883) 18 Fed. 625, and *Sullivan* v. *The Neptune* (1887) 30 Fed. 925, were cited to sustain the contention that a common sailor and a mate are not fellow servants. The reply of the court was as follows: "The first case contains on this point *dicta* only of Deady, J.; the second case contains a report of an oral charge to a jury by the same judge, which expressly assumes the responsibility of instructions against the admitted probable weight of authority; the third case was against the owners of a vessel, one of whom was the master, for negligence of the master."

In *The Walla Walla* (1891) 46 Fed. 198, also, *Daub* v. *Northern P. R. Co.* (1883) 18 Fed. 625, was held to be against the weight of authority, and a first mate who superintended the loading of a ship and discharged the longshoremen was held to be a mere servant.

In one case it was held, without qualification, that the owner of a vessel is not responsible for injuries to a seaman, caused by the negligence of the mate in failing to examine the fastenings of a block which had been chafed by wear and tear. *Halverson* v. *Visen* (1876) 3 Sawy. 562, Fed. Cas. No. 5,970; but in view of the late decisions as to non-assignable duties, this ruling needs some modification. See chapter XXXI., *post*.

In an Australian case it was laid down that the chief mate is a mere servant while superintending bumpers in discharging cargo, unless he is acting as defendant's general manager. *Sanderson* v. *Smith* (1882) 3 New So. Wales L. R. 31 (accident from giving way of rotten rope. — negligence of defendant as to furnishing not discussed).

(q) *Commanding officers of ships.* — A captain of a vessel has been held to be a representative of the owner according to the following cases: *Malone* v. *Western Transp. Co.* (1873) 5 Biss. 315, Fed. Cas. No. 8,996 (failure to have a hatch closed or protected by a light); *The Job T. Wilson* (1897) 81 Fed. 204 (here the master was keeping a lookout; but the rule seems to be laid down in general terms, and no stress is laid on the nature of the functions they were discharging. See subtitle F, *infra*); *The Ravensdale* (1891) 63 Fed. 621 (load which was being hoisted aboard a lighter was inadequately secured, and fell); *Johnson* v. *Boston Tow Boat Co.* (1883) 135 Mass. 209, 16 Am. Rep. 458 (captain of a lighter); *Loughlin* v. *State* (1887) 105 N. Y. 159, 11 N. E. 271 (plaintiff set to work under a bank, after the captain of a large had loosened the overhanging earth); *Scariff* v. *Metcalf* (1887) 107 N. Y. 211, 13 N. E. 796 (except as regards his performance of the duty of giving medical aid to a seaman); *Gabrielson* v. *Wendell* (1892) 135 N. Y. 1, 17 L. R. A. 228, 31 N. E. 969 (a case of unquestionable personal violence); *Greenman* v. *Atlas S. S. Co.* (1895) 146 N. Y. 369, 40 N. E. 507 (neglect of the master or mate of a

D. Doctrine that all superior servants are vice principals as regards their subordinates.

521. General statement.—Several of the American courts have adopted what may be conveniently designated as "the doctrine of superior and subordinate,"[1] or, more briefly still, the "superior servant doctrine."[2] The nature and scope of this doctrine is indicated by the subjoined extracts from various opinions.

"Where the negligent act of one servant causes injury to another, as the result of the exercise of the authority conferred upon him by the master over the servant injured, the master is liable."[3]

vessel to use iron doors supplied by the owner to bar an opening in her side, and the use, instead, of an insufficient rope, in consequence of which a member of the crew falls through the opening and is drowned); *Olson* v. *Oregon Coal & Nav. Co.* (1899) 96 Fed. 109, Affirmed in (1900) 44 C. C. A. 51, 104 Fed. 574 (seaman thrown, by a lurch of the ship, down an open hatchway); *Baltimore Elevator Co.* v. *Neal* (1886) 65 Md. 438, 5 Atl. 338 (here the captain of a tugboat belonging to an elevator company omitted to brace the yards of a ship, so that they should not come into collision with the elevator building, the result being that one of them struck a piece of slate from the roof and it fell onto a laborer,—vice principalship denied partly on the ground that servants may be coemployees, though not engaged in the same particular piece of work. See chapter XXVII., subtitle B, especially § 496, *ante*); *Price* v. *Houston Direct Nav. Co.* (1877) 46 Tex. 537; *Mathews* v. *Case* (1884) 61 Wis. 491, 50 Am. Rep. 151, 21 N. W. 513 (mate injured here); *Caniff* v. *Blanchard Nav. Co.* (1887) 66 Mich. 638, 33 N. W. 744 (left hatchways open when the mate went on board to inspect the ship as she was lying in harbor); *Larsson* v. *Delaware, L. & W. R. Co.* (1901) 59 App. Div. 202, 69 N. Y. Supp. 355 (negligent direction of captain of barge to cast off a hawser); *Leddy* v. *Gibson* (1873) 11 Sc. Sess. Cas. 3d series, 304 (sailor, in complying with an order to let go a rope under a heavy strain, had his leg broken); *Wyman* v. *The Duart Castle* (1899) 6 Can. Exch. 387.

In a recent English case it was held that the doctrine of common employment applies to the death of a seaman falling overboard and drowning, because of the neglect of the master to put in place stanchions and rails provided to raise the bulwarks to a proper height. *Hedley* v. *Pinkney & Sons S. S. Co.* [1894] A. C. 222. Affirming *Hedley* v. *Pinkney & Sons S. S. Co.* [1892] 1 Q. B. 58, and overruling *Ramsay* v. *Quinn* (1874) Ir. Rep. 8 C. L. 322 (where the ground taken was that the position of captain, for the purpose of securing the safety of the crew, is not that of a servant, but that of a superintendent). It was considered that, in view of the decision in *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30 (§ 529, *infra*) the only question to be decided was whether the captain was a servant or an agent. This question was thus briefly answered by Lopes, L. J., in the court of appeals: "The ship owner appoints and pays him, and can dismiss him. These are the ordinary incidents of the status of a servant, and apart from authority would show that the captain is a servant of the ship owner." *Hedley* v. *Pinkney & Sons S. S. Co.* [1892] 1 Q. B. 67.

[1] *Norfolk & W. R. Co.* v. *Nuckols* (1895) 91 Va. 195, 21 S. E. 342. Mr. McKinney's designation for the doctrine is the "superior servant limitation." Fellow Servants, chap. IV.

[2] This phrase is used in *Northern P. R. Co.* v. *Hogan* (1894) 11 C. C. A. 51, 27 U. S. App. 184, 63 Fed. 102, and many other cases.

It should be remarked that, even by courts outside the group we are now concerned with, decisions have been rendered which, at first sight, would seem to commit them to this doctrine. But these are explicable on special grounds. See the summary of cases in chapter XXX., *post*.

[3] *Consolidated Coal Co.* v. *Wombacher*

"Where the master appoints an agent with a superintending control over the work, and with power to employ and discharge hands and direct and control their movements in and about the work, the agent . . . stands in the place of the master." [4]

"Where the master gives to a person power to superintend, control, and direct the men engaged in the performance of work, such person is, as to the men underneath him, a vice principal, and it can make no difference whether he is called a superintendent, conductor, boss, or foreman. For his negligent acts and omissions in performing the duties of the master, the master is liable." [5]

A servant "does not assume risks and dangers caused by the negligent act of another servant under whose orders he works, and who, in a legal sense, stands as the master's representative, in rendering unsafe and dangerous work which the superior servant orders the employee to perform." [6]

"If the servant has been injured by the negligence of a superior servant having a right to control, and while executing the order of such superior about a matter in which the superior had a right to control, then such superior servant is, as to the inferior, a vice principal, and his negligence is that of the master." [7]

The master is equally responsible under this doctrine, whether the injury resulted from obedience to an order by the injured servant himself or by one of his fellow servants.[8]

In spite of the very sweeping language used in such passages as those quoted above, some of the courts whose decisions are cited have rather inconsistently declined to carry the doctrine enunciated to its logical conclusions. How low down in the scale of controlling em-

(1890) 134 Ill. 57, 24 N. E. 627. For other examples of the same form of expression, see—*Chicago & A. R. Co.* v. *May* (1884) 108 Ill. 288; *Louisville & N. R. Co.* v. *Lahr* (1888) 86 Tenn. 335, 6 S. W. 663; *Taylor* v. *Missouri P. R. Co.* (1891; Mo.) 16 S. W. 206; *Foster* v. *Missouri P. R. Co.* (1893) 115 Mo. 165, 21 S. W. 916; *Hoke* v. *St. Louis, K. & N.* R. Co. (1885) 88 Mo. 360.

[4] *Stephens* v. *Hannibal & St. J. R. Co.* (1885) 86 Mo. 221.

[5] *Miller* v. *Missouri P. R. Co.* (1891) 109 Mo. 350, 19 S. W. 58.

[6] *Anderson* v. *Ogden Union R. & Depot Co.* (1892) 8 Utah, 128, 30 Pac. 505.

[7] *Coal Creek Min. Co.* v. *Davis* (1891) 90 Tenn. 711, 18 S. W. 387.

[8] *Chicago & A. R. Co.* v. *May* (1884) 108 Ill. 288; *Hoke* v. *St. Louis, K. & N. R. Co.* (1885) 88 Mo. 360; *Spencer* v. *Brooks* (1895) 97 Ga. 681, 25 S. E. 480; *Proctor* v. *Missouri, K. & T. R. Co.* (1890) 42 Mo. App. 124; *Purcell* v. *Southern R. Co.* (1896) 119 N. C. 728, 26 S. E. 161; *Dick* v. *Indianapolis, C. & L. R. Co.* (1882) 38 Ohio St. 389 (conductor allowed engineer to run train at undue speed, and a section hand was struck down).

Contrast the principle, applied in the courts which reject the "superior servant" doctrine, that the master is not the less free from responsibility for the reason that the negligent order which caused the injury was given to a fellow servant of the injured person. See § 515, note 2, *supra*.

ployees the line between liability and nonliability should be drawn is far from being clear under the decisions, as they stand, and we shall therefore content ourselves with stating the effect of the few rulings which bear upon the question."

It need scarcely be said that the superior servant doctrine has no application to cases in which a superior servant is injured by the negligence of a workman under his control.[10]

521a. Relation of the superior servant doctrine to the doctrine that the head of a department is a vice principal.— In enunciating the superior servant doctrine, courts have often used language which, if taken literally, would imply that there is no distinction between that doctrine and the one which denies the character of a vice principal to any employee below the rank of the head of a department.[1] See subd. F., *infra*. But the facts involved in the decisions in which

[9] That the delinquent was a vice principal has been denied in the case of a "boss-wiper," who directs the engine wipers when to work and what to do (*Knox* v. *Southern R. Co.* [1898] 101 Tenn. 375, 47 S. W. 491); and of one of a small body of laborers, who is merely directing their work, but has no power to compel them to work in a particular manner, and to discharge them if they refuse (*Kellyville Coal Co.* v. *Hamble* [1899] 87 Ill. App. 437; *Agnew* v. *Supple* [1898] 80 Ill. App. 437).

But it is not easy to see how the refusal to maintain the action in these cases can be reconciled with the rulings allowing a servant to recover where the delinquent was merely the feeder of a machine and the injured employee a boy helping him (*Fanter* v. *Clark* [1884] 15 Ill. App. 470); or where the delinquent was superintending a gang of men engaged in lifting some heavy article (*Fraser* v. *Hand* [1889] 33 Ill. App. 153; *Fraser* v. *Schroeder* [1896] 163 Ill. 459, 45 N. E. 288).

As no negligence was proved in another case, it was left undetermined whether an operator of a sheers was a vice principal of his helper. *Glover* v. *Kansas City Bolt & Nut Co.* (1900) 153 Mo. 327, 55 S. W. 88.

[10] *Chicago & N. W. R. Co.* v. *Snyder* (1886) 117 Ill. 376, 7 N. E. 604, holding that a conductor is chargeable with the negligence of his subordinates, and cannot recover for an injury partly caused by such negligence, although the negligence of an employee in another department is a co-operating cause of the accident.

[1] "When a railway company confers authority upon one of its employees to take charge and control of a gang of men in carrying on some particular branch of its business, such employee, in governing and directing the movements of the men under his charge with respect to that branch of its business, is the direct representative of the company itself, and all commands given by him within the scope of his authority are, in law, the commands of the company." *Chicago & A. R. Co.* v. *Hay* (1884) 108 Ill. 288. The language of this statement is followed very closely in *Wyanet Coal Co.* v. *Holmquist* (1894) 152 Ill. 581, 38 N. E. 946; *Illinois Steel Co.* v. *Schymanowski* (1896) 162 Ill. 447, 44 N. E. 876; *Wabash, St. L. & P. R. Co.* v. *Hauck* (1887) 121 Ill. 259, 11 N. E. 253.

"One who has charge and control of other servants, and has authority to govern and direct their movements in the branch of the principal's business in which they are engaged, is, while acting in pursuance of and within the scope of such authority, a vice principal, so as to make his acts and directions the acts and directions of the principal." *Lichtenberg, McV. & L.* v. *Scherman* (1893) 146 Ill. 540, 34 N. E. 701 (contents of one of a pile of barrels removed, thereby weakening it, so that it could not support the weight resting on it, and the barrels consequently spread and fell on plaintiff). Affirming (1892) 50 Ill. App. 123.

See also *Gravelle* v. *Minneapolis & St. L. R. Co.* (1882) 3 McCrary, 352, 10 Fed. 711, where the jury were charged that a servant invested with control

liability has been imposed on the master by the courts which have expressed themselves in this fashion show quite clearly that the domains covered by the two doctrines are far from being coextensive. No more striking proof of the essential difference between them can be given than the fact that, in one of the cases just cited, it was declared that the master is none the less liable for the reason that the negligent employee may have an immediate superior standing between him and the master,[2] —a circumstance which is usually inconsistent with the theory that such employee is the manager of a department (see §§ 519 *supra*, 534 *infra*). Moreover, it is plain from the illustrative rulings given in § 524, *infra*, that the manager of a department, as such an official is conceived by the courts which have adopted the doctrine of departmental vice principals, is a functionary of a much higher grade than those who are regarded as vice principals under the superior servant doctrine.[3]

The difficulty of defining so essentially vague a term as "department" has, as we shall see in a later subtitle (F., *infra*), produced much conflict of opinion as to the position of certain functionaries, —notably conductors; but this source of confusion is manifestly inoperative wherever the superior servant doctrine is adopted.

522. Rationale of the doctrine.— The theoretic foundations of the superior servant doctrine have been variously stated.

over another "with respect to any *particular part of the business*" is not a fellow servant of the latter.

In one Texas case a section foreman was spoken of as being in control of a department. *Gulf, C. & S. F. R. Co.* v. *Wells* (1891; Tex.) 16 S. W. 1028. And in another the same phrase is used as to the foreman of a railway car repairing shop. *Missouri P. R. Co.* v. *Williams* (1889) 75 Tex. 4, 12 S. W. 835.

[2] *Chicago & A. R. Co.* v. *May* (1884) 108 Ill. 288. Compare the facts as illustrating this distinction in *Darling* v. *Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298; *St. Louis, A. & T. H. R. Co.* v. *Holman* (1894) 53 Ill. App. 617; *McDonough* v. *Great Northern R. Co.* (1896) 15 Wash. 244, 46 Pac. 334; *Lloyd* v. *St. Louis & S. F. R. Co.* (1893) 58 Ark. 66, 22 S. W. 1089, and the cases cited in § 524, *infra*, more especially those relating to section foremen.

This fundamental distinction is lost sight of in at least one case, where the ground assigned for holding that a car repairer entrusted by the master workman with the duty of instructing in his duties the plaintiff, a new employee who was to take his place, was a vice principal, was that he was the manager of a department in which his duty was that of direction and superintendence. *Chicago, R. & Q. R. Co.* v. *Sullivan* (1889) 27 Neb. 673, 43 N. W. 415. This ruling is only sustainable under the superior servant doctrine pure and simple.

See subd. F, *infra*, and the summary of Federal decisions in chapter XXX., *post*, especially the remarks in the *Ross Case*.

In *Fort Worth & D. City R. Co.* v. *Peters* (1894) 87 Tex. 222, 27 S. W. 257, Affirming (1894) 7 Tex. Civ. App. 78, 25 S. W. 1077, the court, referring to the earlier decision of *Missouri P. R. Co.* v. *Williams* (1889) 75 Tex. 4, 12 S. W. 835, where the character of vice principal had been ascribed to an "employee who has charge of a special department" of the business, said that this did not mean that, in order to let in the "superior servant doctrine," the department controlled must be a principal one.

a. Unequal knowledge of superior and subordinate.- One case dwells on the presumably unequal knowledge of the superior and inferior servants.[1] But a presumption which must evidently be, in a large proportion of instances, contrary to fact, is neither appropriate nor adequate to support a rule which is enunciated as one of universal application. Indeed, the statement in the case just cited is directly contradicted by another in a later judgment of the same court.[2]

In other cases language is used which implies that there are good grounds for admitting an exception to the doctrine of common employment, where the superior servant "in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised."[3] Clearly, however, it is impossible to ascribe any logical force to the element thus emphasized. The rule which prevents recovery for the negligence of a fellow servant is perfectly general in its scope, and the ignorance of the injured person as to the dangers of his environment at a certain conjuncture must be characterized as an entirely irrelevant circumstance. So far as this factor is concerned, the rationale of the doctrine of common employment requires the conclusion that the injured servant's knowledge or lack of knowledge is not material, except so far as it had relation to his connection with the delinquent coemployee. If he knew that he was to work under the orders of another person, he must necessarily have known that, in the normal course of things, he would be exposed to the risk of being injured by the latter's negligence. A general acceptance of the risk being thus imputed, it can make no difference under which of the many possible forms the breach of duty may ultimately take effect.

[1] In *Louisville & N. R. Co.* v. *Bowler* (1872) 9 Heisk. 861, the court remarked: "It is absurd to hold that the common manual laborer, as a general rule, understands the management of such work, its proper mode of execution, and the dangers attending it, equally with him who sets himself up as the overseer, director, and architect of it."

Compare the language in the dissenting opinion of Turney, J., in *Knoxville Iron Co.* v. *Dobson* (1881) 7 Lea, 367, denying that one whose duty it was to retemper the knives of a nail machine was the fellow servant of a feeder of the machine, the ground taken being that the one duty was a matter of skill; the other simply mechanical, requiring no skill.

[2] *Nashville, C. & St. L. R. Co.* v. *Wheless* (1882) 10 Lea, 741, 43 Am. Rep. 317. See the quotation under subd. C, *infra*.

[3] *Missouri P. R. Co.* v. *Peregoy* (1887) 36 Kan. 424, 11 Pac. 7. Compare the grounds assigned for the decisions in *Thompson* v. *Chicago, M. & St. P. R. Co.* (1883) 4 McCrary, 629, 14 Fed. 564; *Consolidated Coal Co.* v. *Womacher* (1889) 31 Ill. App. 288 (1890) 134 Ill. 57, 24 N. E. 627. But, in the latter case at least, no stress is intended to be laid on the character and effects of the negligent order.

b. Inability of master or superior agents to supervise all details of the work.—Another consideration relied on is that the manager of an entire establishment (or the master himself) cannot be present everywhere in person to direct the employees in their work, but must, of necessity, give orders through others.[1] But this is a fact the significance of which depends entirely on the standpoint. There is no reason why it should not be deemed equally appropriate to serve as a justification of the theory that a servant assumes the risks of his superior's negligence, and such is actually the use made of it by the courts in which that doctrine is accepted. See § 516, *supra*. It cannot be of any force unless and until the conclusion has, on other grounds, been arrived at, that the doctrine of the assumption of a coservant's negligence shall not extend to cases in which an employee has been deputed to give orders at times and places at which it is impossible for the master or his general agent to be present. To conceive of an order of a subordinate foreman as being in effect an order of the master or his general agent, for the reason that the latter has actually or impliedly instructed the workmen to do whatever the former directs them to do, does not strengthen the theory here criticised. Such a conception, it is obvious, really begs the whole question which has to be determined, *viz.*, whether the subordinate foreman is to be regarded as an employee who stands in the place of his superior.[2]

c. Obligation of servant to obey his superior.—From the language used in some cases it would seem that a sufficient foundation for the superior servant doctrine is by some judges supposed to be furnished by the obligation of a subordinate to obey the orders of those who are set in authority over him.[3]

d. Duty to use care in giving orders regarded as one of the non-

[1] See the extract from *Dixon* v. *Ranken* (1852) 14 Sess. Cas, 2d series, 420, 1 Am. Ry. Cas. 569, in note 7, *infra*; also *Dowling* v. *Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298.

[2] See *Dowling* v. *Allen* (1881) 74 Mo. 13, 41 Am. Rep. 208.

[3] "In exercising this power he does not stand upon the same plane with those under his control. His position is one of superiority. When he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey, at the peril of losing their situations; and such commands are, in contemplation of law, the commands of the company, and hence it is held responsible for the consequences." *Chicago & A. R. Co.* v. *May* (1884) 108 Ill. 288.

"In entering the service of the defendant, the plaintiff might be and is presumed to understand and take upon himself every risk naturally pertaining to such service, and, amongst others, that which may proceed from the possible carelessness of such fellow servants as he must know, from the very nature of the employment, he may be required to associate with in the performance of his duties. But no such presumption is or should be raised, of his willingness to assume the risk growing out of the possible negligence of one who, while a servant to their common master, stands to himself in the light of a superior

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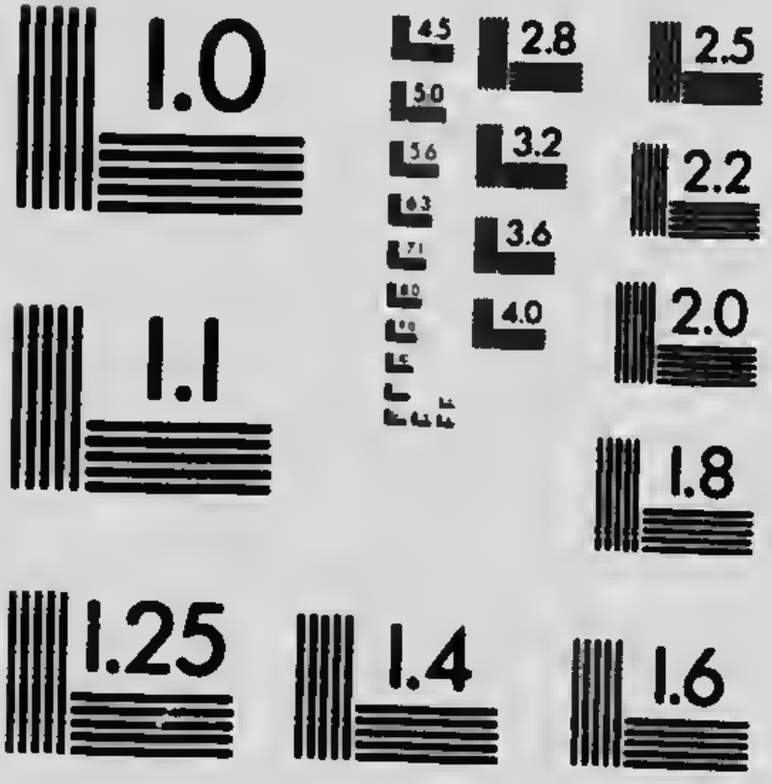

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assignable duties of the master.—(See also § 576, *ad finem*, *post.*)—Another suggested basis for the doctrine is that the duty of using reasonable care in giving orders to servants is one of those obligations which the master cannot delegate so as to absolve himself from lia-

whose commands and directions he is bound to obey; for so to hold, in the case of a corporation like this defendant, which can only operate through its agents and employees, would be to absolve it from all responsibility to those in its employment." *Cooke* v. *Richmond & D. R. Co.* (1881) 84 N. C. 309, 37 Am. Rep. 620.

The test is whether the subordinates "have just reason for believing that the failure or refusal to obey the superior will or may be followed by a discharge." *Turner* v. *Goldsboro Lumber Co.* (1896) 119 N. C. 387, 26 S. E. 23. But the language held in North Carolina is not of a uniform tenor in this connection. See the extract from *Patton* v. *Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 863, in note 7, *infra*.

In other cases it has been laid down that the rule is not based "upon the idea of the relative rank of the two servants, or the general superiority of the one in position, intelligence, or skill, or in the wages received, but upon the ground that the one is placed under the orders and directions of the other, and required to submit to and obey such orders in the performance of his duties; that the 'inferior' is placed in the position of a servant to the 'superior.' In such cases the superior is held to represent the master." *Nashville, C. & St. L. R. Co.* v. *Wheless* (1882) 10 Lea, 741, 43 Am. Rep. 317; *Illinois C. R. Co.* v. *Spence* (1893) 93 Tenn. 173, 23 S. W. 211.

Among the states which adopt this theory may, perhaps, be numbered Kentucky, though the following extract from the leading case of *Louisville & N. R. Co.* v. *Collins* (1865) 2 Duv. 114, 87 Am. Dec. 486, shows that in some respects, notably in respect to the distinction taken between the effects of gross and ordinary negligence, the views of this court place it in a class by itself (see § 549, *post*). "In the employment and control of his subordinates, the engineer acts as the representative agent of the common superior,—the corporation. They have no authority to control or resist him in his allotted sphere of service: and why, then, should the law imply a contract to trust him alone, and never look to the corporation as his employer and constituent, for indemnity for damage resulting from his wilful wrongs or grossly negligent omissions? When they engaged to serve under him, perhaps they knew nothing of his trustworthiness or his credit; but they knew that they would serve a corporation, and probably faith in its responsibility and protection induced them to venture into its service; and this faith may be presumed to include an assurance of safety as well as of pay. Perhaps if they had understood that the corporation would not be responsible for the conduct of its engineer, they would never have risked such service under him. The contract implied by law would, therefore, rather seem to be that the subordinates should look to the corporation, and not to its agent alone, for indemnity for loss arising to them from his unskilfulness or culpable negligence. Nor can we perceive how public policy could be subserved by the irresponsibility of the corporation in such a case. Such exemption, if known, might possibly stimulate the subordinates to a more vigilant observance of the engineer's conduct; but why should they be left to depend on that which could be of little, if any, avail to prevent the unskilfulness or negligence of a superior above their dictation or control? In undertaking the perilous service, they might be presumed to risk the hazards necessarily incident to their employment; and as they could not expect infallibility in the management of the locomotive and its running train, and as they knew that the most faithful and skilful managers occasionally lapse into common blunders and ordinary negligence, the law might imply an agreement to risk their possible occurrence. But the corporation being under an implied obligation to provide sound and safe cars and engines and a competent and faithful engineer, his subordinates cannot reasonably be presumed to expect or to hazard his gross negligence, which borders on fraud and crime; and it seems to us therefore, that while the corporation may not be responsible to them for his ordinary negligence both justice and policy require that it should be held liable for his gross negli-

bility for their nonperformance or improper performance. This theory seems to furnish the only really satisfactory explanation of the liability imposed, as it brings this particular exception to the coservant rule into line with the others, which rest upon the representative character of the negligent employee.[7] Such a standpoint

gence as its chief and controlling agent in the management of its running train. . . . The only consistent or maintainable principle of the corporation's responsibility is that of agency. *Qui facit per alium facit per se.* It is therefore responsible for the negligence or unskilfulness of its engineer as its controlling agent in the management of its locomotives and running cars, and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill: as to strangers, ordinary negligence is sufficient; as to subordinate employees associated with the engineer in conducting the cars, the negligence must be gross; but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient. Among common laborers, constituting a distinct class, all standing on the same platform of equality and power, and engaged in a merely incidental, but independent, service, no one of them, as between himself and his coequals, is the corporation's agent, and therefore it is not, on the principle of agency or otherwise, responsible for damage to one of them resulting from the act or omission of another of them, although each of the company's employees would be its agent as to entire strangers to it." But when it is remembered that what is really wanted is some reason which will be adequate to justify introducing an exception to the general rule that the risks of a fellow servant's negligence are assumed, this conception is, it is obvious, quite irrelevant. There is no such essential incompatibility between an agreement not to hold the master liable for a fellow servant's acts, and a duty to obey the same fellow servant's orders, that it is warrantable to suppose the implication of the agreement to be excluded by the existence of the duty.

[7] The language of the following elaborate exposition of the doctrine in the early case of *Cleveland, C. & C. R. Co. v. Keary* (1[illegible]3 Ohio St. 204, where a railway co[illegible] was held liable for the negligence of a conductor, is unduly wide, in so far as it supposes the existence of a general obligation in the master to "superintend and control the forces he employs:" for such a principle, if carried to its logical conclusion, would make him the supervisor of every act of every servant, and thus sweep away the whole doctrine of coservice. But otherwise it is a sound and lucid presentment of the considerations by which the inference of an acceptance of the risk of a fellow servant's negligence in this particular instance may be deemed to be negatived. "No one has the right to put in operation forces calculated to endanger life and property, without placing them under the control of a competent and ever-active superintending intelligence. Whether he undertakes it, or procures another to represent him, the obligation remains the same, and a failure to comply with it in either case imposes the duty of making reparation for any injury that may ensue. When one enters his employment in a subordinate situation, and agrees to be subject to his orders, either directly or indirectly given, he has a right to expect that his employer will perform the duty resting upon him to furnish suitable machinery and control it with care and prudence. Whenever the law recognizes duties it imposes corresponding obligations. It is the duty of the owner to superintend and control the forces he employs, and the duty of the servant to obey and perform under his directions: and certainly, in the absence of positive stipulations, the law will not, as between themselves, throw those which belong to the one on to the other, or refuse to enforce the obligations which either may have incurred. As corporations can act only through their agents and officers authorized to exercise the functions conferred by their charters, there is much force in the view . . . that the superintendent (and conductor when running a train) of a railroad ought to be regarded as the proper representatives of the company, and their acts considered as those of the company. But I do not think it necessary to insist upon this position.

is fully warranted by the fact that the power of controlling the details of the work to be done is, as shown in volume III., the very element which serves to distinguish one who is, from one who is

Let the company be liable only upon the maxim, *respondeat superior*, or upon the obligations arising out of the contract of service and in either view their liability for injuries to their subordinates, caused by the carelessness of the conductor they have placed over them, in charge of the train, is, in our opinion, sufficiently apparent. This conclusion rests wholly upon the idea that the company, from the very nature of the contract of service, is under obligations to them, as well as they to the company; and that amongst these obligations is that of superintending and controlling, with skill and care, the dangerous force employed, upon which their safety so essentially depends. For this purpose the conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogatives of the owner; and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as a man and a party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both necessary to produce the result. It is his to command and theirs to obey and execute. No service is common that does not admit a common participation; and as servants are fellow servants when one is placed in control over the other. The servants employed to execute cannot recover for injuries arising from a failure in that part of the business committed to them, because it is their failure, and not that of their employer; and although it should happen from the negligence of but one of them, yet each one entered the common service with a knowledge that others must be engaged, and they were jointly bound to perform what was jointly intrusted to them, and public policy may be concerned in their keeping a supervision over each other for the purpose. But how this can be made to extend to the conductor, over whose acts they have no supervision or control, and are not presumed to be possessed of the requisite intelligence for the purpose, we are wholly unable to see; and equally so, how the safety of travelers is likely to be jeopardized by adding to the responsibility of the conductor for his carelessness that of the company that places him in power. . . . While the principle of *respondeat superior* is as old as the law itself, it is everywhere admitted that no exception to its operation, as is now contended for, was ever asserted until the case of *Priestley* v. *Fowler* [(1837) 3 Mees. & W. 1 Murph. & H. 305, 1 Jur. 987] was decided. That case and those made upon its authority in England and America have all proceeded upon the general ground of exempting the master from responsibility to one servant for injuries arising from the carelessness of another engaged in the common service, because the servant, by his contract, takes these risks upon himself. None of them have in terms declared that he is not liable for the negligent and careless conduct of him to whom he delegates the power of control and command over them. The court whose authority has been most relied on in this country has expressly refused to declare it. Even to this extent the doctrine has been resolutely resisted at every step by distinguished jurists. To speak of it, therefore, as a settled principle of the common law, is to confound ideas. To adopt it without a conviction of its justice and propriety is to abuse the power with which the law has invested us. Our plain duty is to endeavor to ascertain the true nature of the relation between the parties and the inherent elements of the contract on which it is founded, and from them deduce the principle that ought to govern. . . . Tested in this manner it seems to us clear, in a case like the present, that, as between the company and those employed to labor in subordinate situations under the control of a superior, two distinct classes of obligations arise,— the one resting upon the company and the other upon the servants,—and both founded upon what each, either expressly or impliedly, has agreed to do in execution of the

not, a master as regards the injured person. It is a perfectly logical and rational position to take, that, where this essentially characteristic function is involved, the rule as to assumption of risks shall

contract. It is the duty of the company to furnish suitable machinery and apparatus, and, as they reserve the government and control of the train to themselves, and intrust no part of it to these servants, to control it and them with prudence and care. As the necessity for this prudence and care is constant and continuing, the obligation is performed only when it is constantly exercised, and they cannot rid themselves of it by devolving this power upon the conductor. If they intrust him with its exercise, in the language of Judge Story, they 'in effect warrant his fidelity and good conduct.' It is the duty of the servants to obey the orders of the superior thus placed over them, and to perform as he shall direct. If they fail to do this, and injure each other, they violate their engagements to the company, and are alone answerable for the wrongs they may do. In such case there is no failure of the company to do what, as between them and these servants, it was understood they should do, when the servants entered the service. But they cannot be made to bear losses arising from carelessness in conducting the train, over which their employer gave them no power or control, either separately or collectively, until we are prepared to say that justice and public policy require the consequences of duty omitted by one party to be visited upon the other, although stripped of all power to prevent such consequences."

This opinion was largely based on the Scotch case of *Dixon* v. *Rankeu* (1852) 14 Sc. Sess. Cas. 2d series, 420, 1 Am. Ry. Cas. 569 (afterwards overruled by the House of Lords in *Bartonshill Coal Co.* v. *Reid* [1858] 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767), where Lord Justice Clerk reasoned thus: "The master's primary obligation in every contract of service in which his workmen are employed in a hazardous and dangerous occupation for his interest and profit is to provide for and attend to the safety of the men. That is his first and leading obligation, paramount ev[illegible]o that of paying for their labor. T[illegible] ligation includes the duty of furnishing good and sufficient machinery and apparatus, and of keeping the same in good condition,—and the more rude and cheap the machinery, and the more liable on that account to cause injury, the greater his obligation to make up for its defects by the attention necessary to prevent such injury. In his obligation is equally included, as he cannot do everything himself, the duty to have all acts by others whom he employs done properly and carefully, in order to avoid risk. This obligation is not less than the obligation to provide for the safety of the lives of his servants by fit machinery. The other servants are employed by him to do acts which, of course, he cannot do himself, but they are acting for him and instead of himself, as his hands. For their careful and cautious attention to duty, and for their want of vigilance, and for their neglect of precaution, by which danger to life may be caused, he is just as much responsible as he would be for such misconduct on his own part if he were actually working or present. And this particularly holds as to the person he intrusts with the direction and control over any of his workmen, and who represents him in such a matter."

Other judicial statements of the same tenor are the following: "The master, by appointing a foreman or other person to superintend work, with power to direct the men under him when and how to do it, thereby devolves upon such person the performance of those duties personal to the master." *Miller* v. *Missouri P. R. Co.* (1891) 109 Mo. 350, 19 S. W. 58.

"There seems to be no well-settled rule that classifies the agents and servants of a common employer, whether natural or artificial, first, into such as have authority to represent, act for, and in the place of, the employer in respect to the persons, business, matters, and things wherewith they are charged; and, secondly, such as have no such authority, but are merely fellow servants. But, without regard to such rule, there is no reason why such authority may not be specially conferred upon any such agent or servant. In this case the burden of proving the authority—its extent and compass— by competent evidence, would rest upon the party alleging it, unless the nature of the agency or employment implied its existence and extent. Thus, an employer might confer upon a particular laborer charged to do a particular sort of service, but who simply, by

the nature of his employment, would have no authority to represent or bind his principal in any respect, power to employ other like laborers with himself to do the service to be done, to direct and command them when, where, and how to work, to control and superintend them, and to discharge them from employment in his discretion, although he should labor with and as one of them. And there can be no question that the employer would be answerable for the misfeasance or nonfeasance of such agent in the course of his employment and in the exercise of the power thus conferred upon him. This is so because the agent in such case would be expressly authorized to represent, act for, and in the place of, his employer in the business designated and within the compass of the power conferred. And so, in the case before us, although the section master or foreman might not have authority, arising from the nature of his employment, to bind the defendant for his acts toward, and his commands to, his fellow servants, yet, if the defendant conferred upon him power and authority to employ laborers—fellow laborers with himself—to work on the section of the road wherewith he was charged, and authority to superintend them, to give them orders and commands in the line of work to be done, which they were bound to obey, and to discharge them from such employment, in his discretion, as alleged in the complaint and as the evidence introduced on the trial tended to prove, the defendant would be liable for his misfeasance and nonfeasance in the course of the exercise of his authority thus conferred by it. This is so upon the plainest principles of law applicable to and governing the relations of principal and agent towards each other and third persons. This case is not like the ordinary one of injury done by one fellow servant acting as foreman or leader of several or many laborers, to one of his fellow servants. The complaint expressly alleges that the section master named was agent and servant, and 'had full power and authority of the said defendant to hire and discharge hands and servants in that behalf on said section, and who was the superior of the said plaintiff in that behalf, whose orders and commands in the line of said service, as the agent, foreman, and boss of the said defendant, the said plaintiff was lawfully bound to obey;' and there are other similar allegations to the same effect. Evidence was introduced on the trial to prove this material allegation, and the jury found by their verdict that it was true. So it appears that the section master in this case was not simply a fellow servant of the plaintiff, but as well the agent of the defendant, charged with authority to employ, control, and command the plaintiff as to the labor he should do on the railroad of the defendant while he was so in its service, and to discharge him from such service, just as its president or other leading executive officers might have done; and the defendant must therefore be held liable for his misfeasance in the course of his agency, just as if the same had been done by its chief executive officer." *Patton* v. *Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 86.

The following passage from a Minnesota case is also instructive in this connection, though it must be remembered that in that state the superior servant doctrine has never been accepted: "Where a large number of men are employed upon the same work, it is essential that reasonable orders regulating their conduct and assigning them proper places in which to work should be given. It is the duty and the right of the master to give orders and direct the places where his servant shall work. . . . A workman when ordered from one part of the work to another cannot be allowed to stop, examine, and experiment for himself in order to ascertain if the place assigned to him is a safe one; and therefore in obeying the order, . . . he has a right to rely upon a faithful discharge of the master's duty to use ordinary care to warn and protect him against unusual dangers. Any rule or doctrine which deprives the workman of this right and protection when the master delegates the power and duty of giving such orders to a subordinate, no matter how high or low his rank or grade, is unsupported by reason, violates all considerations of justice, and is not supported by the weight of authority." *Carlson* v. *Northwestern Teleph. Exch. Co.* (1896) 63 Minn. 438, 65 N. W. 914. Strictly speaking, this reasoning is, it should be remarked, applicable in its entirety only to one particular kind of order, viz., that which takes a servant to a new place of work without giving him time to examine his surroundings. If, however, the propositions here laid down are unreservedly accepted, it is difficult to see what logical halting place there can be short of an adoption of the su-

give way to the rule which makes certain obligations of the master nonassignable.[3]

Not the least of the merits of this mode of explaining the rationale of the doctrine—and it is a merit which none of the other theories possess—is that it furnishes a simple, clearly defined issue upon which the controversy between the opposing schools of thought which reject and which accept the superior servant doctrine may be concentrated. The advantages of such a situation in dialectics are as obvious as they are in pleading.

e. Summary.—Whichever of the above explanations of the doctrine may be regarded as the correct one, it seems abundantly evident that the broad question whether the master shall be held responsible for the negligence of all supervising employees, and, if so, whether the responsibility shall extend to every species of negligent act, or be circumscribed within the lines indicated by some of the cases cited in chapter XXIX., *post*, is not susceptible of settlement on any purely juridical basis, and therefore presents a peculiarly appropriate subject for that legislative intervention which, in a large number of jurisdictions, has already enlarged the servant's right of

perior servant doctrine. But when tested by the earlier and later decisions in this state, the case cannot be sustained except on the narrow ground of a breach of the duty of instruction or warning. See § 57, *ante*.

See also *Hoon* v. *Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401; *Criscell* v. *Pittsburgh, C. & St. L. R. Co.* (1888) 30 W. Va. 798, 6 S. E. 31; *Schroeder* v. *Chicago & A. R. Co.* (1891) 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094; *Foster* v. *Missouri P. R. Co.* (1893) 115 Mo. 165, 21 S. W. 916; *Bland* v. *St. Louis & S. F. R. Co.* (1893) 58 Ark. 66, 22 S. W. 1089—which all proceed more or less upon the theory that the duty of supervision is nonassignable.

[3] In discussing this particular aspect of an employer's responsibility Messrs. Shearman & Redfield (1 Neg. § 233) seem to the present writer to put the case for their own side of the question much more strongly than the authorities really warrant. There is a wide distinction between the theory that the master must answer for the results of a negligent order when it is given by a general or departmental manager, and the theory that any employee to whom the power of control is delegated is a vice principal. This distinction, it is submitted with all deference, the learned authors have not fully appreciated; otherwise they would hardly have cited in support of their views the decisions of the Federal courts, or of Alabama, Connecticut, Georgia, Colorado, Minnesota, Oregon, Vermont, Washington, Louisiana, Wyoming, and Indiana. As the summary of decisions in chapter XXX., *post*, indicates, these are all jurisdictions in which responsibility cannot be fixed upon the master merely by showing that the injury was caused by complying with the orders of a controlling employee. South Carolina, the decisions in which are also relied upon, is a more doubtful state; but in the decisions as they stand (see summary in chapter XXX., *post*), it can scarcely be classed as one of those which accept the superior servant doctrine in the sense contended for. Virginia and West Virginia, which supported the theory of the learned authors at the time their treatise was compiled, have now gone over to the opposite camp. See summary in chapter XXX., *post*.

It is noticeable that the phraseology employed in stating the nature of the supervision exercised by a foreman often suggests his representative character from the point of view adverted to in the text,—as, where he is described as

recovery.[9] But it is not unworthy of remark that there is some inconsistency in the position of those courts which reject the superior servant doctrine, and at the same time maintain that the duty of framing suitable regulations for the conduct of the business is non-delegable. Such regulations are essentially nothing but general orders, the object of which is to secure the safety of servants. Why should any distinction be made, in the present point of view, between such general orders, and the particular orders which it is the duty of controlling officials, as the work progresses, to issue in such a form that their subordinates will not be exposed to undue perils?[10] The only difference between the two kinds of orders is that by one of them the master's will is declared in such a form as to indicate the

an agent "who directs the manner of executing the particular work" (*Herriman* v. *Chicago & A. R. Co.* [1887] 27 Mo. App. 435); or as one who has "control of work and authority to direct how, when, and where it should be done" (*Cox* v. *Sprague Granite Co.* [1890] 39 Mo. App. 424).

[9] In this connection it is interesting to note that one of the main innovations introduced by the English employers' liability act of 1880 and the American statutes modeled upon it embodies the following principle formulated in the report which the Parliamentary Commission of Inquiry submitted in 1877: "Where the actual employers cannot personally discharge the duties of masters, or where they deliberately abdicate their functions and delegate them to agents, the acts or defaults of the agents who thus discharge the duties and fulfil the functions of the masters should be considered as the personal acts or defaults of the principals and employers, and should impose the same liability on such principals and employers as they would have been subject to had they been acting personally in the conduct of their business, notwithstanding that such agents are technically in the employment of the principals."

[10] The essential identity of general and particular orders is thus noted by the supreme court of Missouri: "It is a part of the personal duty of the master to give direction to the work he undertakes, and to prescribe the system or method of conducting it. In so doing he must use ordinary care for the safety of those engaged in his service. Accordingly, it has been held that the omission to adopt and to enforce rules necessary for the reasonably safe management of a business as complex and as hazardous to life and limb as that here in view may sometimes form the basis for a finding of negligence on the part of the master. *Reagan* v. *St. Louis, K. & N. W. R. Co.* (1887) 93 Mo. 348, 6 S. W. 371; *Abel* v. *Delaware & H. Canal Co.* (1891) 128 N. Y. 662, 28 N. E. 663; *Whittaker* v. *Delaware & H. Canal Co.* (1891) 126 N. Y. 544, 27 N. E. 1042. Such holdings rest upon the same principle that supports the rule of liability for defects in the plant or appliances. As has lately been tersely said in a case which received very thorough consideration: 'A master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself.' Lord Watson in *Smith* v. *Baker* [1891] A. C. 353, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660. Rules, however, are but one means of giving direction to the master's work. Its guidance, as to details, is often necessarily intrusted to managers, foremen, and others. By whatsoever name such a superior employee may be called, his relation to the subordinates acting under his orders is not that of a fellow workman in respect to his performance of the master's function of directing them and the work in his charge." *Schroeder* v. *Chicago & A. R. Co.* (1891) 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094.

Compare the language used in *Foster* v. *Missouri P. R. Co.* (1893) 115 Mo. 165, 21 S. W. 916, as quoted under § 523, note 3, *infra*.

course to be pursued at those indefinite times in the future when the circumstances provided for shall happen to supervene, while by the other he expresses his wishes as to some particular operation connected with work which is about to be carried out or is already in progress. There is no little difficulty in discovering any adequate or satisfactory ground upon which it can be maintained that this difference is so fundamental as to justify the application of [illegible] rules of law with respect to the representative capacity of the two classes of employees from whom the general and the special orders issue. If there is such a difference, it has never been explained in what it consists or on what ground it rests. The present writer ventures to think that the only loophole by which this difficulty can be escaped is furnished by the bald theory that reasonable care requires the master to promulgate general rules, but not to give orders about details. If there is no duty in the latter respect, the question whether such a duty is nonassignable becomes immaterial.[1] In the nature of the case, however, it is clear that the existence or nonexistence of such a duty must remain a mere matter of opinion, the inherent uncertainty of which once more suggests the need of a legislative determination of the controversy.

522a. What constitutes the exercise of control within the meaning of the doctrine.—It is very rarely that there can be any possible dispute as to what constitutes an exercise of control within the meaning of the superior servant doctrine. In a few cases recovery has been sought on the theory that the signals given by employees to one another while they are performing duties which render such means of intercommunication necessary are in the nature of orders or commands, the argument being that, as each employee is authorized to give them and the others are bound to obey them when given, the result is to create the relation of superior and subordinate. But this contention has not prevailed.[2]

[1] This is practically the [illegible] setts doctrine. See § 560, *post*.

[2] Evidence that the rules of a [illegible] company required that the engineer should give certain specified signals as a "notice" to apply or loose the brakes, and that the brakeman should manage the brakes accordingly, and while on the train be in subordination to the conductor, has been held not to render the brakeman a subordinate servant in such a sense as to render the company liable for an injury occasioned by the negligence of the engineer. (Scott and Ashburn, JJ., dissenting.) *Pittsburg, Ft. Wayne & C. R. Co.* v. *Lewis* (1877) 33 Ohio St. 196. The following passage is extracted from the opinion of the majority: "To secure the management and transit of trains, and the safety of passengers, employees, and others, from the nature of the business many signals and of various kinds are required. They are required by the rules to be given by all classes of employees,—conductors, engineers, brakemen, switchmen, stationmen, flagmen, trackmen. A corresponding duty of heeding signals is required

A mere request is not an order within the scope of the superior servant doctrine, where it emanates from an employee who is not authorized to require the service performed in compliance with it.[3] Compare § 536, *infra*.

523. Existence or absence of a power to hire and discharge subordi-

of all employees without reference to their grade of employment; and yet it was never supposed that thereby any relation of superior and subordinate was created or necessarily existed. The system of giving notice by signals is a mere mode of doing the business of the company, arising from the necessity of the case. They are to be given and heeded by both superiors and subordinates, in accordance with the nature of the thing to be done, or as circumstances may require. It is as much the duty of an engineer to be controlled by the signals of brakemen, given under the rules of the company, as it is the duty of brakemen to be governed by the signals of an engineer, given under the same rules, and neither one more than the other is thereby made subordinate to the other. That relation can be created only by the act of the master conferring his authority upon one over the other; when that is done then one represents the authority of the master, and therefore may control the other, who for that reason becomes his subordinate."

The same conclusion, though again by a divided court, was arrived at in *Pittsburgh, C. & St. L. R. Co.* v. *Ramey* (1882) 37 Ohio St. 665 (signal given by engineer to brakeman). "These signals," it was said, "are so named properly, and are intended to notify all concerned of the thing signified. They are addressed to the conductor as well as brakeman, and it is the duty of the conductor to see that brakemen perform the duty signified. This duty is imposed upon the brakemen by force of the rule itself, and not by virtue of any authority vested in the engineer over the brakeman. The signal is a mere notice. The rule is the order of the company to the brakeman directly. Suppose a train is signaled by a station agent, as this train was, to stop for orders. It thereby became the duty of the conductor, as well as of each employee on the train, to stop for orders; and yet no one can contend that such station agent who gives the signal is the superior, and the train crew subordinate, employees of the company within the meaning of the rule under consideration. A variety of signals, under a variety of circumstances, are required to be given by different employees of the company, to signify that an occasion exists for the performance of a particular duty; but it would be absurd to hold that in each case the employee giving the signal is a superior servant, to whom all others to whom information is thus communicated are subordinated, so that the company would be responsible to them for any act of negligence of the employee who gave the signal, whether such negligence was in giving the signal or in the performance of other duties. For, it must be observed, that negligence or carelessness is not affirmed of the act of the engineer in giving either the signal to tighten the brakes or to loosen them. The only negligent and careless act charged against him was in forcing the engine forward violently, without giving time to the brakeman to loosen the brakes."

Compare also the doctrine that a servant who is appointed to give warning signals or to notify his coworkers as to the approach of transitory dangers is not engaged in discharging the master's nondelegable duty to maintain a safe place of work. *Hermann* v. *Port Blakely Mill Co.* (1896) 71 Fed. 853.

It is deserving of note that a workman who merely gives directions when to set in motion or stop machinery is not a "superintendent" within § 1, subs. 2, of the English employers' liability act of 1880. *Shaffers* v. *General Steam Nav. Co.* (1883) L. R. 10 Q. B. Div. 356, 52 L. J. Q. B. N. S. 260, 48 L. T. N. S. 228, 31 Week. Rep. 656, 47 J. P. 327.

Hunter v. *Kansas City & W. R. & Bridge Co.* (1898) 29 C. C. A. 206, 54 U. S. App. 653, 85 Fed. 379, a ruling as to a similar provision in the Arkansas statute of 1893, is to the same effect as this English decision, and the *Ramey Case* (1882) 37 Ohio St. 665, was cited with approval. Compare also *Texas C. R. Co.* v. *Frazier* (1896) 90 Tex. 33, 36 S. W. 432, construing the Texas statute.

[3] *Bradley* v. *Nashville, C. & St. L. R. Co.* (1884) 14 Lea. 374 (yardmaster coupled cars at request of engineer).

nate; significance of.—(Contrast with the doctrines discussed in this section those noticed in § 518, *supra.*)—The possession of the power to hire and discharge his subordinates is normally possessed by a large proportion of those employees who are held under the superior servant doctrine to be vice principals, and is frequently mentioned by the courts in the enumeration of their attributes.[1] As the cases stand, however, the precise evidential significance of this power, as an actually determinative element, is somewhat obscure.

If it were of any importance to determine the character of a servant who should possess the power of discharge without the power of control, there is apparently some authority for the principle that the fact of an employee's having authority from the master to discharge his fellow servants does not of itself constitute him a vice principal.[2] The correct rule in regard to the situation supposed is, however, of very small moment, inasmuch as the only instance of the separation of powers likely to occur in practice is that in which the power of discharge is wielded by a servant superior to the one who actually controls the workmen while actually engaged in their work: and this official would of necessity always be a vice principal by virtue of that potential power of control which is implied by his higher rank, and which is susceptible of being called into active exercise whenever he chooses to assume the personal management of any servants who may be normally supervised by a subordinate foreman.

As regards the cases in which the superior servants possess the power of control without the power of discharge, the obvious inference from the theory that such servants are vice principals for the reason that the exercise of control involves the discharge of a non-

[1] *Patton* v. *Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 863; *Logan* v. *South Carolina R. Co.* (1895) 116 N. C. 940, S. E. 359; *Miller* v. *Cairo P. R. Co.* (C. C. 53) 5 McCrary, 300, 17 Fed. 67; *Chicago Dredging & Dock Co.* v. *McMahon* (1888) 30 Ill. App. 358; *Chicago, B. & Q. R. Co.* v. *Blank* (1887) 24 Ill. App. 438; *Mason* v. *Edison Mach. Works* (1886) 28 Fed. 228; *Kansas P. R. Co.* v. *Little* (1877) 19 Kan. 267; *Clowers* v. *Wabash, St. L. & P. R. Co.* (1886) 21 Mo. App. 213; *Rowland* v. *Missouri P. R. Co.* (1886) 20 Mo. App. 463; *Hoke* v. *St. Louis, K. & N. R. Co.* (1882) 11 Mo. App. 574; *Clayhaugh* v. *Kansas City, Ft. S. & M. R. Co.* (1894) 56 Mo. App. 630; and other cases cited in § 524, *infra*,— especially those relating to section, foreman.

[2] *Webb* v. *Richmond & D. R. Co.* (1887) 97 N. C. 387, 2 S. E. 449; *Hamilton* v. *Iron Mountain Co.* (1877) 4 Mo. App. 564, Appx. But the later case is a mere memorandum of the conclusion of the court, and the opinion in the former mentions no precedents, and does not state the grounds on which the conclusion is based to rest. It is therefore impossible to say exactly what were the precise limits of the doctrine intended to be laid down,—especially as the superior servant in both cases was, so far as appears, in control of the work as well as invested with the power of discharge. In any event, the mere fact that the negligent servant may have the right to employ other servants, but not the complainant, will not invest him with the character of vice principal as respects the latter. *Lloyd Coal Min. Co.* v. *McNally* (1881) 15 Ill. App. 181.

delegable duty is that they are none the less representatives of the master because they are not invested with the power of discharge. And such is the effect of most of the decisions.[3] Especially must the nonpossession of this power be immaterial, where the superior servant is of sufficiently high rank to control the employee who actually possesses the power; though, perhaps, it would be more correct to describe such a case as one in which the power is not exercised directly, rather than one in which it is wanting.[4]

The doctrine that an employee without the power of discharge cannot be a vice principal would be a natural deduction from the theory which refers the superior servant doctrine to the obligation of the subordinate to obey duly authorized commands. But the deduction is not a necessary one.[5]

[3] *Deghuish* v. *Hannibal & St. J. R. Co.* (1890) 103 Mo. 570, 15 S. W. 554 *Carpenter*; *Moore* v. *Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588; *Glover* v. *Kansas City Bolt & Nut Co.* (1900) 153 Mo. 329, 55 S. W. 88; *Hull* v. *St. Joseph Water Co.* (1892) 48 Mo. App. 356.

The fact that an assistant superintendent of a sawmill reports to the superintendent in regard to the hiring and discharge of his subordinates does not make him the less a vice principal as respects any non-delegable duties imposed on him. *Zontek* v. *Stimson Mill Co.* (1894) 9 Wash. 395, 37 Pac. 310.

In *Foster* v. *Missouri P. R. Co.* (1893) 115 Mo. 165, 21 S. W. 916, the court said: "Defendant's contention is that the master should not be held answerable for negligent directions, unless the managing employee is intrusted with the authority to hire and discharge and thereby to enforce obedience to his orders. But that contention ignores the principle on which the master's liability in such circumstances rests. It is part of his personal duty to direct the work he has in hand, and, where it is complex (as that of railroading), to provide and enforce reasonable and necessary regulations of the labor engaged therein. . . . But the master's function of directing a large enterprise must of necessity be intrusted, as to many details, to subordinate employees. In exerting that function they perform the master's part, and for their action (within the scope of that delegated authority, and as to those placed under their orders) the master is responsible, whether the superintending employee has or has not power to hire and discharge, and whatever may be the title by which he is designated."

But it has also been held in Missouri that the head hostler of a roundhouse is a fellow servant, and not the vice principal, of a locomotive fireman and of a "wiper or fire puller" employed in the roundhouse; and his knowledge of the incompetence of the latter employee is not chargeable to the company so as to render it liable for personal injuries to the fireman resulting from such incompetence, where the roundhouse was in charge of a foreman and master mechanic, who alone had the power to hire and discharge servants. *Smith* v. *St Louis & S. F. R. Co.* (1892) 151 Mo. 391, 18 L. R. A. 368, 52 S. W. 378. The differentiating element here seems to be the fact that the hostler was not under any duty to report the incompetence.

[4] *Foster* v. *Missouri P. R. Co.* (1893) 115 Mo. 165, 21 S. W. 916, from which an extract is given in the last note, was a case of a roadmaster whose negligence injured a section hand hired by a foreman subject to the roadmaster.

[5] In Illinois, one of the states where this theory has been enunciated (§ 522, subd. (c), *supra*), the capacity of the controlling official is still for the jury, though it is shown that he had no power to discharge. *Fraser* v. *Schroeder* (1896) 163 Ill. 459, 45 N. E. 288; *Foster* v. *Clark* (1884) 15 Ill. App. 470. The contrary seems to be laid down in *Illinois C. R. Co.* v. *Weger* (1895) 65 Ill. App. 5[illegible] (his decision was affirmed in (1899) 177 Ill. 591, 52 N. E. 818, but this particular point was not touched upon.

It has recently been held by the court

From the decisions in North Carolina, it was scarcely possible, until quite lately, to extract a clear doctrine; but it appears to be now settled that, in the absence of evidence that the negligent superior servant had power to discharge the plaintiff, the former is not deemed to be a vice principal.[6]

In Texas the doctrine is that a superior servant is a vice principal when he has the power of hiring and discharging the class of servants to which the injured person belongs, but not otherwise.[7] But

of appeals that the fact that a foreman in a mine had on previous occasions directed the plaintiff, a dirt scratcher, to assist the timber man in propping the roof did not have the effect of constituting the timber man the plaintiff's vice principal on another occasion when the latter complied with the former's request for assistance, since under such circumstances the timber man had no power to compel the plaintiff to do the work, or to discharge him if he refused. *Kellyville Coal Co.* v. *Humble* (1900) 87 Ill. App. 437. But here the essence of the situation seems to be the coemployee's lack of authority to control the plaintiff's actions.

[6] *Bryan* v. *Southern R. Co.* (1901) 128 N. C. 387, 38 S. E. 913 (crew of four men were loading timbers on a car under the direction of another employee).

In *Dobbin* v. *Richmond & D. R. Co.* (1879) 81 N. C. 446, 31 Am. Rep. 512, it was declared that the power of discharge was one of the essential elements of vice principalship. But that decision was distinctly rested on the ground that the delinquent was the head of a department, and, as already stated (§ 518, *supra*), the conception of such a functionary devested of the power of discharge would involve a logical contradiction. The case of *Patton* v. *Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 863, throws no light upon the question, the power being merely enumerated among the foreman's attributes. See extract in § 522, subd. d, *supra*. Where the particular point to which the inquiry is directed is whether the subordinate was justified in obeying the order which led to his injury, it is not essential, in this state, to show that the superior had the power of discharge. Here, however, a special reason is operative; for, if the rule were otherwise, the master would be enabled to evade responsibility by the colorable expedient of arranging that the power of discharge should be lodged in some other agent than the immediate superior, though, as a matter of fact, the latter's recommendations as to dismissal would always be acted upon. See *Turner* v. *Goldsboro Lumber Co.* (1893) 113 N. C. 387, 26 S. E. 23 (§ 441, *ante*). There the *Patton Case* was cited, so that it is possibly a legitimate inference that the rule was considered to be the same when, as in the earlier case, the question was simply whether the superior servant was a vice principal. But the attention of the court does not seem to have been specially directed to the different character of the question involved, and for this reason the real support of the *Patton Case* in the present connection may be regarded as doubtful.

[7] *Missouri P. R. Co.* v. *Williams* (1889) 75 Tex. 4, 12 S. W. 835; *Galveston, H. & S. A. R. Co.* v. *Smith* (1890) 76 Tex. 611, 13 S. W. 562; *Gulf, C. & S. F. R. Co.* v. *Wells* (1891; Tex.) 16 S. W. 1025; *Vix* v. *Texas P. R. Co.* (1891) 82 Tex. 373, 18 S. W. 571; *Campbell* v. *Cook* (1894) 86 Tex. 630, 26 S. W. 486; *Texas C. R. Co.* v. *Frazier* (1896) 90 Tex. 33, 36 S. W. 432; *Fort Worth & D. C. R. Co.* v. *Peters* (1894) 87 Tex. 222, 27 S. W. 257, Affirming (1894) 7 Tex. Civ. App. 78, 25 S. W. 1077; *Sumner* v. *Atchison, T. & S. F. R. Co.* (1897) 17 Tex. Civ. App. 337, 43 S. W. 533 (fireman of switch engine not a vice principal as to brakeman of freight train); *Riley* v. *Galveston City R. Co.* (1895) 13 Tex. Civ. App. 247, 35 S. W. 826; *Texas & P. R. Co.* v. *Reed* (1895) 88 Tex. 439, 31 S. W. 1058; *San Antonio & A. P. R. Co.* v. *Reynolds* (1895; Tex. Civ. App.) 30 S. W. 846; *Vaughan* v. *Behring* (1898) 19 Tex. Civ. App. 299, 46 S. W. 917.

It also seems to be held in one of these cases, though the language of the court is somewhat obscure, that the master is not liable unless at the time of the injury the injured servant was working under the immediate supervision and control of the servant who had the power to discharge. *Missouri P. R. Co.* v. *Wil-*

even in this state the master cannot escape liability on the ground that the superior servant through whose negligence in sending an incompetent workman to work with the plaintiff the injury was received had no power to discharge that workman. Under such circumstances the only essential question is whether the superior servant had the power to assign the workman to the duties which he was performing.[8]

Under any theory of the evidential significance of the power of hiring and discharging, the character of the superior servant as a vice principal will not be taken away by the fact that the power can only be exercised subject to the approval of a higher officer.[9] Nor, of course, is there any room for doubt that the possession of the power renders an employee a vice principal as respects the discharge of the correlative duty which it imposes on him, of selecting competent and careful servants.[10] In this connection it is worth noting that the courts, in estimating the significance of the power so far as it bears upon the status of a superior servant, have not always been mindful of the distinction which the nonassignable quality of this duty creates between the cases where the question is whether that duty has been fulfilled, and the cases where the question is merely whether a superior servant shall be regarded as the representative of the master for general purposes.[11]

524. Illustrative cases.— In note 2 are tabulated, under headings calculated to facilitate comparison with the cases collected under the

liams (1889) 75 Tex. 4, 12 S. W. 835; *Galveston, H. & S. A. R. Co.* v. *Farmer* (1889) 73 Tex. 85, 11 S. W. 156, seems to declare that the power of discharge is not a test of vice principalship, except where the duty of selecting competent servants is in question. But if this is its effect, it is clearly contrary to the weight of authority in Texas.

[8] *Missouri P. R. Co.* v. *Patton* (1894; Tex.) 26 S. W. 978, Affirming (1894; Tex. Civ. App.) 25 S. W. 339.

[9] *International & G. N. R. Co.* v. *Hinzie* (1891) 82 Tex. 623, 18 S. W. 681 (foreman of paint shop could discharge only with the consent of the superintendent of the car department) *Fort Worth & D. C. R. Co.* v. *Peters* (1894) 87 Tex. 222, 27 S. W. 257 (immaterial by whom power of discharge was conferred); *Zintek* v. *Stimson Mill Co.* (1894) 9 Wash. 395, 37 Pac. 340 (power exercised by foreman of mill lumber yard, subject to sanction of general superintendent).

"The first and most important question is, When the foreman commands, must the workman obey or be discharged by the foreman or by some other authority to whom the foreman may report the act of disobedience? In such case the effect is the same whether the foreman discharges the workman at once, or only after consultation with his own superior. In either case the procuring cause of the discharge is disobedience to the foreman, which is taken by the railroad authorities as disobedience to the principal." *St. Louis, A. & T. H. R. Co.* v. *Holman* (1894) 53 Ill. App. 617.

[10] See § 572, *post*.

[11] See, for example, the arguments in *Chicago, B. & Q. R. Co.* v. *Sullivan* (1889) 27 Neb. 673, 43 N. W. 415; *Harrison* v. *Detroit, L. & V. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034.

preceding subtitle, the decisions already cited in the present subtitle, as well as others in which the general principles above discussed have been applied, with the result of imposing liability on the master for the acts of the employees referred to.

Some of the cases in which damages have been recovered for an injury received in obeying the order of a superior to do work outside the scope of the original employment have the practical effect of extending the domain of the superior servant doctrine, under these particular circumstances, to courts whose decisions have been reviewed in the preceding subtitle. These cases stand in a class of their own, and depend upon special considerations which are explained in § 465, *ante*.

In another class of cases a doctrine not distinguishable from that of superior and subordinate has been applied for the benefit of minor employees. These decisions also turn upon a special principle of a narrow scope, the boundaries of which are not very clearly defined as yet, except where the gravamen of the action is a default in respect to the duty of instruction. See chapter XVI., *ante*. In the summary, chapter XXX., *post*, are cited some Georgia cases illustrating the more general principle that a higher degree of care is owed to minor employees than to adults, and showing how this principle sometimes produces decisions which, if the employee had been of full age, could only be justified on the theory that any superior servant is a vice principal.

In regard to some of the courts the writer has felt considerable doubt whether the decisions should be cited in this section or among those relating to departmental managers (subd. F, *infra*). To avoid misunderstanding, it will be proper to explain the plan upon which these doubtful cases have been distributed. The position of each state with respect to the superior servant doctrine is assumed to have been fixed by the decision in which its supreme court, when holding a delinquent to be a representative of the master, has gone the furthest down in the scale of supervising employees. Accordingly, if by any decision which is still in force, or which, supposing the common law to have been superseded by a statute, was in force up to the time of the enactment of that statute, a court has predicated liability in respect to acts done by an employee of a lower grade than departmental vice principals, in the sense in which that term is used in the best-considered judgments, every ruling by that court has been included in the subjoined list, although in many instances the delinquent may have been of sufficiently high rank to be possibly, or even

certainly, a departmental principal. If such a decision has been rendered, but was discarded, independently of statutory provisions, no ruling in that particular state is here mentioned, and the discredited decisions are noted under other subtitles. Such an arrangement necessarily excludes from this section all the Federal decisions which embody the superior servant doctrine. These will be found reviewed in chapter XXX., *post.*

The Kansas decisions are tabulated under the present section, for the reason that the most recent of them have unmistakably committed the supreme court of that state to the superior servant doctrine, and thus superseded one or two rulings of a different, or at least doubtful, tenor in the earlier volumes of the reports. See chapter XXX., *post.*

The Georgia decisions which hold a master to be liable for the negligence of superior employees are reserved for subd. F, *infra.* The reasons for this arrangement will be apparent from chapter XXX., *post,* where some cases are noted which are apparently, but, as the writer conceives, not really, applications of the superior servant doctrine.

The cases in Arkansas, North Carolina, and Louisiana are included in this section, for the reason that they predicate vice principalship as to lower grades of employees than is justifiable under the best-considered of the decisions which turn upon the doctrine of departmental control. See chapter XXX., *post.* But it has been found convenient to mention some of the decisions in these states under that subtitle also which relates to departmental managers. See § 535, *infra.*

Virginia and West Virginia, which might, perhaps, for some years have been classed among the states which applied that doctrine, have now abandoned it definitely. See summary, chapter XXX., *post.*

In Missouri a recent case[1] seems to foreshadow a complete change of front as regards the doctrine of superior and subordinate; but for the present it must be numbered among the states which accept that doctrine.

As to the peculiar limitation on the superior servant doctrine which prevails in Kentucky, see the summary of the decisions in that state § 549, *post.*

In the list below, no decision is mentioned except those in which the injury was received by a subordinate under the control of the delinquent employee, for the effect of the general rule stated in § 514 *supra*

[1] *Grattis* v. *Kansas City, P. & G. R. Co.* (1900) 153 Mo. 380, 48 L. R. A. 399, 55 S. W. 108. See chapter XXX., *post.*

is that, as to persons not under their control, they are mere fellow servants, except in so far as they may be discharging some nonassignable duty owed by the master to those persons.

For brevity's sake, only the designation of the delinquent employee is mentioned, it being understood that, unless otherwise stated, the employee was held to be a vice principal.[2] In the courts which apply

[1](a) *General managing agents.*—See the cases cited under §§ 527, 537, *post*, and also the general remarks in subd. E. F. *infra*, as to the alternative theories by which the ascription to these officials of the status of the master's agents may be conceived to be supported.

(b) *Employees controlling the movements of trains which they do not assist in operating.*—An assistant superintendent is a vice principal. *Chicago, B. & Q. R. Co.* v. *McLallen* (1876) 84 Ill. 109. Held to be negligent in ordering a freight train forward without making it certain that a passenger train traveling in the opposite direction had an order which could in some manner restrain its speed and regulate its movements so as to guard with certainty against collision.

Under the rule in Tennessee a telegraph operator at a way station, who has no control of or connection with the running of railway trains, except as a medium through which orders from the superintendent's office are communicated to servants of the company in charge of its trains, is not the fellow servant of a train conductor. *East Tennessee, V. & G. R. Co.* v. *De Armond* (1887) 86 Tenn. 73, 5 S. W. 600 (said to be the conductor's superior as a helper of the superintendent; accident was caused by omission of the operator to display a signal to stop an expected train, the result being a collision).

In *West Chicago Street R. Co.* v. *Dreyer* (1894) 57 Ill. App. 440, it was held that, on the evidence, the "starter" of a street railway company was probably a superior servant (plaintiff ordered into position where he was injured owing to grip machinery being out of order).

A railroad company is liable to a section hand for injuries received by a car upon which he is riding in the discharge of his duty coming in contact with a car upon a side track, negligently left by the station agent having control of such track in such a position that a collision was inevitable. *St. Louis, A. & T. H. R. Co.* v. *Biggs* (1894) 53 Ill. App. 550.

(c) *Employees in control of railway trains.*—*Meyer* v. *Illinois C. R. Co.* (1899) 177 Ill. 591, 52 N. E. 818. Affirming (1895) 65 Ill. App. 531 (here, however, recovery was denied on the ground that the negligent act was non official. See §§ 543, 544, *post*); *Mobile & O. R. Co.* v. *Godfrey* (1895) 155 Ill. 78, 39 N. E. 590 (here held not to be a vice principal for all purposes. See chapter XXIX., *post*); *Walker* v. *Gillett* (1898) 59 Kan. 214, 52 Pac. 442 (car driven without warning against a stationary one the coupling of which a brakeman was examining); *Louisville & N. R. Co.* v. *Robinson* (1891) 13 Ky. L. Rep. 153, 16 S. W. 707 (conductor in failing to notify a brakeman that a car had been rendered dangerous to couple by reason of the slipping of lumber on it, at the time he sent him to make such coupling, when he knew of such danger, was guilty of wilful negligence); *Louisville & N. R. Co.* v. *Moore* (1886) 83 Ky. 675 (conductor allowed inexperienced fireman to operate an engine while plaintiff was coupling); *Louisville & N. R. Co.* v. *Mitchell* (1888) 87 Ky. 327, 8 S. W. 706 (vice principal-ship assumed in argument); *Newport News & M. Valley Co.* v. *Deutzel* (1890) 91 Ky. 42, 14 S. W. 958 (conductor failed to stop the rear section of a broken train, the result being that the plaintiff, a brakeman on the forward section, was killed by a collision of the two sections); *Greer* v. *Louisville & N. R. Co.* (1893) 94 Ky. 169, 21 S. W. 649 (speed dangerously increased while brakeman was attempting to uncouple two cars from a moving train; brakeman lost his footing and fell under the cars); *Cincinnati, N. O. & T. P. R. Co.* v. *Palmer* (1895) 98 Ky. 382, 33 S. W. 199 (charge held erroneous which allowed jury to find for the plaintiff in the case of ordinary negligence; see summary of Kentucky decisions in chapter XXX., *post*); *Newport News & M. Valley R. Co.* v. *Carroll* (1895) 17 Ky. L. Rep. 374, 31 S. W. 132 (minor injured in coupling cars under orders of conductor); *Louisville & N. R. Co.* v. *Wallingford* (1893) 15 Ky. L. Rep. 170, 22 S. W. 439 (foreman of construction

train ordered a train to move back while a switchman was coupling, without waiting for a signal from the latter); *Clark* v. *Hughes* (1897) 51 Neb. 780, 71 N. W. 776 (signaled to back cars while brakeman was coupling); *Mason* v. *Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698 (1894) 114 N. C. 718, 19 S. E. 362 (brakeman obeyed order to couple with his hands when the stick required by the rules proved ineffective; here the actual point decided was that the brakeman was not negligent in complying with the order); *Shadd* v. *Georgia, C. & N. R. Co.* (1895) 116 N. C. 968, 21 S. E. 554 (conductor prematurely ordered movement of cars, without ascertaining whether coupling was complete; same point as in last case); *Purcell* v. *Southern R. Co.* (1896) 119 N. C. 728, 26 S. E. 161 (sudden starting of train threw brakeman to the ground); *Haltom* v. *Southern R. Co.* (1900) 127 N. C. 255, 37 S. E. 262 (ordered brakeman to get a stone and scotch a rolling car at night); *Little Miami R. Co.* v. *Stevens* (1851) 20 Ohio, 415 (engineer was injured in a collision resulting from the omission of the conductor to observe his time card); *Cleveland, C. & C. R. Co.* v. *Keary* (1854) 3 Ohio St. 201 (similar accident); *Lake Shore & M. S. R. Co.* v. *Spangler* (1886) 44 Ohio St. 471, 58 Am. Rep. 833, 8 N. E. 467 (assumed in opinion) *Lake Shore & M. S. R. Co.* v. *Knittal* (1878) 33 Ohio St. 468 (flying switch negligently made); *Illinois C. R. Co.* v. *Spence* (1893) 93 Tenn. 173, 23 S. W. 211 (collision caused by conductor's allowing freight train to pass a certain station in violation of the time-card rules injured fireman); *Openshaw* v. *Utah & N. R. Co.* (1889) 6 Utah, 132 (negligent loading of car; piece of timber fell on brakeman). See also Louisiana cases cited in § 535, note 1, subd. (b), *infra*.

Upon principle the liability of the company in the case of conductors of construction or work trains would also seem to be indisputable under the superior servant doctrine, but the authorities are conflicting.

The servant was allowed to recover in *Chicago, St. P. M. & O. R. Co.* v. *Lundstrom* (1884) 16 Neb. 254, 49 Am. Rep. 718, 20 N. W. 198 (conductor of construction train sent a laborer into a cut when a train was known to be due); *Burlington & M. River R. Co.* v. *Crockett* (1886) 19 Neb. 138, 26 N. W. 921 (conductor of gravel train neglected to station a watchman to give notice of danger from a bank caving in, and the under boss of the train was killed by an earth slide); *Louisville & N. R. Co.* v. *Hawkins* (1899) 21 Ky. L. Rep. 354, 51 S. W. 126 (conductor of gravel train was negligent in signaling for the movement of a train); *Miller* v. *Missouri P. R. Co.* (1891) 109 Mo. 350, 19 S. W. 58 (conductor of material train without warning gave signal to start train, the result being that a laborer who was stepping from one car to another was jerked off and run over; see, however, summary of Missouri cases in chapter XXX., *post*); *Dobbin* v. *Richmond & D. R. Co.* (1879) 81 N. C. 446, 31 Am. Rep. 512 (injury caused by fall of gravel bank); *Chicago, B. & Q. R. Co.* v. *Blank* (1887) 24 Ill. App. 438 (conductor of gravel train ordered air brakes to be set suddenly, thereby causing a jerk which threw a laborer off. This case does not refer to the Illinois decisions, *infra*).

But such conductors were held to be mere fellow servants of their subordinates in *Ahrend* v. *Terre Haute & I. R. Co.* (1881) 111 Ill. 202, 53 Am. Rep. 616 (collision caused by the negligence of the conductor of a wrecking train in disregarding his running orders); Followed in *Chicago & A. R. Co.* v. *Mcdonald* (1887) 21 Ill. App. 409. Distinguishing the *Ross Case* and other cases of conductors of regular trains; collision caused by disregard of running regulations; said to be "acting under special order at all times in the movement of his train").

Under the Texas rule (§ 523, *supra*) a conductor, not being invested with the power of discharge, is a mere coservant of the other trainmen. *Campbell* v. *Cook* (1894) 86 Tex. 630, 26 S. W. 486 (negligent management of cars while brakeman was coupling).

To employees whose services a conductor is authorized to command temporarily he bears the same relation as to employees regularly under his control, so far as the liability of the company under this doctrine is concerned. *Ritt* v. *Louisville & N. R. Co.* (1887) 9 Ky. L. Rep. 397, 4 S. W. 796 (train started without warning injured car repairer).

An engineer, though not a vice principal (except, under some circumstances, in Kentucky; see § 514, *supra*) while he is acting under a conductor, becomes, according to some decisions, a vice principal when he is in charge of a train. *East Tennessee & W. N. C. R. Co.* v. *Collins* (1886) 85 Tenn. 227, 1 S. W. 883 (cars negligently backed against

each other); *Cowles* v. *Richmond & D. R. Co.* (1881) 84 N. C. 309, 37 Am. Rep. 620 (but case really turned on proved negligence of defendant as to defective appliances); *Means* v. *Carolina C. R. Co.* (1900) 126 N. C. 424, 35 S. E. 813, Former Appeals (1898) 122 N. C. 990, 29 S. E. 939 (1899) 124 N. C. 574, 45 L. R. A. 164, 32 S. E. 960. He is therefore a vice principal after he has taken charge of the forward section of a train which has separated, where it is his duty to do so under the rules of the company. *Louisville & N. R. Co.* v. *Martin* (1889) 87 Tenn. 398, 3 L. R. A. 282, 10 S. W. 772 (here held, however, to be a mere fellow servant of brakeman, as he had not actually taken charge); *Newport News & M. Valley Co.* v. *Howe* (1892) 3 C. C. A. 121, 6 U. S. App. 172, 52 Fed. 362 (assumed in opinion; but such a doctrine is hardly law in Federal courts since the *Baugh Case*; see § 535, *infra*.

The decisions as to conductors in South Carolina, Virginia, West Virginia, and the Federal courts will be noticed in subd. F, *infra*, and chapter XXX., *post*.

(d) *Supervising employees in railway yards and depots.*—A yardmaster having charge of making up trains, handling cars in the yard, and having control of the switchmen. *Renfro* v. *Chicago, R. I. & P. R. Co.* (1885) 86 Mo. 302 (ran cars against the car which injured servant was repairing); *Taylor* v. *Missouri P. R. Co.* (1891; Mo.) 16 S. W. 206 (improvised a coupling by the use of a piece of a brakebeam rod, and inserted it in such a manner that it fell out when the cars were in motion); *Chicago, R. I. & P. R. Co.* v. *Touhy* (1887) 26 Ill. App. 99 (but negligence was held to be non-official here); *Norris* v. *Illinois C. R. Co.* (1899) 88 Ill. App. 614 (negligence as to order not to put out a signal caused collision).

An assistant yardmaster. *Gravelle* v. *Minneapolis & St. L. R. Co.* (1882) 3 McCrary, 352, 10 Fed. 711 (in charge to jury; but this case is no longer law under the more recent decisions of the supreme court denying vice principalship to any lower grade than heads of departments; see subd. F, *infra*).

A night yard master with power to discharge switchmen. *Texas & P. R. Co.* v. *Reed* (1895) 88 Tex. 439, 31 S. W. 1058.

A yard foreman. *San Antonio & A. P. R. Co.* v. *Reynolds* (1895; Tex. Civ. App.) 30 S. W. 846 (charge erroneous which failed to state differentiating significance of the power or want of power to discharge).

A foreman of one of several switching crews. *Armstrong* v. *Oregon Short Line & U. N. R. Co.* (1893) 8 Utah, 420, 32 Pac. 693 (cars backed violently against one which one of the switchmen was coupling in the nighttime).

A foreman of a switching crew. *Louisville & N. R. Co.* v. *Hurst* (1892) 14 Ky. L. Rep. 632, 20 S. W. 817 (negligence *per se* so to station himself when he knows that a member of the crew is between the cars attempting to uncouple them, that signals of danger can be given by him to the engineer only through the fireman of the engine).

The foreman of a railway lumber yard. *Chicago & A. R. Co.* v. *May* (1884) 108 Ill. 288 (a car the bumper of which supported some planks projecting over the end of a push car being removed by the foreman's orders; the push car was tilted up and thrust onward so as to crush the plaintiff's intestate against the other car). An official similarly described was held to be a departmental manager, in *Baldwin* v. *St. Louis, K. & N. W. R. Co.* (1888) 75 Iowa, 297, 39 N. W. 507.

A foreman of car repairers. *Hannibal & St. J. R. Co.* v. *Fox* (1884) 31 Kan. 586, 3 Pac. 320 (failed to protect subordinate from moving cars); *Moore* v. *Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588 (same breach of duty); *Renfro* v. *Chicago, R. I. & P. R. Co.* (1885) 86 Mo. 302 (same breach of duty); *St. Louis, A. & T. H. R. Co.* v. *Holman* (1894) 53 Ill. App. 617 (allowed car under repair to stand where it was so close to an adjoining track that a car moving thereon struck it); *Stucke* v. *Orleans R. Co.* (1898) 50 La. Ann. 188, 23 So. 342 (failed to secure a servant repairing a car against the approach of other cars); *Lake Shore & M. S. R. Co.* v. *Laralley* (1880) 36 Ohio St. 221 (car allowed to strike the one under which the plaintiff was working).

A car repairer deputed by the master workman to instruct as to his duties the plaintiff, a new employee who was to take his place. *Chicago, B. & Q. R. Co.* v. *Sullivan* (1889) 27 Neb. 679, 43 N. W. 415 (failed to protect new employee against moving cars).

On the other hand a "hoss wiper" who is the foreman of a gang of wipers employed by a railroad company to wipe its locomotives, and directs them when to work and what to do, is their fellow servant, and not a vice principal. *Knox*

v. *Southern R. Co.* (1898) 101 Tenn. 375, 47 S. W. 491 (wiper injured by engine moved under the orders of the foreman; this case seems to indicate some change of view in this state as to the scope of the superior servant doctrine; see summary of decisions in chapter XXX., *post*).

The foreman of an electric railway company at its car shed is a vice principal. *Metropolitan West Side Elev. R. Co.* v. *Skola* (1900) 183 Ill. 454, 56 N. E. 171 (ran cars himself on to the repair track, and injured a repairer).

(e) *Employees supervising the loading of railway cars.*—A foreman in charge of gang loading or unloading cars, and giving orders as to the manner of unloading. *Higgins* v. *Missouri P. R. Co.* (1890) 43 Mo. App. 547 (failure to furnish chain to prevent tipping of car); *Proctor* v. *Missouri, K. & T. R. Co.* (1890) 42 Mo. App. 124 (foreman without warning ordered workmen to throw to the ground a rail which plaintiff was helping to raise to the side of a car to serve as a skid, and which he supposed was about to be placed as other rails had been).

(f) *Employees supervising track work on railways.*—The general road master of a line. *Hoke* v. *St. Louis, K. & N. W. R. Co.* (1885) 88 Mo. 360. Reversing (1882) 11 Mo. App. 574 (road master carelessly gave a wrong signal to engineer, the result being that he started his engine in the wrong direction, and drew a car from under the wrecked car, allowing it to fall on plaintiff, a laborer.

A road master. *Stoddard* v. *St. Louis, K. C. & N. R. Co.* (1877) 65 Mo. 514 (failure to employ another man where force was inadequate; possibly decided rather on the ground of a breach of a non-delegable duty than under the superior servant doctrine); *Foster* v. *Missouri P. R. Co.* (1893) 115 Mo. 165, 21 S. W. 916 (section man injured by a rail thrown on to the car where he was by the orders of the road master); *Thompson* v. *Chicago, M. & St. P. R. Co.* (1883) 5 McCrary, 542, 18 Fed. Rep. 239 (assumed in charge to jury; not law under recent supreme court decisions; question was whether the failure to protect laborers from a bank which fell was due to a want of care).

A division road master. *Browning* v. *Wabash Western R. Co.* (1894) 124 Mo. 55, 24 S. W. 731, 27 S. W. 644 (removal of brake staff caused engineer's death);

As to *Rains* v. *St. Louis, I. M. & S. R. Co.* (1879) 71 Mo. 164, 36 Am. Rep. 459 (brakeman killed by low overhead bridge), which denies that a road master is a vice principal, see chapter XXX., *post*.

A section boss or track foreman *Chattanooga Electric R. Co.* v. *Lawson* (1898) 101 Tenn. 406, 47 S. W. 489 (ordered to board a moving car; held to be an official act, as it was done in the discharge of his function of controlling the cars); *Gann* v. *Nashville, C. & St. L. R. Co.* (1898) 101 Tenn. 380, 47 S. W. 493 (nonofficial negligence in this case); *Illinois C. R. Co.* v. *Bolton* (1897) 99 Tenn. 273, 41 S. W. 442 (except when engaged in manual labor, as in this case); *Louisville & N. R. Co.* v. *Bowler* (1872) 9 Heisk. 866 (nature of negligent act not stated); *Schroeder* v. *Chicago & A. R. Co.* (1891) 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094 (laborer injured by a hand car which was struck by a train while the section gang were attempting to get it off the track); *McDermott* v. *Hannibal & St. J. R. Co.* (1885) 87 Mo. 285 (same facts); *Stephens* v. *Hannibal & St. J. R. Co.* (1885) 86 Mo. 221, Second Appeal (1888) 96 Mo. 207, 9 S. W. 589 (laborer injured in complying with an order to get a large stone off the track when a train was approaching); *Russ* v. *Wabash Western R. Co.* (1892) 112 Mo. 45, 18 L. R. A. 823, 20 S. W. 472 (water keg rolled off hand car, owing to carelessness of foreman, who had used it for a while as a seat, and then jumped up and left it unsecured); *Rowland* v. *Missouri P. R. Co.* (1886) 20 Mo. App. 463 (assured laborer that the end of a rail about to be thrown on a car was free; not being so it rebounded and struck the laborer); *Clowers* v. *Wabash, St. L. & P. R. Co.* (1886) 21 Mo. App. 213 (foreman knowing hand car was defective failed to report it); *Banks* v. *Wabash Western R. Co.* (1890) 40 Mo. App. 458 (hand car allowed to become unsafe); *Herriman* v. *Chicago & A. R. Co.* (1887) 27 Mo. App. 435 (rail which plaintiff was ordered to remove from the track caught under another rail and flew back and struck plaintiff; foreman not assisting); *Claybaugh* v. *Kansas City, Ft. S. & M. R. Co.* (1894) 56 Mo. App. 630 (dangerous method of loading ties on cars *Hetson* v. *Missouri P. R. Co.* (1892) Mo. App. 300 (injury caused by foreman's use of pick); *Louisville & N. R. Co.* v. *Bass* (1897) 19 Ky. L. Rep. 1474, 43 S. W. 463 (negligence in management of hand car not shown); *Chicago & A. R. Co.* v. *Goltz* (1897) 71 Ill. App. 414 (injury received in operation of hand

car; denied to be negligent in this instance); *Chicago, St. L. & P. R. Co.* v. *Goss* (1889) 35 Ill. App. 178, Affirmed in (1890) 133 Ill. 37, 24 N. E. 563 (gave no warning of the approach of a train); *Patton* v. *Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 863 (track man injured by jumping from a moving hand car in obedience to the orders of his foreman); *Logan* v. *North Carolina R. Co.* (1895) 116 N. C. 940, 21 S. E. 959 (injury caused by obedience to order to remove a hand car from the track when a train was approaching); *Johnson* v. *Southern R. Co.* (1898) 122 N. C. 955, 29 S. E. 784 (hand car was started on a curve where an expected train could not be seen); *Missouri P. R. Co.* v. *James* (1888; Tex.) 10 S. W. 332 (derailment caused by defective hand car and defective track which foreman had promised to repair); *Succum* v. *Gulf, C. & S. F. R. Co.* (1892) 84 Tex. 433, 19 S. W. 555 (threw switch prematurely while hand car was moving on to the main line, the result being a derailment); *Gulf, C. & S. F. R. Co.* v. *Wells* (1891; Tex.) 16 S. W. 1025 (derailment of defective hand car); *Torian* v. *Richmond & A. R. Co.* (1887) 84 Va. 192, 4 S. E. 339 (did not signal the approach of a train). *Criswell* v. *Pittsburgh, C. & St. L. R. Co.* (1888) 30 W. Va. 798, 6 S. E. 31 (foreman disregarded rules promulgated for the purpose of securing the safe running of hand cars); *Gregory* v. *Ohio River R. Co.* (1893) 57 W. Va. 606, 16 S. E. 819 (section hand injured while on a hand car taken out on a Sunday by order of the foreman, but in contravention of a rule forbidding this to be done without the consent of the road-master).

It is probable that the last three decisions are no longer good law in the states where they were rendered. See chapter XXX., *post*.

As to the status of section foreman in South Carolina, see chapter XXX., *post*.

(g) *Employees supervising various kinds of construction work.*—A superintendent of construction on a railway is a vice principal. *Kansas P. R. Co.* v. *Little* (1877) 19 Kan. 267 (defective machinery furnished). Under the more recent decisions in some states, such an employee would be regarded as a departmental manager. See § 535, note 1, subd. (c), *infra*.

A jury is justified in ascribing, as regards an employee engaged in loading bridge materials, the character of a vice principal to another employee spoken of as assistant superintendent, or as foreman, in charge of the structural iron work of a bridge company, with authority to direct the foreman of the yard where the material is stored to get it out and load it for transportation. *Pittsburg Bridge Co.* v. *Walker* (1897) 70 Ill. App. 55, Affirmed in (1897) 170 Ill. 550, 48 N. E. 915 (dispensed with a tag-line which should have been used to steady a piece of the framework of the bridge while being transported to its place, and attempted to steady it with his hands).

The following employees are vice principals:

A foreman of bridge builders. *Bloyd* v. *St. Louis & S. F. R. Co.* (1893) 58 Ark. 66, 22 S. W. 1089 (as to this case, see chapter XXX., *post*); *St. Louis, A. & T. R. Co.* v. *Torrey* (1893) 58 Ark. 217, 24 S. W. 244 (case went off on point that negligent act was one done as a mere servant; see §§ 543, 544, *post*).

A foreman of a gang of carpenters. *Hiller* v. *Union P. R. Co.* (1883, 5 McCrary, 300, 17 Fed. 67 (assumed in charge to jury in a case where the injury resulted from an order to use a hand car for transporting the gang; not law under recent decisions of the supreme court; see chapter XXX., *post*); *Leiter* v. *Kinmare* (1896) 68 Ill. App. 558 (improper order).

A foreman of a gang engaged in the business of repairing bridges, water tanks, and telegraph lines along a railway. *Sioux City & P. R. Co.* v. *Smith* (1888) 22 Neb. 775, 36 N. W. 285 (sudden application of brake to hand car by the foreman threw plaintiff off).

A foreman of a pile driving crew. *Fremont, E. & M. Valley R. Co.* v. *Leslie* (1894) 41 Neb. 159, 59 N. W. 559 (insufficient number of men detailed to stay the driver while it was being moved).

A foreman in charge of the construction of a telegraph line. *Postal Teleg. Cable Co.* v. *Coote* (1900; Tex. Civ. App.) 57 S. W. 912 (hiring of incompetent fellow servant was the negligence alleged).

A foreman in full control of the work of constructing a line of telegraph, with power to discharge the workmen. *Ivers* v. *Cumberland Teleph. & Teleg. Co.* (1900) 52 La. Ann. 2153, 28 So. 367 (too much power was, by the foreman's order, brought to bear upon a pole which was being braced and straightened).

An employee supervising the work of taking down a building. *Faren* v. *Sellers*

(1887) 39 La. Ann. 1011, 3 So. 363 (unsafe method of demolition adopted).

A foreman of a gang of carpenters engaged in erecting a new floor in a building. *Pullman's Palace Car Co.* v. *Harkins* (1893) 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. 932 (inexperienced workman set to work in a dangerous place: not law according to the late decisions of the supreme court: see chapter XXX., *post*).

A foreman in charge of the construction of a building. *Heckman* v. *Hackey* (1888) 35 Fed. 353 (pitfall created in the absence of the plaintiff by an order to a coemployee to remove a securely fastened plank in a staging, and substitute another which was left loose: hardly law under recent decisions of the supreme court, unless—which the report does not show—the foreman was a general agent).

A foreman of carpenters putting in car scales. *Kansas City Car & Foundry Co.* v. *Scevist* (1898) 59 Kan. 778, Appx. (beam fell owing to removal of props).

An assistant foreman in charge of the drilling of a well. *Nix* v. *Texas P. R. Co.* (1891) 82 Tex. 473, 18 S. W. 571 (engineer managing stationary engine was injured by the sudden application of steam to the machinery without any warning).

A foreman of a crew engaged in the construction of a turntable. *Dowling* v. *Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298 (1885) 88 Mo. 293 (inexperienced boy was ordered to stop an engine, and was injured by a set screw while attempting to step over a revolving shaft).

A foreman in charge of the removal of the roof of a building. *Sullivan* v. *Hannibal & St. J. R. Co.* (1891) 107 Mo. 66, 17 S. W. 748 (staging which foreman had assured plaintiff was safe gave way: here, as plaintiff had nothing to do with its construction, the case is also covered by the principle that the duty to provide a safe place of work is non-delegable).

A railroad foreman in a gravel pit, having full charge of the work, with power to hire and discharge men and to direct and control their work. *Anderson* v. *Ogden Union R. & Depot Co.* (1892) 8 Utah, 128, 30 Pac. 305 (plaintiff crushed by caving of bank, owing to fact that he did not receive customary warning).

The foreman in charge of the removal of an embankment. *Bradley* v. *Chicago, M. & St. P. R. Co.* (1897) 138 Mo. 293, 39 S. W. 760 (laborer sent to work on a place where there was danger of the earth falling).

A foreman of a water company supervising the excavation of a reservoir. *Hall* v. *St. Joseph Water Co.* (1892) 48 Mo. App. 356 (walls of trench fell in).

A foreman supervising the construction of a city sewer. *Chicago* v. *Cronin* (1900) 91 Ill. App. 466 (ordered pipe to be lowered in an improper manner).

A city engineer acting as foreman of the work of constructing a sewer. *La Salle* v. *Kostka* (1901) 190 Ill. 130, 60 N. E. 72. Affirming (1900) 92 Ill. App. 91 (side of sewer not properly braced).

(b) *Foremen in the mechanical departments of railway companies.*—A master mechanic in railway repair shops. *Douglas* v. *Texas Mexican R. Co.* (1885) 63 Tex. 564 (negligent order).

That a wrecking train was under the supervision of a conductor will not render the master mechanic traveling upon the train a fellow servant with a bridge carpenter of whom he has the full control. *Tabler* v. *Hannibal & St. J. R. Co.* (1887) 93 Mo. 79, 5 S. W. 810. In any orders given within the scope of his authority—as, in directing the material of which a coupling shall be made, where there is no drawhead,—he represents the company.

Master mechanics are by some courts regarded as departmental vice principals. See § 535, note 1, subd. (c), *infra*.

A foreman in a machine shop. *Missouri P. R. Co.* v. *Peregoy* (1887) 36 Kan. 424, 14 Pac. 7 (ignorant apprentice set, without notice or instruction, to do work which was dangerous to any one but a skilled mechanic; here, be it observed, the duty violated was a non delegable one).

The foreman of a railway car-repairing shop. *Missouri P. R. Co.* v. *Williams* (1889) 75 Tex. 4, 12 S. W. 835 (foreman broke his promise to protect car repairer from moving cars).

An employee in charge of a roundhouse, the engines, and men necessary to care for them. *Dayharsh* v. *Hannibal & St. J. R. Co.* (1890) 103 Mo. 570, 15 S. W. 554 (moved engine upon plaintiff without warning).

A foreman of a wrecking crew (here spoken of as being in charge of a gang carrying on a particular branch of the business). *Wabash, St. L. & P. R. Co.* v. *Hawk* (1887) 121 Ill. 259, 12 N. E. 253 (floor of wrecked car fell, owing to inadequacy of propping).

A wreckmaster has also been considered to be a vice principal, as being the head of a department. *Borgman* v. *Omaha & St. L. R. Co.* (1890) 41 Fed. 667. See, however, chapter XXX., *post*, as to the authority of this case in Federal courts.

The foreman of the paint shop of a railway company. *International & G. N. R. Co.* v. *Hinzie* (1891) 82 Tex. 623, 18 S. W. 681 (plaintiff set to work painting cars without having been instructed as to a rule requiring men working on side tracks to set out signal flags).

An engineer is a vice principal as regards a common laborer subject to his directions. *Baltimore & O. R. Co.* v. *Sutherland* (1894; Ohio C. C.) 1 Toledo Leg. News, 388.

(i) *Employees in charge of machinery.*—A feeder of a planing machine as regards a boy under his orders. *Foster* v. *Clark* 1884) 15 Ill. App. 470 (boy injured in obeying an order to pull a shaver out of a planing machine).

A foreman supervising a gang hoisting stone with a derrick. *Union P. R. Co.* v. *Fray* (1890) 43 Kan. 750, 23 Pac. 1039 (defective machinery).

The foreman of a dredger. *Chicago Dredging & Dock Co.* v. *McMahon* (1888) 30 Ill. App. 358 (injury caused by compliance with a negligent order).

A foreman of a machine factory. *Huson* v. *Edison Mach. Works* (1886) 24 Blatchf. 93, 28 Fed. Rep. 228 (accident occurred in the moving of heavy machinery which plaintiff was left to hold up alone; not law since recent decisions of the supreme court, unless foreman was a general agent, which the report does not show; see chapter XXX., *post*).

(j) *Supervising employees in manufacturing establishments.*—An operator of a machine. *Norton Bros.* v. *Vadebok* (1901) 190 Ill. 595, 54 L. R. A. 842, 60 N. E. 843 (helper injured by starting of machine while he had his hand inside it); *Glover* v. *Kansas City Bolt & Nut Co.* (1899) 153 Mo. 327, 55 S. W. 88 (plaintiff injured by stumbling against a shearing machine immediately after it was started; held, that there was no evidence to show that the operator could by ordinary care have seen the danger before starting the machine).

A foreman in a sugar refinery. *Groszewski* v. *Chicago Sugar Ref. Co.* (1899) 84 Ill. App. 583 (ordered a servant to shove a car through a door, without warning him that there was not space enough to walk between the car and the sides of the door).

A foreman of a foundry. *Fitzgerald* v. *Honkomp* (1892) 44 Ill. App. 305 (negligence as regards order denied upon the evidence).

The foreman of a steel company (apparently not the general manager). *Illinois Steel Co.* v. *Schymanowski* (1896) 162 Ill. 447, 44 N. E. 876 (foreman struck the side of a loose pike of ore, thereby causing a large piece to fall on plaintiff).

A foreman in charge of a mill and vested with power to employ and discharge employees. *Sulphur Lumber Co.* v. *Kelley* (1895; Tex. Civ. App.) 30 S. W. 696 (machinery not stopped to make necessary repairs).

A foreman of a sawmill. *Sulphur Lumber Co.* v. *Kelley* (1895; Tex. Civ. App.) 30 S. W. 696 (did not stop machinery to examine it, when there were indications that something had gone wrong); *Lawrence* v. *Hagemeyer & Co.* (1892) 93 Ky. 591, 20 S. W. 704 (omitted to have machinery repaired as he had promised).

A foreman of a fertilizer company's business. *National Fertilizer Co.* v. *Travis* (1899) 102 Tenn. 16, 49 S. W. 832 (started machinery without warning).

The foreman of a meat packing establishment. *Libby, McN. & L.* v. *Scherman* (1893) 146 Ill. 540, 34 N. E. 801, Affirming (1892) 50 Ill. App. 123 (barrels carelessly piled fell).

Some of the above employees, it will be observed, were of a grade which placed them nearly, if not quite, in the class of general managers; but whether they were really such was a question not necessary to be considered, the superior servant doctrine being decided in fixing their position.

In Arkansas the foreman of the oil department of a compress company's establishment has been held a vice principal. *Ft. Smith Oil Co.* v. *Slover* (1893) 58 Ark. 168, 24 S. W. 106. But this is perhaps intended as an explicit adoption of the doctrine of departmental control. See chapter XXX., *post*. In any event, the default alleged was in respect to the nondelegable duty of instruction, and might be rested on that ground alone.

(k) *Supervising employees in smelting works.*—See the Kansas case cited under § 555, note 1, subd. (h), *infra*.

(l) *Employees supervising the moving of heavy articles.*—An employee super-

the superior servant doctrine there is no difference of opinion as to the responsibility of a railway company for the negligence of a conductor of a regular freight or passenger train. As to whether, under the superior servant doctrine, a conductor is a vice principal as to employees not controlled by him, see § 514, note 1, *supra*, and compare § 535, note 1, subd. b, *infra*.

E. Relation of a general managing agent to his subordinates.

525. Introductory.— From a very early period in the development

vising the hoisting of a heavy box. *Fraser* v. *Hand* (1889) 37 Ill. App. 153 (unsafe method adopted for hoisting).

A foreman of a gang of men engaged in lifting heavy pieces of machinery. *Fraser* v. *Schroeder* (1896) 163 Ill. 159, 45 N. E. 288 (manner of incompetent servant's obedience to order to stop machinery caused injury).

(m) *Employees supervising the loading of vessels.*—An employee superintending the entire work of unloading coal barges at the wharf of a foundry. *Devany* v. *Vulcan Iron Works* (1877) 4 Mo. App. 236 (scaffold so defectively constructed that, when a laborer stepped on it, it fell and crushed plaintiff). Possibly this case is intended as an application of the "head of department" theory, as the phraseology appropriate to that theory is employed. But see § 521, n. *supra*.

(n) *Foreman in quarries.*—A foreman of a quarry belonging to a railway company. *Kansas City, Ft. S. & M. R. Co.* v. *Hammond* (1894) 58 Ark. 324, 24 S. W. 723 (laborer allowed to remain on the track when a train was known to be approaching).

The foreman of a quarry. *Berea Sto. Co.* v. *Kraft* (1877) 31 Ohio St. 287, 27 Am. Rep. 510 (foreman himself attached the hooks of a hoisting apparatus to a large stone which was so soft that chains should have been used). As to official in this position who is in some cases treated as a general manager, see § 527, *infra*.

One of three subordinate foremen in a quarry. *Cox* v. *Syenite Granite Co.* (1890) 39 Mo. App. 424 (plaintiff was ordered back to work from place where he had gone for safety while a boatload of stone was being swung to the top of the quarry cliff by a derrick, and was struck by a stone which fell back over the cliff after the boat had passed the derrick. Contention of defendant was that the foreman was not the defendant's vice principal in signaling the plaintiff to return to work, because a motion of the hand could not be construed into an order.

(o) *Foremen in mines.*—A pit boss in a mine having authority to command the workmen in respect to what work they shall do, and when they shall discontinue. *Consolidated Coal Co.* v. *Woolbacher* (1890) 134 Ill. 57, 24 N. E. 627. Affirming (1889) 31 Ill. App. 288 (order to work under a dangerous portion of the roof).

An underground manager. *Somerville* v. *Gray* (1863) 1 Sc. Sess. Cas. 3d series, 768; *Hardie* v. *Addie* (1858) 20 Sc. Sess. Cas. 2d series, 553 (roof fell in); these two decisions are inconsistent with later cases, especially *Wilson* v. *Merry*. See § 529, *infra*.

A foreman in full charge of a coal mine underground. *Cunningham* v. *Union P. R. Co.* (1885) 4 Utah, 206, 7 Pac. 795 (overhanging piece of coal fell); *Trihay* v. *Brooklyn Lead Min. Co.* (1886) 4 Utah, 468, 11 Pac. 612 (plaintiff injured by fall of roof of untimbered stope).

A mine boss who has control of a mine, with power to hire and discharge employees. *Wellston Coal Co.* v. *Smith* (1901) 65 Ohio St. 70, 55 L. R. A. 99, 61 N. E. 143 (mine owner chargeable with knowledge of boss).

An assistant manager. *Consolidated Coal Co.* v. *Gruber* (1900) 188 Ill. 584, 59 N. E. 254. Affirming (1900) 91 Ill. App. 15 (operated machine for the purpose of testing it).

(p) *Officers of ships.*—Several cases decided in the lower Federal courts before the date of the *Ross Case* proceed upon or countenance the theory that the officers of a ship are vice principals. These are clearly contrary to the weight of authority in the Federal courts. See § 520, note 1, subd. (p), *supra*, and chapter XXX., *post*.

of the doctrine of common employment, one of the currents of judicial authority has set strongly towards the theory that a master ought not to be allowed to escape the consequences of the rule which fastens liability upon him for his personal negligence by transferring the entire control of his business to an agent.[1] Such a theory obviously involves the practical result that, as we ascend the scale of supervising employees, a grade is at length reached at which the representative character of the employee becomes the controlling element in the case, superseding *pro tanto* the operation of the doctrine that the defense of common employment is none the less available to the master for the reason that the negligent servant was of higher rank than the one injured. Whether the corresponding situation should, under the so-called superior servant doctrine, be regarded as one of substitution or merger, is not very material, since in either case the master's responsibility, so far as appears, will be precisely the same.

In another line of decisions may be traced the influence of the opposite view, that the principle by which a servant is charged with an assumption of the risks of a fellow servant's negligence, on the ground that such negligence is one of the ordinary and known incidents of his relations to his master, is universal in its application, and must prevail even when it comes into conflict with the principle of accountability for the defaults of a general agent.

Before we proceed to the examination of the cases which support each of these two views, it is proper to remark that the only kind of functionary with which we are properly concerned in this and the following subtitles is an employee who may be described as being "retained generally to represent the principal in his absence;"[2] or as one whom the master substitutes for himself in the superintendence of his business;[3] or as an agent in whose hands the master "has placed the entire charge of the business or a distinct branch of it, exercising no

[1] See cases referred to in § 526, note 1, *infra*, for examples of this trend of opinion not many years after the establishment of that doctrine in the *Priestley* and *Farwell Cases*, in 1837 and 1842 respectively.

Murphy v. *Smith* (1865) 19 C. N. S. 361, 12 L. T. N. S. 605. Compare *Corcoran* v. *Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369, where the court laid stress on the fact that the master gave no personal attention to the business. In *Conway* v. *Belfast & N. Counties R. Co.* (1877) Ir. Rep. 11 C. L. 345, it was suggested that a servant should not be deemed the *alter ego* of the employer, unless he had been invested with such authority that, as between him and the employee, nothing done by him in relation to the business of which he had control would be an unauthorized act.

Plainly, the directors of a corporation must, at all events, be its representatives in all respects where the safety of the employee is concerned. *Rose* v. *Boston & A. R. Co.* (1874) 58 N. Y. 217; *Brickner* v. *New York C. R. Co.* (1870) 2 Lans. 506.

[2] *O'Brien* v. *American Dredging Co.* (1891) 53 N. J. L. 291, 21 Atl. 324.

authority and superintendence of his own therein;"[4] or as one employed to superintend the employer's entire business;[5] or as one to whom "full power to manage a business and employ and discharge servants, without interference," has been delegated by an employer.[6] Obviously these descriptions are not fulfilled where the evidence fails to show that the alleged vice principal was vested with the whole power and authority of the master in the conduct of the business,[7] either as a whole, or as regards a single department of it which was so distinct from and independent of the others that the authority delegated to the employee supervising it resembled in its nature and extent that which is wielded by a manager of an entire establishment. See subd. F, *infra*.

At least one case which, at first sight, would seem to commit the court to a total rejection of the doctrine that a master is responsible for the acts of a general manager may be explained on the ground that the test thus indicated was, under the circumstances, not satisfied.[8] Other cases in which recovery was denied present facts which place them near the border line, and the functions of the negligent employee and the precise grounds on which the court proceeded are not stated with sufficient fulness to indicate whether they really embody the principle that even general agents are not vice principals, or are simply intended as affirmations of the rule that all controlling employees, however high their rank, are mere fellow servants until the level of general agents is attained.[9] Indeed, it is often impossible, in perusing some of the opinions, to avoid the suspicion that judges have not

[4] *Lehigh Valley Coal Co.* v. *Jones* (1878) 86 Pa. 439. Compare the language employed by this court in *Frazier* v. *Pennsylvania R. Co.* (1860) 38 Pa. 104, 80 Am. Dec. 467; *Irdesco Oil Co.* v. *Gilson* (1869) 63 Pa. 150; *Hullan* v. *Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2; *Lewis* v. *Reifert* (1887) 116 Pa. 628, 11 Atl. 514; *New York, L. E. & W. R. Co.* v. *Bell* (1886) 112 Pa. 400, 4 Atl. 50.

Coulson v. *Leonard* (1896) 77 Fed. Rep. 538 (*arguendo*).

[5] *Shumway* v. *Walworth & N. Mfg. Co.* (1894) 98 Mich. 411, 57 N. W. 251.

[6] *Schultz* v. *Chicago, M. & St. P. R. Co.* (1879) 48 Wis. 375, 4 N. W. 399; *Hoth* v. *Peters* (1882) 55 Wis. 405, 13 N. W. 219. In the latter case recovery was sought on the sole ground that one of the several foremen of a nonresident defendant's lumber yard directed a car to be started when he knew that the plaintiff occupied a dangerous position on the car; but the court considered that such an allegation did not bring the case within the rule applicable where the whole power and authority of the master are vested in the employee who gives the order.

[8] See *Feltham* v. *England* (1866) L. R. 2 Q. B. 33, 7 Best & S. 676, 36 L. J. Q. B. N. S. 14, 15 Week. Rep. 151 (several freshly built piers collapsed), setting aside verdict in (1865) 4 Fost. & F. 460, where the master, though he was not present when the accident occurred, had retained a general control over the work.

[9] Some of the Massachusetts cases cited in § 520, note 1, subd. (1), *supra*, are of this doubtful color. But the recent case of *Merchau* v. *Speirs Mfg. Co.* (1899) 172 Mass. 375, 52 N. E. 518, as well as others noted in § 530, *infra*, leave no doubt as to real position of this court.

always realized adequately the extreme importance of marking and taking into account the fundamental distinction which may fairly be said to exist on strictly logical grounds, as it certainly does according to many authorities, between the situations in which there is or is not an entire abdication by the master of the management of his business.

Another source of difficulty for the commentator is that the courts frequently do not make it entirely clear whether their decisions were based upon the general agency of the delinquent, as a deputy master for all purposes, or upon the narrower ground that his delinquency involved the breach of some specific non-delegable duty for which the employer would be responsible quite irrespective of the rank of the delinquent. In a large number of instances this question is of no practical importance, so far as regards the servant's right of recovery. But as long as there is so wide a difference of opinion respecting the limits of the so-called "official acts" of supervising employees for which the master should be held responsible (see (G), *post*), there must remain a considerable residuum of cases in which the distinction between the consequences of a general agency and of an agency in regard to the particular duty shown to have been violated will always be material. A difficulty of the same kind, but of exactly the opposite character in its bearing on the servant's rights, has been noticed in § 520, *supra*.

In view of the uncertainties by which an exact classification of the authorities is, under these circumstances, embarrassed, it has been deemed advisable to note in the succeeding sections a considerable number of rulings which might possibly be assigned with equal propriety to the following chapter.

526. Doctrine that a general manager is a vice principal. English, Scotch, and colonial cases.— In the earlier periods of the development of the doctrine of common employment in England, we find several more or less distinct recognitions of the principle that the case of general managers constituted an exception to the rule which precluded recovery for the negligence of a coservant.[1]

[1] In *Paterson* v. *Wallace* (1854) 1 Macq. H. L. Cas. 748, the point actually determined by the House of Lords was that the trial judge was not justified in holding, as matter of law, that the plaintiff, a miner, was guilty of contributory negligence in continuing to work at a place where he knew that the roof of a drift was rendered dangerous by a large stone which ultimately fell upon him after the underground manager had given orders to have it removed. The real scope of the decision is therefore narrow; but the remarks made by two of the members of the House are only intelligible upon the hypothesis that they regarded the mine owner as responsible for the negligence of his manager. Lord Brougham said that the defendants were, beyond all doubt, answerable for the negligence of the manager. Lord Cranworth, in one part of his opinion, was equally emphatic on the same side, declaring it to

be good law "that if Snedden, the defenders' manager, had failed in his duty in timeously directing the stone in question to be removed, it would afford no defense that Paterson [the plaintiff] had continued to work after the orders for the removal of the stone had been ultimately given." In another passage he seems inclined to go even further, though the language used was more guarded. In commenting upon the point made by plaintiff's counsel in his exception taken to the action of the judge in withdrawing the case from the jury, *viz.*, that, if the plaintiff continued so to work in consequence of the directions of the roadsman the defenders were responsible for such directions, he said: "That may be right or wrong: for we have no evidence to show what is the character of a 'roadsman.' This, therefore, would require further explanation. If a 'roadsman' is, according to the rules and regulations of Scotch mines, a person whose province it is to direct the workmen whether they may safely work or not, the law stated in the exception may be correct." These expressions of opinion are peculiarly interesting when it is remembered that the same noble lord concurred fourteen years afterwards in the decision in *Wilson* v. *Merry* (§ 529, *infra*). Still more remarkable is the fact that the clear recognitions of the doctrine of vice principalship in *Paterson* v. *Wallace* should have been so completely ignored in the later case.

In *Potts* v. *Plunkett* (1866) 9 Ir. C. L. Rep. 290, Lefroy, Ch. J., construed *Paterson* v. *Wallace* as being a decision based on the broad principle that a master "is liable . . . for the acts and default of those whom he places in his stead and to whom he deputes his authority." Mr. Bevens comment on this gloss (1 Neg. 738) is that it is "manifestly an inaccurate statement of the law." Too broad and sweeping, undoubtedly it is; for under such a principle, taken literally, even a mere foreman of subordinate rank would be a vice principal. But the remarks of Lord Brougham and Lord Cranworth, referred to, certainly justify the inference that they considered some classes of supervising employees to be deputies of the master in such a sense that he must answer for at least a portion, if not all, of their acts. And this is all that Chief Justice Lefroy seems to mean.

In the same year that *Paterson* v. *Wallace* was decided, Lord Cranworth and Lord Chelmsford expressed a qualified approval of the Scotch case of *O'Rourke* v. *Burn* (1854) 16 Sc. Sess. Cas. 2d Series, 1025, where a young girl was injured while she was working on a machine, of the peculiar dangers of which she was not aware. The former said: "It may be that, if a master employs inexperienced workmen, and directs them to act under the superintendence and to obey the orders of a deputy whom he puts in his place, they are not, within the meaning of the rule, employed in a common work with the superintendent. They are acting in obedience to the express commands of their employer, and if he, by the carelessness of his deputy, exposes them to improper risks, it may be that he is liable for the consequences." *Bartonshill Coal Co.* v. *Reid* (1858) 3 Macq. H. L. Cas. 266, 295, 4 Jur. N. S. 767. Lord Chelmsford's comments upon the same case were as follows: "It was hardly possible to apply the principle of the servant having undertaken the service with a knowledge of the risks incident to it. She was an inexperienced girl employed in a hazardous manufactory, placed under the control, and, it may be added, the protection, of an overseer who was appointed by the defendant and intrusted with this duty. And it might well be considered that, by employing such a helpless and ignorant child, the master contracted to keep her out of harm's way in assigning to her any work to be performed." This amounts to a recognition, albeit rather a halting one, of the principle that, where young persons are concerned, the obligation of the master to protect them from perils which they do not understand is one of which he cannot devest himself by intrusting the superintendence of his business to an employee. The particular form in which this principle is applied by the American courts is that the duty to instruct such persons is nonassignable (§§ 578, 579, *post*).

A few years later, in a case where the plaintiff was injured by unfenced machinery, the theory that there may be an *alter ego* of the master was thus distinctly adopted by Byles, J.: "I do not rest the right of the plaintiff to recover on the statutable obligation incumbent on the master to fence the machinery, nor yet on the personal knowledge of the master that the machinery was improperly left unfenced, though I do not presume to intimate any disagreement with the court of exchequer. But I

think the master liable on the broader ground, to wit, that the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition. . . . Why may not the master be guilty of negligence by his manager or agent, whose employment may be so distinct from that of the injured servant that they cannot with propriety be deemed fellow servants? And if a master's personal knowledge of defects in his machinery be necessary to his liability, the more a master neglects his business and abandons it to others the less will he be liable." *Clarke* v. *Holmes* (1862) 7 Hurlst. & N. 937, 947, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405.

In *Gallagher* v. *Piper* (1864) 16 C. B. N. S. 669, 33 L. J. C. P. N. S. 329, all of the judges reasoned upon the assumption that, under an appropriate showing of facts, a managing employee might be held to be a vice principal; but the majority of the court were of opinion that there was no such evidence set out on the record. The ground upon which the plaintiff rested his claim was this: One Phear was the defendants' foreman or manager at the work in question,—a large building. One Mahoney was employed under him as a foreman of the scaffolders; and the plaintiff worked at the raising of the scaffolding under the orders of Mahoney. It was Phear's duty to supply the materials, consisting of poles, putlogs, and boards, for the rearing of the scaffolding. He had notice through Mahoney that the supply of these materials for the due and safe performance of the work was insufficient; and the cause of the injury sustained by the plaintiff was Phear's omission to supply proper and sufficient materials upon Mahoney's requisition. Chief Justice Erle said: "The only matter upon which I pause is whether or not Phear was such a general manager as to make him stand in the place of Messrs. Piper, so that what was said to Phear may be considered as having been said to them. Is there anything to show that Phear, the foreman or manager more represented his employers here than the foreman did in *Wigmore* v. *Jay* [(1850) 5 Exch. 354, 19 L. J. Exch. N. S. 296, 14 Jur. 837]? In each case the defendants were engaged in very extensive works, and in each a foreman or manager was employed to direct them, and to whom the workmen looked for their instructions. In this case, beyond a doubt, Phear, the manager, was guilty of negligence in the performance of his duty: he had repeated notices that there were not sufficient materials for the erection of the scaffolding, but failed to supply them. But I think Phear and the plaintiff were fellow workmen within the principle laid down in the cases I have referred to. There was no evidence of any default on the part of the defendants themselves, either as to the supply of sufficient materials or in the selection of Phear to be their foreman or manager; and the neglect of Phear imposes no responsibility upon them. The rule in this case, therefore, will be absolute to enter a nonsuit." To the same effect is the reasoning of Willes, J.: "Here the notice was given, not to the masters, but to the foreman. If Phear had been a partner with the defendants, notice to him would have rendered them liable; for the case would not then have fallen within the rule illustrated by *Priestley* v. *Fowler* [(1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987], and that class of cases. But here we are dealing with a case where the person whose negligence caused the injury is a servant of the persons sought to be charged. It is true, he filled a superior position, but still he was a servant; and I am unable to draw any distinction in this respect between one description of servant and another, so long as the relation of master and servant exists, and the party injured and the person whose negligence caused the injury are employed under one common master. If this had been the case of a person who might be said to have authority to act for the master as a kind of universal agent, I should have been prepared to consider the suggestions thrown out by my brother Byles in his judgment in *Clarke* v. *Holmes* (1862) 7 Hurlst. & N. 937, 949, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, and see whether he could come within the denomination of "servant" at all. But before I could bring myself to say that such an agent did not come within the rule, I should take time to look into the subject, and especially to consider the position of that most authoritative of all agents, the master of a ship. I should like to consider whether, if the master of a ship, without the knowledge of his owners, were to start from an intermediate port with the vessel in a damaged and unseaworthy condition, and she was in consequence driven on shore or upon a

In Scotland, also, the courts adopted still more unequivocally the same view.[2]

rock, and some of the crew thereby sustained personal injury, it would be just or reasonable to hold the owners to be liable to the sailors, as they would undoubtedly be to third persons. But it is unnecessary to discuss that here: for it is plain that Phear was as much a servant of the defendants as was any one of the laborers employed under his direction and control." In a strong dissenting opinion, Byles, J., whose opinion in *Clarke* v. *Holmes* has just been noticed, thus discussed the position of the foreman: "As I understood the evidence, he was not merely the foreman or manager *pro hac vice*, but had been the general manager of the defendants' work for many years,—about twenty-four or twenty-five years. He had the entire management of the men employed under him, engaging them and dismissing them as he thought fit, Mahoney being employed under him as foreman of the scaffolders. It is said that Phear stood in the relation of fellow servant to the plaintiff. I am bound to say that I think otherwise. He was acting master. At all events there was evidence for the jury that such was his position. Take the case of a large builder, who is never seen near his works, but who intrusts the entire conduct of his business to a foreman or manager, who is eyes, ears, tongue, brains, and everything to him. Is not the master liable for acts of negligence of his employer,—for I will not use the term, 'servant' which, like that of 'foreman,' is susceptible of many meanings,—whilst acting thus for him? If these defendants had been a corporation aggregate they must have employed somebody to represent them. Take the case of a railway company employing a general traffic manager, and through his negligence an accident happens to a servant of the company. Is it to be said that the party injured is without remedy, because the corporation is incapable of personal misconduct? If the rule here relied on be found so inconvenient that it cannot be applied to a case like that, ought it to be applied here? That depends very much upon the position of Phear. If he had been a servant, though a superior one, I should have entertained some doubt. But I do not think he stood in the position of a servant at all. He stood rather in the position of a general agent for the defendants. It is true he was called the foreman; but that is a word the meaning of which is extremely various. The case of *Wigmore* v. *Jay* (1850) 5 Exch. 354, 19 L. J. Exch. N. S. 296, 14 Jur. 837, is distinguishable in this, that there it does not appear that the person whose negligence caused the accident was anything more than foreman for the particular work. For these reasons, I think notice to Phear and negligent misconduct of Phear would be notice to the defendants and negligence or misconduct of the defendants. Personal knowledge is not indispensable: for it has been held that notice to one of two partners is notice to both. So here, I cannot help thinking that notice to Phear was notice to the defendants."

The charges of Cockburn, Ch. J., in *Feltham* v. *England* (1865) 4 Fost. & F. 460, and in *Webb* v. *Rennie* (1865) 4 Fost. & F. 608, may perhaps also be taken to indicate that this eminent judge had accepted the doctrine that, under certain circumstances, a managing employee might be a vice principal.

In *Murphy* v. *Smith* (1865) 19 C. B. N. S. 361, 12 L. T. N. S. 605, the court set aside a verdict for the plaintiff solely on the ground that there was no evidence to show that the negligent workman was, as contended, a general manager of a lucifer factory *pro hac vice*. See § 509, note 1, *supra*. But it must be admitted that the case is deprived of a part of its significance by the fact that the injured servant was an inexperienced boy, and this may have been considered a differentiating factor, so far as regards the remarks of the judges conceding that the master might have been held liable under a different state of the evidence.

[2] In one case Lord Ingles expressed the opinion that there was no authority, either English or Scotch, for the doctrine that a foreman or manager who represents the master in the entire work, and to whom has been delegated the entire duty of the master, is not a person for whose negligence the master is responsible. *Finnighan* v. *Peters* (1861) 23 Sc. Sess. Cas. 2d series, 260.

In another case a foreman or general superintendent of a factory was held to be a vice principal. *Darby* v. *Duncan* (1861) 23 Sc. Sess. Cas. 2d series, 529

So far as these decisions embody the theory that a master can be liable for the negligent acts of a general manager, committed in the course of his superintendence of a going concern, they are no longer law in any jurisdiction where the authority of the House of Lords is paramount. See § 529, *infra*.[3]

527. — American cases.—It has been deemed advisable to comment at some length upon the decisions embodying a doctrine thus finally repudiated in the mother country, not merely because they are of interest to the student of historical jurisprudence, as indicating the trend of opinion among a considerable number of very distinguished judges, but because the doctrine which they recognize is that which has finally prevailed in nearly every court of the United States.[1]

(fencing around machinery allowed to become defective). Lord Pres. M'Neill summed up his position in the following words: "It comes to this, that there has been a delegation of his duty by the master, and until I am otherwise instructed, I cannot hold that, where a master delegates his duty, he is to be freed from liability."

In another case a complaint alleging that a defect in a scaffolding had been pointed out to the manager was held not demurrable. *Lynch* v. *Haggart* (1857) 19 Sc. Jur. Cas. 2d series, 399.

In another case it was ruled that a complaint alleging that the injury was due to the negligence of one of the defendant's foremen in giving an order to lift an excessive weight is not demurrable, as the liability depends on the particular charge which the foreman had in the business. *M'Millan* v. *M'Millan* (1861) 23 Sc. Sess. Cas. 3d series, 1082.

In *McAulay* v. *Brownlie* (1860) 22 Sc. Sess. Cas. 2d series, 975, it was held that a contractor's foreman superintending the erection of a building was a vice principal of the master in regard to providing the laborers with a safe scaffold. This duty was assumed by the court (see especially the opinion of Ld. Deas) to be non-delegable.

[3] Curiously enough, however, the doctrine of an *alter ego* does not seem to be quite extinct in at least one of the British colonies. Thus, there has been held to be a liability for the negligence of the manager of a mine conducting the business in a manner as complete as an individual owner would or could have done on the spot. *Band of Hope & J. Consols* v. *Mackay* (1871) 2 Victorian Rep. (L.) 158 (ladder insecurely fastened); *Wilson* v. *Merry* (§ 529, *infra*) was cited by counsel, but not commented on by the court.

In *Sanderson* v. *Smith* (1882) 3 New So. Wales L. R. 31, it was suggested, but not directly decided, that a general manager was a vice principal. The actual point ruled was that a mate of a ship was not a representative of the shipowner.

The same view is taken in Quebec. *Hall* v. *Canadian Copper Co.* (Quebec, 1879) 2 Legal N. 245 (foreman ordered use of drill which caused the accident). Here the case was considered as one of personal interference by the master, so far as such interference was possible in the case of a company. But in this Province the doctrine of common employment, as a whole, is rejected. See *Canadian P. R. Co.* v. *Robinson* (1887) 14 Can. S. C. 105. The decision in the Quebec case is therefore of no importance to common lawyers.

[1] The cases *contra* are noted in § 530, *infra*.

Possibly the earliest American case in which there is a suggestion of the principle that a master is liable for the acts of a general agent is to be found in *Honner* v. *Illinois C. R. Co.* (1854) 15 Ill. 550, where the court leaned to the opinion that there might be "cases of carelessness or misconduct on the part of those to whom a corporation may intrust the management of its concerns, producing injury to the employees of the company for which it would be liable," but said that the declaration of the plaintiff did not raise this point.

In 1859 the doctrine was fully recognized as to the superintendent of a railway in *Washburn* v. *Nashville & C. R. Co.* 3 Head, 638, 75 Am. Dec. 784. The significance of this decision is, however,

How widely that doctrine prevails is apparent from the decisions cited in the subjoined notes, though it must be remembered that many of them, inasmuch as they emanate from courts which have accorded more or less recognition to the superior servant doctrine, cannot with entire certainty be cited as being authorities for the particular rule with which we are now concerned, *viz.*, that the case of a general managing agent constitutes an exception to the principle that the exercise of a power of control does not make the controlling employee the *alter ego* of the master. That principle has been thus formally stated in a leading New York case:

Where the "master withdraws from the management of the business, or the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the master is liable for the neglects and omissions of duty of the one charged with the selection of the other servants in employing and selecting such servants, and in the general conduct of the business committed to his care."[2]

Most of the decisions illustrating this rule relate to agents bearing designations indicative of positions which suggest the conduct of a permanent business and tenure of office extending over an indefinite period.[3]

diminished by the fact that it was rendered in a state in which the superior servant doctrine is applied. See subd. D, *infra*.

Even seven years after the date of this decision it would appear, from the report of a Pennsylvania case, that the master's liability under such circumstances was not then established in that state. In *Caldwell* v. *Brown* (1866) 53 Pa. 453, where the trial court, at the request of the plaintiff, instructed the jury that the acts and knowledge of the manager of a rolling mill were the acts and knowledge of the proprietor himself, the supreme court said that this charge was perhaps not warranted by the authorities (*Albro* v. *Agawam Canal Co.* (1850) 6 Cush. 75), but that, if it was, it was not an error of which the plaintiff could complain.

After 1870 the cases illustrating the doctrine become quite numerous in the reports.

[2] *Malone* v. *Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573. Following *Murphy* v. *Smith* (1865) 19 C. B. N. S. 361, 12 L. T. N. S. 605 (see § 526, note 1, *supra*).

[3] Thus, a railway company must answer for the negligence of its general manager or superintendent. *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914 (*arguendo*); *Frazier* v. *Pennsylvania R. Co.* (1860) 38 Pa. 104, 80 Am. Dec. 467 (error to reject evidence that he knew of incompetency of delinquent); *Patterson* v. *Pittsburg & C. R. Co.* (1871) 76 Pa. 389, 18 Am. Rep. 412 (defective construction of siding was known); *Huntingdon & B. T. Road & Coal Co.* v. *Decker* (1877) 84 Pa. 419 (unfit servant employed); *Hoover* v. *Carbon County Electric R. Co.* (1899) 191 Pa. 146, 43 Atl. 74: (doctrine: assumed but proximate cause of the injury was held to be the act of a fellow servant); *Lasky* v. *Canadian P. R. Co.* (1891) 83 Me. 461, 22 Atl. 367 (despatch of trains); *Wonder* v. *Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143 (conceded *arguendo*; but see § 530, *infra*); *Cumberland & P. R. Co.* v. *State* (1875) 44 Md. 283 (purchase of defective machinery: see § 530, note *infra*); *Harrison* v. *Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034 (*arguendo*); *Krogg* v. *Atlanta & W. P. R. Co.* (1886) 77 Ga. 202 (defective track caused derailment); *Bateman* v. *Peninsular R. Co.*

Upon purely logical grounds the same rule is, it would seem, equally applicable to employees superintending a specific piece of work whose controlling functions have relation only to that work, and will cease when it is finished. The situation in such cases, so far as

(1898) 20 Wash. 133, 54 Pac. 996 (not taking steps to stop trains upon learning that a forest fire is raging along the road); *Washburn* v. *Nashville & C. R. Co.* (1859) 3 Head, 638, 75 Am. Dec. 784; (collision caused by failure to give proper running orders); *Haines* v. *East Tennessee & G. R. Co.* (1866) 3 Coldw. 222 (train started at an unusual hour); *Galveston, H. & S. A. R. Co.* v. *Smith* (1899) 76 Tex. 611, 13 S. W. 562 (failure to give such information and orders to the company's servants in charge of its trains as will enable them to avoid collision is the neglect of the company); *Pittsburgh, C. & St. L. R. Co.* v. *Henderson* (1882) 37 Ohio St. 552 (negligent orders with respect to the management of a train); *Cleveland, C. & C. R. Co.* v. *Keary* (1851) 3 Ohio St. 201 (negligent operation of trains); *Reddon* v. *Union P. R. Co.* (1887) 5 Utah, 344, 15 Pac. 262 (workmen ordered to help in clearing gangway of the mine, in which sup. intendent had temporarily ceased to put up timbering although he knew that pieces of coal were constantly falling); *Hyatt* v. *Hannibal & St. J. R. Co.* (1885) 19 Mo. App. 294 (breach of agreement to provide means to keep men warm while they were shoveling snow at night in very cold weather; plaintiff was frost-bitten).

In one case it was not decided, but said to be at least open to question, whether the superintendent of a short branch line leading to coal mines was a fellow servant of the conductor of a train in giving an order. *Woodes* v. *Delaware & H. Canal Co.* (1891) 141 Pa. 632, 21 Atl. 733. But it is difficult to see why the smallness of a concern should have any qualifying effect. The only proper question is whether the superior servant is in a real sense the master's substitute in the management of the concern.

The same doctrine holds good where the negligent act is that of the general manager or superintendent of other concerns,—as, of a flour mill. *Hirick* v. *Morton* (1901) 62 Kan. 870, 64 Pac. 609 (servant not warned as to latent danger).

Or of a mill and elevator company. *Colorado Mill. & Elevator Co.* v. *Mitchell* (1899) 26 Colo. 284, 58 Pac. 28 (failure to provide proper appliance for raising a smokestack).

Of a steel-mill. *Duffy* v. *Oliver Bros.* (1890) 131 Pa. 203, 18 Atl. 872 (*arguendo*).

Of a saw mill. *Sulphur Lumber Co.* v. *Kelley* (1895; Tex. Civ. App.) 30 S. W. 696 (negligent order to start saw when there were indications of the existence of a defect); *Shumway* v. *Walworth & N. Mfg. Co.* (1894) 98 Mich. 411, 57 N. W. 251; *Bouck* v. *Jackson Sawmill Co.* (Ky.; 1899) 49 S. W. 472.

Of a manufacturing establishment. *Griffin* v. *Glea Mfg. Co.* (1892) 67 N. H. 287, 30 Atl. 344 (orders); *State, use of Hamelin* v. *Malster* (1881) 57 Md. 287, *arguendo* (at all events so far as regards his function of employing servants and procuring the instrumentalities necessary for the service (see § 530, *infra*); *Corcoran* v. *Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369 (elevator suffered to get into bad repair; owner was nonresident and gave no personal attention to the business but see §§ 543, 547, *post*); *Northwestern Fuel Co.* v. *Danielson* (1893) 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 915 (gave orders increasing danger for workmen not directly affected by them and failed to warn them); *Keenan Boiler Co.* v. *Erickson* (1898) 78 Ill. App. 35 (steam allowed to enter boiler which plaintiff was repairing); *Hess* v. *Adamant Mfg. Co.* (1896) 66 Minn. 79, 68 N. W. 774 (assumed in the opinion); *Mattise* v. *Consumers' Ice Mfg. Co.* (1894) 46 La. Ann. 1535, 16 So. 400 (here the negligent employee had "succeeded" the superintendent in his function; the negligence alleged was failing to keep a boiler in repair); *Doctiaq* v. *Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298 (orders); *Cole Bros.* v. *Wood* (1894) 11 Ind. App. 37, 36 N. E. 1074 (orders); *Foster* v. *Pusey* (1888) 8 Houst. (Del.) 168, 14 Atl. 545 (defective machinery); *Strange* v. *McCormick* (1849) 1 Phila. 156; *Crispin* v. *Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521 (but case went off on the point that the negligent act was nonofficial; see §§ 513, 547, *post*; owner of concern was nonresident); *Gormly* v. *Vulcan Iron Works* (1876) 61 Mo. 492 (fire or-

the completeness of the transfer of the master's powers and obligations is concerned, may well be, and often is, the same as in the case of the general managing agents of a continuing business. A few decisions

dered to be applied to a furnace in iron works, so as to produce an explosion); *Martin* v. *Cook* (1891) 37 N. Y. S. R. 733, 14 N. Y. Supp. 329 (seems to assume that the foreman was a vice principal; but the negligence was a breach of a non-delegable duty in not discarding a defective appliance).

Of a hog-slaughtering establishment, *Mitchell* v. *Robinson* (1881) 80 Ind. 281, 41 Am. Rep. 812 (defective boiler).

Of a lumber company, *Newbury* v. *Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743 (conceded); *Doughty* v. *Penobscot Log Driving Co.* (1884) 76 Me. 143 (*arguendo*); *Klochinski* v. *Shores Lumber Co.* (1896) 93 Wis. 417, 67 N. W. 934 (but act here was nonofficial; see chapter XXIX., *post*); *Lund* v. *Hersey Lumber Co.* (1890) 41 Fed. 202 (defective rope and tackle furnished; proprietors were a foreign corporation).

Of a brick company, *Chicago Anderson Pressed Brick Co.* v. *Sobkowiak* (1894) 148 Ill. 573, 36 N. E. 572, Affirming (1892) 45 Ill. App. 317 (assurance that overhanging bank was not dangerous; the question of coservice was not raised in the court of appeals at the place cited, but was discussed on former hearing (1889) 34 Ill. App. 312).

Of a quarry or stone-cutting establishment, *Hoosier Stone Co.* v. *McCain* (1892) 133 Ind. 231, 31 N. E. 956 (cars, being insufficiently blocked on an incline, were started by impact of another car, and injured servant who was loading one of them); *Salem-Bedford Stone Co.* v. *O'Brien* (1898) 150 Ind. 656, 49 N. E. 857 (wheels of heavy traveler were not secure); *Donnelly* v. *Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874 (defective hoisting gear broke under a load); *Richmond Granite Co.* v. *Bailey* (1896) 92 Va. 554, 24 S. E. 232 (superintendent disregarded a rule made by himself, as to giving a warning signal before the cable which drew the cars up an incline was drawn taut); *Reed* v. *Stockmeyer* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186 (orders as regards the kind of work to do); *Lantry* v. *Silverman* (1892) 1 Colo. App. 404, 29 Pac. 180 (slab thrown down towards place where foreman had sent plaintiff to remove some tools, without proper precautions being taken to see that he had reached a place of safety); *Calloa* v. *Norton* (1889) 52 Hun, 9, 4 N. Y. Supp. 221 (employee ordered into place of danger), Reversed in (1891) 126 N. Y. 1, 26 N. E. 905, on the ground that the danger was solely the result of the manner in which the foreman performed or directed a detail of the work.

Of an ice company, *Gerrish* v. *New Haven Ice Co.* (1893) 63 Conn. 9, 27 Atl. 235 (omission to notify engineer that servant was in a position where he would be endangered by the starting of machinery, and breach of a rule requiring the posting of an employee to see that the machinery was not started without a signal); *Crystal Ice Co.* v. *Sherlock* (1893) 37 Neb. 19, 55 N. W. 294 (piece of ice sent down a chute).

Of a mine, *Pantzar* v. *Tilly Foster Iron Min. Co.* (1885) 99 N. Y. 368, 2 N. E. 24 (knew that a cliff was in danger of falling, and failed to safeguard plaintiff; here, however, the court relies rather on the non-delegable character of the duty violated than on the general agency of the superintendent); *What Cheer Coal Co.* v. *Johnson* (1893) 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. 810 (assumed); *Northern P. Coal Co.* v. *Richmond* (1893) 7 C. C. A. 485, 15 U. S. App. 262, 58 Fed. 756 (negligence alleged was ordering boy to do dangerous work outside scope of employment); *Wagner* v. *Sullivan Min. Co.* (1884) 76 Me. 100 (cut a hole in a platform creating secret pitfall); *Quincy Min. Co.* v. *Kitts* (1879) 42 Mich. 34, 3 N. W. 240 (*arguendo*); *Descrant* v. *Cerrillos Coal R. Co.* (1898) 9 N. M. 495, 55 Pac. 290 (seems to be assumed in opinion, though case did not require a decision on this point). Other supervising officials in mines who have been held to be vice principals have been described as follows: A foreman of the entire work at a mine, with power to employ and discharge hands, *McLean* v. *Blue Point Gravel Min. Co.* (1876) 51 Cal. 255 (plaintiff not notified that a blast was about to be fired). A mining captain who has the entire management of the mine, without interference by the owner, a nonresident, *Ryan* v. *Bagaley* (1883) 50 Mich. 179, 45 Am.

have recognized this identity, and imposed liability upon employers for the negligence of agents in charge of important works of construction.[4] But that the tendency of the courts is to treat employees of

Rep. 35, 15 N. W. 72. Defendant argued that, as the captain had been appointed by the owner's agent, he was "a mere foreman, or department leader, or subchief;" but it was pointed out that the agent, not being an expert himself, took no part in the management, and that the essential question was, What, as matter of fact, was his position? not by what directness or circuity he got it.

The foreman of a gang of men, to whom a stevedore delegates the entire management of the work of unloading a vessel, with "full discretion to control and supervise it," is a vice principal as to his subordinates. *Brown* v. *Sennett* (1885) 68 Cal. 225, 58 Am. Rep. 8, 9 Pac. 74 (failure to signal for stoppage of engine when an overloaded bucket of coal was swinging dangerously. This ruling was criticised in *Congrave* v. *Southern P. R. Co.* (1891) 88 Cal. 360, 26 Pac. 175, as being hard to reconcile with some other rulings, particularly *Collier* v. *Steinhart* (1875) 51 Cal. 116 (complaint alleging the negligent employment of an engineer by the superintendent of a mine held demurrable). It was also suggested that *Beeson* v. *Green Mountain Gold Min. Co.* (1880) 57 Cal. 20, went no further than to hold that the duty of providing suitable appliances was nonassignable. The decision may doubtless stand on this footing; but that it was not founded on any such theory is apparent from the report. A recent decision of this court seems to indicate that whatever doubt it may at one time have entertained as to the vice principalship of general agents is now abandoned, as the master has been held liable for the negligence of an engineer in charge of a refrigerating machine under the direction of the superintendent and general manager of a corporation when he was present, and in sole charge during his absence. *Ryan* v. *Los Angeles Ice & Cold Storage Co.* (1896) 112 Cal. 244, 32 L. R. A. 524, 44 Pac. 471 (allowing inexperienced men to do work for which they were unfitted). See further the summary of California decisions in chapter XXX., *post*.

As to the position of captains of ships, see § 535, *infra*.

If the functions discharged by a supervising employee are those of a general manager, he will be treated as such, though he was appointed by an agent of the master, a nonresident, where it also appears that such agent, not being an expert, took no part in the conduct of the business. *Ryan* v. *Bagley* (1883) 50 Mich. 179, 45 Am. Rep. 35, 15 N. W. 72.

[4] Recovery has been allowed for the negligence of the following employees:

One having full control of the erection of a building. *Slater* v. *Chapman* (1887) 67 Mich. 523, 35 N. W. 106 (foreman removed cleat which kept a temporary staircase in position, and subsequently ordered plaintiff to ascend it).

A person in full control of the construction of a tunnel. *Dobinson* v. *Bennett* (1888) 16 Or. 515, 19 Pac. 765 (workman set to drilling holes, without any steps being taken to ascertain whether there were any unexploded blasts).

An employee in full charge of the construction of a bridge. *Brothers* v. *Carter* (1873) 52 Mo. 372, 14 Am. Rep. 424 (falsework gave way).

An employee in full charge of the construction of a building. *Whalen* v. *Centenary Church* (1876) 62 Mo. 326 (defective scaffold).

A general foreman of construction work, in full charge of work, with power to hire and discharge. *Engan* v. *Tucker* (1879) 18 Hun, 347 (plaintiff injured while executing order to excavate under a pier the lower part of which, below the beam on which the upper section rested, was left without any support except that given by the force of cohesion: possibly a case merely of a breach of non-delegable duty).

A superintendent in entire control of the work of constructing a bridge. *Fort* v. *Whipple* (1877) 11 Hun, 586 (scaffold collapsed in consequence of the superintendent's directing the removal of the stay-laths; but perhaps the remark made as to the last case applies to this one also).

See also *Gallagher* v. *Piper* (1864) 16 C. B. N. S. 669, 33 L. J. C. P. N. S. 329, discussed under the preceding section, note 1.

With the above decisions should be compared those cited in subd. F, *infra*

this class as mere foremen will be abundantly evident if we compare the decisions cited in the last two notes with those tabulated in § 7, note 1, subd. F, ante. The tendency disclosed by this comparison is, it will be observed, not confined to courts which, like those of Massachusetts and Maryland, construe the doctrine of common employment most rigorously against the servant, but is equally apparent in states in which general managers of a continuing business are conceded to be vice principals. This inconsistency is doubtless one of the many embarrassing consequences of the haphazard fashion in which the doctrine of vice principalship has been evolved; and it must be admitted that there is also a genuine difficulty in separating the cases of this description which really involve the exercise of the functions of a general agent from those in which the supervising employee is a mere foreman, exercising no larger discretion than those who, in a complicated concern, like a railway, are intrusted with certain well-defined duties of a simple character.[5] But neither in justice nor in reason can a court which treats a general manager of a continuing business as a vice principal decline to indemnify a servant for the negligence of an official occupying a position which actually involves the discharge of functions differing in no essential respect from those which are characteristic of a general manager.

That the above rule of liability is considered to be applicable to corporations is shown by the large number of cases in which, as is shown by note 3 to the present section, such bodies were held responsible without any suggestion that a distinction could be raised on this ground. Any other doctrine, in fact, would involve the absurd and unjust consequence that, as all the business of corporations is neces-

in regard to departmental managers: —especially those relating to the masters of ships, who, according to circumstances, may sometimes be general, and sometimes departmental, managers.

The value of the two Missouri decisions referred to above is, so far as other jurisdictions are concerned, somewhat diminished by the fact that this court has become an uncompromising adherent of the superior servant doctrine. See subd. D, *supra*. But they seem to date from the earlier period during which that doctrine was not accepted. See summary in chapter XXX., *post*.

A ruling of the supreme court of New York, that the superintendent of repairs to a ship was a vice principal (*Hussey* v. *Coger* [1886] 39 Hun. 639), was reversed by the court of appeals on the ground that he was merely a special agent in regard to some of his duties (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556.

Whether a foreman in charge of the construction of a bridge is a vice principal was left undecided in *Ross* v. *Walker* (1890) 139 Pa. 42, 21 Atl. 15, 159, the court denying recovery on the special ground that the mere selection of materials from a mass is the act of a mere servant. See § 603, *post*.

[5] It has been expressly held that a servant appointed to supervise a little job, such as raising a piece of timber by a derrick for a building under erection, cannot be placed in the category of general superintendents. *McDonald* v. *Eagle & P. Mfg. Co.* (1881) 67 Ga 761 1882) 68 Ga. 844.

sarily transacted by agents, they would be virtually absolved from all liability.[6] Where the corporation is a foreign one, the propriety of not admitting any exception on such a ground is especially obvious.[7]

528. Rationale of the doctrine.—The language used by the judges in discussing the responsibility of the master for the negligence of a general manager shows that such an employee is conceived to be a vice principal for the reason that, as a necessary consequence of the essential elements of the position which he occupies, he must be regarded as the agent appointed by the master to see that the subordinate workmen are as fully guarded against unnecessary perils as if the master himself were conducting his business in person.[1] In the large

[6] *Lehigh Valley Coal Co.* v. *Jones* (1878) 86 Pa. 439. In *Washburn* v. *Nashville & C. R. Co.* (1859) 3 Head. 638, 75 Am. Dec. 784, the trial judge ruled that "the superintendent, and even the president, of a railway company, stood upon exactly the same footing as any other employee, however subordinate his position, and that the board of directors only was to be regarded as the principal. The criticism of the supreme court was as follows: "If this be correct, it will inevitably follow that the company cannot be held liable in a case like the present, unless it can be shown that the injury resulted from the direct action of the company in its corporate capacity. This is absurd. The corporation of necessity acts through the instrumentality of its officers and agents. If not prohibited by the charter, it may delegate its authority to its officers and agents, so far as it may be necessary to effect the purposes of its creation. It must act in this mode, or not act at all. The superintendent may be said to be, as respects this particular company, from the power shown to have been given him by the board, the immediate representative of the company,—the corporate executive officer,—intrusted for the time with the power and authority of the board of directors, so far as regards the control and management of the train and all the arrangements connected therewith. In this view, the company must be held liable for any injury resulting from the negligence or improper order of the superintendent, just as much as if it had emanated directly from an act of the company in its corporate capacity."

[7] As in *Lund* v. *Hersey Lumber Co.* (1890) 41 Fed. 202; *Crispin* v. *Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521.

[1] In a case decided by the supreme court of New York, the reasoning of which was indorsed by the court of appeals, the following lucid argument is found: "A corporation cannot act personally. It requires some person to superintend structures, to purchase and control the running of cars, to employ and discharge men, and provide all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents, they are the representatives of the corporation. They are then the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointees equally with themselves represent the corporation as master in all those respects. And though in the performance of these executive duties he may be and is a servant of the corporation, he is not in those respects a co-servant, a colaborer, a coemployee, in the common acceptation of those terms, any more than is a director who exercises the same authority. Though such superintendents may also labor like other colaborers, and he may be in that respect a colaborer, and his negligence as such colaborer, when acting only as a laborer, may be likened to that of any other, yet when by appointment of the master he exercises the executive duties of master, as, in the employment of servants in the selection for adoption of the machinery, apparatus, tools, structures, appliances, and means suitable and proper for the use of other and subordinate servants,—then his acts are executive acts, are the acts of a master; and then the corporation are responsible that he shall act with a rea-

majority of instances the discharge of these protective functions will be measured by, and coextensive with, the performance of those obligations which are treated as non-delegable by very nearly all the

sonable degree of care for the safety, security, and life of the other persons in their employ. These executive duties may also be distributed to different heads of different departments, so that each superintendent within his sphere may represent the corporation as master. In controlling and directing structures, in employing and dismissing operatives, in selecting machinery and tools, thus he speaks the language of a master. Then he issues their orders to their operatives. Then he is the mouthpiece and interpreter of their will. Their voice, which is silent, is spoken by him. He then only speaks their executive will, not the irresponsible will of a fellow workman or colaborer. The corporation can speak and act in no other way. His executive acts are their acts. His negligence is their negligence. His control their control. He has in this executive duty no equal. He is not, while in the performance of these executive duties, only the equal of the common colaborer or coservant." *Brickner* v. *New York C. R. Co.* (1870) 2 Lans. 506, Affirmed in (1872) 49 N. Y. 672.

In *Corcoran* v. *Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369, the following language is used: "The defendants who operated the mill at the time of the injury gave no personal attention to conducting the mill, but it was managed by a general agent who had general charge of the mill, machinery, and operatives, with power to purchase all supplies and hire and discharge operatives. It is evident that this general agent was not a mere fellow servant of the plaintiff, who was a common hand in the mill, but that he was charged with the performance of the duties which the defendants owed to the hands employed in the mill. There was no other person to discharge those duties, and the defendants could not, by absenting themselves from the mill and refraining from giving any personal attention to its conduct, but committing the entire charge of it to an agent, exonerate themselves from those duties, or from the consequences of a failure to perform them."

Compare also the following extracts:

"So far as the corporate directors are concerned, no question can be made that for all purposes they represent the corporation, and their acts as a board are the acts of the principal; but, in the management of its affairs, certain powers are and must be delegated to agents or servants who are clothed with certain discretionary powers. If the master places the entire charge of his business, or a distinct branch of it, wholly in the hands of an agent, exercising no discretion and no oversight, the neglect of the agent of the ordinary care in the exercise of the business of the master thus intrusted to him is a breach of duty for which the master is held liable." *Harrison* v. *Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034.

"To the general rule [that a foreman is a fellow servant of his subordinates] there is this qualification, or exception, that, where the middleman or superintendent is intrusted with the discharge of the duties incumbent upon the master, as between the latter and the servant, there the master may be liable for the omissions or neglect of the manager or superintendent in respect to those duties. If the master relinquishes all supervision of the work, and intrusts not only the supervision and direction of the work, but the selection and employment of laborers, and the procuring of materials, machinery, and other instrumentalities necessary for the service, to the judgment and discretion of a manager or superintendent, in such case the latter becomes a vice principal, and for his omissions or negligence in the discharge of those duties the principal will be liable." *State use of Hamelin* v. *Halster* (1881) 57 Md. 287.

"If the master has delegated to a servant or employee the care and management of the entire business, or a distinct department of it, the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master, then such superior servant stands in the place of the master, and the rule of *respondeat superior* applies." *Schroeder* v. *Flint & P. M. R. Co.* (1894) 103 Mich. 213, 29 L. R. A. 321, 61 N. W. 665.

"The servant on entering upon the employment is supposed to know and

American courts.[2] But it is impossible, as the authorities stand, to say that the conception of general agency and non-delegability of duties can be treated as interchangeable tests of vice principalship. Most of the courts which have adopted the doctrine of non-delegability of duties have refused to construe it in such a sense that the master would be subjected to responsibility for any superior servant's lack of care in giving orders (see subd. D, *supra*); and yet a large number of the decisions in jurisdictions where the doctrine now under discussion has been applied, proceed upon the hypothesis that a master must answer for injuries caused by complying with the negligent directions of a general manager. See § 541, *post*.[3]

assume the risk. But does he risk the carelessness and negligence of those placed over him, in the selection of suitable materials, machinery, and the appliances incident to the employment? He acts in subordination. His simple duty is obedience. He has no means or opportunity of knowing whether the articles furnished are safe, and has to rely on the judgment of his superiors. If the master in person superintends the work, then there is no controversy or dispute as to where the responsibility belongs. If the master deputes the superintending control of the work, with the power to employ and discharge hands and purchase and remove materials, to an agent, then the master acts through the agent, and the agent becomes the master. The duties are the duties of the master, and he cannot evade the responsibilities which are incident and cling to them, by their delegation to another. When the master appoints some other person to perform these duties, then the appointee represents the master, and though in their performance he may be and is a servant to the master, yet in those respects he is not a coservant, a colaborer, a coemployee, in the common acceptation of these terms. He is an agent and stands instead of the principal, and is not a fellow servant within the meaning of the rule as applied to laborers and workmen. His acts are the acts of a master and superior, and the servants are bound to use whatever materials, machinery, apparatus, or appliances he may see fit to provide for them." *Brothers* v. *Cartter* (1873) 52 Mo. 372, 14 Am. Rep. 424, quoted with approval in *Gormly* v. *Vulcan Iron Works* (1876) 61 Mo. 492.

In another case the court speaks of a general agent employed to represent the master in his absence, and "charged with the duties which it would be incumbent on the master to perform if he were present." *Mitchell* v. *Robinson* (1881) 80 Ind. 281, 41 Am. Rep. 812.

"It is not the mere fact that the chief engineer had control over the firemen and the coal passer that destroys the relation of fellow servants between him and the servants, but the additional fact that he succeeded the superintendent and vice principal, George Smith; that he had full authority to provide for the safety of the servants, and had the management of the factory, and in view of the further fact that it is the duty of the master to supply machinery and tools, and to see to their repair and that they are kept in good repair." *Mattise* v. *Consumers' Ice Mfg. Co.* (1894) 46 La. Ann. 1535, 16 So. 400.

"For the purposes of managing the business, determining what machinery should be used and how placed, what men should be employed and how much paid, he was the defendant. He was its mouthpiece and hand. He selected the materials of which the pipe was to be constructed; knew, or ought to have known, whether it was sufficient for the purposes for which it was intended (except as to the latent defects in the material); knew, or ought to have known, whether it was safe to be placed within an inch or two of wood." *Beeson* v. *Green Mountain Gold Min. Co.* (1880) 57 Cal. 20.

See also *Minneapolis* v. *Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525; *Quincy Min. Co.* v. *Kitts* (1879) 42 Mich. 34, 3 N. W. 240.

[2] The few exceptions are discussed in § 530, *infra*.

[3] In some of the states, notably New York, general managers are employees

529. Doctrine that a general manager is not a vice principal. English and colonial cases.—The trend of English judicial opinion during the period which preceded the rendition of the judgment to be presently referred to is shown by the cases cited in § 526, *supra*, to have been strongly in the direction of the doctrine which, as is apparent from § 527, *supra*, is now accepted by most American courts. It may fairly be said that, although the courts had undoubtedly rendered some decisions inconsistent with the theory that an employee might be converted into a vice principal merely by virtue of being intrusted with certain duties having relation to the protection of the servants,[1] they had never committed themselves to the theory that a master who had completely abdicated his functions of control as respects a going concern, was not responsible for the negligence of the employee to whom he intrusted the discharge of those functions.[2] The whole question, therefore, was still an open one up to 1868, when the House of Lords settled it in the master's favor by the famous case

who, for the purpose of gauging the extent of the master's liability, are viewed merely as agents intrusted with the performance of the obligations which are most commonly known as non delegable, and the theory of a representative capacity existing independently of and disconnected from such duties has, in theory, been entirely discarded. But it has yet to be settled whether all these courts will go to the same length as some of them have already done, and hold that the doctrine thus adopted requires them to absolve the master from responsibility where a general manager's negligent order in respect to the details of the work results in injury (see § 543, *post*). The statement that the agent "in the general arrangement and management of the business is in the discharge of the duty pertaining to the principal" (*Flike* v. *Boston & A. R. Co.* [1873] 53 N. Y. 549, 553, 13 Am. Rep. 545), does not solve this question as regards New York, for such a principle still leaves open the possibility of a distinction being drawn between the "general arrangement" and particular orders as to details,—a distinction not obscurely suggested by the reasoning in *Brick* v. *Rochester*, N. Y. & P. R. Co. (1885) 98 N. Y. 211. In *Rose* v. *Boston & A. R. Co.* (1874) 58 N. Y. 217, Johnson, J., while recognizing the doctrine that a railway company must, at its peril, see that certain functions are discharged, suggests that "its responsibility may be extended to other particulars by the direct exercise of the authority of its managing body, or, perhaps, of its general agents." But what description of employee a "general agent" in this sense was conceived to be was not explained.

[1] As that of inspection and repair of appliances. *Searle* v. *Lindsay* (1861) 11 C. B. N. S. 429, 31 L. J. C. P. N. S. 106, 8 Jur. N. S. 746, 5 L. T. N. S. 427, 10 Week. Rep. 89; *Hall* v. *Johnson* (1865) 3 Hurlst & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 13 Week. Rep. 411; *Brown* v. *Accrington Cotton Spinning & Mfg. Co.* (1865) 3 Hurlst. & C. 511, 34 L. J. Exch. N. S. 208, 13 L. T. N. S. 94.

[2] The strongest case is *Feltham* v. *England* (1866) L. R. 2 Q. B. 33, 36 L. J. Q. B. N. S. 14, 15 Week. Rep. 151, 7 Best. & S. 676; but there the decision only goes to the extent of holding that a manager is not the master's "*alter ego*" where the master retains control of the business himself, the bodily absence of the master at the time of the injury not being enough to override the effect of this principle.

Of course, under any theory except the superior servant doctrine, properly so called, the question whether a foreman is a vice principal or not is immaterial, where the master himself superintends the work. The question of delegation of authority cannot then arise. *Scott* v. *Craig* (1862) 24 Sc. Sess. Cas. 3d series, 789.

of *Wilson* v. *Merry*.[3] In its essential effect this decision amounts to a declaration that the principle under which each servant is deemed to assume the risks arising from the negligent acts of other servants is not subject to any exception based on the master's transfer of his function of superintendence, and the propriety of regarding the employee invested with the function so transferred as a representative for whose acts the master must answer. But the actual ground upon which Lord Cairns denied the right of recovery is, as will be seen from the subjoined extract from his opinion, that it is not one of the implied terms of a contract of service, that the master should supervise the operations incident to his business:

"I do not think the liability or nonliability of the master to his workmen can depend upon the question whether the author of the accident is not, or is, in any technical sense, the fellow workman or co-laborateur of the sufferer. In the majority of cases in which accidents have occurred, the negligence has, no doubt, been the negligence of a fellow workman; but the case of the fellow workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand upon higher and broader grounds. As said by a

[3] (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30. There the essential facts were as follows: By the faulty construction of a scaffold in a Scotch mine the ventilation was obstructed, and the fire damp accumulated and blew up the scaffold, thus killing the plaintiff's son. The erection of the scaffold was ordered by one Neish, the manager of the pit, and the persons who actually constructed it were the underground manager, one Bryce, and a miner. Over these employees was the general manager of the defendant's mines. The scaffold had been completed before the deceased was employed, and was blown up immediately after he began to work. There was a verdict for the plaintiff, but the court of sessions granted a new trial on the ground of misdirection, in that the jury were charged that if they were satisfied that the system of ventilation in the pit at the time of the accident had been designed and completed by the manager before the deceased was engaged to work, and that the defendants had delegated their whole power, authority, and duty in regard to that matter, and also in regard generally to underground operations, without control or interference on their part, the deceased and the pit manager did not stand in the relation of fellow workmen in the same common employment. The House of Lords upheld the ruling of the court of sessions.

Those parts of the opinions which relate more particularly to the form of the instruction are as follows: Lord Cairns, after expressing his opinion as to the substantive law of the case in the passage quoted in the text, proceeded thus:

"Applying these observations to the direction of the learned judge to the jury in this case, I think the first error in that direction is that it is pregnant with the suggestion to the jury that, if they found the scaffold to have been finished by Neish before the deceased was engaged to work in the pit, a liability for the accident was thrown upon the respondents, which would not have existed if the deceased had been engaged before the scaffold was finished. This, my Lords, was calculated, as I think, to mislead, and it appears to have misled, the jury. But, my Lords, I think there is another objection to the charge of the learned judge. He asks the jury to consider whether the respondents had delegated to Neish their whole power, authority, and duty in regard to the arrangement or system of ventilation, and also in regard generally to all the underground operations, without control or interference on their part. My Lords,

distinguished jurist, *Exempla non restringunt regulam, sed loquuntur de casibus crebrioribus.* Donellus, de Jure Civ. L. 9, c. 2, n. The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in 'that which he (the master) has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business. But what the

I think there is nothing in the evidence which would warrant a question being lett to the jury in these terms. The respondents had delegated no power, authority, or duty to Neish, except in the sense in which a master who employs a skilled workman to superintend a portion of his business delegates power, authority, and duty to the workman for that purpose. It was admitted that the respondents gave no specific directions to Neish as to the manner or form in which the scaffold was to be arranged. They told him that the Pyotshaw seam was to be opened, and they left to him the arrangements underground for opening and working it. And the learned judge ought not, as I think to have suggested to the jury that this could be viewed in any other light than as the ordinary employment by the respondents of a submanager or foreman. I think the learned judge ought to have told the jury that, if they were of opinion that the respondents exercised due care in selecting proper and competent persons for the work, and furnished them with suitable means and resources to accomplish the work, the respondents were not liable to the appellant for the consequences of the accident."

Lord Chelmsford said: "Although the learned judge, in the course of his summing up, distinguished 'between keeping clear and in good working order the ventilation arrangement or system when completed, and a defect or fault in the arrangement or system itself,' yet he does not appear to have left it to the jury to decide whether the accident occurred through faulty ventilation, or through casual obstruction in the ventilation, the latter of which appears from the evidence to be more likely to have been the case. But, supposing it to have been quite clear that the ventilation itself was defective, yet, if it occurred in the course of the operations in the pit, it ought to have been distinguished from that 'system of ventilation and putting the mine into a safe and proper condition for working,' which, according to the opinion of the Lord Justice Clerk, in *Dixon* v. *Rankin* (1852) 14 Sc. Sess. Cas. 2d series, 420, 'it was the duty of the master for whose benefit the work is being carried on to provide.' In the course of working the Haughhead pit it became necessary to arrange a system of what, for distinction's sake, I may call local ventilation. This must be considered as part of the mining operations, and therefore, even if the accident happened in consequence of the scaffold in the Pyotshaw seam having, under Neish's orders, been constructed so as to obstruct the necessary ventilation, it would have been the result of negligence in the course of working the mine; and if Neish and the deceased were fellow servants, it would have been one of the risks incident to the employment in which the deceased was engaged."

Lord Colonsay said: "Now, the direction of the learned judge with reference to the circumstances of this case appears to me to have been objectionable for these reasons: First, it deals, apparently, with the alleged defect in the scaffold as if it was a defect in the general arrangement or system of ventilation of the pit, for which, in certain views, the defenders might be regarded as liable, whereas it was a defect in the construction of a temporary structure erected by order of Neish for certain working operations, whereby the free action of a good system of ventilation was

master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master; and if an accident occurs to a workman to-day, in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as 'fellow workmen.'

In two later cases the opinion has been expressed that the language of Lord Cairns was to be read as meaning that a fellow servant who is the *alter ego* of the master—who directs but does not labor—is a co-laborateur for the purposes of the rule of law on the subject.[4] In another,[5] the ground was distinctly taken that the doctrine of vice principalship had been "exploded" by *Wilson* v. *Merry*. This statement, however, is possibly too broad, unless the term "*alter ego*" is to be taken in a very narrow sense. See § 531, *infra*.

As the subjoined note shows, the decision in *Wilson* v. *Merry* has

temporarily interfered with, which raised a totally different question for the consideration of the jury in reference to the liability of the defenders for the fault of Neish. But the distinction does not appear to have been adverted to. Secondly, it suggests to the jury that, if the faulty scaffold was completed before Wilson entered into the employ of the defenders, a liability was imposed on the defenders which would not otherwise have existed, inasmuch as in that case Wilson and Neish could in no view have been fellow workmen at the time when the fault was committed by Neish. But if it was the duty of Neish to provide for the passage of air upwards in the shaft, that duty did not cease with the erection of the scaffold, but continued while the scaffold remained, and he was in fault so long as that duty was not performed. It was not merely the erection of the scaffold on Saturday, but the maintenance of it in a defective state until Tuesday morning, that caused the injury, if it was really caused by the defective construction of the scaffold; and consequently there was no room for the suggested disconnection of Wilson and Neish as fellow workmen. Thirdly, the direction points the attention of the jury to the question whether Wilson and Neish stood in the relation of fellow workmen engaged in the same common employment, as the test of nonliability, without sufficient explanation of what constituted that relation; and, in particular, without explaining that diversity of duties and gradation of authority are not inconsistent with that relation, and without referring to the effect which might be produced on the liability of the master by a careful selection of proper persons to take charge of different departments in the working of the mine."

[4] *Johnson* v. *Lindsay* [1891] A. C. 371, 65 L. T. N. S. 97; *Hedley* v. *Pinkney & Sons S. S. Co.* [1892] 1 Q. B. 58.

[5] "The owners of a colliery within the coal mines regulations act of 1872 (35 & 36 Vict. chap. 76) appointed a certificated manager, as required by § 26. A miner employed in the colliery was killed by an explosion of fire damp, the death being caused by the negligence of the manager. Held, that the fact that the manager was appointed pursuant to the act, which placed him "in control" of the mine, did not put him in any different position than that he would have held had he been simply appointed manager. *Howells* v. *Landore Siemens Steel Co.* (1874) L. R. 10 Q. B. 62, 44

been followed in numerous cases, both in the United Kingdom and in the colonies.[6]

L. J. Q. B. N. S. 25. 32 L. T. N. S. 19, 23 Week. Rep. 335.

[6] *England.*—See notes 4, 5, *supra*.

Scotland.—Master held not liable for the negligence of the manager of a mine. *Sneddon* v. *Moss End, etc.* (1876) 3 Sc. Sess. Cas. 4th series, 868 (roof of adit insufficiently supported gave way), where Lord Ardmillan, who strongly protested against this extreme extension of the doctrine, took the view that *Wilson* v. *Merry* rests on the broad ground that, "in a question of damages for injury inflicted by the fault of one servant on another, down through the whole gradation of servants, the employer is not responsible," unless personal fault is shown.

Of the general manager and secretary of a limited liability mining company. *Wright* v. *Dunlop* (1893) 20 Sc. Sess. Cas. 4th series, 363 (no difference between such an official and a mere certificated manager); *Stewart* v. *Coltness Iron Co.* (1877) 4 Sc. Sess. Cas. 952.

Ireland.—Here the question was left in a somewhat peculiar position by *Conway* v. *Belfast & N. Counties R. Co.* (1875) Ir. Rep. 9 C. L. 498 (1877) Ir. Rep. 11 C. L. 345. The court of common pleas ruled on the authority of *Wilson* v. *Merry* and *Howells* v. *Landore Siemens Steel Co.* (1874) L. R. 10 Q. B. 62, 44 L. J. Q. B. N. S. 25, 32 L. T. N. S. 19, 23 Week. Rep. 335, that a traffic manager was not a vice principal as regards a trackman. The Irish exchequer chamber, ignoring these decisions, laid it down that a master may so depute to an employee the entire control of his establishment as to constitute that employee his *alter ego*, and virtually held that, while all those in the employment of a railway company are prima facie fellow servants, this inference may be rebutted by showing that the status of the negligent person was that of a representative or vice principal. But the ruling of the lower court was not disturbed. Upon the facts, therefore, the decision is not open to exception, even in England; but it seems clear that no court which is bound by the principles formulated in *Wilson* v. *Merry* can accept the theory of the exchequer chamber as to the possibility of an employee being invested with functions which will put him in the position of a vice principal.

Canada.—Master not liable unless manager is incompetent. *Smith* v. *Intercolonial Min. Co.* (1876) 2 R. & C. (Nova Scotia) 556 (defective plan of working caused explosion of gas). *Campbell* v. *General, etc. Asso.* (1868) 1 Gold. & Ox. (Nova Scotia) 415; *Rudd* v. *Bell* (1887) 13 Ont. Rep. 47; *Matthews* v. *Hamilton Powder Co.* (1887) 14 Ort. App. 261; *Fairweather* v. *Owen Sound Stone Quarry Co.* (1895) 26 Ont. Rep. 604 (where the principle was broadly laid down that where the negligence complained of is that the manager of a quarry prepared a charge so that it failed to explode, and also that the plaintiff was ordered to remove the charge without the proper implements therefor, the action cannot be sustained, so far as the liability of the employer depends upon the acts of the manager).

The reeve of a municipality who takes service as the foreman of a pile driver under a councilor who undertakes the repair of a bridge is considered, with respect to anything which he does in that capacity, to be, not the representative of the municipality, but a fellow servant of the workmen whom he directs. *Drew* v. *East Whitby Twp.* (1881) 46 U. C. Q. B. 107 (hammer of pile driver fell on workman, owing to its being insufficiently blocked).

In *Melanis* v. *Malaga Min. Co.* (1895) 25 N. S. 345, the system in vogue at a mine, with respect to the keeping of a quantity of dynamite in the shaft house, was, so far as the evidence disclosed, established by defendant's manager or foreman; and there was no proof that defendants interfered in any way, or directed the mode of working, or the system in operation in any particular at the time, before or at the time of the accident. It was held that, if the explosion which caused the injury arose from a defect in the system of management, it could not entitle plaintiff to recover, in the absence of proof that such system was due to the acts or intervention of the defendants themselves directly.

In an action for a death caused by a defective boiler, the jury should be specifically charged that the duty of a master, in the event of his not personally superintending the work of repairing his machinery, is to select competent persons for this purpose, and to furnish them with all adequate materials re-

The fact that the employer is a corporation, and can, therefore, act only through a manager, does not affect the operation of the doctrine laid down by the House of Lords.[7]

530.—American cases.—In the American reports are to be found a considerable number of decisions and *dicta* which, under any reasonable construction, must be regarded as embodying a doctrine not materially different from that formulated by the House of Lords. Some of these are explicitly overruled or discredited by later decisions of the same court; but, after every possible deduction under this head has been made, there is still some authority in favor of the English rule. The cases which seem to require comment in this connection are collected in the note below. Undoubtedly, however, the great weight of authority in this country sustains the doctrine that the master is responsible for the negligence of general managers and other employees intrusted with similar functions, so far, at least, as such negligence may occur in the exercise of what may be called their official duties. See § 527, *supra*, and chapter XXIX., *post*.

quired for the work. *Baird* v. *Dunn* (1895) 33 N. B. 156 (new trial ordered because this duty was not properly explained).

Australia.— The "running foreman" of a locomotive shed, charged with the duty of looking after the condition of the engines, is not a vice principal. *Brown* v. *Board of Works* (1882) 8 Victoria L. Rep. (L.) 414, following *Wilson* v. *Merry*. Higginbotham, J., dissented on the ground that the board could not delegate the statutory duty of supervision which was imposed on them, and that the question whether an employee was a vice principal was a mixed question of law and fact. See, however, § 526, note 3, *supra*.

[7] *Howells* v. *Landore Siemens Steel Co.* (1874) L. R. 10 Q. B. 62, 44 L. J. Q. B. N. S. 25, 32 L. T. N. S. 19, 23 Week. Rep. 335. S. P., *Wright* v. *Dunlop* (1893) 20 Sc. Sess. Cas. 4th series, 363; *Ullen* v. *New Gas Co.* (1871) L. R. 1 Exch. Div. 251, 45 L. J. Exch. N. S. 668, 34 L. T. N. S. 541.

[8] *Alabama.*—In *Mobile & M. R. Co.* v. *Smith* (1877) 59 Ala. 245, the company was absolved on the ground that the superintendent of a railroad, when he sends out a repair train to put the road in proper condition after a storm, is not exercising a function of the company itself, but merely performing a duty incumbent on him as one of the company's skilled servants. Commenting on the functions of the superintendent, the court said: "He was possessed of a much larger authority than O'Brien [road master], and more directly represented the company. But he was also in its service. If it authorized him to exercise the functions which properly belonged to the company itself, and which it, by its board of directors or president, might perform,—as, the selection and employment of the persons who were to do the work of building, equipping, keeping in repair, and operating its railroad,—and through want of care and due diligence he should employ incompetent [illegible] persons, whereby injury is done [illegible] of its employees, the company [illegible] liable therefor to them. He would [illegible] its substitute in the performance of such an office. So, perhaps, he would be when intrusted with the duty of procuring the materials for the work. But a railroad company, or the stockholders and directors thereof, are not supposed to be civil engineers, or to possess the scientific or mechanical skill necessary to the building, repairing, and operating of a railroad. The company is expected to employ, and must rely on, other persons who possess such skill to do such work, while its duty further is to procure and furnish the requisite and proper materials, and to pay the wages of the numerous employees." The instruction of the trial judge that the defendant was absolutely liable for any

531. Opposing theories reviewed.— The foregoing review of the cases turning upon the relation of general managers to their subordinates indicates that, if the reasoning of the House of Lords in *Wilson* v. *Merry* is sound, the inquirer has once more reached one of those logical *impasses* which so often confront him in the law of employers' liability,—that is to say, an antagonism of opposing theories which

negligence of the superintendent was expressly disapproved.

The earlier case of *Walker* v. *Talling* (1853) 22 Ala. 294, simply decides that a general manager (here the captain of a steamer) is the agent of the master as regards the proper performance of his duty to employ competent servants, and is therefore not necessarily in conflict with the general principle formulated in *Mobile & O. R. Co.* v. *Thomas* (1868) 42 Ala. 672.

Most of the cases which have come before the courts in this state since 1885 are naturally controlled by the provisions of the employers' liability act passed in that year; but there is nothing in the later decisions which can be said to indicate that, so far as the rights of the parties may be governed by the common law, the views expressed in the case just referred to have undergone any modification.

In *Postal Telg. Cable Co.* v. *Hulsey* (1896) 115 Ala. 193, 22 So. 854, the supervising employee was merely the foreman of a gang of men employed in the construction of a telegraph, and therefore the position of a general manager did not directly come into question. But the decision in *Mobile & M. R. Co.* v. *Smith*, was thought in *Georgia P. R. Co.* v. *Davis* (1890) 92 Ala. 300, 9 So. 252, to have gone to the "extreme verge of soundness."

California.—In one case the supreme court went so far as to hold that a complaint which counts on the negligence of a fellow servant, alleging that the defendant did not use ordinary skill in selecting him, is demurrable where the recital of facts also shows that the fellow servant was employed by the defendant's superintendent, and there is no averment that such superintendent was negligently selected. *Collier* v. *Steinhart* (1875) 51 Cal. 116. But this ruling is decidedly inconsistent with other decisions in this state. See § 537, note 3, and summary in chapter XXX., *post.*

Indiana.—*Wilson* v. *Merry* was relied upon in *Columbus & I. C. R. Co.* v. *Arnold* (1869) 31 Ind. 174, 99 Am. Dec. 615, to support a decision that a master machinist was not a vice principal; but this ruling is inconsistent with several later cases in the same court. See § 537, note 3, and summary in chapter XXX., *post.*

Maine.—In 1860 the supreme court regarded it as well settled that, "if a company exercise ordinary care to employ servants of good habits and of competent skill and experience in their various departments, and to furnish them with machinery and apparatus of approved construction and material, their responsibility extends no further." *Beaulieu* v. *Portland Co.* (1861) 48 Me. 291. But the principle, though verbally it is hardly distinguishable from that laid down by the House of Lords, is not deemed, in this state, to preclude recovery for the negligence of a general superintendent. See *Mayhew* v. *Sullivan Min. Co.* (1884) 76 Me. 100.

Maryland.—The doctrine that a railway company would be responsible for an injury caused by defective appliances, if the defect should be known to an employee occupying the position of a superintendent, is recognized, *arguendo*, in *Wonder* v. *Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143. But in that case it was held that an inspector of machinery and rolling stock was not a vice principal; and the same ruling was subsequently made as to the master of machinery who sent out a defective engine. *Shauck* v. *Northern C. R. Co.* (1865) 25 Md. 462. In later cases the position of the court was still further defined by the decisions that vice principalship cannot be predicated as to one who merely exercises supervision, but only as to one to whom it also gives the selection of subordinate servants, and the procuring of the instrumentalities necessary for the service (*State use of Hamelin* v. *Matster* [1881] 57 Md. 287); that a railway company was liable for the negligence of its superintendent in purchasing a defective engine (*Cumberland & P. R. Co.* v. *State* [1875] 41 Md. 283); and that the chief manager of charcoal works, who works at charging

are dialectically unassailable, provided the postulates on which they are founded are granted. It seems, however, to be fairly open to question whether that reasoning is entirely satisfactory. The present writer ventures to express the opinion that there is a palpable *non se-*

the retorts, etc., with no direct charge over the machinery, but with the right to repair it, and with the duty to see whether it is out of repair, but with no authority to buy, alter, or change machinery, where the works and machinery are inspected once or twice a week by different officers of the company, is a fellow servant with a man employed in such works in using an apparatus consisting of a large bucket hanging from a yoke, which runs on a wheel on an overhead track, and is not a vice principal whose negligence as to such workman will make the employer liable (*Yates* v. *McCullough Iron Co.* [1888] 69 Md. 370, 16 Atl. 280).

A comparison of these cases might seem to indicate that the position of a superintendent in this state is determined by an assumed distinction between the duty of furnishing instrumentalities, including servants, and the supervision of those instrumentalities in the ordinary operation of the establishment, with a view to securing their efficient condition. So far as he or any other official may be intrusted with the former duty he will be a vice principal. So far as he may be merely discharging the latter duty, he will be a mere servant. But in *Yates* v. *McCullough Iron Co.* there was the very material circumstance that the master must have been retaining a general control over the business, as he used frequently to inspect his works; and in *State use of Hamelin* v. *Walster*, the language used is fairly open to the construction that an employee who is a "universal agent" in the management of the business as a going concern is a vice principal. It cannot, therefore, be affirmed with certainty that the doctrine in this state is absolutely identical with that of *Wilson* v. *Merry*. Probably, however, this court would not be prepared to go to the same length as that case; for, although a train despatcher has been denied to be a vice principal in the still more recent case of *Norfolk & W. R. Co.* v. *Hoover* (1894) 79 Md. 253, 25 L. R. A. 711, 29 Atl. 994, the default there alleged consisted not in controlling the movements of trains improperly, but in sending out unfit brakemen, who were not employed by him, but by the division superintendent. The reasoning of the court seems, at all events, to assume that such a superintendent might have been held a vice principal if the question had presented itself, and the opinion certainly leans towards the view that, if the delinquency had been in connection with the moving of trains, the servant would have been entitled to recover.

Massachusetts.—In *Albro* v. *Agawam Canal Co.* (1850) 6 Cush. 75, the master was held not liable, where the superintendent in charge of a large establishment was alleged to have negligently directed a person employed in the manufacture of gas to throw all the weights off a gas meter, the result being that the gas was forced into the mill and induced spasmodic fits in the servant. In the next year the same court defined its position still further in *King* v. *Boston & W. R. Corp.* (1851) 9 Cush. 112: "As a corporation can act only through the agency of some individual person or persons, a question has sometimes been made as to what particular officers or persons should be considered as the corporation itself, as distinct from the servants of the corporation, for the purpose of settling what should be considered as the neglect of the corporation itself, and not of its servants. I am not aware that there has been any direct adjudication on this point. But, assuming that it is correct, as a general principle, that the responsibility as to the sufficiency of the road rests on the defendants themselves, still, their obligation, so far as respects those in their employment, would not extend beyond the use of ordinary care and diligence, and they would be held responsible only for the want of ordinary care and diligence. If a corporation itself should be held responsible to its servants that the road, when first used, was safe and sufficient, yet, keeping the road in proper repair afterwards would seem to be the work of servants or laborers, as much as any other part of the business of the corporation." The language thus used would seem to indicate that the court, in spite of the earlier decision just cited, considered that the responsibility of an employer for the defaults of a gener manager was still an open question in Massachusetts. But, whether the language

quitur involved in an argument the essence of which is that, because a master must sometimes intrust this business wholly to the management

is or is not susceptible of this construction, that point can no longer be regarded as a doubtful one since the decision in *Floyd* v. *Sugden* (1883) 134 Mass. 563. There the purchaser of a mill property hired one Gilman to take the entire charge of the premises, and make all repairs that in his judgment might be necessary to put them into a proper condition for use or for sale. Gilman, in accordance with these instructions, assumed the entire control of the premises, collecting the rents, selecting, hiring, and discharging the employees, purchasing and providing whatever tools, appliances, and machinery he deemed necessary, and paying all bills, including the wages of the employees, with money furnished for that purpose by the defendant, who withdrew entirely from the management of the repairs, and did not undertake to exercise any discretion or control over the acts of Gilman or the employees. It was held that the following instruction was rightly refused: "If the defendant withdrew from the management of the work, and intrusted to Gilman the entire charge of it, exercising no discretion and no oversight, then the defendant is liable for the neglect by Gilman to cause the trench to be shored up and to construct a platform in the bottom of the trench over the penstock for the plaintiff to stand upon, if in the exercise of reasonable care such appliances were necessary for the safe performance of the service." If the circumstances specified in this instruction do not constitute a "universal agent" (see *Gallagher* v. *Piper*, § 526, note 1, *supra*), it is difficult to see how any degree of independence in the control of a business can ever be sufficient for that purpose.

Taking this decision in connection with the fact that, as will be shown in the following chapter, the doctrine of nonassignability of duties is probably not accepted in Massachusetts in the sense in which it is understood by most American courts, it is apparent that there is no material difference between the law in this state and in England.

The recent case of *McGuerty* v. *Hale* (1894) 161 Mass. 51, 36 N. E. 682, where the master was held not liable for the coercion of a foreman of a factory to ventilate a workroom properly, is of neutral import as respects the present subject, as it need not necessarily be considered to raise the question of the position of a general agent. But in the still later decision in *Meehan* v. *Spears Mfg. Co.* (1899) 172 Mass. 375, 52 N. E. 518, the delinquent employee is described as a superintendent in full control of a factory, and would therefore have been regarded as the master's representative in most states.

The passage of the employers' liability act in 1887 has naturally had the effect of diminishing the number of decisions in Massachusetts which could throw light on the subject.

Mississippi.—The doctrine of the House of Lords in *Wilson* v. *Merry* has been explicitly followed, the court laying it down that, "in order to hold a railroad company responsible to an employee (as conductor on its train) for injuries sustained because of the road or its appurtenances being out of repair, it must be shown that the company is in default in its duty, either by the selection of incompetent servants, or an insufficient number to do the work, or failure to furnish proper material, or that the company had notice of the bad condition of the road, or is chargeable with negligence for not knowing." *Hoard* v. *Mississippi C. R. Co.* (1874) 50 Miss. 178. See also *New Orleans, J. & G. N. R. R. Co.* v. *Hughes* (1873) 49 Miss. 258.

This principle requires the conclusion that a general manager is not a vice principal, though no specific ruling to that effect has been made. It has been held, however, that the train despatcher of a railway company is a coservant of a fireman (*Millsaps* v. *Louisville, N. O. & T. R. Co.* [1891] 69 Miss. 423, 13 So. 696),—a doctrine contrary to that now held in most jurisdictions. See § 577 a, *post*.

In this state the superior servant doctrine has been introduced by the Constitution of 1890, § 193, and § 3559 of the Code of 1892.

Missouri.—In *McDermott* v. *Pacific R. Co.* (1860) 30 Mo. 115 (defective bridge) the superintendent of a railway was denied to be a vice principal, and the master's nonliability was distinctly put upon the ground that there was no allegation that the defendant had failed to exercise ordinary care in the selection of servants. But so far as Missouri itself

of others, and is even under the obligation of doing so whenever he does not possess that degree of technical skill which would qualify him to

is concerned, this is no longer the law, since that state has not only adopted the superior servant doctrine (see subd. D, *supra*),—which, of course, imports liability under the supposed circumstances,—but also the doctrine of the nonassignability of duties such as the superintendent was charged with not performing. See, for example, *Herdler* v. *Buck's Stove & Range Co.* (1896) 136 Mo. 3, 37 S. W. 115.

New Jersey.—In one case it was laid down that the president of a corporation so far represented it that it was liable for his acts of negligence; but the court declined to go into the question whether the liability extended to any of the employees properly so called. *Smith* v. *Oxford Iron Co.* (1880) 42 N. J. L. 407, 36 Am. Rep. 535.

Quite recently, however, in deciding that a foreman of the entire work of constructing a sewer was not a vice principal (*Curley* v. *Hoff* [1899] 62 N. J. L. 758, 42 Atl. 731), this court relied on *Wilson* v. *Merry*,— a citation which seems to place it in the same class as that of Massachusetts; especially as it had previously used language which implied that even employees who have full charge of a business, or a distinct department of it, are fellow servants of their subordinates in *O'Brien* v. *American Dredging Co.* (1891) 53 N. J. L. 291, 21 Atl. 324; and has explicitly laid down the rule that the master sufficiently discharges his duty as to the inspection and repair of appliances by employing competent persons to make the inspection and repairs. *Harrison* v. *Central R. Co.* (1895) 31 N. J. L. 293; *Rogers Locomotive & Mach. Works* v. *Hand* (1888) 50 N. J. L. 464, 14 Atl. 766; *Essex County Electric Co.* v. *Kelly* (1894) 57 N. J. L. 160, 29 Atl. 427; *McAndrews* v. *Burns* (1876) 39 N. J. L. 117.

It must be admitted, however, that it is extremely difficult to say what view is really predominant in this state, as in other cases the court distinctly recognizes the doctrine that a master may be liable for the negligence of a foreman in failing to keep the place of work safe (*Van Steenburgh* v. *Thornton* [1895] 58 N. J. L. 169, 33 Atl. 380; trench caved in); and distinguishes, *arguendo*, a foreman who is simply supervising the building of a boat and working with his subordinates, from an agent in full control and acting as middleman exclusively (*Olsen* v. *Nixon* [1898] 61 N. J. L. 671, 40 Atl. 694). It has also applied the doctrine that, where the duty of inspecting and repairing appliances is cast upon an employee not actually engaged in the work which the plaintiff is doing, such employee is the master's representative. In *Nord Deutscher Lloyd S. S. Co.* v. *Ingebrosten* (1894) 57 N. J. L. 400, 31 Atl. 619 (storekeeper furnished a worn cable for use in unloading a vessel). The distinction suggested by these last two cases as compared with the others is, to say the least, extremely subtle, and does not appear to be recognized by any other court, at least in the form in which it is here stated. Nor is it apparent how the decision in *Van Steenburgh* v. *Thornton* can be reconciled on the facts, with *Curley* v. *Hoff*. The doctrine of *VanSteenburgh* v. *Thornton*, however, was approved in a case decided the year before *Curley* v. *Hoff*, the court holding that the existence of the duty to provide a safe place of work implied the nonassignability of the duty to warn workmen in time to get out of danger when a blast was about to be set off. *Belleville Stone Co.* v. *Mooney* (1897) 61 N. J. L. 253, 39 L. R. A. 834, 39 Atl. 764, Affirming (1897) 60 N. J. L. 323, 38 Atl. 835. Coming from a court which had previously gone so far in the direction of absolving the master for the negligence of the supervising agents this ruling is quite remarkable, as it extends the doctrine of non delegable duties to circumstances which by most courts are regarded as being outside its operation. See § 580, *post*.

New York.—In *Brown* v. *Maxwell* (1844) 6 Hill, 592, 41 Am. Dec. 771, the earliest case in New York in which the doctrine of common employment was applied, the court assumed that the principle of the decision in *Farwell* v. *Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339, required the conclusion that the foreman of a stonecutter's establishment was a fellow servant of the workmen under him; but it is not certain, from the report, what the precise functions of the foreman were. The master may have retained a general supervision over the work, and, if so, the case is not inconsistent with later ones in the same state.

conduct the business in person, his duties to his servants, "in the event of his not personally superintending the work," are limited to selecting "proper and competent persons to do so, and to furnishing them with adequate materials and resources for the work."[1]

It is quite possible without any inconsistency to concede that large industrial establishments could not, and, in many instances, ought not to, be conducted upon any other footing than that of control and supervision by competent experts hired for that purpose,[2] and at the same time to deny that the situation thus regarded as inevitable, or most conducive to the interests of all parties, necessarily implies that the servant should be deemed to accept the risks which are incident to the master's delegation of his functions of control. The logical propriety of such a deduction depends altogether upon whether any special considerations can be suggested which are of sufficient force to override the effect of the fundamental principle embodied in the maxim *Qui sentit commodum sentire debet et onus;* and with this aspect of the question the House of Lords has made no attempt to deal.[3]

In *Warner* v. *Erie R. Co.* (1867) 49 Barb. 558, the supreme court held a superintendent of bridges to be a vice principal, but the decision was reversed by the court of appeals (1868) 39 N. Y. 468. *Wilson* v. *Merry* (see last section) and *Hard* v. *Vermont & C. R. Co.* (see *infra*, under Vermont decisions) were expressly approved by the latter court. The language used in the opinion embodies doctrines wholly inconsistent with later decisions in New York, and to this extent it is not law; but the decision itself may be supported on the facts, as the supervising employee was really not proved to have been culpable in the performance of his duties. It should be remembered that this case dates from a period at which the theory of non-delegability of duties (see next chapter), was not as yet established in this state. That theory was first enunciated in its modern form by Chief Justice Church in *Flike* v. *Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545. The authority of *Wilson* v. *Merry* was still recognized even in 1876, when it was held that a master could not be held liable for the negligence of an employee who constructed a washtub with defective supports. *Malone* v. *Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573. Church, Ch. J., however, dissented, considering the decision to be inconsistent, not only with the *Flike Case*, but with *Laning* v. *New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417, which proceeded on the theory that the duty of hiring fit servants could not be delegated.

Vermont.—In *Hard* v. *Vermont & C. R. Co.* (1860) 32 Vt. 473, the principle was laid down in broad terms that the master "does not warrant that the servants shall faithfully discharge their duties in keeping the machinery in its original safe condition," a doctrine which, although it was here applied with the effect of absolving the employer from responsibility for the negligence of a master mechanic, possibly implies that even a general manager would not have been regarded as a vice principal by this court. This decision, whatever its import, was overruled in *Davis* v. *Central Vermont R. Co.* (1882) 55 Vt. 84, 45 Am. Rep. 590, and the doctrine of *Wilson* v. *Merry* was expressly repudiated in favor of that of the nonassignability of certain duties. But it remains to be seen whether in this state a master would be held liable for the negligence of a manager in giving orders,—a function which is not of an essentially non-delegable quality.

[1] *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 332, 19 L. T. N. S. 30, per Lord Cairns.

[2] As was remarked by Lord Ormidale in *Stewart* v. *Coltness Iron Co.* (1877) 4 Sc. Sess. Cas. 4th series, 952.

[3] See § 475, *ante*. The bearing of this

If a concern is set in operation which it is impossible or improper for the owner to supervise in person, whether because it is too extensive or because he lacks the necessary skill and knowledge, or, as happens in an ever-increasing number of instances, because it is the property of a corporation which can act only by agents, it is certainly by no means self-evident that the law might not to require the owner of the concern to bear, among the other drawbacks of such an arrangement, any which may arise from using the services of others to represent him in the control of the work and the workmen. Granting that it was settled by the authorities preceding *Wilson* v. *Merry* that, so long as the master maintains a general supervision over his business, the negligence of all employees, whatever their rank, must be regarded as one of the ordinary risks of service, it may fairly be urged that neither by these decisions themselves, nor by the principles which they embody, is the conclusion required that a master who abdicates all his functions is not answerable for the negligence of the employee to whom those functions are transferred. It may be that there are some great considerations of public policy involved which would justify the application of the doctrine of common employment to this extreme case; in none of the opinions delivered in the House of Lords is it intimated that such considerations, if any there are, were relied upon.

The necessity for strengthening the argument at this point becomes still more imperative when it is remembered that, even from a purely juridical standpoint, it is, to say the least, doubtful whether there is a preponderance of abstract equity on the side of the rule adopted,[4] and

maxim upon the extent of an employer's responsibility has been far too much slighted in judicial discussions of that particular phase of the subject with which we are here concerned; but its importance has been duly recognized by some courts. See, for example, the following passage from a very recent case:

"A master choosing to have a scattered or diversified business which he cannot personally look after must need have a representative on the ground, and hence, taking the benefits of such an extended business, he must bear the burdens incident to its transaction." *Gratlis* v. *Kansas City, P. & G. R. Co.* (1899) 153 Mo. 380, 48 L. R. A. 399, 55 S. W. 108.

[4] It has already been mentioned (§ 526, *supra*) that several of the most distinguished English judges have declined to concede the justice of a rule which entails the anomalous consequence that masters who do not interfere at all in the conduct of their business incur a smaller measure of responsibility than those who act as their own managers. Lord Cockburn, one of the Scotch judges who accepted under protest the English doctrine that a master is not liable for the negligence of a supervising employee, considered that, although this doctrine was supposed to be recommended by its own inherent justice, "the justice of the case is exactly in the opposite direction." See reporter's note to *Searle* v. *Lindsay* (1861) 11 C. B. N. S. 429, 31 L. J. C. P. N. S. 106, 8 Jur. N. S. 746, 5 L. T. N. S. 127, 10 Week. Rep. 89.

In *Davis* v. *Central Vermont R. Co.* (1882) 55 Vt. 84, 45 Am. Rep. 590, the court, after noting that the view taken by the House of Lords "places the liability of the master upon the duty he

that, if the employers' liability act of 1880 is to be taken as embodying the opinion of the majority of non-professional Englishmen on this question, the justice of the rule, when referred to the more general ethical tests which laymen are quite as competent to apply as lawyers, is even less clearly beyond controversy.

It would appear, therefore, that the decision in *Wilson* v. *Merry* is open to exception in this respect, at all events,—that no attempt is made to bridge over the logical hiatus indicated by the fact that, as that decision has apparently extended the doctrine of common employment to a point at which its antagonism to a general maxim of jurisprudence becomes especially manifest and direct and its justice particularly questionable, the conclusion deduced cannot be admitted to be a necessary consequence of the premise laid down.

But this is not the only weak point in the argument. The doctrine propounded amounts, as the present writer ventures to think, to a logically untenable compromise between the admission and rejection of the non-delegability of certain obligations imposed by the law upon the master. From the opinion of Lord Cairns it seems impossible to draw any other inference than that, while the duty of the master to keep the plant in reasonably safe condition is deemed to be one which he can delegate in such a sense as to incur no responsibility if it is not properly performed, the duty to "select proper and competent persons to superintend the work, and to furnish them with adequate resources and materials for the work," is regarded by him as one which cannot be so delegated. In view of the language used there is apparently no escape from this conclusion, unless the wholly inadmissible hypothesis is entertained that he intended to stand sponsor for the self-contradictory proposition that a person may be subject to positive obligation, and, at the same time, not liable for the defaults of the agent appointed to discharge that obligation.[5] A similar theory is

owes the workman arising from their relations to each other," and "implies that if the master personally attempts to discharge that part of the work which the relation devolves upon him, and his negligence therein causes injury to the workman," he is liable therefor, proceeded thus: "The question is naturally suggested, why should he not also be liable for the negligence of the agent or servant whom he has appointed to discharge the same duty in his stead, although he has exercised due care to select a person competent and skilful? Is such an agent or servant, while performing the duty cast by the relation upon the master, a fellow workman with the master's servant in the employment, in such a sense that the latter cannot and ought not to recover of the master for injuries sustained through the negligence of the former? If so, the master who performs his part of the duty, as this defendant and all corporations must, by agents and servants, secures an immunity from liability, which the master who personally enters the service to manage and direct the performance of the work does not enjoy."

[5] See, however, § 558, *post*, as to the delegation of duties to an independent contractor.

indicated by the remarks of the other law lords and of various judges who have dealt with the question in later cases. See § 567a, *post*.

That the adoption of any such distinction as that which is now taken involves some consequences sufficiently anomalous to throw doubt upon its validity may, we think, be shown without any difficulty. If the duty of furnishing proper instrumentalities at the inception or extension of a business is absolute, there is no rational ground upon which it can be denied that the duty of replacing those instrumentalities when they are no longer fit for use is also absolute;[3] and, if the duty of replacement is absolute, it seems to be a natural, if not necessary, deduction, that the same absolute quality should be ascribed to the duty of seeing that the instrumentalities do not fall below the obligatory standard of efficiency and safety while they are in use. The maintenance or restoration of that standard being the essential object to which both duties have reference, it is a mere scholastic refinement to differentiate them in the present connection. The conclusion, therefore, seems to be irresistible that the qualified concessions which are made in *Wilson* v. *Merry* to the theory that there are certain non-delegable duties have the effect of rendering the arguments deficient in logical symmetry, if not actually self-destructive, and that the doctrine of vice principalship ought either to be wholly rejected, or extended so as to cover the cases which the House of Lords excludes from its domain.

F. Relation of a departmental manager to his subordinates.

532. General statement.—As the greater includes the less, the rejection of the doctrine that the manager of an entire business is a vice principal necessarily involves the consequence that the master is not responsible for the negligence of the manager of a single department of a business.[1]

It may be remarked in passing that the fallacy adverted to in the text underlies the reasoning of Mr. Beven (1 Neg. 738), by which he seeks to establish that the remarks of the law lords in *Paterson* v. *Wallace* (1854) 1 Macq. H. L. Cas. 748, do not support the doctrine of vice principalship. See § 526, note 1, *supra*.

[3] This proposition is too self-evident and elementary to need, or to have been embodied in, many specific authorities. See, however, *Moynihan* v. *Hills Co.* (1888) 146 Mass. 586, 16 N. E. 574.

[1] The decision of the House of Lords in *Wilson* v. *Merry* (§ 529, *supra*), though rendered in terms which are broad enough to cover the case of managers of a whole business, really dealt with the negligence of an employee who, under the theory of the cases to be cited below, would possibly be a manager of a department. That it was the intention of the trial judge to propound a theory not materially different from the one embodied in those cases is apparent from the terms of his instruction as well as from the following remarks by Lord Chelmsford on the propriety of putting to the jury the question whether

On the other hand, no court which treats a general manager as a vice principal can, without disregarding logical considerations of controlling operative force, decline to hold the master liable for the negligence of at least some classes of supervising employees of lower grade than managers of an entire business.

The control of a single important branch of an extensive and complicated business—notably that of transportation—often involves the management of what is virtually a separate industrial concern, and implies that the controlling agent is left as completely to the exercise of his own discretion as if he were actually conducting an entire concern of a similar description for an independent proprietor. Of such an agent it would be wholly illogical to affirm that, so far as the master's liability is concerned, he should not be placed on the same footing as the general manager, which to all intents and purposes he is.[2]

What may be regarded as the leading case on the subject of departmental vice principals is *Chicago, M. & St. P. R. Co.* v. *Ross*,[3] which was made to turn upon the theory there is a "clear distinction to be made in their relation to their common principal, between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department in which their duty is entirely that of direction and superintendence."[4] B

the defenders had delegated to Neish (the underground manager), their whole power, authority, and duty in regard to the arrangement or system of ventilation, and also generally in regard to all the underground operations, without control or interference on their part. "The words 'delegated' and 'without interference or control' are ambiguous, or, at all events, misleading expressions. Every master may be said to delegate to his servant the power, authority and duty of his particular department in the service, without his interference and control, and yet he would be responsible to third persons for the consequences arising from the negligence of that servant in the performance of the duties so intrusted to him. What the learned judge meant to tell the jury was that if Neish 'had the complete power of engaging and dismissing workmen as he pleased, and the ventilation process was entirely left to him, without the direction or control of the defenders, he was a superintendent, and not a fellow workman with the deceased.' But if the learned judge had so directed the jury, it would, in my opinion, have been a misdirection."

Thus decision overrules two earlier Scotch cases in which a mine owner was held liable for the negligence of his underground manager in not properly securing the roof. *Hardie* v. *Hill* (1858) 20 Sc. Sess. Cas. 2d series, 553, *Lennon* v. *Addie* (1859) 21 Sc. Sess. Cas. 2d series, 1382.

[2] See the extract from the opinion in the *Baugh Case*, as set out in § 534 *infra*.

[3] (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184 (see § 535, note 1, subd. (b) *infra*. This celebrated decision, as we are informed by an eminent Federal judge, was "a surprise to the profession, and was regarded as carrying the doctrine of departmental control to an extreme." Brewer, J., in *Howard* v. *Denver & R. G. R. Co.* (1886) 26 Fed. 837.

[4] "The reason of the rule of the liability of the master for the servant's negligence, as declared in the *Ross Case*,

the later decisions of the Supreme Court the range of positions to which the general principle enunciated was at first supposed to be applicable has been considerably narrowed." See chapter XXX., *post*. But the general principle itself has been steadily adhered to, and, as the cases to be cited in this subtitle clearly show, it is now fully recognized as a test of representative capacity, not only by Federal judges, but also by a large and increasing number of the state courts.

Considered in its relation to the superior servant doctrine, the vice principalship of departmental managers, like that of general manager, may be viewed as the result either of merger or of substitution, operating as regards all employees above a certain grade. Compare § 525, *supra*. In this connection, however, it will seldom be material where the division line between departmental managers and other superior servants should be drawn. If it is once admitted that all servants exercising control are vice principals as regards their subordinates, the only theory upon which the plaintiff's right of recovery can possibly be enlarged by fixing the character of departmental manager upon the delinquent employee is that the range of official acts for which the master is responsible is wider in the case of a general agent like a departmental manager than in the case of a

and interpreted in the *Baugh Case*, does not consist in the fact that the conductor of the train was the superior officer of the injured servant, but rather in the fact that the latter was in the department of the former; and the conductor was held to be a vice principal, not because he could enforce the obedience of subordinate servants placed under his charge, but because he was clothed with the power to govern the movements of the train, which constituted his department." *Northern P. R. Co. v. Beaton* (1891) 42 C. C. A. 301, 2 U. S. App. 88, 61 Fed. 563.

The doctrine formulated by the supreme court of Georgia on the authority of the *Ross Case* is as follows: "An agent or employee of a corporation, who, in the discharge of his general duties, has charge of a particular branch of the corporation's business, as to which he acts in the capacity of a vice principal, and as such employs and has control of all the subordinate servants who are at work under him, is, as to one of the latter whose duty it is to obey his orders and who takes his orders from no other source, a quasi master, and not a fellow servant in the sense that such subordinate servant will have no right of action against the corporation for personal injuries caused without fault on his part by the negligence of the superior." *Taylor v. Georgia Hardware Co.* (1895) 99 Ga. 512, 27 S. E. 768.

[5] There is, however, a want of precision in the recent statement of one of the Federal circuit courts of appeal, that "the *Ross Case* . . . has been so limited to its peculiar facts as to make it of no force as authority in any case where those facts are not exactly presented." *Cincinnati v. Southern R. Co.* (1899) 31 C. C. A. 191, 92 Fed. 191. It is true that since the *Conroy Case* (see § 535, note 1, subd. (b), *infra*), the specific ruling as to the relation of a conductor to his subordinates is discredited, but a decision declaring a principle to be wrongly applied under the particular facts in evidence in an earlier case cannot properly be spoken of in the terms used by the court of appeals. On the contrary, the correct way of describing its present status as a precedent would rather be to say that it has been overruled as a decision on the facts, but still stands unshaken in so far as it enunciates a general principle.

superior servant of lower rank. Whether such a distinction is recognized in any of the courts is quite doubtful. See chapter XXIX., *post*, where it will be shown that the difference of opinion which prevails as to the liability of a master for the manual acts of a vice principal is illustrated by cases decided both in states where the superior servant doctrine is rejected and in states where that doctrine is applied.[6]

[6] This is a convenient place to refer to several examples of a use of the term "department," which, if the doctrine of departmental control is to form an integral, well-defined division of the law of employers' liability, must be pronounced inaccurate.

One court lays it down that, as long as a mere foreman of a department of a business keeps within the line of his duties as such he is a mere fellow servant of one of his subordinates. *Indiana Car Co.* v. *Parker* (1885) 100 Ind. 181.

Another denies that the foreman of the "silver-room department" of smelting works is a vice principal. *Nixon* v. *Selby Smelting & Lead Co.* (1894) 102 Cal. 458, 36 Pac. 803.

Another has been guilty of a double verbal inaccuracy when, on the one hand, it has refused to predicate the vice principalship in the case of the foreman of the "carpenter department" under a corporation (*Dewey* v. *Parke, D. & Co.* [1889] 76 Mich. 631, 43 N. W. 644), and has spoken of a mere foreman of a room in a factory as a "foreman of a department" (*Findlay* v. *Russel Wheel & Foundry Co.* [1896] 108 Mich. 285, 66 N. W. 50); and, on the other hand, has declared a certain employee to be a vice principal, and not a mere "department leader" (*Ryan* v. *Bagaley* [1883] 50 Mich. 179, 45 Am. Rep. 35, 15 N. W. 72). In all these instances it is clear that the "department" intended is not such a subdivision of the business as is contemplated in the decisions to be reviewed below.

The same loose use of the term sometimes produces the converse result of seemingly committing a court to an adoption of the doctrine of departmental vice principalship when there was probably no intention of applying that doctrine; as, where it was ruled that a jury was rightly instructed that if a fireman is placed under an engineer, as his superior, and this superior has a right to give orders in his department, the engineer is to be regarded as the representative of the employer. *Mann* v. *Oriental Print Works* (1875) 11 R. I. 152. The true rationale of this decision is that the doctrine which denies that the power of control constitutes a servant a vice principal ceases to be operative where the exercise of that power takes a subordinate outside the scope of his employment. See § 465, *ante*.

On the other hand, the words "department" or "branch of business" are frequently used, as already noted in § 521a, *supra*, where the superior servant doctrine is adopted to describe the functions of a class of employees who would certainly not be regarded as heads of departments in jurisdictions where the mere power of control does not imply vice principalship.

In some of the Missouri cases in which an employee in charge of a department of the business is regarded as representing the master, the officials are higher than those just mentioned, but yet lower than most courts include in the category of vice principals, and it is difficult to say whether the use of this phraseology is to be taken as implying an adoption of the doctrine now under discussion or mere verbal laxity. *Daykarsh* v. *Hannibal & St. J. R. Co.* (1890) 103 Mo. 570, 15 S. W. 554 (foreman of railway roundhouse); *Devanu* v. *Vulcan Iron Works* (1877) 4 Mo. App. 236 (foreman in charge of the entire work of loading barges at the wharf of a foundry); *Hoke* v. *St. Louis, K. & N. R. Co.* (1882) 11 Mo. App. 574 (a roadmaster).

In Michigan, where an employee must certainly be a head of a department to be a vice principal, the master has been held liable for the acts of agents of no higher grade than these. See next section, and summary of decisions, chapter XXX., *post*). But the rationale of the liability in states where the superior servant doctrine is applied is of no importance, except possibly in the connection adverted to in a section (521a), where reference was made to the relation between that doctrine and the one now under discussion.

533. Rationale of the master's liability for the negligence of a departmental manager.— The parallelism which, as remarked in the preceding section, exists between the characteristic functions of general and departmental managers, seems to indicate that, so far at least as the courts which reject the superior servant doctrine are concerned, the doctrine of departmental control is an offshoot of the doctrine which makes general managers vice principals. But whether it was or was not evolved along this line, the authorities, at all events, show clearly that there is no material difference between the grounds upon which general and departmental managers are held to be vice principals.[1]

534. Limits of the doctrine of departmental con d.—The rationale of the doctrine which declares the master to be responsible for the negligence of a departmental manager indicates that no employee can properly be placed in this category unless he is exercising all the functions which the master himself would exercise, if he were personally supervising the same section of his business. That is to say, his representative character is not established by any evidence which fails to show that there has been that complete transfer of the master's characteristic functions which implies that the transferee is invested with the right and duty, not of merely seeing that his subordinates perform some definite routine work in the manner prescribed, and with the appliances furnished, but of providing the appliances themselves, and of making such a disposition of the workmen in regard to

[1] This will be sufficiently apparent if we compare with the passages quoted in § 528, *supra*, the extract quoted in the following section from Mr. Justice Brewer's opinion in the *Baugh Case*, and such statements as these: "Where a master places the entire charge of his business or a distinct branch of it in the hands of an agent, exercising no discretion and no oversight of his own, it is manifest that the neglect by the agent of ordinary care in supplying and maintaining suitable instrumentalities for the work required is a breach of duty for which the master should be held answerable. The negligence of the agent with such powers becomes the negligence of the master." *Mullan* v. *Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2. It is not unusual, in formal statements of the doctrine that a master is liable for the negligence of an agent managing his entire business, to introduce a supplementary declaration that he is under a liability of a like character and extent with respect to the defaults of an agent in whose hands he places the control of a distinct branch of his business. Thus it has been said: "A vice principal for whose negligence an employer will be liable to other employees must be either, first, one in whom the employer has placed the entire charge of the business, or of a distinct branch of it, giving him not mere authority to superintend certain work or certain workmen, but control of the business, and exercising no discretion or oversight of his own." *Provost* v. *Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88; *New York, L. E. & W. R. Co.* v. *Bell* (1886) 112 Pa. 400, 4 Atl. 50; *Andesco Oil Co.* v. *Gibson* (1869) 63 Pa. 150; *Lewis* v. *Seifert* (1887) 116 Pa. 628, 11 Atl. 544; *Smith* v. *Wabash, St. L. & P. R. Co.* (1887) 92 Mo. 359, 4 S. W. 129; *Minneapolis* v. *Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 215, 58 Fed. 525; *Coulson* v. *Leonard* (1896) 77 Fed. 538.

those appliances as will most effectually secure the general results for the attainment of which the branch of the business under his control has been organized.[1]

[1] Two years after the decision in the *Ross Case* (see § 532, *supra*), Brewer, J., laid down the law as follows: "To make one as the controller of a department properly the representative of the master, his duties should be principally those of direction and control. He should have something more than the mere management of machinery; he should have subordinates over whose various actions he has supervision and control, and not a mere assistant to him in his working of machinery. He should have control over an entire department of service, and not simply of a single machine in that service. He should be so lifted up, in the grade and extent of his duties, as to be fairly regarded as the *alter ego* — the other self — of the master." *Howard* v. *Denver & R. G. R. Co.* (1886) 26 Fed. 837.

In *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, the same distinguished jurist wrote the opinion of the majority of the court, and had an opportunity to explain at greater length his views as to the proper scope and meaning of the doctrine by which the head of a department is a vice principal: "Where the master is a corporation, there can be no negligence on the part of the master except it also be that of some agent or servant, for a corporation only acts through agents. The directors are the managing agents; their negligence must be adjudged the negligence of the corporation, although they are simply agents. So, when they place the entire management of the corporation in the hands of a general superintendent, such general superintendent, though himself only an agent, is almost universally recognized as the representative of the corporation,—the master,—and his negligence as that of the master. And it is only carrying the same principle a little further and with reasonable application, when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employees under them, vice principals, — representatives of the master,—as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. It was this proposition which the court applied in the *Ross Case*, holding that the conductor of a train has the control and management of a distinct department. But this rule can only be fairly applied when the different branches or departments of service are in and of themselves separate and distinct. Thus, between the law department of a railway corporation and the operating department there is a natural and distinct separation,—one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged. So, oftentimes, there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating department: these two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is, as to it, in the place of the master. But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice principal, or representative of the master. . . . It may safely be said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow servants, and puts an end to the master's liability. On the contrary, all the cases proceed on the ground of some breach of positive duty resting upon the master, or upon the idea of superintendence or control of a department. It has ever been affirmed that the employee assumes the ordinary risks incident to the service; and, as we have seen, it is as obvious that there is risk from the negligence of one in immediate control as from one simply a coworker. That the running of an en-

It is not altogether clear what precise evidential weight the courts consider to be due to the official designations which may have been bestowed upon the delinquents by the masters themselves. Those

gine by itself is not a separate branch of service seems perfectly clear. The fact is all the locomotive engines of a railroad company are in the one department,—the operating department; and those employed in running them, whether as engineers or firemen, are engaged in a common employment, and are fellow servants. It might as well be said that, where a liveryman has a dozen carriages, the driver of each has charge of a separate branch or department of service, and that if one drives his carriage negligently against another employe the master is exempt from liability.

The doctrine established by this case has been stated thus: The test as to whether one employee of a corporation is or is not a vice principal as regards another employee is not the control exercised by him over the other, but he must "stand for and represent the corporation as the superintending and commanding head of one of the separate and distinct departments of its service." *Harley* v. *Louisville & N. R. Co.* (1893) 57 Fed. 144.

The theory of the supreme court of Indiana is similar: "Ordinarily the duties pertaining to a given employment are clearly defined. When one speaks of employment as a section hand, a brakeman, or an engineer on a railroad, or as a farm hand, or as a puddler in an iron furnace, or a moulder in a foundry, the general character of the duties such employee will be required to perform are at once understood by those initiated into the mysteries of the particular calling. As a rule, also, the mention of a given employment suggests the character of the appliances to be used, and the place and manner of using them. One who is placed in charge of a force of men engaged in any of those occupations, whose duties are limited to carrying on the work, or directing it, whether actively assisting therein or not, and who is invested with no authority or charged with no duty in furnishing places or appliances for the work, or in the employment or retention of employees, is himself usually a mere coemployee. His duties require him to use, or superintend and direct the using of, places and appliances, and to control employees furnished by the master. If, however, he is given additional authority, and is charged with the duty of furnishing places to work, and appliances for the work, and is authorized to employ and discharge operatives, he is, as to such things, not a coemployee, but speaks and acts as the master. One who is placed in unrestricted control of a given department by his master, and is clothed with the power to command the services of the other employees, not simply to see that they faithfully discharge the duties ordinarily pertaining to their employment, and in the usual places, with the usual appliances provided therefor, but has authority to require of them the performance of other duties, in other places, and with other appliances, . . . is certainly in such matter more than a mere fellow servant with those thus subject to his control." *Nall* v. *Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 269, 28 N. E. 183, 611.

In another case a foreman was considered to be a departmental vice principal because he had absolute control of employees working under him, and authority to direct them from one kind of employment to another, without any immediate directions or supervision. *Consolidated Kansas City Smelting & Ref. Co.* v. *Peterson* (1899) 8 Kan. App. 316, 55 Pac. 673. The characteristic function of a departmental vice principal which is here referred to recalls the rule already noticed (§ 465, *ante*), that when an order takes a servant outside the scope of his employment the directing employee is treated as a vice principal with respect to the order and its results, whether he would or would not occupy that relation to the master under the doctrine of the court in which the case presents itself.

Compare also the language used in *Mullan* v. *Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2 (§ 533, note 1, *supra*); *Ryan* v. *Bagaley* (1883) 50 Mich. 179, 45 Am. Rep. 35; *Louisville, N. A. & C. R. Co.* v. *Graham* (1890) 124 Ind. 89, 24 N. E. 668.

In *Doughty* v. *Penobscot Log Driving Co.* (1884) 76 Me. 143, the court contrasts the position of a general or departmental manager with that of "a foreman in a particular special job of work."

A jury may deduce vice principalship

designations are certainly not conclusive;[2] but in the absence of some special reason for inferring that a descriptive title which ordinarily imports a general agency as regards a certain branch of a business is wrongly applied, a court ought always, it is conceived, to accept such a title as a declaration or admission of the master himself that his characteristic functions have, within the area indicated by it, been transferred to the employee bearing it. In recent cases it has been admitted that on approaching the line of separation between a fellow workman and a superintendent of a particular and separate department, there may be embarrassment in determining the character of the delinquent[3]; and it has also been intimated that the scope of the doctrine of departmental control is, in all probability, quite limited.[4]

The descriptive titles and functions of the employees mentioned in the cases tabulated under the following section show that the master is not usually held liable for the negligence of any employees of lower grades than those who, in the ordinary course of business, would be subject to the immediate control of the master himself or his general manager. But there is some authority for including within the scope

from evidence that the delinquent employee was placed by a railway company in charge of a quarry, with authority to employ, control, and discharge the workmen, his control and management being referred to his discretion and judgment, and not governed by detailed rules known to his subordinates as well as to himself. *Kansas City, Ft. S. & M. R. Co.* v. *Hammond* (1894) 58 Ark. 324, 24 S. W. 723.

The circumstance that "neither exercises the discretion or the judgment or the control of the master, but each contributes his part to the safe running of the train" has been adverted to as one of the reasons for holding telegraph operators and trainmen to be fellow servants. *Baltimore & O. R. Co.* v. *Camp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952. Compare *Monaghan* v. *New York C. & H. R. R. Co.* (1887) 45 Hun, 113, where it was said that an operator was not a vice principal, as he merely had to exercise some discretion within a department.

[2] See § 508, *supra*.

[3] *Northern P. R. Co.* v. *Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

[4] "The *Baugh Case* has set such limits to the vice principal doctrine that it is exceedingly difficult to suggest a position, outside of the superintendent or acting superintendent of the various great departments of the railroad, which will not be filled by fellow servants of all the other employees." *Grady* v. *Southern R. Co.* (1899) 34 C. C. A. 494, 92 Fed. 491. The building of a bridge is a single undertaking, not varied or extensive enough to admit of distinct departments. *Kelly* v. *Jutte & F. Co.* (1899) 98 Fed. 380.

In *Muhlman* v. *Union P. R. Co.* (1889) 2 L. R. A. 192, 37 Fed. 189, it was held that a complaint alleging an injury caused by another, the master mechanic, having sole control of the yard, was demurrable for reasons thus explained: "Whether it was a yard with one switch or two; a side track or two; whether it was a trifling matter or a large and extensive responsibility; whether this sole control was limited to the repairs of engines or things of that kind, or whether it went to the entire business of a yard of such size and with so extensive works and duties that the company is bound to put in charge some man of experience, information, and character,—one for whose acts in all respects it should be held responsible,—is not sufficiently disclosed by a mere statement that the party was a master mechanic, having sole control of this yard. The size of the yard, amount of responsibility, or vastness of the busi-

of the doctrine of departmental control a class of officials who, for want of a better term, may be termed deputy vice principals, as being the real representatives of the master in the absence of their own superiors, so far as regards a portion of the official domain controlled by those superiors.[5] Logically, such a doctrine is unexceptionable

ness intrusted to him,—the extent of his control,—is not disclosed. I do not mean to say that he does occupy such a position that he cannot properly be considered as in control of a department so that the company may be responsible. I simply hold that the complaint as it stands is defective in that respect, and the demurrer will be sustained."

[5] An assistant roadmaster having general charge of a portion of a railroad, with control of all the section gangs along that line, is not a fellow servant with a section hand so as to prevent recovery by the latter for an injury caused by the negligence of the former in ordering him to continue his work of adjusting a load of poles on a car while an engine is approaching, thus throwing him off his guard, and then failing to take care to prevent injury by the approach of the engine. *Harrison* v. *Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034. Discussing the position of the negligent servant, the court said: "He had general charge of the entire length of about 150 miles of defendant's road, and had under his control all the section gangs along that line; and there is nothing in the record showing that Doyle, the general road master, in any way interfered with him in the manner in which the work of that division was being conducted. He in fact controlled that entire division absolutely, so far as employing and discharging the men was concerned. The order came from Doyle to remove these poles, because they were to be taken to another division or branch of the same road. Wahl was not present at the time of the injury, and the fair inference is that whatever power Doyle would have had, if present, Light had like power, and represented the defendant company as fully as Doyle would have done. He did no manual labor himself, but had the full oversight, care, and management of it. It is apparent that the business of the railroad could not be carried forward without this division of labor and responsibility. It was necessary that these heads of departments and divisions should be made, and power delegated to each head. Under such circumstances, and well-settled rules of law, it must be held that Light represented the company; and for his negligence, while in the line of the duties so assigned and delegated to him, the company must be held responsible. . . . Any other rule than this would enable the master to escape all liability, by parceling out his work to different heads of departments or divisions, and retiring from any management or control of it; and the more he abandoned it to others,—the more he neglected it,—the less would he be liable. When the master appoints a middle man, with such powers as were delegated to Light in this case, or where the business is of such a nature that it is necessarily committed to agents, with full power to employ and discharge those acting under them, and with full and absolute control of the work, the principal is liable."

The same view was taken in a later case, where the court, in holding an assistant road master to be a vice principal, reasoned thus: "He had charge of and directed the method of its performance, and while it does not appear that he personally had anything to do with employing plaintiff in the first instance, yet his authority was so great that, at least while engaged in this particular work, he even had control and direction over the section foreman, Mr. Cavenaugh, who did employ the plaintiff, and who also, as representing the defendant, acted in accordance with Wahl's instructions in reference to the work and method of its performance. Under the facts shown by this record it is apparent that Mr. Wahl, as assistant road master, had not only full power to direct and control the work, and prescribe the method of its performance, but that he did so, and, in addition, that his judgment as to what men should be employed, and when or how long their employment should continue, or when a man should be discharged from such employment, was absolute, or as nearly so as it is possible for a master to confide a power of that sort to an agent to perform for him. To hold otherwise would be to close our eyes to conditions

for it cannot be denied that, if the business of the employer is so extensive and complicated that there is necessarily a complete transfer of his characteristic functions to a grade of officials lower than those which take their orders directly from himself or his general manager, he should be required to answer for their negligence. But it must be admitted that, upon the facts, the cases cited in the last note carry the doctrine of departmental control beyond the limits by which the chief exponents of that doctrine, the Federal courts, seem inclined to circumscribe it in the most recent decisions.[6]

patent to everybody in all the ordinary business affairs of life. It is evident that the plaintiff and all the other section hands, including the section foreman, looked upon Wahl as the absolute manager and controller of the work, and from whom they received their orders, and whom they were bound to obey. Under these circumstances, we must hold that the act of Wahl was the act of the defendant." *Palmer* v. *Michigan C. R. Co.* (1892) 93 Mich. 363, 17 L. R. A. 636, 53 N. W. 397.

The liberal construction put by this court upon the doctrine of departmental control is also exemplified in the ruling that a foreman of a gravel train is a vice principal. *Erickson* v. *Milwaukee, L. S. & W. R. Co.* (1890) 83 Mich. 281, 47 N. W. 237. See, however, as to this case, § 535, note 1, subd. (b), *infra*. See also *Lyttle* v. *Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571, holding a railway company liable for the negligence of a yard master. But in this last case distinctly non-delegable duties were involved. See § 535, note 1, subd. (d), *infra*.

In another state it has been held that a foreman having authority to employ and discharge the men under his direction, who is the sole representative of a railroad company at the place where the work of blasting rock and transporting it on flat cars is being prosecuted, and who has authority to direct when, how, by whom, and in what manner the work shall be performed, is not the fellow servant of a laborer under his direction, and his negligent omission to remove a blast, or warn the latter of its presence, is chargeable to the company, although he is under the general control of a road master, whose headquarters are several miles away. *McDonough* v. *Great Northern R. Co.* (1896) 15 Wash. 244, 46 Pac. 334.

With these cases may possibly be classed *Foley* v. *California Horseshoe Co.* (1896) 115 Cal. 184, 47 Pac. 42, where it was held that an assistant foreman in a factory was not a fellow servant of a minor fourteen years of age, "under his control and subject to his order and discretion." The injury was due to the fact that the boy's sleeve caught in a cogwheel while he was putting in a bolt. This work, though unusual, was spoken of as not being beyond the scope of the servant's employment, so that the case cannot be classed with those cited in § 465, *ante*. The doctrine as to departmental vice principals was not referred to, and the language used is broad enough to commit the court to the superior servant doctrine. But as the latter doctrine is undoubtedly rejected in California (see § 549, *post*), it would seem that the only category in which the negligent employee can be placed is that of departmental vice principals. On the facts it is clear that the decision might have been referred to the theory that the foreman had not discharged the non-delegable duty of instructing the boy as to the dangers of the work, see §§ 518, 519, *supra*. It may be that this is the real effect of the ruling, as the case relied upon is *Mullin* v. *California Horseshoe Co.* (1894) 105 Cal. 77, 38 Pac. 535, where the master was held liable on the distinct ground that the superior employee had not provided a safe place of work. But if this is the court's point of view, the language used is very inapt, as it was laid down quite generally that the foreman was not a vice principal, and there was nothing said from which it can be inferred that he was regarded as being a vice principal merely because he was discharging a non-delegable duty.

[6] See note 1, *supra*, and chapter XXX., *post*. In a decision rendered prior to the *Baugh Case* it seems to have been assumed by the Supreme Court of the United States that a foreman of con-

It is manifest that only the directors of a corporation, or the general superintendent, in whose hands its entire management is placed, can be held to be vice principals in a case where there is no division of the business of the corporation into distinct departments.[7]

535. Supervising employees held to be heads of departments.—In the subjoined note are tabulated, under suitable headings, all the cases which may certainly be referred to the doctrine of departmental control properly so called, as well as a number of others which, though not categorically relying upon that doctrine, involve facts which render it desirable to notice them in this connection. To the latter class belong, in particular, several decisions in New York,—a state in which the true doctrine of departmental vice-principals does not seem to have been formulated with any distinctness. (See chapter XXX., *post.*) In fact, it is now, for all practical purposes, merged in the theory that the character of the negligence determines whether the negligent employee was the master's agent. The reasons why the decisions of some states whose attitude on the doctrine of departmental control is more than usually difficult to define have been classified under the subtitle relating to the superior servant doctrine, rather than under the present one, have been explained in § 524, *supra.* But it has been deemed advisable to make the following list of departmental managers more complete by citing again any of those decisions which, though already tabulated in the other subtitle, seem to be legitimate illustrations of the principles now under discussion.[1]

struction was a vice principal. *Coyne v. Union P. R. Co.* (1889) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382. But probably, though it is not apparent from the report, his rank was higher and his functions more comprehensive than those of the foreman in the *McDonough Case* (1896) 15 Wash. 244, 46 Pac. 334. In the *Harrison Case* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1031, it was remarked that the tendency of modern decisions was to enlarge the liability of masters, especially where the delinquent was a superior servant, and the decision was doubtless influenced by the supposition that the general current of authority was being followed. This supposition, however, was scarcely justified. Any tendency there may be to hold the master to a larger measure of liability may rather be said to be manifesting itself in the majority of jurisdictions, at least, along the lines indicated by the theory which refers his responsibility directly to the character of the act which caused the injury, and ignores the functions ordinarily discharged by the negligent employee. See chapter XXIX., *post.*

[1] *What Cheer Coal Co. v. Johnson* (1893) 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. 810, disapproving an instruction to the effect that one of several foremen in charge of a few miners, himself subject to the control of a pit boss, who was in turn under the direction of the general superintendent of the mine, was a vice principal if the power of control, management, and direction as to the men engaged in the room under his charge had been conferred upon him, and the duty of obedience was exacted from his subordinates.

[1] (a) *Employees in the operating department of railway companies.*—A division superintendent of a railroad company who has general charge and supervision of the company's entire busines-

over his division, including the control of the movement of all trains, is a vice principal. *Louisville, N. A. & C. R. Co. v. Heck* (1898) 151 Ind. 292, 50 N. E. 988.

The same doctrine was possibly assumed to be the true one in *Norfolk & W. R. Co. v. Hoover* (1894) 79 Md. 253, 25 L. R. A. 710, 29 Atl. 994, though all that was actually decided was that a train despatcher appointed by a division superintendent, and subject to his orders, is not a vice principal in respect to sending out unfit brakemen with trains.

The reopening an abandoned switch, without restoring the lights or notifying the trainmen that it has been put into use again, is deemed to be the negligence of the railway company, and not of the section master, where it was the division superintendent who authorized the reopening. *Town v. Michigan C. R. Co.* (1890) 84 Mich. 214, 47 N. W. 665.

In *Hunn v. Michigan C. R. Co.* (1889) 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502, a train despatcher was regarded as the head of a department. The decision in *Darrigan v. New York & N. E. R. Co.* (1884) 52 Conn. 285, 52 Am. Rep. 590, was possibly put partly on this ground, as the court in its argument seems to waver between the conception of departmental control and non-delegable duties. The *Ross Case* is one of those relied upon. But the Federal court of appeals seems to consider that the master's responsibility in this instance cannot properly be referred to this conception, as it remarks in one case that a train despatcher, in giving notice of a change in the running of trains, acts as a vice principal, "not because he has charge of a department, but because of the nature of the duty which he discharges." *Oregon Short Line & U. N. R. Co. v. Frost* (1896) 21 C. C. A. 186, 44 U. S. App. 606, 74 Fed. 965. There seems, however, to be no valid reason why the master's liability should not be placed on either of these grounds.

For cases denying a train despatcher and a traffic manager to be vice principals, see the note to § 26, *ante, ad finem.*

(b) *Employees in charge of railway trains.*—In *Chicago, M. & St. P. R. Co. v. Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, the Supreme Court of the United States held, affirming (1881) 2 McCrary, 235, 8 Fed. 544, that a conductor is not a fellow servant of the engineer in respect to the issuance of proper running orders to the engineer of his train (Bradley, Matthews, Gray, and Blatchford, JJ., dissenting.) The grounds of the decision are thus explained by Field, J., who, after laying down the general principle stated in § 532, *supra*, proceeded thus: "A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is, in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles, at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the term is he a fellow servant with the fireman, the brakemen, the porters, and the engineer. The latter are fellow servants in the running of the train under his direction; as to them and the train, he stands in the place of, and represents, the corporation. . . . There are decisions in the courts of other states, more or less in conformity with those cited from Ohio and Kentucky, rejecting or limiting, to a greater or less extent, the master's exemption from liability to a servant for the negligent conduct of his fellows. We agree with them in holding—and the present case requires no further decision—that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall

stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner.

But the latest utterance of the Supreme Court is that, in the absence of evidence that special and unusual powers have been conferred upon the conductor of a freight train, it cannot be held, as matter of law, that he is a vice principal as regards the other trainmen. *New England R. Co.* v. *Conroy* (1899) 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85 (conductor did not properly examine a train at a place where it was especially liable to break apart); Harlan, J., dissenting. This decision, although not explicitly condemning the *Ross Case*, must, we think, be regarded as having virtually overruled it. The conclusion arrived at in the earlier case was declared to have been based on certain assumptions, not borne out by the evidence, respecting the powers and duties of the conductors of freight trains, and to be inconsistent both with the reasoning and the conclusion in the *Baugh Case* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914. The precise position of the majority, as explained by Shiras, J., in his opinion, was that, as the evidence merely showed that the negligent servant was a freight conductor exercising the ordinary powers of such an employee, the plaintiff was virtually asking the court to declare, upon such common knowledge as it could be supposed to possess, that the conductor was a vice principal. This, it was considered, would be going further than was warrantable, although the court had taken upon itself to lay this down in the *Ross Case*. The doctrine that a conductor may by possibility be shown to be the head of a department, and for that reason a vice principal, is left intact; but it is very difficult to conceive of any specific evidence which, after this decision, would be regarded by a court as strong enough to overcome the presumption that he is a mere coservant of his subordinates.

By the court of appeals the *Conroy Case* has been viewed as having absolutely overruled the *Ross Case*. *Stevens* v. *Chamberlin* (1900) 51 L. R. A. 513, 40 C. C. A. 421, 100 Fed. 378; *Bridgal* v. *Southern P. R. Co.* (1900) 39 C. C. A. 359, 98 Fed. 958; *Maher* v. *Union P. D. & G. R. Co.* (1900) 45 C. C. A. 301, 106 Fed. 309. The practitioner, therefore, should bear in mind that the decisions mentioned in the remainder of this subdivision cannot any longer be safely cited in a Federal court as precedents supporting the specific theory that a conductor is a vice principal. But as long as the *Ross Case* is followed in other jurisdictions, these decisions have not lost all their authority, and it would be improper to ignore them here.

The *Ross Case* was followed in Federal courts as to the relation of a conductor to the trainmen in the subjoined decisions: *Northern P. R. Co.* v. *Carnaugh* (1892) 2 C. C. A. 358, 10 U. S. App. 197, 51 Fed. 517 (disobedience to telegraphic order as to holding train); *Canadian P. R. Co.* v. *Johnston* (1894) 25 L. R. A. 470, 9 C. C. A. 587, 26 U. S. App. 85, 61 Fed. 738 (sudden starting of train while brakeman was in a position of danger); *Union P. R. Co.* v. *Callaghan* (1895) 6 C. C. A. 205, 12 U. S. App. 541, 56 Fed. 988 (disobedience to rule requiring conductor, after storms, to obtain information about the condition of the track at frequent intervals); *Northern P. R. Co.* v. *Poirier* (1895) 15 C. C. A. 52, 29 U. S. App. 583, 67 Fed. 881 (rear end collision); *Ragsdale* v. *Northern P. R. Co.* (1889) 42 Fed. 383 (demurrer to answer sustained); *Missouri P. R. Co.* v. *Texas & P. R. Co.* (1889) 38 Fed. 816 (train was started while brakeman was tying a bell cord).

It has been held that an engineer in charge of a train during the absence of the conductor so far represented the company as to have the power of waiving a rule, expressly assented to by a brakeman, which forbade entering between cars to couple them, where such waiver was required by a sudden necessity caused by defects in the lever and brake of the engine, which prevented the engineer from controlling properly its movements. *Finley* v. *Richmond & D. R. Co.* (1893) 59 Fed. 419.

In another case which may fitly be mentioned in this place, it was laid down that to run a train towards a hand car, after warning, without keeping any lookout ahead, was a neglect of duty on the part of the trainmen, for which the railroad company was liable in case of injuries from a collision. *Howard* v. *Delaware & H. Canal Co.* (1889) 6 L. R. A. 75, 40 Fed. 195. This decision proceeded on what is manifestly a mistaken view of the purport of the *Ross Case* (1884)

112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, and of *Davis* v. *Central Vermont R. Co.* (1882) 55 Vt. 84, 45 Am. Rep. 590. On the authority of the former case it was considered that the defendant was liable for the negligence of the trainmen, because they acted for it, "in the exercise of the control given over the movements of the train." The decision in the latter case, that trackmen represented the company in such a sense as not to be coservants of the company, was supposed to involve the inference that the trainmen were not coservants of the trackmen.

The doctrine of the *Ross Case* still prevails in some states, according to the most recent decisions on the subject. In *Van Ambacy* v. *Vicksburg, S. & P. R. Co.* (1885) 37 La. Ann. 650, 55 Am. Rep. 514 (train run at undue speed across bridge in course of construction), the court said: "The company is responsible for the other cause, for the conductor was the company on that day and for that occasion. He had exclusive command of that train,—was to the engineer his master for the time,—and did not so much represent the company as personate it. He was the company in bodily form, with authority to command, and power to enforce. The pretension that no responsibility can attach to the company except when it is present through its chief officers would practically relieve it from all responsibility. With its president in New York, and its directors equally remote, no possibility of fastening upon it any liability whatever would exist. No other doctrine than that it is present in the person of those of its employees who, for the time, operate it, would give the smallest modicum of protection to the public."

To the same effect see *Wilson* v. *Louisiana & V. W. R. Co.* (1899) 51 La. Ann. 1133, 25 So. 961 (excessive speed, considering the character of the track; log of wood fell off and derailed train); *Dobson* v. *New Orleans & W. R. Co.* (1900) 52 La. Ann. 1127, 27 So. 670 (conductor of work train left it in charge of the engineer only); *Spencer* v. *Brooks* (1895) 97 Ga. 681, 25 S. E. 480 (conductor signaled engineer to back a car prematurely, so that the plaintiff, a brakeman, was crushed; decided independently of the Georgia statute); *Boatwright* v. *Northeastern R. Co.* (1886) 25 S. C. 128 (failed to procure suitable coupling appliances from a stock supplied by the company); *Coleman* v. *Wilmington, C. & A. R. Co.* (1886) 25 S. C. 446, 60 Am. Rep. 516 (negligent adjustment of switch). As to these South Carolina cases, see chapter XXX., *post*.

In Virginia and West Virginia the *Ross Case*, though once followed, is no longer accepted as an authority. See chapter XXX., *post*.

In Michigan a railway company has been held liable for the negligence of the fireman of a gravel train. *Erickson* v. *Milwaukee, L. S. & W. R. Co.* (1890) 83 Mich. 281, 47 N. W. 237. But here the injury was the result of complying with an order to do work outside the scope of the servant's employment, and cases of this class stand on a peculiar footing. See § 465, *ante*. As already noted in § 526 note 1, subd. (b), *supra*, a conductor is, under ordinary circumstances, a mere fellow servant of [illegible] is subordinates in Michigan.

It is held that the principle of the *Ross Case* is not applicable as between a conductor of a work train and a laborer upon such train, where the road master is in charge of such train, directs its movements, and has control of all persons employed upon it, including the conductor and engineer. *Northern P. R. Co.* v. *Smith* (1894) 8 C. C. A. 563, 15 U. S. App. 294, 59 Fed. 993 (collision alleged to be due to want of proper flagging). Compare *Chicago & A. R. Co.* v. *McDonald* (1887) 21 Ill. App. 409, § 524, note 1, subd. (c), *supra*.

In *McGill* v. *Southern P. Co.* (1893; Ariz.) 33 Pac. 821 (hurried order to get on to a work train), it was held that the conductor of a work train was a vice principal as to a section foreman traveling by the train; but, on a rehearing of the case, they were held to be fellow servants, for the reason that they were both under the control of a superior on the same train. *Southern P. Co.* v. *McGill* (1896; Ariz.) 44 Pac. 302.

That a conductor may be a departmental vice principal as to a servant only temporarily under his control was recognized in a case where it was held that a foreman of bridge carpenters in the employ of a railroad company, in riding to his work, belongs to the train and is in the train department, so as to render the conductor in charge of the train a vice principal rather than a fellow servant, although in going upon the train such foreman acts under the order of his immediate superior. *Northern P. R. Co.* v. *Benton* (1894) 12 C. C. A. 361, 29 U. S. App. 88, 64 Fed. 563 (rock in

a tunnel was loosened by the arm of a derrick improperly left raised, and fell on the plaintiff).

But the doctrine of the *Ross Case* will not render the company liable for the negligence of the driver of an engine not drawing a train, who has no subordinate except a fireman. *Howard* v. *Denver & R. G. R. Co.* (1886) 26 Fed. 837; even though the engineer in such case may be called a conductor, and have full charge of the engine. *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914 (neglected to deliver running orders to engineer).

Compare the ruling that the driver of a "wild engine," not attached to a train, is a fellow servant, and not a vice principal, of a brakeman upon another train with which the engine collides by reason of such engineer's negligence. *Healey* v. *New York, N. H. & H. R. Co.* (1897) 20 R. I. 136, 37 Atl. 676 (plaintiff's counsel had taken the special point that where an engineer is appointed to "conduct" a train agreeably to special orders or general rules, he is not a fellow servant of servants on his own or other trains).

Nor does it follow that because a rule of the company requires section men to obey conductors in furthering the passage of trains delayed by defects in the track, the conductor is constituted a vice principal as to the section men in such a sense as to render the company liable for the conductor's failure to warn one of those section men of the danger that a bluff overhanging the track may fall. *Slavens* v. *Northern P. R. Co.* (1899) 38 C. C. A. 151, 97 Fed. 255.

A conductor is not a vice principal except as to servants under his control. *Northern P. R. Co.* v. *Poirier* (1896) 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741; *Northern P. R. Co.* v. *Mase* (1894) 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. 114. The latter case, in holding that it is only under the Montana statute that a conductor is a vice principal as to men on another train, supersedes the ruling to the contrary effect in *Ragsdale* v. *Northern P. R. Co.* (1889) 42 Fed. 383. A different principle has been applied in Ohio, under the superior servant doctrine. See § 514, *supra*.

For the North Carolina cases on conductors, see § 524, note 1, subd. (c).

(c) *Employees supervising the construction and maintenance of railway tracks and structures.*—A foreman of railway construction is assumed to be a vice principal in *Coyne* v. *Union P. R. Co.* (1889) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382 (negligence alleged was confusing order). His precise functions are not apparent from the report.

Employers have also been held liable for the negligence of the following employees:

A superintendent of construction on a railway. *Kansas P. R. Co.* v. *Little* (1877) 19 Kan. 267 (defective machinery furnished).

A superintendent of the work of extension of a railroad, who has foremen and workmen under him whom he employs and discharges at his pleasure, and who has control of the cars, tools, and machinery, with "full discretion to control and supervise." *Denver, S. P. & P. R. Co.* v. *Driscoll* (1889) 12 Colo. 520, 21 Pac. 708 (control of small flat car without brake was lost on a grade owing to the fact that a workman, in compliance with the superintendent's orders, lifted a stick which was used to govern its speed).

A general foreman of track layers, under the superintendent of construction, having the power to hire and discharge hands, and superintending their labor in constructing a railroad. *Colorado Midland R. Co.* v. *O'Brien* (1891) 16 Colo. 219, 27 Pac. 701 (overloaded steel car was derailed; negligence in regard to transportation of subordinates).

The general agent in charge of the track laying, having five gangs of men under him, each subject to its particular foreman, whom he has authority to hire and discharge, and having supreme control of his department in the absence of the general superintendent. *Colorado Midland R. Co.* v. *Naylon* (1892) 17 Colo. 501, 30 Pac. 219 (derailment caused by the negligent manner in which the work was directed to be done; same accident as *Colorado Midland R. Co.* v. *O'Brien* (1891) 16 Colo. 219, 27 Pac. 701).

The foreman of a railroad company to whom is delegated absolute authority and control of an undertaking to clear away *debris* against one of the company's bridges, and to call out employees to assist in that purpose, and "command where they should work and what they should do." *Nall* v. *Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 260, 28 N. E. 183, 611 (while plaintiff's decedent was at work among driftwood, the foreman suddenly started a locomotive, the result being that one of the ropes passing from

it to the driftwood was jerked from its place, and struck plaintiff's decedent. "The foreman," said the court, "having required decedent to do a certain thing, while that thing is being done, he carelessly, by another command, puts him in mortal peril, and causes his death".

A foreman having exclusive charge and control of the work of constructing a tunnel, and authority to direct all the employees under him where they shall work. *Louisville, N. A. & C. R. Co.* v. *Graham* (1890) 124 Ind. 89, 24 N. E. 668 (plaintiff, while working in the place to which he was assigned, struck by falling timbers, said timbers being of insufficient strength and not sufficiently braced, to the knowledge of the foreman or repairs, who was aware of the existence of a dangerous crack in the roof).

The superintendent of the construction of a railway tunnel. *Tissue* v. *Baltimore & O. R. Co.* (1886) 112 [illegible] 56 Am. Rep. 310, 3 Atl. 667 (servant killed by explosion of dynamite or nitroglycerine placed too close to the work).

Of the remaining decisions in which liability was imposed on the master for the negligence of the officials designated, those decided by the circuit court of appeals are of more than doubtful authority under the more recent decisions of the Supreme Court of the United States. Another, the Nebraska one, as it emanates from a state in which the superior servant doctrine is accepted (see subd. D, *supra*, and chapter XXX., *post*) is of no particular significance. The others probably go further than most of the courts which reject that doctrine would at present be willing to extend the master's responsibility. As to the Michigan cases, see also the preceding section, *ad finem*.

A road master. *Atchison, T. & S. F. R. Co.* v. *Wilson* (1891) 1 C. C. A. 25, 4 U. S. App. 25, 48 Fed. 57 (section hand killed through the overturning of a wrecking car upon which he was engaged, because of the defective construction, under the superintendence of the road master, of a temporary track around a wreck); *Thompson* v. *Chicago, M. & St. P. R. Co.* (1883) 4 McCrary, 629, 11 Fed. 564 (order to go into place of unusual danger). As it was expressly held in *Martin* v. *Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603, that a divisional road master was not a vice principal, the authority of these cases can be saved only, if at all, by assuming (what the report does not show clearly) that the delinquent was the general road master of the entire road.

A road master (not stating whether divisional or general). *Cook* v. *St. Paul, M. & M. R. Co.* (1885) 31 Minn. 45, 24 N. W. 311 (plaintiff was set at work clearing away the *debris* of a burnt depot building, without proper precautions being taken for his safety). As to the relation of these employees to the subordinates in Minnesota, see chapter XXX., *post*.

A divisional road master. *Harrison* v. *Detroit, L. & N. R. Co.* (1890) 79 Mich. 109, 7 L. R. A. 623, 44 N. W. 1034 (on facts see § 24, *ante*).

A assistant road master. *Palmer* v. *Michigan C. R. Co.* (1892) 93 Mich. 367, 17 L. R. A. 636, 53 N. W. 397 (order to drop rails from moving car). As to the two Michigan cases, see § 544 [illegible]

[illegible] charge of a gravel train [illegible] hand under his command, and subject to his [illegible] tion, and subject to his [illegible] *Chicago P. R. Co.* v. *Doyle* (1897) 56 [illegible] 55, 70 N. W. 43 (sudden stop [illegible] in by order of foreman threw [illegible] against a brake).

A foreman in charge of a pile driver, with full authority to have it repaired when out of repair, and to hire and discharge the crew. *Schultz* v. *Chicago, M. & St. P. R. Co.* (1879) 48 Wis. 375, 4 N. W. 399 (failure to repair; but possibly this case was intended to rest on the conception that the negligence alleged was the breach of a non delegable duty).

A foreman of a gang of twenty men engaged in taking down a shed standing between railroad tracks. *Cleveland, C. C. & St. L. R. Co.* v. *Brown* (1893) 6 C. C. A. 112, 18 U. S. App. 10, 56 Fed. 801 (subordinate put to work in a dangerous place without proper precautions to protect him being taken).

(d) *Supervising employees in railroad yards, depots, etc.* — In Michigan a yard master who hires and discharges the yard hands, and directs and assigns their labors, is the agent of the company in these respects as well as in the furnishing of proper, suitable, and safe appliances for their labor. *Luttle* v. *Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571 (knew of defect in engine, and incompetency of fireman to handle it).

The same doctrine has been applied by two Federal courts. *Great Northern R. Co.* v. *McLaughlin* (1895) 17 C. C. A. 330, 44 U. S. App. 200, 70 Fed. 669

(workmen ordered to use defective skids for loading a car); *Hardy* v. *Minneapolis & St. L. R. Co.* (1888) 36 Fed. 857 (order given in making up trains). But these cases are more than doubtful law under the recent decisions of the supreme court. See § 549, *post*.

In Louisiana a yard master is held to be a vice principal. *McGraw* v. *Texas & P. R. Co.* (1898) 50 La. Ann. 766, 23 So. 401 (failed to notify train despatcher that cars had been left in a dangerous position).

The superintendent of the horse department of a street railway company was possibly regarded as a vice principal in *Rettig* v. *Fifth Ave. Transp. Co.* (1893) 3 Misc. 328, 26 N. Y. Supp. 896; but there the negligence was in regard to the place of work (door in a dangerous condition) and, moreover, the general manager had also been notified of the defect.

(c) *Supervising employees in the mechanical departments of railways.*—A railway company is responsible for the negligence of a master mechanic having control of the whole mechanical department of a railway company. *Rehbein* v. *Chicago & N. W. R. Co.* (1875) 33 Wis. 289 (defective engine injured switchman; case possibly rests on fact that negligence was the breach of a non-delegable duty); *New York, L. E. & W. R. Co.* v. *Bell* (1888) 112 Pa. 400, 4 Atl. 50 (allowed a pipe to remain where it was dangerous to men on cars passing under it); *Taylor* v. *Evansville & T. H. R. Co.* (1889) 121 Ind. 124, 6 L. R. A. 584, 22 N. E. 876 (plaintiff was engaged in the work of removing the key of the "equalizer" of a locomotive, under the master mechanic's direction, when the latter negligently pulled the equalizer out of its place so that it fell on the plaintiff).

It has also been held that a foreman of car repairers at the general shops of a railway company, who is known as the "wreck master" of the road, and who has entire control, when he goes to a wreck, of all engaged therein, including, among others, such general officers as the road master, is a vice principal. *Bergman* v. *Omaha & St. L. R. Co.* (1890) 41 Fed. 867 (section hand injured by defective tools). Brewer, J., thought the circumstances rendered the *Ross Case* controlling. Shiras, J., considered that any employee having the power of control and direction was a vice principal, and that the test of responsibility was not whether the negligent employee was at the head of some recognized department of the business. This is certainly not the doctrine of the Supreme Court of the United States. *Quære* as to this case under later decisions of the Supreme Court. See chapter XXX, *post*. A decision antagonistic to it rendered by the Federal court of appeals is cited in § 520, note 1, subd. (d), *supra*.

In *Chicago, B. & Q. R. Co.* v. *Sullivan* (1889) 27 Neb. 673, 43 N. W. 415 (failure to protect car repairer from moving cars), a railway company was held liable for the negligence of a master workman to whom was deputed the duty of instructing a car repairer as to the proper way of doing his work. The *Ross Case* was cited, but whether on the assumption that it is an exponent of the superior servant doctrine, or that it embraced the doctrine of departmental control, is not clear. Probably the former explanation is the correct one, as the Ohio decisions are also referred to.

A foreman of car repairers was held to be a vice principal in *Stacke* v. *Orleans R. Co.* (1898) 50 La. Ann. 188, 23 So. 342.

(f) *Employees supervising railway departments not connected with transportation.*—A railway company is liable for the negligence of the following officials:

An employee having the full control of its timber yard. *Baldwin* v. *St. Louis, K. & N. W. R. Co.* (1888) 75 Iowa, 297, 39 N. W. 507 (pile of timber carelessly put up fell on a subordinate).

A foreman of a quarry belonging to a railway. *Kansas City, Ft. S. & M. R. Co.* v. *Hammond* (1894) 58 Ark. 321, 24 S. W. 723 (allowed laborer to remain on the track when a train might be expected at any moment).

Superintendent appointed by a railway company to supervise and manage its mining operations. *McDade* v. *Washington & G. R. Co.* (1886) 5 Mackey, 144 (defective machinery).

The head of the law department. See argument of Brewer, J., in *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

Compare also *McGovern* v. *Central Vermont R. Co.* (1890) 123 N. Y. 281, 25 N. E. 373, where the negligence of a manager of a grain elevator belonging to a railway company was held to affect it with liability; but the essence of the decision was the breach of the non-delegable duty of examining the possibly dangerous place of work into which he was sending a subordinate.

(g) *Supervising employees of manu-*

facturing establishments.—The following employees have been held vice principals:

The "superintendent of labor" of a large steel company, who is controlling the construction of a new building to contain the works. *Durst* v. *Carnegie Steel Co.* (1896) 173 Pa. 162, 33 Atl. 1102.

The foreman of the oil department of a compress company. *Ft. Smith Oil Co.* v. *Slover* (1893) 58 Ark. 168, 24 S. W. 106 (possibly; but here the negligence alleged was the breach of the non-delegable duty of instruction).

The foreman of the foundry department in machine works. *Drinkout* v. *Eagle Mach. Works* (1883) 90 Ind. 423 (apparently assumed; but case went off on nature of negligent act).

The mill manager of a lumber company. *Newbury* v. *Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743 (negligent order).

An assistant superintendent of a sawmill company in charge of a lumber yard, whose duties are to superintend the piling of the lumber, take charge of the yard and its management, and superintend the workmen, performing no labor himself in handling lumber. *Zintek* v. *Stimson Mill Co.* (1893) 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055, second appeal (1894) 9 Wash. 395, 37 Pac. 340 (pile of lumber set on insecure foundation fell on workman).

(h) *Foremen in smelting works.*—A foreman having absolute control of the workmen engaged in operating the roasters at smelting works, who assigns them to whatever duties he thinks fit, without any immediate direction or superintendence of any one, is a vice principal. *Consolidated Kansas City Smelting & Ref. Co.* v. *Peterson* (1899) 8 Kan. App. 316, 55 Pac. 673 (switch thrown in such a way as to injure a subordinate while pushing a car).

(i) *Employees supervising mining work.*—A jury would be justified in finding that an employee in full charge of the sinking of a shaft is a vice principal. *Deep Min. & Drainage Co.* v. *Fitzgerald* (1895) 21 Colo. 533, 43 Pac. 210 (order to clean out a "missed" hole below a safe depth). Compare cases in (e) *supra.*

(j) *Supervising employee under municipality.*—An employee of a city engaged in shoveling dirt from a bank into a wagon is not a fellow servant of a person appointed by the board of public works of the city, with the approval of the city council, to take charge of the work on the streets, with authority to employ and discharge men, and control and direct the work in its entirety. *Hathaway* v. *Des Moines* (1896) 97 Iowa, 333, 66 N. W. 188 (petition describing an employee with above functions is not demurrable, as it shows him to be a vice principal).

The following have also been held to be vice principals:

A superintendent in full control of a quarry belonging to a city, with power to hire and discharge the workmen, and not joining with them in the work. *Augusta* v. *Owens* (1900) 111 Ga. 464, 36 S. E. 830 (ordered two laborers to loosen rock at a place where the plaintiff, underneath, would be endangered if it fell).

A street commissioner superintending the construction of a bridge. *Lebanon* v. *McCoy* (1895) 12 Ind. App. 500, 40 N. E. 700 (order to work in a dangerous place).

The inspector of the municipal water works, engaged in supervising the construction of a trench. *Ft. Wayne* v. *Christie* (1901) 156 Ind. 172, 59 N. E. 385.

A foreman upon a public work carried on by a municipal corporation which intrusted him with the entire charge of details, giving him the direction of the laborers and power to discharge them. *Stahl* v. *Duluth* (1898) 71 Minn. 311, 74 N. W. 143 (laborer ordered to pick round a hole in which there was an unexploded charge of dynamite).

(k) *Employees concerned with the loading of vessels.*—The relation of a head stevedore of a steamship company to his subordinate was held to be for the jury, where there was some evidence that the entire duty of providing the appliances for loading and unloading the vessels of the defendants had been intrusted to his discretion, and the proof which tends to fix upon him responsibility for the selection of the rigging, and for adjusting and working it, also tends to establish the fact that he was clothed as to these duties with the ultimate power and authority of the company. *Mullan* v. *Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2.

Compare *Brown* v. *Sennett* (1885) 68 Cal. 225, 58 Am. Rep. 8, 9 Pac. 74, where a master stevedore was held liable for the negligence of his foreman. See § 527, note 3, *supra.*

An employee of a steamship company, superintending the loading of a ship, is a vice principal. *Chesney* v. *Ocean S.*

S. Co. (1893) 92 Ga. 726, 19 S. E. 33 (here the delinquency was the failure to keep a promise to supply a "hatch-tender;" but it is not stated whether it was simply an improper disposition of an adequate force, or the omission to hire enough assistants); *Hondson v. Wm. Johnston & Co.* (1899) 109 Ga. 454, 34 S. E. 587 ("walking boss;" for facts see § 540, note 2, *post*).

A steamship company was held liable for the negligence of the superintendent of its dock in *McCampbell v. Cunard S. S. Co.* (1893) 69 Hun, 131, 23 N. Y. Supp. 477 (defective arrangement of appliances injured stevedore). But the decision was reversed in (1895) 141 N. Y. 552, 39 N. E. 637, on the ground that the negligence related merely to the details of the work.

A foreman superintending the loading of a ship was treated as a vice principal in *Anderson v. Elder* (1901) 105 La. 672, 30 So. 120 (block attached to boom was not properly moused).

(1) *The commanding officers of ships.*

On the authority of the *Ross Case* it was held by the circuit court of appeals that the master of a steamboat was not a fellow servant of the engineer. *The Transfer No. 7* (1894) 9 C. C. A. 521, 20 U. S. App. 570, 61 Fed. 364, Reversing on this point (1893) 55 Fed. 38 (collision caused by nonobservance of rules as to signals). It is to be observed that the *Baugh Case*, decided the year before this one, is not cited, and the effect of that decision is still a matter of doubt, as regards this class of employees. See chapter XXX, *post*.

Other rulings have also been made upon the authority of the same case.

A seaman injured by the breaking of a gasket which the captain knew, from the report of the mate, to be in a rotten condition, was allowed to maintain a libel in admiralty against the ship to recover damages for the injury. *The A. Heaton* (1890) 43 Fed. 592, followed in *The Julia Fowler* (1892) 49 Fed. 277 (mate knew that a rope was defective).

A pilot, being a master *pro hac vice*, and responsible for the management and navigation of the vessel, was held not to by a fellow servant of a deckhand who is injured by his derelictions of duty in regard to such management. *The Titan* (1885) 23 Blatchf. 177, 23 Fed. 413 (collision due to not having a lookout properly stationed).

In *The E. B. Ward* (1881) 20 Fed. 702, it was suggested, *obiter*, that a captain was a vice principal.

Another case in which, though not on the ground of his being a departmental manager, a captain was held to be a representative of the shipowner, is *Thompson v. Hermann* (1879) 47 Wis. 602, 32 Am. Rep. 784, 3 N. W. 579. There it was held that a seaman could recover where the captain, who was also part owner, ordered him to adjust the rigging in a dangerous manner, and the seaman, after protesting and suggesting a safer method, was injured in carrying out the order. In a later case this decision was said to have been "placed mainly on the peculiar character of the employment, and the relations existing between the master and a common seaman of a merchant vessel outside of port." *Mathews v. Case* (1884) 61 Wis. 491, 50 Am. Rep. 151, 21 N. W. 513, where recovery was denied to a mate injured by the negligence of the captain, the relations between these two employees not being the same as those between the captain and the seaman.

The action of a mate injured by a captain's negligence was also held not maintainable in *Caniff v. Blanchard Var. Co.* (1887) 66 Mich. 638, 33 N. W. 744.

In *Olson v. Clyde* (1884) 32 Hun, 125, it seems to be assumed, *arguendo*, that the master of a vessel may be the *alter ego* of the owners; but so far as New York is concerned, this is certainly not the law. See § 520, note 1, subd. (g), *supra*.

In *Ramsay v. Quinn* (1871) Ir. Rep. 8 C. L. 322 (seaman drowned while obeying an order to abandon the ship), it was held that a demurrer based on the theory that the captain of a ship was a mere fellow servant of one of the crew should be overruled.

The following passage from Story on Agency, 7th Ed. § 116, was relied on: The captain of a ship is "clothed with the character of a special employer or owner of the ship, and representing not merely the absolute owner (*dominus navis*), but also the temporary owner, or charterer for the voyage (*exercitor navis*). In short, our law treats him as having a special property in the ship, and entitled to the possession of it, and not as having the mere charge of it, as a servant."

But this ruling was disapproved in *Hedley v. Pinkney & Sons S. S. Co.* [1892] 1 Q. B. 58. Affirmed in [1894] A. C. 222 § 7, note, subd. 16, *ante*.

The master of a ship is, in any case, a representative of the shipowner in re-

536. Supervising employees held not to be heads of departments.—The delinquent employees mentioned in the cases collected below were expressly held not to be departmental vice principals. These rulings are referred to in a former subtitle (§ 520, *supra*) and are tabulated here for the reason that they will serve to indicate the downward limits of the doctrine discussed above. The remainder of the decisions cited in the section just specified may also be examined in this connection, for even though it may not be so stated in terms, the employees there named must be taken by implication not to be vice principals within the meaning of that doctrine.[1]

spect to the performance of all non-assignable duties. *Walker* v. *Bolling* (1853) 22 Ala. 294 (employment of crew); *Scarff* v. *Metcalf* (1887) 107 N. Y. 211, 13 N. E. 796 (giving medical aid to crew).

As to the cases in which the captain undertakes to do manual work himself, see chapter XXIX., *post*.

In Washington neither the mate nor the captain is a fellow servant of an ordinary seaman. *Keating* v. *Pacific Steam Whaling Co.* (1899) 21 Wash. 415, 58 Pac. 224 (order to furl sail in a dangerous manner). The *Ross Case* (subd. [b], *supra*) was cited. But this certainly does not support the conclusion that a mate is a vice principal.

[1] The boss of a small gang of ten or fifteen men engaged in making repairs upon a railroad over a distance of three sections, aiding the regular gang upon each section as occasion demands. *Northern P. R. Co.* v. *Peterson* (1895) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843, Reversing (1892) 51 Fed. 182 (careless application of brake); *Goodwell* v. *Montana C. R. Co.* (1896) 18 Mont. 293, 45 Pac. 210 (negligence in directing the work).

A foreman of carpenters, subject to the bridge superintendent, and merely deputed to take down a building. *Cleveland, C. C. & St. L. R. Co.* v. *Brown* (1896) 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970.

A foreman working on the construction of a bridge, with two superiors between him and his employers. *Kelly* v. *Butte & F. Co.* (1899) 98 Fed. 380.

One who is merely in charge of a crew of men for the construction of a particular piece of work. *Hughes* v. *Leonard* (1901) 199 Pa. 123, 48 Atl. 862.

A foreman of car repairers, under a master car builder who is himself under the control of the master mechanic. *Grady* v. *Southern R. Co.* (1899) 34 C. C. A. 494, 92 Fed. 491.

The general foreman of railway shops, under a master mechanic. *Gaynon* v. *Durkee* (1898) 31 C. C. A. 306, 52 U. S. App. 587, 87 Fed. 302.

A general yard master in full control of a yard. *Cincinnati N. O. & T. P. R. Co.* v. *Gray* (1900) 50 L. R. A. 47, 41 C. C. A. 535, 101 Fed. 623; *Thomas* v. *Cincinnati, N. O. & T. P. R. Co.* (1899) 97 Fed. 245

A road master. *O'Viel* v. *Great Northern R. Co.* (1900) 80 Minn. 27, 51 L. R. A. 532, 82 N. W. 1086. See, however, summary of Minnesota decisions in chapter XXX., *post*.

A track foreman. *Spancake* v. *Philadelphia & R. R. Co.* (1892) 148 Pa. 184, 23 Atl. 1006.

An employee who commonly acts for the yard master. *Kirk* v. *Atlanta & C. Air-Line R. Co.* (1886) 94 N. C. 625, 55 Am. Rep. 621. Assuming the delegation of functions to have been complete in this case, it scarcely seems consistent with the other decisions in this state (see summary, chapter XXX., *post*), when construed in connection with the general principle that a servant deputed to act for an absent superior bears the same relation as the latter to his subordinates. Compare, however, *Prevost* v. *Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88; *Durst* v. *Carnegie Steel Co.* (1896) 173 Pa. 162, 33 Atl. 1102, cited *infra*.

The foreman of one of several switching crews engaged in the yard of a railroad company, under the general control of a yard master. *Harley* v. *Louisville & N. R. Co.* (1893) 57 Fed. 144, following the *Baugh Case*.

A gang boss in a railway shop, under

a master mechanic. *McBride* v. *Union P. R. Co.* (1889) 3 Wyo. 247, 21 Pac. 687.

A station agent. *Brown* v. *Minneapolis & St. L. R. Co.* (1884) 31 Minn. 553, 18 N. W. 834 (neither in general control of the business nor of a special branch of it, but simply charged with a special duty).

A telegraph operator. *Dealey* v. *Philadelphia & R. R. Co.* (1886; Pa.) 3 Cent. Rep. 112, 7 Atl. 170; *Monaghan* v. *New York C. & H. R. R. Co.* (1887) 45 Hun, 113. In the last-cited case the telegraph operator was charged with important duties at a certain point, imposing upon him the controlling and directing of the movements of trains there, within the system which the rule provided for that particular locality; but the court held the service required of him was within and subordinate to a department of the business of the company, and that, although in the performance of this service he necessarily exercised discretion and judgment in giving preference by signal in the movement of trains on to a single track, with a view to the safety and protection of persons and property, and for the orderly operation of the road, that did not make his judgment that of the company, as between it and its employees.

That there is nothing in his official character to make a mere telegraph operator, as distinguished from a train despatcher, a head of a department, is also implied in a portion of the reasoning of the court in *Baltimore & O. R. Co.* v. *Camp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952. But the representative character of these employees is usually denied on the ground that they are discharging the functions of mere servants. See § 611, *post*.

An engineer in charge of the motive power of an elevator in which other employees are carried to and from their work. *Walcott* v. *Studebaker* (1887) 34 Fed. 8.

A foreman subject to the order of a yardmaster. *Fraker* v. *St. Paul, M. & M. R. Co.* (1884) 32 Minn. 54, 19 N. W. 349.

A chief engineer who has general charge of an engine room and a department, with power to give orders to the men in the department, and to engage men for short jobs, in the manager's absence. *Prevost* v. *Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88.

A foreman in a woolen mill, sometimes called a "boss machinist" and sometimes a "master mechanic," who was obliged to consult the superintendent as to any important alteration. *Stevens* v. *Chamberlin* (1900) 51 L. R. A. 513, 40 C. C. A. 42, 100 Fed. 378.

A foreman of a gang at a factory. *Casey* v. *Pennsylvania Asphalt Paving Co.* (1901) 198 Pa. 348, 47 Atl. 1128.

A foreman in charge of men constructing a sewer, with authority to hire and discharge them, under the supervision of a superintendent of sewer construction, who is himself subject to the instructions of the city engineer, as general superintendent of all public works. *Minneapolis* v. *Landin* (1893) 7 C. C. A. 344, 58 Fed. 525, 19 U. S. App. 245, following the *Baugh Case*.

A subordinate foreman who is not invested with any of the duties of the vice principal, while absent, and is merely instructed to call upon him to provide against danger, if any should arise. *Durst* v. *Carnegie Steel Co.* (1896) 173 Pa. 182, 33 Atl. 1102.

An employee having direction of the actual work of removing a telephone line. *American Teleph. & Teleg. Co.* v. *Bower* (1897) 20 Ind. App. 32, 49 N. E. 182 (here the work was ordered by the company's district superintendent, and planned by its district chief).

A foreman of carpenters, working for a corporation. *Dewey* v. *Parke D. & Co.* (1889) 76 Mich. 631, 43 N. W. 644.

The underground manager of a mine. *Wilson* v. *Merry* (1868) L. R. 1 H. C. Sc. App. Cas. 326, 19 L. T. N. S. 30.

In Maryland it has been held that a divisional train despatcher on a railway is a fellow servant of an engineer. *Norfolk & W. R. Co.* v. *Hoover* (1894) 79 Md. 253, 25 L. R. A. 710, 29 Atl. 991. The ground taken being that the management of the division upon which the negligent servant was train despatcher had been committed to him, as he was a subordinate appointed by the superintendent, and that, though he had charge of the trainmen and of the movements of trains on his division, and could employ and discharge flagmen and brakemen, it was not shown that the master had relinquished all supervision of the work on that division, and intrusted its direction as well as the procuring of materials and machinery and other instrumentalities necessary for the service to his judgment and discretion. That this ruling, if construed as an unqualified assertion of a general doctrine

as to the position of a train despatcher, is contrary to the weight of authority in most jurisdictions, will be shown in § 577, subd. *a*, *post*. These adverse cases, however, are almost all founded on the theory that the controlling of the movements of trains is a nonassignable function of the railway company; and, as the negligence here alleged was merely that the despatcher had sent out unfit brakemen with a train, and these were not employed by him, but by the division superintendent, the decision is not necessarily repugnant, upon its facts, to those in other states. If the default had had relation to the movement of trains, the trend of judicial opinion in Maryland (see § 530 *supra* and chapter XXX., *post*) seems to leave it an open question whether the servant would not have been allowed to recover.

In an Irish case it has been held that, in the absence of evidence to show that the general traffic manager of a railway company occupies, towards the company, the position of a vice principal, he is to be taken as a fellow servant of a milesman (*i. e.*, track walker) employed by the same company. *Conway* v. *Belfast & N. Counties R. Co.* (1877) Ir. Rep. 11 C. L. 345 (Exch. Cham.). Affirming (1895) Ir. Rep. 9 C. L. 498. But this decision, which rests on *Wilson* v. *Merry* (§ 529, *supra*), is contrary to the general current of American authority.

CHAPTER XXIX.

FOR WHAT ACTS OF SUPERIOR SERVANTS A MASTER IS RESPONSIBLE.

536a. Necessity of proving that the act or omission which caused the injury was negligent.
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540. Breach of non-delegable duties by any superior servant, master liable for.
541. Issuance of orders deemed to be an official act.
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543. Theory that a vice principal does not represent the master except in so far as he is discharging some non-delegable duty.
544. Theory that a vice principal does not act as the master's representative when he engages in manual labor.
545. Qualifications of this theory.
546. Theory that a vice principal represents the master even when he participates in manual labor.
547. Discussion of the doctrine of the dual capacity of vice principals.
    a. With reference to the standpoint of the courts which reject the superior servant doctrine.
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536a. Necessity of proving that the act or omission which caused the injury was negligent.— In the great majority of the cases in which the defense of common employment is raised, the question whether the act or omission from which the injury resulted was culpable is not one of those which is submitted for the consideration of the court of review. It is clear, however, that this preliminary issue must be settled in the plaintiff's favor before the defense can become a material factor in the investigation. In the note below are collected some decisions in which it has been held that negligence was or was not an inference in point of law.[1]

[1] (a) *Negligence held to be for jury.* gineer who was killed by the falling of Negligence on the part of the super a locomotive through a burning trestle intendent of a railroad towards an en is established by evidence that he was

537. No responsibility as to matters beyond the scope of the authority of the superior servant.— Whatever difference of opinion there may be as to the character of the relations which must be shown to

notified by a county road superintendent, about two and a half hours before the accident occurred, that a fire was raging on the road, but sent no one to notify the train, which he knew was approaching, of the danger, and did not go himself in time to reach the dangerous point until after the accident. *Bateman* v. *Peninsular R. Co.* (1898) 20 Wash. 133, 54 Pac. 996.

The question as to whether a section master was guilty of negligence rendering the company liable for injuries sustained by a section hand in attempting to get a hand car off the track and out of the way of an approaching train is for the jury upon evidence that, with knowledge that an express train which was due had not passed, he ordered the car to be placed upon the track, promising the men to keep watch of the train, and that, upon seeing the train approach around a curve, he ordered the crew to remove the hand car. *Johnson* v. *Southern R. Co.* (1898) 122 N. C. 955, 29 S. E. 784.

In an action by an employee for personal injuries received by the fall of a pile driver, evidence, although contradicted, that the foreman ordered plaintiff to the top of the pile driver, some 30 feet high, to oil the wheel, and that, while he was on the same with the hammer near the top, other employees began moving it at the foreman's order by "pinching" it with crowbars, and that only one man was in charge of the guy rope, although two were necessary to properly stay it while being moved, —is sufficient to sustain a judgment for plaintiff. *Fremont, E. & M. Valley R. Co.* v. *Leslie* (1894) 41 Neb. 159, 59 N. W. 559.

A foreman is negligent in undertaking to move a car when a pair of wheels are off the track, as a result of which an employee is caught between such car and other cars standing on an adjoining track, and killed. *Chicago & E. I. R. Co.* v. *Driscoll* (1897) 70 Ill. App. 91.

(b) *Negligence not established.*—A message by a train despatcher to a conductor to "get orders" at a certain station was, as matter of law, an adequate provision to secure his train against collision with another, where it appears that this form of order was in frequent use on the road, and was understood to mean that the train to which it related should be held at the station specified until fresh instructions were received. The sufficiency of such an order as to the movement of a train cannot be tested by the fact that a collision occurred through its disobedience by the conductor and engineer. *Chicago, St. L. & N. O. R. Co.* v. *Doyle* (1883) 60 Miss. 977.

The conductor of a freight train is not guilty of negligence in signaling the engineer to move the train forward for the purpose of easing up upon a coupling pin, after giving instructions to his subordinates to open a switch, cut off a flat car, and place it upon a side track, since he has a right to presume that his subordinates have obeyed his order and are in a position safely and properly to uncouple the cars as directed. *Hudson* v. *Charleston, C. & C. R. Co.* (1893) 55 Fed. 248.

A conductor who is on a train while a running switch is in progress cannot be held negligent on the ground that the speed of the engine is unexpectedly rapid at the moment of the uncoupling, when it has always been usual for the engineer to control the speed, and it is his duty to do so. The conductor has the right to rely on the performance of that duty. *Lake Shore & M. S. R. Co.* v. *Knittal* (1878) 33 Ohio St. 468.

A train master is not negligent in ordering cars to be taken out of a train without seeing specially that a brakeman engaged in coupling cars is warned, since he has a right to assume that his orders will be properly carried out. *Martin* v. *Chicago & I. R. Co.* (1895) 65 Fed. 384. The court said: "The order in and of itself was a perfectly proper one: one which the situation and circumstances required to be given. The fault, if any, which resulted in the plaintiff's injuries, attended the execution of the order as an incident of that act, and was not naturally or necessarily inherent to or resultant from the order."

There was no negligence in placing a lumber car dangerous to mount and pass over, next behind the cars equipped with air brakes, which were immediately in the rear of the engine, where it was unnecessary for the brakeman to climb

exist between the delinquent and the injured employees, in order to affect the master with liability, it is universally agreed that the general rules of the law of agency are controlling in all cases to this extent, that, on the one hand, if the act was within the scope of such employee's authority, the master cannot escape liability on the ground

over it, and the only brake to be set thereon could be reached from the car following. The safety of the brakeman could not have been more effectively secured if the car had been placed in the middle of the train, where it could have been worked up to from both ends of the train by the front and the rear brakeman. *Harris* v. *Chesapeake & O. R. Co.* (1895; Va.) 23 S. E. 219.

Trainmen have a right to rely on the observance of a rule that watch should be kept while repairs are being made under a car, and are not negligent in backing a train against a car which, so far as may be inferred from the absence of a watchman, is not undergoing repairs. *Renfro* v. *Chicago, R. I. & P. R. Co.* (1885) 86 Mo. 302 (car repairer injured).

A section foreman is not negligent in ordering the section hands to get a hand car on which they have been riding, off the track on discovering a passenger train approaching. On the contrary, the failure to give such an order would be culpable. *Chicago & A. R. Co.* v. *Goltz* (1897) 71 Ill. App. 414.

The instantaneous stopping of a work train without warning to a section hand standing on the platform of a caboose was not negligence rendering the company liable for injuries to the section hand from being thrown from the platform, where he knew that the train was to be moved forward a car's length. *Union P. R. Co.* v. *Doyle* (1897) 50 Neb. 555, 70 N. W. 43.

A railroad company is not liable for injuries to an employee engaged in constructing a bridge, incurred while in a dangerous position to which he went upon his understanding that he was ordered there by motions of the foreman in fact not made for such purpose, where the foreman did not know that he was in such place, and proceeded with the work causing the injuries. *McCarthy* v. *Chicago, R. I. & P. R. Co.* (1891) 83 Iowa, 485, 50 N. W. 21.

The foreman of a cable-car company, whose special duty it is to see that the cars are brought out of the car house on time each morning and started for their regular trips with the proper men in charge, is not guilty of negligence towards the gripman of one of such cars when first brought out on an important street, in failing to observe the latter's presence on the car, or to look to the rear of the car before starting it for the purpose of making room for other cars, where he was required to keep a close lookout in front, and had no reason to suspect that the gripman would get on the car in such a manner as to make it dangerous to start it. *Krouen* v. *St. Louis R. Co.* (1897) 141 Mo. 86, 41 S. W. 926.

The mere fact that a vice principal hurried his subordinates at their work, and used oaths in giving directions, does not show negligence. *Coyne* v. *Union P. R. Co.* (1889) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382.

A direction to the engineer by a vice principal in a harsh and loud tone, to hoist a loaded scaleboard, as a team is waiting, is not negligence which will render the employer liable for an injury to a fellow servant of the engineer, caused by the latter's applying the steam and hoisting the scaleboard too quickly. *Griffin* v. *Glen Mfg. Co.* (1893) 67 N. H. 287, 30 Atl. 344. The court said: "The direction to the engineer was not a command to hoist the scaleboard improperly, nor more quickly than usual. He could not reasonably understand he was to act in such manner as to endanger the safety of others. He was not commanded to do an unlawful act, nor a lawful act in an improper manner. There was nothing in the fact that a team was waiting, that required undue haste in hoisting the board. That was the only reason given by Perry to the engineer to attend to the duty assigned to him. There was no danger of injury to the team, nor from it, by collision or otherwise. The negligent manner of hoisting the board was the act of the engineer, and not of Perry."

A foreman of a foundry is not guilty of negligence in attempting to empty a ladle full of molten metal into a perfect one upon learning that the former is beginning to leak, when his act is not manifestly improper, and he has no reason to anticipate a fall of the ladle,

that it was done in direct violation of his orders,[1] and that on the other hand, there can be no recovery, where the act or order which caused the injury was entirely outside the scope of the authority of the delinquent employee. If the act or order had no reference to the master's concerns, there is, of course, no liability on the master's part.[2] But even if this point is determined in the plaintiff's favor, he

resulting in injury to a workman. *Martin* v. *Cook* (1891) 37 N. Y. S. R. 733, 14 N. Y. Supp. 329.

A foreman in a car repair shop is not guilty of negligence in selecting a bolt to be driven through the floor of the car, which is 1 inch longer than is needed, by which an employee under the car is injured, where bolts are frequently used somewhat longer than are required, and a bolt of a proper length would project 1½ inches below the bottom of the car. *Holtz* v. *Great Northern R. Co.* (1897) 69 Minn. 524, 72 N. W. 805.

[1] *Atchison, T. & S. F. R. Co.* v. *Randall* (1888) 40 Kan. 421, 19 Pac. 783. In *Chicago & N. W. R. Co.* v. *Bayfield* (1877) 37 Mich. 205, where the railway company was held liable for the negligence of the conductor of a work train in ordering a laborer to do work outside the scope of his contract (see chapter XXV., *ante*), the court said: "It is, in general, no excuse to the employer that an injury which has occurred was caused by disobedience of his orders, whether they be express orders or implied orders. He assumes the risk of such disobedience when he puts the servant into his business; and the reasons for holding him responsible for the servant's conduct are the same, whether the injury results from a failure to observe the master's directions, or from neglect of the ordinary precautions for which no specific directions are deemed necessary. It will be conceded that for a positive wrong beyond the scope of the master's business, intentionally or recklessly done, the master cannot be held responsible; this being very properly regarded as the personal trespass or tort of the servant himself. But when the wrong arises merely from an excess of authority, committed in furthering the master's interests, and the master receives the benefit of the act, if any, it is neither reasonable nor just that the liability should depend upon any question of the exact limits of the servant's authority. The master fixes these, and it is his duty to keep his servant, in what is done by him, within the limits fixed. An act in excess would still have the apparent sanction of his authority; the occasion for it would be furnished by the employment, and the injured party could not always be expected to know or be able to discover whether it was or was not without express sanction."

In *Redman* v. *Michigan C. R. Co.* (1884) 55 Mich. 57, 54 Am. Rep. 348, 20 N. W. 788, the court was equally divided upon the question whether a brakeman could recover for an injury caused by the conductor's undertaking to manage an engine in the absence of the engineer. Two were for holding the company liable as for an "abuse of authority" by an employee invested with the non-delegable duty of seeing that his subordinates discharged their respective duties. Judge Cooley and another of his colleagues thought there was nothing to show that the conductor was not acting within his powers in operating the engine, and drew the inference that the plaintiff was not in the position of a servant receiving an order, which he might rightfully have disobeyed, to do something outside the scope of his employment. The *Bayfield Case* was thought by them not to be in point.

An employer is liable for the acts of a vice principal done within the scope of his employment, resulting in an injury to an employee, although the employer was not present. *Connor* v. *Saunders* (1894) 9 Tex. Civ. App. 56, 29 S. W. 1140 (defendants had argued that they would not be liable unless they had expressly authorized their foreman to commit an injury upon the plaintiff).

[2] A section hand injured while traveling on a hand car after the day's work was over, and merely for the purpose of bringing provision for his boss, cannot recover. *Hurst* v. *Chicago, R. I. & P. R. Co.* (1878) 49 Iowa, 76.

A foreman in speaking to an employee in a friendly manner and for purposes not connected with the employment is

must still fail, unless he can show that the superior servant had authority, either express or implied from the nature of his functions and the regular course of the business, to do the act or give the order alleged to be negligent.[3] The ultimate and essential question is whether the vice principal had ostensible authority to give the orders which led to the injury. Hence, if a representative capacity is bestowed upon a superior servant by general directions to obey his orders, that capacity continues, so far as the subordinate receiving those directions is concerned, until he is actually informed that the

not acting as a vice principal so as to render the master liable for an injury which the employee receives through having attention diverted momentarily from his work by the foreman's words. *Walsky* v. *Schumacher* (1894) 7 Misc. 8, 27 N. Y. Supp. 331.

[3] Where an engineer has no authority to order a yard master to couple cars, and it is no part of the latter's duties to do such work, the company is not liable for injuries received by him in coupling a car at the request of the engineer. *Bradley* v. *Nashville, C. & St. L. R. Co.* (1884) 14 Lea, 374.

Where a boy employed in a boiler shop to work in a tool room, being out of work, is directed by the boss of the tool room to go into the adjoining boiler room for work, where he sustains the injuries sued for, the boss of the tool room, being merely authorized to direct the work in that room, has no authority to direct plaintiff to seek employment in the boiler room, and the master is not liable. *Fisk* v. *Central P. R. Co.* (1887) 72 Cal. 38, 13 Pac. 144.

A servant who has no power to suspend rules cannot, by directing a subordinate to procure certain materials in violation of the rules provided for such a case, impose responsibility on the master. *Keenan* v. *New York, L. E. & W. R. Co.* (1895) 145 N. Y. 190, 39 N. E. 711. There the plaintiff's intestate and another man were at work repairing a car, and found they needed a bumper spring. The intestate applied to a coemployee for it, and was informed that he did not have one. After a further search he told the "gang boss" that he was unable to find what he wanted, and was directed to go to another track, and take one from a car there. While he was under the car, some cars were backed against it, and he was injured. It was admitted by appellant's counsel that there was no direct evidence in the case showing that it was any part of Tracy's duty to furnish materials required by the workmen under him, but he insisted that, as the defendant had failed to designate any one person whose duty it should be to borrow springs from other cars for temporary use, and still continued the business of car repairing, it not only acquiesced in the gang foreman's procuring such materials, but impliedly authorized them to procure them wherever they could. The appellant's counsel also admitted that Tracy was the fellow servant of the intestate in everything except in the performance of a duty which the law imposed upon the defendant, *viz.*, procuring materials for use. The court declined to adopt these views, saying: "It would lead to the establishment of an exceedingly unsafe rule, to hold that a gang boss over forty or fifty men could, without direct authority from the company, change the safe and proper rules in pursuance of which the work in the repair yards was conducted, and direct workmen to prosecute their labors under cars standing on tracks other than the regular, duly protected repair tracks. Tracy [the gang boss] was in no legal sense the representative of the defendant when he suggested to the intestate that he should procure a spring from a car standing on track No. 8; he was a fellow servant making a very unwise and dangerous suggestion."

A mason injured by the negligence of carpenters working on the same building, in constructing a defective scaffold, cannot recover where there is no evidence to show that it was any part of their employment as carpenters to make ladders for anybody but themselves. *Mercer* v. *Jackson* (1870) 54 Ill. 397.

It will be useful to note here that the principle stated in the text is controlling under the English employers' liability act of 1880 and similar American statutes making the master liable for the negligence of employees exercising su-

authority so given has been withdrawn or restricted.[4] But in cases of this class it is held that the mere belief of the injured servant that he had been directed to obey the orders of the delinquent will not be sufficient to fasten responsibility on the employer, if, as a matter of fact, no such directions had ever been given.[5]

In most kinds of business authority to commit acts of personal violence amounting to a battery cannot be inferred, for this reason, if for no other, that larger powers cannot be imputed to an agent than the principal himself possesses. A master, therefore, cannot ordinarily be held liable for the act of a supervising employee in beating a subordinate, even though it was for the purpose of furthering the master's business by compelling him to work.[6] Under the maritime law a ship owner may be required to answer for a similar offense by the captain of one of his vessels, where it amounts to a misuse of his power to chastise a seaman for the maintenance of discipline, but this principle cannot be extended so as to create a liability for a wanton assault, which, as the evidence shows, was not demanded by any

perintendence or control. *Brown* v. *Butterley Coal Co.* (1885) 53 L. T. N. S. 964, 50 J. P. 230. See chapter XXXVII., *post*.

[4] A son of an employer represents the latter so as to render the latter liable for his neglect in directing an employee to do a certain act which he was not ordinarily called upon to perform, where the son had been directed to have such act performed, and the employee had general directions to do what the son told him. *La Fortune* v. *Jolly* (1896) 167 Mass. 170, 45 N. E. 83. The court held that it was not competent for the defendant to show that the son's general authority had been secretly withdrawn, and that the son had been instructed to perform personally the duty in the execution of which the plaintiff was injured.

An instruction in an action for injuries to a gripman upon a cable car, that it is immaterial whether the person exercising the authority to direct and command was known as a foreman or by any other title, if clothed with such apparent authority, is not objectionable on the ground that the master is not liable for negligence of one clothed with a special or limited authority, not arising from the performance of such authority. *West Chicago Street R. Co.* v. *Dwyer* (1896) 162 Ill. 482, 44 N. E. 815.

[5] *Newbury* v. *Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743 (servant here had been ordered to perform duties outside the scope of his employment).

[6] *Jones* v. *St. Louis, N. & P. Packet Co.* (1890) 43 Mo. App. 398. There Judge Thompson after pointing out that, under the general law of master and servant, the master had no power to inflict personal chastisement upon the servant, and that the admiralty law on this point has no application to actions based on circumstances occurring on a river like the Mississippi, at least when such actions are brought into state courts, summed up as follows: "The case is not one where the superior servant or vice principal had any authority from the general master, either express or implied, to use violence under any circumstances whatever in accomplishing the purposes of the master. It is, therefore, not like the case where the railway conductor wrongfully expels the passenger. Nor was it a case where the master had assumed, by contract or otherwise, any special duty toward the servant injured, of protecting him from injury on the part of another servant, such as the duty which the carrier assumes toward his passenger, of transporting him safely and without harm from one place to another. The act done to the plaintiff by the superior servant was therefore, neither an act done in the scope of his employment, nor an act

pressing emergency, and was a mere vindictive indulgence of the captain's own passions.[7]

Another case in which a vice principal is deemed to be acting outside the scope of his employment is where, merely as a personal matter, he gives a subordinate some information which proves to be erroneous, and the subordinate receives an injury in consequence of his reliance on the statement.[8]

538. Distinction between official and nonofficial acts of supervising employees; generally.— Under the general law of agency, the principal, while he is not liable if the agent transcends his authority, must answer for everything done by such agent within the scope of his authority. But in actions brought by a servant to recover for injuries caused by a delinquent vice principal, the rule of *respondeat superior* is not universally conceded to have this unrestricted scope. As will be shown below (§§543–545, *infra*), many of the courts proceed upon the theory that, even where the negligence in suit is proved to have had reference to the master's business, the plaintiff's action may still be barred by evidence susceptible of the construction that the vice principal was acting in the capacity of a mere servant when he inflicted the injury for which indemnity is sought. In other words, he is conceived of as a functionary having a dual character, some of whose derelictions of duty are official, and others nonofficial, a subordinate being allowed to recover if his injury was due to an official act, and not otherwise.[1]

done in violation of any special duty which the general master has assumed towards the plaintiff, which duty the immediate actor was appointed to perform. It stands in law as his mere wanton and criminal act, for which not another person, but himself, is liable."

[7] *Gabrielson* v. *Waydell* (1892) 135 N. Y. 1, 17 L. R. A. 228, 31 N. E. 969. The court remarked that the captain's command does not extend over the persons of the crew, "beyond the infliction of usual and necessary punishment in cases of disobedience or infraction of rules."

[8] Recovery has been denied where a workman was injured by relying on the statement of his foreman that a rope which he was about to use for the purpose of descending from a trestle was secure. *Louisville & N. R. Co.* v. *Lahr* (1888) 86 Tenn. 335, 6 S. W. 663. The court here relied upon the distinction between official and unofficial acts, but it is submitted that the true and only reason for absolving the employer should have been that the servant was under no orders to descend from the trestle, and was using the rope for his own accommodation entirely. If the servant had been about the company's business, or had been leaving his work, such an assurance would undoubtedly have been given by the foreman in his character of vice principal.

[1] "The same individual may combine in his own person the functions of both master and servant." *Cole Bros.* v. *Wood* (1894) 11 Ind. App. 37, 36 N. E. 1074. "The mere fact that an injury results from the negligence of a servant superior in rank to the injured servant does not render the master liable, but, in order to charge the master with such negligence, the superior servant must so far stand in the place of the master as to be charged in the particular matter with the performance of a duty towards the inferior servant, which, under the law, the master owes that servant." *Allen* v. *Goodwin* (1893) 92 Tenn. 385, 21 S. W. 760.

This theory of course only becomes a

In any jurisdiction where the functions of supervising employees are differentiated upon this basis, the effect which the theory has upon the plaintiff's rights of recovery should be explained to the jury in terms appropriate to the evidence introduced.[2]

The question as to whether an employee was acting as a vice principal at the time an injury was received by another employee is a question for the jury to determine from the evidence in the case.[3]

It may be mentioned in passing, though the subject does not fall,

material element where the delinquent was in control of the injured person. In *Lincoln Coal Min. Co.* v. *McNally* (1884) 15 Ill. App. 181, it was contended that as a negligent shaft boss had the power to hire and discharge other employees of the company working at the shaft, and to superintend them at work, he was a representative of the master, and not a fellow servant with deceased, who did not work under him. But the court said: "It is not necessary to inquire how far, if at all, he represented the power of the common master. The mere fact that he may have had the power to employ and discharge other servants, if conceded, and to superintend them when at work, did not, as to the particular alleged act of negligence by which deceased was killed, change his character from that of a coservant to that of a representative of the company. The death of deceased was not the result of the exercise of any authority conferred upon Downey. He exercised no power that placed deceased in a more exposed or dangerous position than he would otherwise have occupied; nor did any power exercised by him contribute to the accident. The authority possessed by Downey, whatever it may have been, had no influence or bearing upon the accident which caused the injury; and at the time of the accident Downey and deceased were performing the labor of common servants, neither exercising any authority over the other; and they were coservants as to the labor then being performed by them."

In exceptional instances, employees may "occupy not only a dual, but a threefold, relation toward each other, according to the duties they are called upon or delegated to perform, to wit, that of superior or master, co-ordinate or fellow servant, inferior or servant. . . . Where the injury is caused by an employee acting in the discharge of a duty that renders him inferior to or co-ordinate with the injured employee, the master or company is not liable; but where he acts in a superior position the master is liable." "For instance, in running the train, the conductor is the superior of the engineer, and in that particular he represents the master; in the separate management of the engine and the train from the engine back they are co-ordinate or fellow servants, each being independent in his own sphere; and in permitting the fireman or other person to manage the engine in his stead, the engineer is the superior of the conductor, discharging a nonassignable duty delegated to him by the master or company." *Core* v. *Ohio River R. Co.* (1893) 38 W. Va. 456, 469, 18 S. E. 596.

[2] Instructions drawing the attention of the jury to this principle should be given where there is evidence tending to show negligence of a superior servant, whereby an inferior servant has been injured. *Coal Creek Min. Co.* v. *Davis* (1891) 90 Tenn. 711, 18 S. W. 387; *Illinois C. R. Co.* v. *Bolton* (1897) 99 Tenn. 273, 41 S. W. 442 (error to refuse an instruction that a section foreman does not represent the company as to what he does as a laborer); *Mobile & O. R. Co.* v. *Godfrey* (1895) 155 Ill. 78, 39 N. E. 590 (error to instruct a jury on the theory that a conductor who was also acting as foreman of a work train was, as matter of law, a representative of the master for all purposes).

An instruction that, if the jury believe that the complainant was injured through the negligence of defendant or his servants, and not through his own negligence, they will find for the complainant, is too broad, as it does not distinguish between the acts of a vice principal and the acts of a servant. *Chicago, B. & Q. R. Co.* v. *Sullivan* (1889) 27 Neb. 673, 43 N. W. 415.

[3] *Mazzeli* v. *Zdarski* (1901) 93 Ill. App. 331 (weight of evidence held to be that the delinquent employee acted as an interpreter merely, in receiving complaints as to the existence of a defect).

strictly speaking, within the scope of the present note, that the cases decided under the various employers' liability acts which impose a liability for the negligence of superior servants also disclose a conflict of opinion as to the limits of that liability, where the injury was due to participation in manual work. See chapter XXXI., *post*.

539. Distinction considered with relation to the doctrine that the nature of the negligent act is the test of liability.— It should be observed here that, although many of the decisions to be cited in the following sections, in which the master was held liable, might have been equally well referred to the theory that he must, at his peril, see that all non-delegable duties are performed with reasonable care, the only cases with which we are now properly concerned are those in which, conceding the delinquent employee to be a vice principal by virtue of his rank and the nature and extent of the control exercised by him, he was acting as an agent of the master, or as a mere servant. Logically speaking, the process by which the master's liability is determined in this class of cases is, it is manifest, precisely the reverse of that employed in those reviewed in the following chapters. In the one instance, the inquiry starts with the assumption that the delinquent was a vice principal, and proceeds to determine whether he was acting in his representative capacity as regards the default complained of. In the other, the single question to be considered is whether the default imputed was one which amounted to a breach of some one of the master's non-delegable obligations, and the superior rank of the delinquent employee consequently becomes a nonessential element in the inquiry. He is viewed, that is to say, solely as the medium through which the culpable violation of duty operated to the injury of the plaintiff. In classifying the authorities, however, it is often somewhat difficult to observe the distinction here adverted to, for the reason that, where the facts are such as render it possible to conduct the investigation along either of the alternative lines thus indicated, the courts have failed to define, with as much precision as the situation demands, the standpoint from which they were examining the defendant's liability. In not a few instances, indeed, there is even room for doubting whether judges have fully appreciated the distinction and its rationale.[1] Any case in which there is any

[1] For example, in *McCosker* v. *Long Island R. Co.* (1881) 84 N. Y. 77, to sustain the ruling that no recovery could be had for the negligence of a yard master in signaling for the movement of a car at a wrong moment, there is cited *Crispin* v. *Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521. This case, as will be seen by referring to § 543, *post*, was quite inappropriate as an authority, inasmuch as a yard master was, under previous rulings of the court, unquestionably a fellow servant as to the discharge of his ordinary duties. It is ob-

uncertainty on this score will receive notice both in this and in the following chapter.

The essence of the position of a vice principal being that he represents an absent master, it occasionally follows that, "where the employer himself assumes control and gives an express order not only what to do, but how to do it, even a vice principal is bound to obey, and becomes for the time being a mere coemployee, whatever his general authority under the circumstances."[2] An analogous situation is presented where an employee who is a vice principal as being the superintendent of a main department of his master's business is at the time of the accident occupying another position of a lower grade. As long as he fills that position, it is clear that none of his acts can be those of a vice principal, unless they belong to the class of representative acts which are wholly independent of rank.[3]

Although, as will be shown below, many courts hold that a negligent act of a vice principal is not official where it has a direct connection with manual labor, it is clear that the mere fact of its being the duty of a vice principal to assist his subordinates in their work will not prevent recovery for injuries caused by negligence of a distinctly official character.[4]

servable, moreover, that, in none of the late decisions by this court (see § 543, *post*) absolving the master from liability for the defaults of supervising employees whose official position was such as to place them at least on the border line between vice principals and mere servants, is any clear statement found showing whether the tests of representative capacity recognized in *Malone* v. *Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573, and *Corcoran* v. *Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369, are still regarded as having a concurrent existence with the test supplied by the nature of the negligent act, and as being merely limited by the latter test under certain circumstances, or whether the earlier decisions are now no longer law in New York.

[2] *Provost* v. *Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88.

[3] Cases illustrating this rule must, in practice, be extremely rare, for the simple reason that officials of sufficiently high rank to be vice principals seldom discharge the duties of another distinct position in the manner here supposed. But the general principle must clearly be as stated, and it is recognized in the very recent decision of the Federal court of appeals that an engineer, in ordering his fireman to oil a turntable at a place out on the line does not act as a vice principal, although he may also be foreman of a roundhouse at a place some distance away, and, as such, possibly a representative of the company while acting in that capacity. *Briegal* v. *Southern P. Co.* (1900) 39 C. C. A. 359, 98 Fed. 958 (started the turntable). Compare also the language used in *Brick* v. *Rochester*, N. Y. & *P. R. Co.* (1885) 98 N. Y. 211, quoted in § 543, *post*.

[4] *Lake Shore & M. S. R. Co.* v. *Lavalley* (1880) 36 Ohio St. 222 (foreman of car repairers failed to protect properly a car under which he himself and one of his hands were working, the consequence being that it was struck by a moving car). Compare *Patton* v. *Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 863; *Consolidated Kansas City Smelting & Ref. Co.* v. *Peterson* (1899) 8 Kan. App. 386, 55 Pac. 673. The fact that an assistant superintendent in a lumber yard occasionally performs some services in keeping tally of the lumber does not deprive him of his character of vice principal so far as it depends on the discharge of any nonassignable duties. *Zintek* v. *Stimson Mill Co.* (1894) 9 Wash. 395, 37 Pac. 340.

540. Breach of non-delegable duties by any superior servant, master liable for.— According to the great weight of authority, the master must answer for the defaults of employees who are vice principals, under any of the doctrines developed in the three preceding subtitles, wherever the negligence complained of consists in the failure to see that only appliances which satisfy the legal standard of safety are supplied to their subordinates;[1] or that the place of work is and remains as safe as it can be made by reasonable care;[2] or that the serv

[1] *Clarke* v. *Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 805, per Byles, J. (see § 526, *ante*); *Borgman* v. *Omaha & St. L. R. Co.* (1890) 41 Fed. 667 (wreckmaster); *Lund* v. *Hersey Lumber Co.* (1890) 41 Fed. 202 (general superintendent); *Foster* v. *Passeg* (1888) 8 Houst. (Del.) 168, 11 Atl. 545 (general manager); *Colorado Mill & Elevator Co.* v. *Mitchell* (1899) 26 Colo. 284, 58 Pac. 28 (manager); *Helbish* v. *Washington & G. R. Co.* (1886) 5 Mack. 144 (departmental manager); *Lytle* v. *Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571 (yardmaster); *Mc Campbell* v. *Camrid S. S. Co.* (1893) 69 Han. 131, 23 N. Y. Supp. 477 (deck superintendent of steamship company); *Retton* v. *Fifth Ave. Transp. Co.* (1894) 6 Misc. 328, 26 N. Y. Supp. 896 (departmental manager); *Union P. R. Co.* v. *Fay* (1890) 43 Kan. 750, 23 Pac. 1039 (foreman of derrick); *Mitchell* v. *Robinson* (1881) 80 Ind. 281, 41 Am. Rep. 812 (general manager; defective hoister); *Mattise* v. *Consumers' Ice Mfg. Co.* (1894) 46 La. Ann. 1535, 16 So. 401 (boiler exploded; no accident would have occurred if it had been disconnected by the manager when it was observed to be defective); *Walton* v. *Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2 (head stevedore negligent in selecting and adjusting rigging); *Hannas* v. *Missouri P. R. Co.* (1891) 43 Mo. App. 547 (gang foreman failed to furnish necessary appliances); *Tobler* v. *Hannibal & St. J. R. Co.* (1887) 93 Mo. 79, 5 S. W. 810 (master mechanic improvised a coupling); *Taylor* v. *Missouri P. R. Co.* (1891, Mo.) 16 S. W. 206 (road master improvised a coupling); *National Fertilizer Co.* v. *Travis* (1899) 102 Tenn. 16, 49 S. W. 832 (failure of foreman to maintain appliances in safe condition); *Brannon* v. *Wabash Western R. Co.* (1891) 124 Mo. 55, 24 S. W. 731, 27 S. W. 644 (road master removed brake staffs); *Pittsburg Bridge Co.* v. *Walker* (1897) 170 Ill. 550, 18 N. E. 915 (bridge foreman dispensed with appliance necessary for safety); *The Jalo Fowler* (1892) 49 Fed. 277 (chief officer of ship furnished defective rope); *Banks* v. *Wabash Western R. Co.* (1890) 40 Mo. App. 458 (section foreman allowed hand car to become unsafe); *Clowers* v. *Wabash, St. L. & P. R. Co.* (1886) 21 Mo. App. 213 (section foreman failed to report defective hand car for repairs); *Sweeney* v. *Gulf, C. & S. F. R. Co.* (1892) 81 Tex. 133, 19 S. W. 555 (section foreman allowed hand car to become defective); *Wassau P. R. Co.* v. *James* (1888; Tex.) 10 S. W. 332 (same facts); *The* I. *Heaton* (1890) 43 Fed. 592 (captain of ship knew rope to be rotten).

In *Ushros* v. *Ingus* (1895) 61 Ill. App. 304, the trial court held to have erroneously given instructions from which it might be inferred that the foreman was a fellow servant, because the erection of a derrick was for the purpose of carrying on the same general business in which the plaintiff was engaged.

Patterson v. *Pittsburg & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412 (general manager); *Brothers* v. *Carbee* (1873) 52 Mo. 372, 14 Am. Rep. 424 (general manager); *New York, L. E. & W. R. Co.* v. *Bell* (1886) 112 Pa. 100, 4 Atl. 50 (departmental manager); *Patterson* v. *Wallace* (1851) 1 Macq. H. L. Cas. 748 (roof of mine tunnel allowed by underground manager to become unsafe); *Gallagher* v. *Piper* (1864) 16 C. B. N. S. 669, 33 L. J. C. P. N. S. 329 (see § 525, *ante*); *Lynch* v. *Hoppart* (1857) 19 Sc. Sess. Cas. 2d series, 399 (defects in scaffolding known to manager); *Walsh* v. *Centenary Church* (1876) 62 Mo. 326 (same facts); *Deacon* v. *Lukens Iron Works* (1877) 4 Mo. App. 296, (foreman furnished defective scaffold); *Heckman* v. *Hodge* (1888) 35 Fed. 253 (foreman allowed scaffold to become a pitfall); *Slater*

v. *Chapman* (1887) 7 Mich. 523, 35 N. W. 106 (foreman created pitfall by removing clay from a temporary staircase); *Mayhew* v. *Sullivan Min. Co.* (1884) 76 Me. 100 (manager created a pitfall by having hole cut in platform); *Brothers* v. *Carter* (1873) 52 Mo. 372, 14 Am. Rep. 424 (superintendent built defective false work); *Woods* v. *Lindrall* (1891) 1 C. C. A. 37, 4 U. S. App. 49, 48 Fed. 62 (foreman of construction erected an unsafe trestle); *Band of Hope & A. Consols* v. *Mackay* (1871) 2 Victorian Rep. (L.) 158 (general manager allowed mine ladder to remain insecurely fastened); *Louisville, N. A. & C. R. Co.* v. *Graham* (1890) 124 Ind. 89, 24 N. E. 668 (foreman of tunnel did not support roof adequately); *Westcdle Coal Co.* v. *Schwartz* (1898) 177 Ill. 272, 52 N. E. 276, Affirming (1897) 75 Ill. App. 468 (failure of pit boss to look after the roof of a room in a mine); *Anderson* v. *Bennett* (1888) 16 Or. 515, 19 Pac. 765 (superintendent did not make sure that all the blasts had been properly exploded before sending laborer to resume drilling); *Libby, McN. & L.* v. *Scherman* (1893) 146 Ill. 540, 34 N. E. 801, Affirming (1892) 50 Ill. App. 123 (foreman piled barrels carelessly); *Zintek* v. *Stimson Mill Co.* (1894) 9 Wash. 395, 37 Pac. 340 (assistant superintendent raised a pile of lumber on an insecure foundation); *Tissue* v. *Baltimore & O. R. Co.* (1886) 112 Pa. 91, 56 Am. Rep. 310, 3 Atl. 667 (departmental manager stored explosives dangerously close to the place of work); *Chicago Anderson Pressed Brick Co.* v. *Sobkowiak* (1889) 34 Ill. App. 312 (1894) 148 Ill. 573, 36 N. E. 572 (foreman did not secure laborer against being injured by the fall of a bank); *Thompson* v. *Chicago, M. & St. P. R. Co.* (1883) 5 McCrary, 542, 18 Fed. 239 (similar facts); *Burlington & M. River R. Co.* v. *Crockett* (1886) 19 Neb. 138, 26 N. W. 921 (no watchman stationed to give notice of danger while a bank threatened to fall); *LaSalle* v. *Kostka* (1901) 190 Ill. 130, 60 N. E. 72, Affirming (1900) 92 Ill. App. 91 (foreman did not see that sides of sewer trench were properly braced); *Hall* v. *St. Joseph Water Co.* (1891) 48 Mo. App. 356 (similar facts); *Atchison, T. & S. F. R. Co.* v. *Wilson* (1891) 1 C. C. A. 25, 4 U. S. App. 25, 48 Fed. 57 (road master constructed a defective temporary track); *Kansas City Car & Foundry Co.* v. *Scerist* (1898) 59 Kan. 778, Appx. (foreman of carpenters left a heavy beam in such a position that it fell); *Cleveland, C. C. & St. L. R. Co.* v. *Brown* (1893) 6 C. C. A. 142, 18 U. S. App. 10, 56 Fed. 804 (no proper precautions to secure servants taking down building); *Cook* v. *St. Paul, M. & M. R. Co.* (1885) 34 Minn. 45, 24 N. W. 311 (place of work not kept safe for servants ordered to clear away *débris* of a burnt building); *Northern P. R. Co.* v. *Beaton* (1894) 12 C. C. A. 301, 29 U. S. App. 88, 64 Fed. 563 (improper disposition of a derrick on a railway car); *Colorado Midland R. Co.* v. *O'Brien* (1891) 16 Colo. 219, 27 Pac. 701 (overloaded car caused derailment); *Colorado Midland R. Co.* v. *Naylon* (1892) 17 Colo. 501, 30 Pac. 249 (same facts); *Openshaw* v. *Utah & N. R. Co.* (1889) 6 Utah, 132 (defective loading of railway car by conductor); *Salem-Bedford Stone Co.* v. *O'Brien* (1898) 150 Ind. 656, 49 N. E. 457 (superintendent failed to secure wheels of "traveler" used for moving large stones).

Proof that a rule of a steel company, that molds of a certain class rounding on the bottom should be laid down, was violated by leaving such a mold standing on one end with the empty molds, and that, within twenty minutes after it was thus left standing, it fell over on an employee, is sufficient to justify a finding that the servants of such company were guilty of negligence. *Joliet Steel Co.* v. *Shields* (1893) 146 Ill. 603, 34 N. E. 1108, Affirming (1892) 45 Ill. App. 453.

It has been held that a fire boss in a coal mine, whose only power of control is to direct the men to leave a dangerous place at which they are working and go to another, even if he is a vice principal by virtue of his functions, which was denied, does not occupy that relation of vice principal toward an employee, as regards the act of opening his lamp for the purpose of lighting his pipe, after a statement by such employee that there is no gas at a place which such boss is about to test. *Morgan* v. *Carbon Hill Coal Co.* (1893) 6 Wash. 577, 34 Pac. 152, 772 (Dunbar, Ch. J., dissenting). But it is difficult to admit that this decision is correct, in view of the fact that it was the especial duty of the negligent employee to prevent miners from going to places where there were dangerous accumulations of gas.

The employer is responsible for the negligence of the superintendent of the work of loading a ship, in changing the

ants whom they control are competent for the duties to which they are assigned,[3] and sufficient in number to perform those duties without unduly endangering themselves or their coëmployees;[4] or that the place of work and the various appliances are examined at proper intervals with a view to ascertaining whether they have become abnormally dangerous from any cause;[5] or that a safe system for the conduct of the business is adopted and adhered to;[6] or that instruction and

deck crew without notifying the men in the hold, and in replacing that crew by one composed of men unacquainted with the work, the result being that one of them threw down a bale of cotton into the hold and injured the plaintiff. *Woodson* v. *Wm. Johnston & Co.* (1899) 109 Ga. 454, 34 S. E. 587.

Where a carpenter assisting in the care of electric-light towers was sent at half past three to remove a lamp and connect the wires with the circuit, and was injured by the turning on of the current while he was at work, if he had a right to believe that the current would not be turned on earlier than usual, and it was turned on that day earlier than usual, the company is liable. *Colorado Electric Co.* v. *Lubbers* (1888) 11 Colo. 505, 19 Pac. 479.

Where the foreman of the injured servant ordered him to load freight on an elevator, and, without warning him, permitted another person to remove it, and the servant backed into the elevator shaft with a load, the question whether the foreman, in allowing the removal of the elevator, acted as a vice principal or as a fellow servant was held to be for the jury. *Perras* v. *A. Booth & Co.* (1901) 82 Minn. 191, 84 N. W. 739, 85 N. W. 179.

[3] *Huntingdon & B. T. Road & Coal Co.* v. *Decker* (1877) 84 Pa. 419 (general manager employed unfit servant); *Hearn* v. *Brady* (1879) 9 Daly, 142 (superintendent selected unfit employee); *Rowland* v. *Missouri P. R. Co.* (1886) 20 Mo. App. 463 (section foreman was negligent in employing a subordinate); *Little* v. *Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571 (departmental manager retained an incompetent servant with knowledge of his unfitness); *Fraser* v. *Schroeder* (1896) 163 Ill. 459, 45 N. E. 288, Affirming (1895) 60 Ill. App. 519 (similar facts); *Ryan* v. *Los Angeles Ice & Cold Storage Co.* (1896) 112 Cal. 244, 32 L. R. A. 521, 44 Pac. 471 (manager allowed inexperienced men to do work they were unfitted for); *Louisville & N. R. Co.* v. *Moore* (1886) 83 Ky. 675 (conductor allowed fireman to operate an engine).

[4] *Mason* v. *Edison Mach. Works* (1886) 24 Blatchf. 93, 28 Fed. 228; *Stoddard* v. *St. Louis, K. C. & N. R. Co.* (1877) 65 Mo. 514.

[5] *Pantzar* v. *Tilly Foster Iron Min. Co.* (1885) 99 N. Y. 368, 2 N. E. 24 (general manager failed to inspect dangerous bank which fell); *Kansas P. R. Co.* v. *Little* (1877) 19 Kan. 267 (superintendent of construction failed to perform his duty of inspecting the machinery used, and of reporting for repair); *Baldwin* v. *St. Louis, K. & N. R. Co.* (1885) 68 Iowa, 37, 25 N. W. 918 (see extract in note 2 *infra*).

[6] *Farra* v. *Sellers* (1887) 39 La. Ann. 1011, 3 So. 363; *Chisholm* v. *Kansas City, Ft. S. & M. R. Co.* (1891) 56 Mo. App. 630; *Fraser* v. *Hand* (1889) 33 Ill. App. 153; *Richmond Granite Co.* v. *Bailey* (1896) 92 Va. 554, 24 S. E. 232 (general manager gave an order which amounted to an abrogation of a rule issued by himself); *Louisville, N. A. & C. R. Co.* v. *Heck* (1898) 151 Ind. 292, 50 N. E. 988 (division superintendent negligent in controlling the movements of trains); *Chicago, B. & Q. R. Co.* v. *McLallen* (1876) 84 Ill. 109 (similar negligence on the part of an assistant superintendent); *Bateman* v. *Peninsular R. Co.* (1898) 20 Wash. 133, 54 Pac. 996 (general superintendent did not stop a train when it was dangerous for it to proceed); *Maher* v. *Union P. D. & G. R. Co.* (1901) 45 C. C. A. 301, 106 Fed. 309 (breach of rules by conductor); *Palmer* v. *Michigan C. R. Co.* (1892) 93 Mich. 363, 17 L. R. A. 636, 53 N. W. 397 (laborers required by assistant road master to throw rails on moving cars); *East Tennessee, L. & G. R. Co.* v. *De Armond* (1887) 86 Tenn. 73, 5 S. W. 690 (telegraph operator did not display a stop signal); *Bouck* v. *Jackson Sand Mill Co.* (1899) 20 Ky. L. Rep. 1542, 49 S. W. 472 (tightening of wire rope pulled it loose from its fastenings); *Ross* v. *Collier* (1897) 75 Ill. App. 194 (superintendent ordered

warning should be given in all proper cases as to any extraordinary risks incident to the work, whether their abnormal character arises from the inexperience of the servant;[7] or from the condition of the instrumentalities.[8]

It is manifest that although, as will be seen by comparing the various memoranda of facts in the notes to this section with those appended to the citations in § 520, *ante*, and with the cases to be discussed in the next chapter, that the delinquencies falling under the categories thus indicated do not in all instances amount to breaches of a non-delegable duty in such a sense that, even if committed by a mere fellow servant, they would render the master liable, yet they are so distinctly of the same character that it would be irrational to hold them to be nonofficial when the guilty party is once conceded to be a vice principal. See, however, § 546, *infra*.[9]

men to use beam after a suggestion that it should be strengthened); *San Antonio & A. P. R. Co.* v. *McDonald* (1895; Tex. Civ. App.) 31 S. W. 72 (large timber allowed to swing against plaintiff, who had received no notice that it was about to be hoisted); *Cox* v. *Golden Tunnel Min. Co.* (1901) 24 Wash. 261, 64 Pac. 174 (superintendent of tunnel in hillside allowed rocks to be rolled down on servants who had no notice of what was about to be done); *Fremont, E. & M. Valley R. Co.* v. *Leslie* (1891) 41 Neb. 159, 59 N. W. 559 (only one man detailed to hold the guy rope of a pile driver while it was being moved); *The Transfer* (1894) 9 C. C. A. 521, 26 U. S. App. 570, 61 Fed. 364, Reversing (1893) 55 Fed. 98 (captain of ship disregarded rules as to signaling); *Criswell* v. *Pittsburgh, C. & St. L. R. Co.* (1888) 30 W. Va. 798, 6 S. E. 31 (section foreman disobeyed rule); *Gregory* v. *Ohio River R. Co.* (1893) 37 W. Va. 606, 16 S. E. 849 (similar facts).

See also §§ 541, 542, *infra*.

[7] *Missouri P. R. Co.* v. *Peregoy* (1887) 36 Kan. 424, 14 Pac. 7 (no instruction was given by a superintendent to an ignorant apprentice); *Ft. Smith Oil Co.* v. *Slover* (1893) 58 Ark. 168, 24 S. W. 100 (departmental manager); *International & G. N. R. Co.* v. *Hinzie* (1894) 82 Tex. 623, 18 S. W. 681 (foreman).

[8] As, where a departmental manager omitted to remove a blast, or warn a laborer of its presence. *McDonough* v. *Great Northern R. Co.* (1896) 15 Wash. 244, 46 Pac. 334. Where the conductor of a work train failed to see that laborers had timely notice of the danger of earthslides. *Burlington & M. River R. Co.* v. *Crockett* (1886) 19 Neb. 138, 26 N. W. 921. Where the foreman of a gravel pit failed to warn us to the danger of the fall of a bank. *Anderson* v. *Ogden Union R. & Depot Co.* (1892) 8 Utah, 128, 30 Pac. 305. Where a conductor failed to warn brakeman of the dangerous condition of a load. *Louisville & N. R. Co.* v. *Robinson* (1891) 13 Ky. L. Rep. 153, 16 S. W. 707. Where a foreman in a sugar refinery, who had ordered a laborer to shove a car through a door, failed to warn him that there was not space enough to walk between the car and the sides of the door. *Grosczewski* v. *Chicago Sugar Ref. Co.* (1899) 84 Ill. App. 583.

[9] A requested instruction to the effect that the master would not be liable for any negligence of the foreman, unless in the employment of incompetent men, or in the use of unfit machinery or appliances, is properly refused. *Baldwin* v. *St. Louis, K. & N. R. Co.* (1885) 68 Iowa, 37, 25 N. W. 918. The court said: "It may be conceded that a mere foreman, as the word 'foreman' is generally understood,—that is, as a laborer, with power to superintend the labor of those working with him, is a coemployee so far as his own mere labor is concerned. *Peterson* v. *Whitebreast Coal & Min. Co.* (1879) 50 Iowa, 673, 32 Am. Rep. 143. But the instruction is too sweeping. It could be sustained only upon the ground that there was no evidence tending to show negligence on the part of Coller, or anyone else acting as a superior. Now, as we have observed, the evidence showed that Coller

541. Issuance of orders deemed to be an official act.—The logical consequence, if not the actual effect, of some decisions referred to in § 544, *supra*, is to absolve the master even from the results of complying with the negligent order of a vice principal, where such order relates merely to the details of the work. But there is an overwhelming weight of authority to sustain the doctrine that the liability to which the master is declared to be subject wherever "the negligent act is a direct result of the exercise of power conferred by the master, in the performance of a duty devolving by law upon him"[1] is predicable in the case of orders issued in respect to the work, whatever may be the precise object to which those orders may have relation. It is, in fact, difficult to see what more indisputable example there can be of an "exercise of authority" than the giving of such orders, and for the purpose of affecting the master with liability in this instance, it is obviously quite immaterial whether the delinquent employee be a mere superior servant or a general or departmental manager. According to the great majority of the cases, therefore, all that is necessary to fix liability upon the master is that the negligent order which caused the injury should be proved to be incident to the performance of the duties of his position.[2]

The order may be a negligent one because the servant is directed to use dangerously defective appliances;[3] or to work in an abnormally dangerous place,[4] or to do work in a dangerous manner;[5] or to do

had charge of the yard. If his charge involved the duty of maintaining an inspection of the piles in reference to their security against falling upon those employed near them, he was, we think, in the performance of such duty as superior. The close question, perhaps, is as to whether his charge involved such duty; but we think that the jury might infer from the circumstances that it did. . . . We are not prepared to say, therefore, that, as a matter of law, the plaintiff was negligent in not discovering them. If he was not, it would seem to follow that a duty in that respect rested upon the defendant, to be discharged by the person in charge of the yard. Neither the expense nor difficulty of inspecting the pile appears to have been such that an exposure like the one in question should be regarded as practically unavoidable. We think that the defendant should have seen in the first place, as perhaps it did, that the piles were originally properly constructed; and if, as the evidence shows, the piles afterwards sometimes became dangerous by reason of a custom among the employees of cutting the cross-strips to enable them to take out sticks of timber, the defendant should have exercised reasonable diligence in seeing that the piles were rendered safe again by a supply of other cross-strips of proper length."

[1] Phrase used in *Pullman Palace Car Co.* v. *Laack* (1892) 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285.

[2] "The defendant ought not to escape liability for negligently issuing, as master and in the course of the performance of its duty as such to its employees, an improper order." *Hankins* v. *New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. R. A. 396, 37 N. E. 466, Reversing (1889) 55 Hun, 51, 8 N. Y. Supp. 272.

[3] *Great Northern R. Co.* v. *McLaughlin* (1895) 17 C. C. A. 330, 44 U. S. App. 200, 70 Fed. 569.

[4] *Paterson* v. *Wallace* (1854) 1 Macq. H. L. Cas. 748; *Dowling* v. *Allen* (1881) 74 Mo. 13, 41 Am. Rep 298 (1885) 88 Mo. 293. *Bradley* v. *Chicago,*

something which, under the circumstances, will render the place of work abnormally dangerous for a fellow servant.[6]

The order may also be culpable because it directs instrumentalities, suitable and safe if properly handled, to be used in a manner which any man of ordinary prudence and sagacity would understand to be likely to eventuate in disaster,[7] or because it is given in such a way

M. & St. P. R. Co. (1897) 138 Mo. 293, 39 S. W. 763; *Cox* v. *Syenite Granite Co.* (1899) 39 Mo. App. 424; *Consolidated Coal Co.* v. *Wombacher* (1890) 134 Ill. 57, 24 N. E. 627. Affirming (1889) 31 Ill. App. 288; *Pullman's Palace Car Co.* v. *Hackiey* (1893) 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. 932; *Lebanon* v. *McCoy* (1895) 12 Ind. App. 500, 40 N. E. 700; *Jones* v. *Old Dominion Cotton Mills* (1886) 82 Va. 140; *Chicago, St. P. M. & O. R. Co.* v. *Lundstrom.* (1884) 16 Neb. 254, 49 Am. Rep. 718, 20 N. W. 198; *Stuckmeyer* v. *Reed* (1893) 55 Fed. 259; *Deep Min. & Drainage Co.* v. *Fitzgerald* (1895) 21 Colo. 533, 43 Pac. 210.

It is for a jury to say whether negligence can be predicated of the act of a vice principal in setting a laborer to work upon a bench in a perpendicular wall of rock, about 15 feet below the place where other laborers had been ordered to drill holes round an unexploded blast for the purpose of blowing out the rock which held it. *Cullen* v *Norton* (1889) 52 Hun, 9, 4 N. Y. Supp. 774. The master was finally held not liable by the court of appeals ([1891] 126 N. Y. 1, 26 N. E. 905), but merely on the ground that the foreman was not a vice principal.

According to early Scotch decisions a superior servant (here the underground manager of a mine) may be a representative of the master in respect to an order exposing a subordinate to danger (*Somerville* v. *Gray* [1863] 1 Sc. Sess. Cas. 3d series, 768), while he is a fellow servant as to other operations connected with his functions as a controlling employee (*Wright* v. *Roxburgh* [1861] 2 Sc. Sess. Cas. 3rd series, 748 [caused explosion of fire damp caused by temporary interruption of ventilation]). This particular ground of distinction seems never to have been acknowledged in any of the English cases which countenanced the doctrine of vice principalship, and must, in any event, be repudiated in any court which is bound by the subsequent ruling of the House of Lords in *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, § 529, *ante*).

Evidence that a foreman struck a pile of ore, whose fall caused an injury to an employee, and profanely ordered such employee to work at the place, is sufficient to go to the jury on the question whether such conduct was or was not wanton and reckless as alleged in the declaration. *Illinois Steel Co.* v. *Schymanowski* (1896) 162 Ill. 447, 44 N. E. 876.

[6] *Thompson* v. *Hermann* (1879) 47 Wis. 602, 32 Am. Rep. 784, 3 N. W. 579; *Palmer* v. *Michigan C. R. Co.* (1892) 93 Mich. 363, 17 L. R. A. 636, 53 N. W. 397; *Proctor* v. *Missouri, K. & T. R. Co.* (1890) 42 Mo. App. 121 (disposition of rails which were being loaded); *Foster* v. *Missouri P. R. Co.* (1893) 115 Mo. 165, 21 S. W. 916 (same facts); *Foster* v. *Clark* (1884) 15 Ill. App. 470 (direction to remove obstruction from a planing machine without stopping it); *Illinois C. R. Co.* v. *Johnson* (1900) 95 Ill. App. 54, Judgment Affirmed in 61 N. E. 334 (direction to make a "running switch"); *Stahl* v. *Duluth* (1898) 71 Minn. 341, 74 N. W. 143 (employee ordered to pick round a hole where there was an unexploded charge of dynamite); *Gormly* v. *Vulcan Iron Works* (1876) 61 Mo. 492 (order to apply fire to an oven in a manner calculated to cause an explosion); *Keating* v. *Pacific Steam Whaling Co.* (1899) 21 Wash. 415, 58 Pac. 224 (furling of sails).

[7] *Augusta* v. *Owens* (1900) 111 Ga. 464, 36 S. E. 830.

[7] The most frequent illustrations of such orders are furnished by the cases in which conductors and other employees having the control of railway cars manage them so as to cause injury. *Chicago, M. & St. P. R. Co.* v. *Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184; *Union P. R. Co.* v. *Callaghan* (1893) 6 C. C. A. 205, 12 U. S. App. 541, 56 Fed. 988; *Northern P. R. Co.* v. *Carnaugh* (1892) 2 C. C. A. 358, 10 U. S. App. 197, 51 Fed. 517; *Canadian P. R Co.* v. *Johnston* (1894) 25 L. R. A. 470, 9 C. C. A. 587, 26 U.

S. App. 85, 61 Fed. 738; *Northern P. R. Co.* v. *Poirier* (1895) 15 C. C. A. 52, 29 U. S. App. 583, 67 Fed. 881; *Missouri P. R. Co.* v. *Texas & P. R. Co.* (1889) 38 Fed. 816; *Northern P. R. Co.* v. *Smith* (1894) 8 C. C. A. 663, 15 U. S. App. 294, 59 Fed. 993; *Ragsdale* v. *Northern P. R. Co.* (1889) 42 Fed. 383; *Lake Shore & M. S. R. Co.* v. *Knittal* (1878) 33 Ohio St. 468; *Clark* v. *Hughes* (1897) 51 Neb. 780, 71 N. W. 776; *Little Miami R. Co.* v. *Stevens* (1851) 20 Ohio, 415; *Cleveland, C. & C. R. Co.* v. *Keary* (1854) 3 Ohio St. 201; *Illinois C. R. Co.* v. *Spence* (1893) 93 Tenn. 173, 23 S. W. 211; *Miller* v. *Missouri P. R. Co.* (1891) 109 Mo. 350, 19 S. W. 58; *Spencer* v. *Brooks* (1895) 97 Ga. 631, 25 S. E. 480; *Wilson* v. *Louisiana & N. W. R. Co.* (1899) 51 La. Ann. 1133, 25 So. 961; *Van Inbury* v. *Vicksburg, S. & P. R. Co.* (1885) 37 La. Ann. 650, 55 Am. Rep. 517; *Walker* v. *Gillett* (1898) 59 Kan. 214, 52 Pac. 442; *Ritt* v. *Louisville & N. R. Co.* (1887) 9 Ky. L. Rep. 307, 4 S. W. 798; *Newport News & M. Valley Co.* v. *Dentzel* (1890) 91 Ky. 42, 14 S. W. 958; *Greer* v. *Louisville & N. R. Co.* (1893) 94 Ky. 169, 21 S. W. 649; *Louisville & N. R. Co.* v. *Wallingford* (1893) 15 Ky. L. Rep. 170, 22 S. W. 439; *Newport News & M. Valley Co.* v. *Carroll* (1895) 17 Ky. L. Rep. 374, 31 S. W. 132; *Chicago, B. & Q. R. Co.* v. *Blank* (1887) 24 Ill. App. 438; *Ayers* v. *Richmond & D. R. Co.* (1888) 84 Va. 679, 5 S. E. 582; *Purcell* v. *Southern R. Co.* (1896) 119 N. C. 728, 26 S. E. 161; *Mason* v. *Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 815, 16 S. E. 698; *Shadd* v. *Georgia, C. & N. R. Co.* (1895) 116 N. C. 968, 21 S. E. 554; *Haney* v. *Pittsburgh, C. C. & St. L. R. Co.* (1893) 38 W. Va. 570, 18 S. E. 748; *Madden* v. *Chesapeake & O. R. Co.* (1886) 28 W. Va. 610, 57 Am. Rep. 695; *Daniel* v. *Chesapeake & O. R. Co.* (1892) 36 W. Va. 397, 16 L. R. A. 383, 15 S. E. 162; *Louisville & N. R. Co.* v. *Hawkins* (1899) 21 Ky. L. Rep. 354, 51 S. W. 426; *East Tennessee & W. N. C. R. Co.* v. *Collins* (1886) 85 Tenn. 227, 1 S. W. 883; *Kirk* v. *Atlanta & C. Air-Line R. Co.* (1886) 94 N. C. 625, 55 Am. Rep. 621; *Hardy* v. *Minneapolis & St. L. R. Co.* (1888) 36 Fed. 657; *Norris* v. *Illinois C. R. Co.* (1899) 88 Ill. App. 614; *Armstrong* v. *Oregon Short-Line & U. N. R. Co.* (1893) 8 Utah, 420, 32 Pac. 693; *Nall* v. *Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 260, 28 N. E. 183, 611; *Chicago & A. R. Co.* v. *May* (1884) 108 Ill. 288.

In *Chicago, R. I. & P. R. Co.* v. *Touhy* (1887) 26 Ill. App. 99, it was held that a yard master, in giving a signal to an engineer that a public crossing was clear of teams and might be blocked by backing some cars, was not acting as a representative of the company in the same sense that he would have been if he had issued a peremptory command, and that the company was therefore not liable for an injury received by a switchman through being crushed between a moving and a stationary car. But the distinction thus implied seems to be of very dubious correctness.

The negligent management of hand cars by section foremen and other employees controlling them is another analogous instance of official culpability. *Schroeder* v. *Chicago & A. R. Co.* (1891) 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094; *McDermott* v. *Hannibal & St. J. R. Co.* (1885) 87 Mo. 285; *Woodward Iron Co.* v. *Andrews* (1896) 114 Ala. 213, 21 So. 440; *Louisville & N. R. Co.* v. *Bass* (1897) 19 Ky. L. Rep. 1474, 43 S. W. 363; *St. Louis, I. M. & S. R. Co.* v. *Rickman* (1898) 65 Ark. 138, 45 S. W. 56; *Alabama Mineral R. Co.* v. *Jones* (1896) 114 Ala. 519, 21 So. 507 (1898) 121 Ala. 113, 25 So. 814; *Gann* v. *Nashville, C. & St. L. R. Co.* (1898) 101 Tenn. 381, 47 S. W. 493; *Johnson* v. *Southern R. Co.* (1898) 122 N. C. 955, 29 S. E. 784; *Louisville & N. R. Co.* v. *Bass* (1897) 19 Ky. L. Rep. 1474, 43 S. W. 463; *Chicago & A. R. Co.* v. *Goltz* (1897) 71 Ill. App. 414.

Similar official acts of negligence are the omission to station a lookout at the proper place on board a ship. (*The Titan* [1885] 23 Blatchf. 177, 23 Fed. 413); and an order to use a push-car for the improper purpose of transportation (*Miller* v. *Union P. R. Co.* [1883] 5 McCrary, 300, 17 Fed. 67).

See also, as illustrating the general principle in the text: *Chattanooga Electric R. Co.* v. *Lawson* (1898) 101 Tenn. 406, 47 S. W. 489; *Leiter* v. *Kinnare* (1896) 68 Ill. App. 558; *Lloyd* v. *St. Louis & S. F. R. Co.* (1893) 58 Ark. 66, 22 S. W. 1089; *Denver, S. P. & P. R. Co.* v. *Driscoll* (1889) 12 Colo. 520, 21 Pac. 708; *Chicago Dredging & Dock Co.* v. *McMahon* (1888) 30 Ill. App. 358; *West Chicago Street R. Co.* v. *Dwyer* (1894) 57 Ill. App. 440; *McCarthy* v. *Chicago, R. I. & P. R. Co.* (1891) 83 Iowa, 485, 50 N.

that, under the circumstances, it is likely to confuse the workman receiving it, and thus render him less capable of protecting himself;[8] or because it has the effect of throwing the workman off his guard when some transitory danger is approaching.[9]

It is scarcely necessary to cite authorities to the point that an order within the meaning of the general rule may be given by word of mouth, or by any other means of communication which may be appropriate or convenient.[10] It is also clear that the entire omission to give any orders at all, when the occasion demands it, is as culpable as the actual giving of improper orders.[11]

One who acts as vice principal in an emergency, in selecting men, machinery, and a place to work, does not become a fellow servant immediately upon beginning the work, with all suitable agencies provided therefor, but continues a vice principal in directing the movements of the individual employees.[12]

W. 21; *Herriman* v. *Chicago & A. R. Co.* (1887) 27 Mo. App. 435; *Logan* v. *North Carolina R. Co.* (1895) 116 N. C. 940, 21 S. E. 959; *Patton* v. *Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 863; *Stephens* v. *Hannibal & St. J. R. Co.* (1885) 86 Mo. 221 (1888) 96 Mo. 207, 9 S. W. 589; *Ramsay* v. *Quinn* (1874) Ir. Rep. 8 C. L. 322.

[8] *Coyne* v. *Union P. R. Co.* (1889) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382.

[9] As, where an assistant road master ordered a laborer to continue working on a car when an engine was close at hand. *Harrison* v. *Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034.

[10] *Cox* v. *Sycnite Granite Co.* (1890) 39 Mo. App. 424; *Louisville & N. R. Co.* v. *Hurst* (1892) 14 Ky. L. Rep. 632, 20 S. W. 817; *Hoke* v. *St. Louis, K. & N. R. Co.* (1885) 88 Mo. 360, Reversing (1882) 11 Mo. App. 574 (road master, while directing the removal of a wreck, gave a wrong signal to an engineer, and so caused injury to a laborer); *Spencer* v. *Brooks* (1895) 97 Ga. 681, 25 S. E. 480 (conductor signaled engineer to back a car prematurely, so that plaintiff was crushed); *Devine* v. *Boston & L. R. Co.* (1893) 159 Mass. 348, 34 N. E. 539 (failure of conductor to give the stop motion at the proper time to an engineer who was running cars on to a siding). Compare also § 424, *ante*.

[11] *Gerrish* v. *New Haven Ice Co.* (1893) 63 Conn. 9, 27 Atl. 235 (manager did not take steps to prevent plaintiff from being injured by the sudden starting of machinery); *Brown* v. *Sennett* (1885) 68 Cal. 225, 58 Am. Rep. 9 Pac. 74 (head stevedore failed to signal engineer to stop the machinery when an overloaded bucket of coal was swinging dangerously).

[12] *Nall* v. *Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 260, 268, 28 N. E. 183, 611. The court said: "Counsel err in assuming that when Helms pointed out to the assembled employees the imperiled bridge and the accumulated drift and *débris* which threatened it, he had completed the work of selecting the place to work. As above stated, within their several departments each man knows, or should know, in a general way at least, what duties are required of him, and how, when, and where to use the appliances provided; but at such a time and in such an emergency as that described in the complaint there must be an intelligent directing head to assign to the men their places and direct them what to do; to direct what appliances shall be used, and when, where, and how they shall be used. This intelligent and directing head must be the master. And he to whom the master delegates such duty acts as the master, who cannot escape responsibility by having another act in his stead. Therefore, when Helms ordered the decedent to go down among the driftwood, and directed him what he should do there, he was still acting as vice principal, and was furnishing to decedent his place to work."

Intimately connected with negligence in issuing orders is that which consists in assuring a servant that there is no danger to be feared, when, as a matter of fact, the superior giving the assurance knows or ought to know that his statement is not true. The liability of the master under this head is fully treated in chapter XXIV, *ante*.

542. Failure to protect subordinates from transitory dangers deemed to be official negligence.—The courts, as a whole, require the master to answer for the negligence of a vice principal whenever the default complained of consists in the omission to take such precautions as a prudent man would, under the circumstances, have taken for the purpose of protecting the injured subordinate against some peril of the transitory class, against which he had no adequate means of guarding himself.[1]

[1] It has often been held or assumed that employees controlling workmen whose duties require them to be in places where they may be struck by moving railway cars are acting in their representative capacity when they do not adopt means for preventing the cars from reaching the place where the work is going on, or for giving the workmen due warning, at all events, of the approach. Cases where injured car repairers have been allowed to recover on this ground are the following: *St. Louis, A. & T. R. Co.* v. *Triplett* (1891) 51 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266; *Stucke* v. *Orleans R. Co.* (1898) 50 La. Ann. 172, 23 So. 342; *Moore* v. *Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588; *Renfro* v. *Chicago, R. I. & P. R. Co.* (1885) 86 Mo. 302; *Lake Shore & M. S. R. Co.* v. *Lavalley* (1880) 36 Ohio St. 221; *Missouri P. R. Co.* v. *Williams* (1889) 75 Tex. 4, 12 S. W. 835; *Chicago, B. & Q. R. Co.* v. *Sullivan* (1889) 27 Neb. 673, 43 N. W. 415; *St. Louis, A. & T. H. R. Co.* v. *Holman* (1894) 53 Ill. App. 617; *Hannibal & St. J. R. Co.* v. *Fox* (1884) 31 Kan. 586, 3 Pac. 320.

The duty of a section foreman to protect his subordinates from moving trains is also recognized as official in several cases. *Torian* v. *Richmond & A. R. Co.* (1887) 84 Va. 192, 4 S. E. 339; *Chicago, St. L. & P. R. Co.* v. *Gross* (1889) 35 Ill. App. 178. Affirmed in (1890) 133 Ill. 37, 24 N. E. 563; *St. Louis, I. M. & S. R. Co.* v. *Rickman* (1898) 65 Ark. 138, 45 S. W. 56.

In *Hannibal & St. J. R. Co.* v. *Fox* (1884) 31 Kan. 586, 3 Pac. 320, the court, in holding the company liable for the negligence of a foreman of car repairers, said: "He was not only the foreman to direct the work of his subordinates, but he was the person above all others to provide that they had a reasonably safe place at which to work; and while he was present, overseeing their work, upon him devolved the duty of using ordinary care and diligence to prevent them from being injured, mangled, or crushed by other trains or cars moving the one under which he had placed them. It is immaterial, therefore, whether Lovell be called superintendent, middleman, boss repairer, or foreman. The duty devolved upon him to direct his subordinates to work in a peculiarly dangerous place, where by the exercise of reasonable care they could not protect themselves from approaching trains of cars; and under such circumstances the duty devolved upon him, as the representative of the company, to protect his subordinates, while at work, from the switching of cars and the making up of trains on the same track. He failed to perform his duty. For his negligence in this respect the company is liable. The latter cannot in this matter interpose between itself and Fox, who has been injured without fault on his part, the personal responsibility of Lovell, who in exercising the company's authority has violated the duty he owed, as well to Fox as to the company."

A foreman who orders a workman to get into an open coal car boarded up at the sides about 48 inches, and to pile ties thrown from the outside, places him in a position in which at times he cannot possibly see what is done by the men who are loading the ties, and is therefore bound to adopt some appropriate precaution to guard against the risk of

The duty to prevent the happening of the occurrence which would expose the servant to such a peril, or, if that is not possible, to give such warning as will enable him to remove his person out of the zone of danger in time to avoid injury, may well be regarded as a form of the nonassignable duty to furnish and maintain a safe place of work.[2] It is true that the weight of authority is against pressing this theory to such an extent as to hold a mere servant to be a vice principal solely for the reason that he was appointed to look out for the apprehended peril and take appropriate steps to prevent its producing injury.[3] But the negation of liability in this regard clearly does not involve the consequence that one who is a vice principal by virtue of his position as a superior official ceases to be a vice principal while he is discharging the duty in question, any more than the acceptance of the doctrine which prevails in most courts, that the mere possession of a power of control does not constitute an employee a vice principal, necessitates the conclusion that such a vice principal

his being struck by a tie. *Claybaugh* v. *Kansas City, Ft. S. & M. R. Co.* (1894) 56 Mo. App. 630.

See also *Illinois C. R. Co.* v. *Gilbert* (1895) 157 Ill. 354, 41 N. E. 724 (servant's work was taking wheels across tracks where trains were passing every few minutes).

Other cases which illustrate the general rule in the text are the following: *McLean* v. *Blue Point Guard Min. Co.* (1876) 51 Cal. 255 (foreman of mine failed to notify workman that a blast was about to be let off). *Johnson* v. *Richmond & A. R. Co.* (1888) 84 Va. 713, 5 S. E. 707 (conductor failed to station himself where he could control the movements of the cars so as to avoid injuring a brakeman ordered to couple); *Kewanee Boiler Co.* v. *Erickson* (1898) 78 Ill. App. 35 (superintendent allowed steam to be let into a boiler which plaintiff was repairing); *Wabash, St. L. & P. R. Co.* v. *Hack* (1887) 121 Ill. 259, 12 N. E. 253 (floor of wrecked car, being insecurely propped, fell); *Alaska Treadwell Gold Min. Co.* v. *Whelan* (1901) 12 C. C. A. 225, 29 U. S. App. 1, 61 Fed. 462 (night boss in mine failed to warn workman that chute was about to be opened; reversed in [1897] 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40, solely on the ground that the negligent servant was a mere gang foreman); *Hoosier Stone Co.* v. *McCain* (1892) 133 Ind. 231, 31 N. E. 956 (manager of quarry allowed insufficient blocked cars to be started on an incline by the impact of others); *Wills* v. *Cape Girardeau S. & R. Co.* (1891) 44 Mo. App. 51 (superintendent negligently ordered an engine to be moved while the plaintiff was at a certain place); *Richmond Granite Co.* v. *Bailey* (1896) 92 Va. 551, 24 S. E. 222 (foreman in quarry failed to warn subordinate that a cable was about to be tightened); *Augusta* v. *Owens* (1900) 111 Ga. 461, 36 S. E. 831 (orders given to fellow servant without warning plaintiff); *Kirk* v. *Senzig* (1898) 79 Ill. App. 251 (foreman failed to warn elevator man of presence of another workman in the shaft).

See also the cases cited in note 11 to the last section and also those in note 7, which deals with the management of railway and hand cars most of which may be referred to the principle now under discussion, as well as to the conception of negligence in giving orders.

[2] See the language used by the court in *Alaska Treadwell Gold Min. Co.* v. *Whelan* (1901) 12 C. C. A. 225, 29 U. S. App. 1, 61 Fed. 462 (Reversed in Supreme Court, but merely on the ground that the superior servant was not a departmental manager); *St. Louis, A. & T. R. Co.* v. *Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266.

[3] See § 580, *post*.

does not represent the master as respects the orders which he issues to his subordinates.

543. Theory that a vice principal does not represent the master except in so far as he is discharging some non-delegable duty.—An examination of the cases cited in this and the following sections will show that many of the courts have practically committed themselves to the adoption of a principle which, if carried to logical conclusions, would prevent recovery wherever the negligence of the delinquent vice principal did not amount to a breach of one of those personal duties of the master which are non-delegable in the sense that any servant intrusted with their performance represents the master *ad hac vice*.[1] Since none of the courts, apart from those which apply the superior servant doctrine, predicate nonassignability with regard to the duty of giving orders, it is clear that the acceptance of such a rule in its entirety involves the consequence that, even in giving orders, a vice principal does not always act in a representative capacity. From this consequence, as will be seen from the decisions cited below, some judges have not shrunk, though, upon any reasonable theory of the relations of a vice principal to his subordinates and to the common employer, it is difficult to see how such a doctrine can be justified. See the remarks in § 547, *infra*.[2]

In *Dayharsh* v. *Hannibal & St. J. R. Co.* (1890) 103 Mo. 570, 15 S. W. 554, the ground seems to be distinctly taken that the boss of a roundhouse, in directing where the engines are to be placed, is performing the employer's nonassignable duty to see that the servants doing the work of the roundhouse are not exposed to any extraordinary risks from the insecurity of the place of work, and is therefore a vice principal. The case shows how readily one line of argument in this class of cases may run into another; but the true rationale of the decision is probably that the negligence was an official default of a vice principal, which the delinquent certainly was under the rulings of this court.

[1] In a case where a bridge superintendent pushed a piece of timber over the edge of a pit, so that it fell on a laborer, an instruction that the employer is answerable to all the underservants for the negligence of a vice principal, either in his personal conduct within the scope of his employment, or in his selection of other servants, was held erroneous, faulty, as failing to distinguish between acts done in the performance of the master's duty to the servant, and acts done in discharge of a duty which the master might properly commit to another without liability for negligence. An employer, it was declared, is liable for the negligence of a vice principal only when the latter is engaged in the performance of some of the employer's personal duties. *Scott* v. *Chicago G. W. R. Co.* (1901) 113 Iowa, 381, 85 N. W. 631.

[2] Recovery was denied in *The Queen* (1889) 40 Fed. 694 (collision caused by the negligence of the master of a ship having too long a hawser, in omitting to give signals in a dense fog); *Olson* v. *Oregon Coal & Nav. Co.* (1899) 96 Fed. 109 (master of ship omitted to have the cover placed over a hatch), laying down the general rule that the master was a fellow servant of his crew in regard to all matters pertaining to the navigation of his ship; *Jackson* v. *Norfolk & W. R. Co.* (1897) 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258 (conductor was negligent in waving to engineer to back up a car;—conductor assumed to be, for the purposes of this statement, a vice principal, though this was denied; see chapter XXX., *post*); *Garland* v. *Missouri, K. & T. R. Co.*

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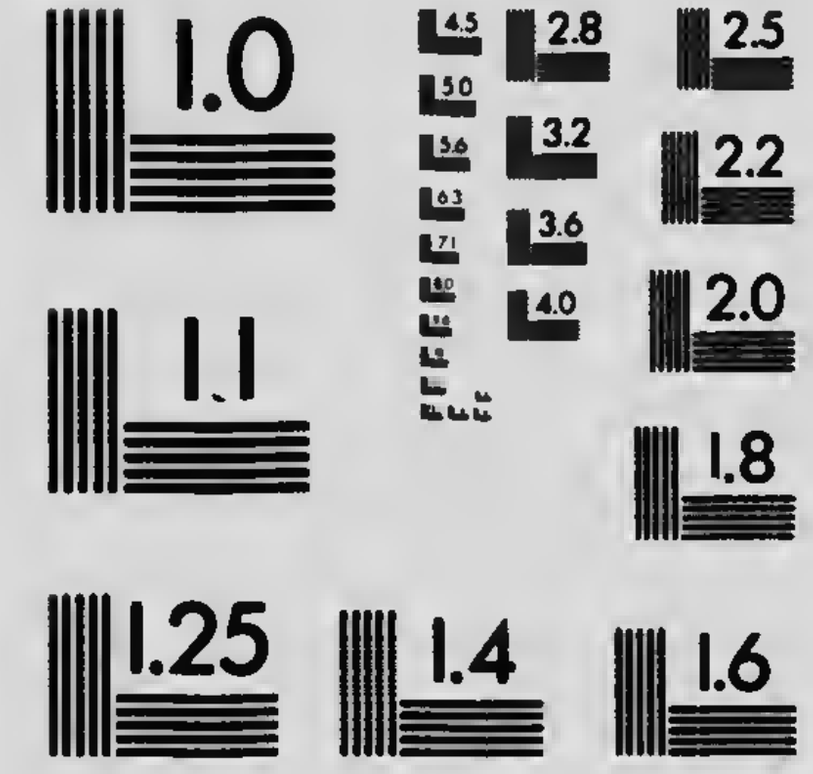

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It is especially difficult to see any rational ground on which it can be maintained, as has been done in one case, that the official character

(1900) 85 Mo. App. 579 (foreman of switching crew held not to represent the company when transmitting a signal, according to the usual practice, from a switchman who was making a coupling, to the engineer).

In *Brick* v. *Rochester, N. Y. & P. R. Co.* (1885) 98 N. Y. 211, the plaintiff, a laborer on a repair train, was injured through a derailment caused by a crossing which was not kept properly cleaned. It was held that the company could not be made liable on the theory that the general foreman of the repairs on the old road, which was under reconstruction, was a vice principal as regards the negligence in question, though he might be such as regards the nonperformance of other functions in connection with the system of the defendant as a whole. After declaring that a conclusive bar to the action was supplied by the plaintiff's implied assumption of the special risks incident to the work of repairing an old road, the court proceeded thus: "More especially is such the case when the individual who had charge of the construction train and the reconstruction of the road was chargeable with negligence in performing such work as was necessary to keep the track in good condition. In the capacity in which he acted, he was only a fellow servant, and for his negligence the defendant was not responsible according to well-settled rules of law. The fact that Thompson had imposed upon him larger duties, embracing the reconstruction of the entire road, does not alter his relation here, and it is sufficient to say that at this time he was acting as foreman or superintendent of a number of men employed by the company to repair its old road, and was on the construction train for that purpose. He thus became and was a coemployee with the others who were there, and was not relieved from responsibility because he had other and more important duties to perform outside of those in which he was specifically engaged. Even if Thompson may have been regarded as representing the master in some respects in reference to the road generally, the duties he was at this time performing were those of a fellow servant, and not of the master; and hence, if he was chargeable with negligence, it was that of a fellow servant, and not of the master, within the principle of well-considered cases. *Crispin* v. *Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521; *McCosker* v. *Long Island R. Co.* (1881) 84 N. Y. 77."

In *Hussey* v. *Coger* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556, the delinquent employee was the superintendent in full control of the work of repairing a steamer, and the plaintiff was a workman whose injury resulted from the improper method adopted for removing the covering of one of the hatches. This case belongs more properly to the following section, but in the present connection it is worth while to quote the following passage from the opinion, which is sufficiently general in its language to commit the court to a doctrine of the scope mentioned in the text, if the superintendent is assumed to be a vice principal: "Assuming that this evidence presented a question of fact for the jury, and that it might properly find that no signal was given, yet the duty of giving the caution necessarily belonged to those engaged in executing the work, and not to the master. It pertained purely to the mode of execution, and rested upon those who were engaged in its performance and were well informed of the customary usage in respect thereto. It was no part of the duty of the master to remove hatches or direct the particular mode of doing so, any more than to direct workmen in the use of the tools with which they performed their work. There were customary and established modes of performing such services, and each employee was expected to do his work in the manner and style to which he was accustomed, without special directions in respect thereto. It was entirely immaterial whether the superintendent undertook to perform the work of removing hatches, or ordered it to be done by others; he was, in either case, engaged in performing the duty of a workman."

The language used in *Hankins* v. *New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. R. A. 396, 37 N. E. 466 (quoted in § 541, *supra*, is, so far as it goes, an authority against the extreme doctrine which would thus absolve an employer from liability for a negligent order given by a vice principal within the scope of his authority. But the remark was made with respect to a train despatcher, the very essence of whose

of a vice principal is suspended so completely by his mere participation in the work which is being done, that a command given during the period of such suspension is not deemed to be given in his representative capacity.[3]

544. Theory that a vice principal does not act as the master's representative when he engages in manual labor.—A large number of decisions proceed upon the theory that a superior employee, although he may be a vice principal by virtue of his official rank, does not represent the master as to any purely manual acts which he may do while engaged in manual labor. Or to put the matter in another form, the defense of common employment is allowed to prevail if the fact of the negligent servant's superiority was not one of the actual evidential elements involved, that is to say, if the injury might as well have happened, even though he was not superior;[1] or, as it is also expressed, if the negligence complained of consisted of some act or omission of a vice principal "which relates to his duties as a colaborer with those under his control, and which might just as readily have happened with one of them having no such authority," the master will not be liable.[2]

functions is to issue orders of a certain description, and not with respect to a general manager.

[3] *Klochinski* v. *Shores Lumber Co.* (1896) 93 Wis. 417, 67 N. W. 934 (superintendent of lumber company was helping to roll logs when he gave the order which caused the injury). This decision is directly opposed to that in *Hardy* v. *Minneapolis & St. L. R. Co.* (1888) 36 Fed. 657 (§ 545, note 2, *infra*).

In *Meyer* v. *Illinois C. R. Co.* (1899) 177 Ill. 591, 52 N. E. 848 (fireman cannot recover for injuries caused by conductor's failure to have brakes set in time to enable his train to be side tracked, as ordered by the train despatcher), the court said: "The accident did not occur on account of the conductor's exercise of any authority over the appellant, which appellant, by virtue of his inferior position, was bound to obey under penalty of discharge; but the accident resulting from the negligence, if any, was one that might have happened if any other person than the conductor had been intrusted with simply running the train and setting the brakes in connection with the fireman and others, without any control over the fireman. The negligence was, then, that of a fellow servant, done in the performance of a fellow servant's duty, so far as the evidence shows." This case is not easy to reconcile with those cited in § 545, note 1, *infra*.

[1] *Mann* v. *Oriental Print Works* (1875) 11 R. I. 152.

[2] *Chicago & A. R. Co.* v. *May* (1884) 108 Ill. 288; *Fitzgerald* v. *Honkomp* (1892) 44 Ill. App. 365.

"If a superior undertakes to do the work of a fellow servant, and puts himself in the place to do the work of a fellow servant, he becomes one as to that particular work; and his negligence in such case is that of a fellow servant, and not that of a vice principal, although he is a vice principal generally." *Gann* v. *Nashville, C. & St. L. R. Co.* (1898) 101 Tenn. 380, 47 S. W. 493.

The leading case on this doctrine is *Crispin* v. *Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521, where the plaintiff was injured by the negligence of the managing representative of a nonresident owner of iron work in letting steam into a cylinder and so starting machinery, and was held not entitled to recover by the majority of the court, which laid down the general rule that "a superintendent of a factory, although having power to employ men or represent the master in other respects, is, in the management of the machinery, a fel-

545. Qualifications of this theory.— The courts which apply the rule stated in the last section have conceded it to be subject to some limitations.

Under the doctrines of legal causation, as generally accepted, it is

low servant of the other operatives." For a criticism of this case see § 547, *infra*.

Reed v. *Stockmeyer* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186, Affirming, on this point (1893) 55 Fed. 259, the court argues thus: "In ordering the plaintiff to work below the stone which was being quarried, the foreman was performing an act pertaining to the duties of a master; but no injury arose from the plaintiff's obedience to this order. Nor was the dry seam in the stone the proximate cause of the injury. The proximate cause of the injury was the careless and negligent acts of the foreman in pounding and prying on the stone in attempting to remove it from its bed. The quarrying of the stone and its removal from its bed pertained to the duties of a servant, and not to those of a master. The injury was the proximate result of the careless and negligent acts of the foreman which pertained to his duties as a servant, and not to the improper performance of those duties which pertained to the defendant as master."

A complaint is demurrable which alleges an injury caused by a local "agent and manager" of an express company through the manner in which he drove a wagon which it was the plaintiff's duty to load and unload. *Dwyer* v. *American Exp. Co.* (1882) 55 Wis. 453, 13 N. W. 471. The court said: "If the complaint had alleged facts showing that Colvin was in fact the vice principal of the defendant, and authorized and empowered to do all acts at the city of Oshkosh which the company was authorized to do, there would still remain the disputed question whether the company would be liable to the plaintiff for the negligence of such agent when in fact employed in the same work with the plaintiff. If the agent or manager had full power to act for the company at Oshkosh in all matters pertaining to its business there, and was also required to act as driver of the team in transporting goods, etc., to and from the office to the depots, the authorities are somewhat in conflict whether he would not be held as the plaintiff's coemployee while so engaged, notwithstanding his ample authority in other respects, and whether, for his negligence in the capacity of driver, the company might not claim exemption from liability on the ground that the injury resulted from the negligence of a coemployee."

An instruction in an action by an employee for injuries sustained, that, if one P. was foreman of a certain department, with power to employ and discharge plaintiff, he was not a fellow servant of such plaintiff, is erroneous, where P. was helping plaintiff at the time of the accident. *Southern R. Co.* v. *Mauzy* (1900) 98 Va. 692, 37 S. E. 285. See also the following cases, in which acts specified in the memoranda appended to the citations were held not to have been done by the vice principals in their representative capacity: *Gall* v. *Beckstein* (1898) 173 Ill. 187, 50 N. E. 711, Affirming (1897) 69 Ill. App. 616 (foreman assisted subordinates to lift a barrel); *Meeker* v. *C. R. Remington & Son Co.* (1900) 53 App. Div. 592 65 N. Y. Supp. 1116 (superintendent opened a valve while testing some new steampipes;—on second appeal, a decision was rendered in the servant's favor, on the ground of a breach of the nondelegable duty to furnish a safe place of work; see § 568, *post*); *Taylor* v. *Evansville & T. H. R. Co.* (1889) 121 Ind. 124, 6 L. R. A. 584, 22 N. E. 876 (general superintendent helping a laborer to load a rail, example given *arguendo*); *Deep Min. & Drainage Co.* v. *Fitzgerald* (1895) 21 Colo. 533, 43 Pac. 210 (superintendent of the work of sinking a shaft undertook to work a sand pump to clean out a "misse" hole in a mine); *Drinkout* v. *Eagle Mach. Works* (1883) 90 Ind. 423 (superintendent of foundry department of machine works acts as a servant in preparing the flasks for the making of the castings); *American Teleph. & Teleg. Co.* v. *Bower* (1897) 20 Ind. App. 32, 49 N. E. 182 (foreman held to have acted not as a vice principal when he climbed a telegraph pole and loosened the wires, thus causing several poles standing in unfilled trenches to fall); *Solom Stone & Lime Co.* v. *Chastain* (1893) 9 Ind. App. 453, 36 N. E. 910 (superintendent of quarry pried off a part of a stone, so

clear that a master cannot be allowed to escape liability where the official and the nonofficial acts were so closely associated and inter-

that a laborer was crushed); *St. Louis, A. & T. R. Co.* v. *Torrey* (1893) 58 Ark. 217, 24 S. W. 244 (foreman of bridge construction acts as mere servant in wrapping the rope of a block and tackle around the brace of the bridge to take it out of the way of a passing engine; here the engine cab caught the rope and flung the block against plaintiff); *Ricks* v. *Flynn* (1900) 196 Pa. 263, 46 Atl. 360 (foreman of crew constructing a wall, even if a vice principal, acts as a mere servant in hooking the tongs into a hole drilled in a large stone which was being lifted by a derrick); *Chicago & A. R. Co.* v. *May* (1884) 108 Ill. 288 (section foreman working with his gang and negligently striking one of them; example mentioned *arguendo*); *Illinois C. R. Co.* v. *Swisher* (1895) 61 Ill. App. 611 (negligence of engineer caused a train to run off the track and injured fireman); *Clay* v. *Chicago, B. & Q. R. Co.* (1894) 56 Ill. App. 235 (hostler negligently started engine while his helper was underneath in the ash pit, cleaning out the ashes); *Chicago & W. I. R. Co.* v. *Massig* (1893) 50 Ill. App. 666 (hostler at a roundhouse, and his helper in caring for locomotives, are fellow servants in respect to injuries to the latter from the running of a locomotive upon his foot placed upon or inside the rail); *Nashville, C. & St. L. R. Co.* v. *Handman* (1884) 13 Lea, 423 (boiler exploded, because engineer was not at his post as he should have been under the rules, and injured the fireman. *Held*, that the engineer did not stand in the place of the master, so far as the particular negligence in question was concerned, for the performance of any duty which, under the law, the master was bound to perform for the protection of the servant); *Allen* v. *Goodwin* (1893) 92 Tenn. 385, 21 S. W. 760 (heavy iron pipe dropped by foreman); *Deep Min. & Drainage Co.* v. *Fitzgerald* (1895) 21 Colo. 533, 43 Pac. 210 (handling brakes or coupling cars; example given *arguendo*); *Sontar* v. *Minneapolis International Electric Co.* (1897) 68 Minn. 18, 70 N. W. 796 (superintendent handed workman a box to enable him to reach a point above his head. See, however, *O'Neill* v. *Great Northern R. Co.* [1900; Minn.] 82 N. W. 1086, the effect of which is stated in § 547, note 11, *infra*); *Indianapolis & St. L. R. Co.* v. *Johnson* (1885) 102 Ind. 352, 26 N. E. 200 (in discussion of sufficiency of complaint; negligence alleged was in regard to loading of cars); *Great Northern R. Co.* v. *McLaughlin* (1895) 17 C. C. A. 330, 44 U. S. App. 189, 70 Fed. 669 (selection and placing of skids for loading a car, and assisting in the work afterwards); *Saygeard* v. *Carlson* (1890) 1 Wash. 29, 23 Pac. 830 (foreman of mill deemed to be a fellow servant of the hands while actually engaged in sawing); *Gann* v. *Nashville, C. & St. L. R. Co.* (1898) 101 Tenn. 389, 47 S. W. 493 (manipulation of brake by section foreman); *Holtz* v. *Great Northern R. Co.* (1897) 69 Minn. 524, 72 N. W. 205 (foreman drove a bolt through the floor of a car); *National Fertilizer Co.* v. *Travis* (1898) 102 Tenn. 16, 49 S. W. 832 (machinery started without warning by foreman running an engine, and killed man adjusting bolts); *Gulf, C. & S. F. R. Co.* v. *Schwabbe* (1892) 1 Tex. Civ. App. 573, 21 S. W. 706 (foreman of railway yard undertook to handle an engine and injured a wiper; decision placed on the ground that he was not engaged in the performance of a duty owed by the master, but apparently sustainable also on the ground that the act was beyond the scope of his authority; otherwise it is in conflict with the Texas cases cited under the next section); *Quinn* v. *New Jersey Lighterage Co.* (1885) 23 Blatchf. 209, 23 Fed. 363 (captain undertook to hook the tongs to rails which were being loaded); Followed in *The Miami* (1899) 35 C. C. A. 281, 93 Fed. 218, Affirming (1898) 87 Fed. 757 (where the injury was caused by the mate attempting to cast off a chain from around a drum); *Chicago Architectural Iron Works* v. *Nagel* (1898) 80 Ill. App. 492 (case for jury, where there was evidence that the foreman was engaged in performing the same kind of work as the injured subordinate); *Page* v. *Naughton* (1901) 63 App. Div. 377, 71 N. Y. Supp. 503 (injury caused by fall of bags of cement, piled by superintendent).

Whatever may be the position of a master or mate of a vessel, they are not vice principals where the injury is caused by the negligence of the former in keeping a lookout, and of the latter in steering. *The Job T. Wilson* (1897) 84 Fed. 204.

In *Barnicle* v. *Connor* (1900) 110

woven that the injury must be regarded as being the result of both in combination;[1] nor, *a fortiori*, where the evidence shows that such a

Iowa, 238, 81 N. W. 452, the court held that, whether the foreman of carpenters, who was the delinquent, was a vice principal or not, there could not, in any event, be a recovery, as the negligence was committed in regard to manual work. This case is a very strong application of the doctrine of dual capacity, as the facts were that the foreman was directing plaintiff in the moving of a column, and told him to let go of it, and do something else, and that, when the foreman had taken plaintiff's place, and the latter had turned to go to the other work, the column rolled and struck him. Such a situation, we think, is governed by the same principle as the cases cited in § 545, note 1, *infra*.

Other decisions in which courts have recognized the doctrine of dual capacity are: *Ricks* v. *Flynn* (1900) 156 Pa. 263, 46 Atl. 360; *Ross* v. *Walker* (1891) 139 Pa. 49, 21 Atl. 157, 159 (see the comments on these in § 547, *infra*); *Hobbes* v. *Standard Wheel Co.* (1899) 152 Ind. 680, 52 N. E. 391, 54 N. E. 383.

In *Moore* v. *Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588, it was said that a foreman of car repairers would have been treated as a mere servant, if he had caused the injury by his negligence while he was actually engaged in the manual work of repairing the cars; and this doctrine was reasserted in *Rowland* v. *Missouri P. R. Co.* (1886) 20 Mo. App. 463. But in both of these cases the negligence was unquestionably of an official kind, and the remarks as to the dual capacity of the employees were merely *obiter*. They are also antagonistic to some other Missouri rulings in which this point was directly involved. See § 546, note, 1, *infra*.

[1] In holding an employer responsible for the negligence of a vice principal in dispensing with the use of a tag line in raising the framework of a bridge, notwithstanding that he attempted to control the swaying framework by seizing it with his hands and holding it in proper position by his unaided strength (*Pittsburgh Bridge Co.* v. *Wacker* [1897] 170 Ill. 550, 48 N. E. 915, Affirming [1897] 70 Ill. App. 55), the court said: "The primary cause of the injury received by the appellee was the exercise by Farnsworth of authority conferred upon him by the master to order, direct, and control the operation of moving the framework from its position on the bank to the place where it was needed to be placed in the bridge, without using the tag line. If the appellant, through Farnsworth as vice principal, abandoned the use of a tag line,—a confessedly appropriate and safe device,—and adopted an improper and unsafe method of accomplishing such removal, and injury resulted to appellee in consequence thereof, under such circumstances as the master would be liable if Farnsworth had not personally participated in the execution of the plan, no reason is perceived why liability should be avoided upon the ground that Farnsworth personally assisted in endeavoring to perform the work. In so assisting, Farnsworth voluntarily assumed temporarily to labor as a common workman, but he was not any the less the representative of the appellant company, nor his position any the less one of superiority."

The question what cars shall be taken into repair tracks, and where they shall be placed, is determined by the foreman of an electric railway in his capacity as vice principal; and if under the circumstances he should have notified a workman on one of those tracks that other cars were about to be moved thereon, the company is liable for his omission to give such notification, and will not be absolved for the mere reason that he himself acted as motorman in moving the cars. *Metropolitan West Side Elev. R. Co.* v. *Skola* (1900) 183 Ill. 454, 56 N. E. 171.

In a case where the injury resulted from the negligence of a section foreman in suddenly rising from a keg on the front end of a hand car, which he was using as a seat, the result being that it rolled off and derailed the car, it was held that this act, although done for the purpose of assisting his men, could not be separated from the negligence which it also imported as being a breach of his duty to look out for their safety while engaged in propelling the car. *Ross* v. *Wabash W. R. Co.* (1892) 112 Mo. 45, 18 L. R. A. 823, 20 S. W. 472.

The principle in the text is recognized in the exceptive form of statement that a railway company is not liable for an injury to an employee caused by the negligence of a foreman while performing an act of labor in common with that of the employee, "unless its own negligence as employer contributed to pro

breach was in a legal sense the sole proximate and efficient cause of the injury.[2]

Nor could the master, without a gross absurdity, be absolved where the manual act which caused the injury was done for the very purpose of discharging some non-delegable duty.[3]

Other cases proceed upon the theory that a vice principal who orders a workman to take up a particular position where he will be imperiled if certain kinds of manual acts are negligently done must be regarded as a representative of the master in respect to any acts of that description by which he may subsequently injure the workman.[4] It would seem, however, that the qualification of the rule

duce the injury." *St. Louis, A. & T. R. Co.* v. *Torrey* (1893) 58 Ark. 217, 24 S. W. 244.

[2] Where a servant was injured by the fall of a heavy iron box which was being hoisted by two chains, and the accident was due to the fact that a handle of the box had been broken, and the hook on the end of one of the chains had slipped on the flange of the box to which it had been attached by the orders of the employee in charge of the work, the injury was regarded as being due, not to his negligence on the character of a fellow servant, but to his breach of the nonassignable duty of preventing the accident by using additional chains or taking some other precaution suggested by the circumstances. *Fraser* v. *Hand* (1889) 33 Ill. App. 153.

Where it was the duty of a yard master to see to the making up of trains, if he directed a boy engaged as a call boy to perform the duties of a switchman, the fact that he was on an engine in charge of it at the time of giving the orders is immaterial; and if it was negligence to give such orders, it was his negligence as yard master, and not as engineer. *Hardy* v. *Minneapolis & St. L. R. Co.* (1888) 36 Fed. 657 (injury declared to have been caused, not by the operation of the engine, but in the discharge of the yard master's duties in making up trains).

[3] *Hess* v. *Adamant Mfg. Co.* (1896) 66 Minn. 79, 68 N. W. 774 (no error in submitting to jury the question whether the starting of machinery for the purpose of testing it was an act done as a vice principal); *Consolidated Coal Co.* v. *Gruber* (1901) 188 Ill. 584, 59 N. E. 254, Affirming (1900) 91 Ill. App. 15 (assistant mine manager operated a coal cutting machine to ascertain why it would not work, and while doing so brought down a portion of the roof).

See, however, *Wellihan* v. *National Wheel Co.* (1901) 128 Mich. 1, 87 N. W. 75 (§ 601, note 1, *post*); *Hecker* v. *C. R. Remington & Son Co.* (1900) 53 App. Div. 592, 65 N. Y. Supp. 1116, Second Appeal (1901) 62 App. Div. 472, 70 N. Y. Supp. 1070 (§ 567, note 7, subd. [b], *post*).

[4] In *Taylor* v. *Evansville & T. H. R. Co.* (1889) 121 Ind. 124, 6 L. R. A. 584, 22 N. E. 876, where a master mechanic, after ordering a servant to do work which required him to take up a certain position with respect to a locomotive, caused him injury by taking out the "equalizer," the court said: "The obligation to make safe the working place and the materials with which the work is done rests on the master, and he cannot escape it by delegating his authority to an agent. It is also the master's duty to do no negligent act that will augment the dangers of the service. In this instance Torrence was doing what the master usually and properly does when present in person, for he was commanding, and directing the execution of what he had commanded. By his own act he made it unsafe to do what he had commanded should be done. Acts of the master were, therefore, done by one having authority to perform them, and the breach of duty was that of one who stood in the master's place. It is not easy to conceive how it can be justly asserted that one who commands an act to be done, and who possesses the authority to command and enforce obedience from all servants employed in a distant department by virtue of the power delegated to him by the master, is no more than a fellow servant; for, in the absence of the master, the command, if

which is thus admitted is essentially inconsistent with the rule itself. The cases in which the doctrine has been applied that a vice principal is a mere servant when he is doing a servant's work all presuppose, at the very least, some general direction respecting the work, which accounts for the position of the injured servant at the time of the accident; and there is apparently no logical ground upon which such a direction can, as an essential and controlling element of the juridical situation, be differentiated from a special order, so as to entail the consequence that recovery shall be allowed in one case and denied in the other. Until this difficulty has been fairly met, and, supposing that to be possible, cleared away, the cases last cited must be regarded as antagonistic in principle, if not upon the specific facts, to the decisions referred to in the preceding section. The suggestion in the Nebraska case cited in the last note above, that the

entitled to obedience, must be that of the master, conveyed through the medium of an agent. Nor can it be held, without infringing the principles of natural justice, that if he who is authorized to give the command makes its execution unsafe, the employee, whose duty it is to obey, has no remedy for an injury received while doing what he was commanded to do."

In *Cole Bros.* v. *Wood* (1894) 11 Ind. App. 37, 36 N. E. 1074, where the foreman of a factory, after giving an order which required a servant to take up a certain position with reference to a machine, proceeded to do some work himself on the same machine, and by his careless handling of a tool caused the injury complained of, the court said: "In doing these things he was performing the master's duty, and in that respect he was not a fellow servant with the appellee. The execution of the master's orders, in conjunction with the manual acts of Crawley and Eller [the foreman] rendered the place in which appellee was working dangerous, and injury actually befell him. Here was a violation of the master's duty which the appellant owed to appellee, to keep the place in which he worked reasonably safe." (Dissenting, Ross, J.)

In *Crystal Ice Co.* v. *Sherlock* (1893) 37 Neb. 19, 55 N. W. 294, where the manager of an ice company injured a workman on a chute by sending down upon him a lump of ice, the court, in replying to the argument of plaintiff's counsel that, as the injury was caused by setting free the piece of ice which caused the damage sued for, the defendant should not be held liable, for the reason that the act was not peculiarly within the scope of the foreman's duties but was rather one of the performance of which properly fell within the class of labor properly to be performed by the laborers under the direction of said foreman, said: "The difficulty with this argument is that it loses sight of the fact that the defendant in error was placed in a dangerous place, and required to do an act which of necessity forbade his avoidance of injury, should the foreman set in motion a piece of ice from a point above where the foreman's orders required him to go. Suppose, now, that this piece of ice had been detached by a fellow servant of the defendant in error, under the orders of the foreman, after the foreman had so located the defendant in error that he must inevitably suffer if the order was executed, could it with any propriety be claimed that the company was relieved of liability simply because the agency which caused the injury was set in motion by a fellow servant? In such case, as in the one at bar, the negligence and carelessness pertained not to the mere manual act of releasing the ice which caused the injury, but was rather imputable to the order which placed defendant in error in such situation, under such circumstances that injury to him was unavoidable from the foreman's setting in motion the ice which caused the damage."

In a later Nebraska case the act of a foreman with general control and authority to employ and discharge workmen, in ordering a subworkman upon

injury was, under the circumstances, really caused rather by the order than by the subsequent manual act, would plainly not suffice as a ground of distinction between the decisions in which recovery has been allowed and refused, except in so far as the order may have been itself culpable, and it does not seem to have been of that description either in the Nebraska case or the others referred to.

546. Theory that a vice principal represents the master even when he participates in manual labor.— A considerable body of authorities can also be produced for the other view, that a vice principal acts in a representative capacity as to what he does while assisting to do the work which he is appointed to supervise. To this conclusion, as is indicated by the extracts quoted below from the opinions, the courts have felt themselves forced by their inability to find any satisfactory logical grounds upon which to predicate a distinction between the quality of an act done by the order of a vice principal, and the quality of the same act when done by the vice principal in person.[1]

an elevator, and himself operating the elevator with negligence, to the workman's injury, was held not to be the act of a fellow servant, but of a vice principal. *Swift & Co.* v. *Bleise* (1902) 63 Neb. 739, 57 L. R. A. 147, 89 N. W. 310.

Recovery has been allowed for an injury caused by the negligence of an operator in starting a machine suddenly while the "helper" had his hand inside it, removing an obstruction, in compliance with the operator's orders. *Norton Bros.* v. *Nadebok* (1901) 190 Ill. 595, 54 L. R. A. 842, 60 N. E. 843, Affirming (1900) 92 Ill. App. 541.

Where a foreman, while assisting his workmen in lowering a heavy sewer pipe into a trench, ordered a departure from the usual manner of lowering such pipe [illegible]ing it fall down of its own weight [illegible]giving employees at work in the [illegible]otice and an opportunity to es[illegible]nd one of them was injured in [illegible]nce, the employer was held to be [illegible]e, though in assisting to lower the pipe the foreman was acting as a fellow servant. *Chicago* v. *Cronin* (1900) 91 Ill. App. 466.

The negligence of a track foreman who was acting as motorman of an electric car, in failing to stop the same in time to prevent an accident to a track hand who had attempted, pursuant to his direction, to board the same while in motion, and was in a perilous position, was official, and not personal. *Chattanooga Electric R. Co.* v. *Lawson* (1898) 101 Tenn. 406, 47 S. W. 489.

Other cases to the same effect are: *Illinois Steel Co.* v. *Schymanowski* (1896) 162 Ill. 447, 44 N. E. 876 (allowing recovery where a foreman picked at a pile of ore so as to cause it to fall on a laborer set to work beside it); *New Omaha Thomson-Houston Electric Light Co.* v. *Baldwin* (1901) 62 Neb. 180, 87 N. W. 27 (foreman held to have acted as vice principal where he neglected to keep his hold on a rope, thus bringing about the fall of a ladder); *William Graver Tank Works* v. *O'Donnell* (1901) 191 Ill. 236, 60 N. E. 831, Affirming (1900) 91 Ill. App. 521 (servant thrown off a plank on to which he had been ordered to go, as a result of the efforts of his foreman and a fellow workman to unscrew a pipe).

Compare also the statement that the master is not released from responsibility for an injury sustained by a servant in the course of his employment because ordered by a foreman to work in a dangerous place, although the foreman co-operated with the servant in the work. *Kolb* v. *Carrington* (1897) 75 Ill. App. 159.

On the facts the *Shumway Case*, 98 Mich. 411, 57 N. W. 251, cited in note 1 to the next section, might perhaps be classed with those here referred to; but the language of the court indicates, we think, an adoption of a doctrine more favorable to the servant.

[1] In *Shumway* v. *Walworth & N. Mfg. Co.* (1894) 98 Mich. 411, 57 N. W. 251 (machinery started by a superintendent after an obstruction had been removed),

547. Discussion of the doctrine of the dual capacity of vice principals.—*a. With reference to the standpoint of the courts which reject the superior servant doctrine.*—In 1875 the supreme court of

the defendant was held liable on the broad ground that a superintendent "stands in the place of the master in whatever he does in furtherance of the business and operations he has in charge." The court said: "The defendant concedes, in effect that Mr. Neville's relations to the defendant corporation and to the plaintiff were such as that, for some purposes, he might in law be regarded as a representative of the master, but that in the performance of the particular act of starting the machine he was acting in the capacity of a fellow servant; and the contention is that the question of whether the act was that of a master or of a fellow servant depends for its solution rather upon the nature of the act than upon the general scope or extent of the superior servant's authority. The contention, precisely as made, is undoubtedly supported by eminent authority, but we are constrained to hold that the previous holdings of this court have not so limited the liability of the master. It is not necessary to a decision of this case to hold that an agent exercising only occasional acts of authority, while performing duties, in the main, those of a subordinate, is, in the performance of the latter duties, to be regarded as a representative of the principal; but, in the performance of the particular duty in question, Neville was performing an act of authority which he only had the right to perform by virtue of his authority as superintendent of the mills, and within the scope of his authority to see that the machinery was in safe condition. We think, under the former rulings of this court, he must be held to have been, in the performance of this act, a representative of the master, rather than a fellow servant."

In *Berea Stone Co. v. Kraft* (1877) 31 Ohio St. 287, 27 Am. Rep. 510, where the injury was caused by using hooks for hoisting a large stone which was so soft that chains should have been passed round it, the court said: "The fact, if it be true, that Stone's negligence in assisting in fastening the hooks to the stone to be raised may have caused the injury, and that he was then performing the duty of a common workman, and not those strictly pertaining to the duties of foreman, in no wise relieves the company from liability. If the act done by him had been done under his direction as he did it, by one of the employees of the company, its liability could not be doubted, and for the reason that the negligent act, although committed by the hand of another, was, in law, the act of the foreman, and consequently the act of the master. And it could be no less the act of the master when performed by the foreman in person."

In *Purcell v. Southern R. Co.* (1896) 119 N. C. 728, 26 S. E. 161, the court laid down the law as follows: "The defendant had no cause to complain of the instruction of the court that the conductor could change his own relation to the company from that of *alter ego* to that of a fellow servant of a brakeman by volunteering to anticipate the plaintiff in the performance of his ordinary duty. If the conductor had ordered the fireman to do an act which might reasonably have been expected to endanger the brakeman, and which did result in injury to him, the company would have been answerable for the natural consequences of his orders. It would be unreasonable to hold that, by doing the careless act himself, instead of ordering another who felt constrained to obey to do it, he relieved the company from responsibility. *Qui facit per alium, facit per se*, is the maxim which applies where, as vice principal, he compels another to do what is culpable. It would be illogical to say that, where he directs or orders, he utters the command of the company, and adopts for it the act of the employe who obeys, and yet, when he does the act in proper person, he descends from the role of vice principal to that of servant."

In *Daghirsh v. Hannibal & St. J. R. Co.* (1890) 103 Mo. 570, 15 S. W. 554, where the "boss" of a roundhouse undertook to move one of the engines himself, and injured a subordinate, the court reasoned thus: "If he had expressly directed the engine to be moved down by another upon the plaintiff, in the manner described in the evidence for the latter, the defendant would have been responsible for the act; and we are unable to perceive any logical or reasonable distinction between so directing it, and his performing such negligent act

Rhode Island recognized, *arguendo*, the theory that there are certain classes of negligent acts in regard to which a vice principal does not

himself, in the circumstances here shown. It was one which fell within his authority as the master's representative to direct, and it can make no difference in principle whether he did it personally or by another, in its bearing on the rights of the parties to this cause, where his act involved an obvious breach of the master's duty to use care to provide a reasonably safe place for plaintiff to work."

In *Hutson* v. *Missouri P. R. Co.* (1892) 50 Mo. App. 300, where a section foreman injured a laborer with the pick which he was using to pull a tie from under the rails, the court said: "In this case we have the unusual fact that the injury was directly inflicted by the foreman himself while engaged in the work as a colaborer with plaintiff. Does this fact alter the relation of the parties, or interfere with the master's liability? Our opinion is that it does not. If in the case at bar the section foreman had ordered one of his hands to strike his pick down between the heads of the two others, it would not be contended that defendant was not liable for the injury resulting from such imprudent order. There is no just or logical distinction between the act of the vice principal in negligently ordering a servant to do an imprudent thing, and in doing the thing himself. In each case it is the act of the vice principal; in one, he wills the servant shall do the act, in the other, he wills that he himself shall do it."

In a recent case the supreme court of Texas, in holding the defendant liable for the negligence of a section foreman in prematurely throwing a switch for a hand car, referred to three earlier decisions in that state, *viz.*: *Missouri P. R. Co.* v. *Williams* (1889) 75 Tex. 4, 12 S. W. 835 (ferry car repairers failed to keep proper lookout to protect subordinate); *Galveston, H. & S. A. R. Co.* v. *Smith* (1890) 76 Tex. 611, 13 S. W. 562 (road master in moving train so as to cause collision acts as servant; decision of commission adopted by supreme court, but only on the ground that the case was distinguished from the *Williams' Case* by the fact that the injured servant "was not employed under the immediate eye of the road master." *Nix* v. *Texas P. R. Co.* (1891) 82 Tex. 473, 18 S. W. 571 (assistant foreman negligently started machinery while plaintiff was near a driving belt). After pointing out that, in the first of these cases, the delinquent was a vice principal, the court proceeded thus: "Such relation being established, the three cases first cited, as adopted by the supreme court, lead to the conclusion that Murphy should be held to have been the representative of the defendant in the performance of any act, service, or duty for the defendant in the line of his employment, and that no distinction should be drawn between the performance of those higher duties intrusted to him specially, and those of an ordinary character which both he and the subordinate servants and employees under him were in the habit of indiscriminately performing. In other words, when he negligently injured the plaintiff the law viewed his act in the same light as if the same master had been personally present and committed the negligent act himself, and in the latter contingency no one would doubt the liability of the master." *Sweeney* v. *Gulf, C. & S. F. R. Co.* (1892) 84 Tex. 433, 19 S. W. 555.

See also the following cases in which the master was held responsible: *Northern P. R. Co.* v. *Peterson* (1892) 2 C. C. A. 457, 4 U. S. App. 574, 51 Fed. 182 (sudden application of the brake of a hand car by foreman of track repairers); Reversed in (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843 (but solely on the ground that the delinquent employee was not a vice principal. The Supreme Court mentioned but did not pronounce any decided opinion as to the controversy respecting the proper limits of official acts); *Consolidated Kansas City Smelting & Ref. Co.* v. *Peterson* (1899) 8 Kan. App. 316, 55 Pac. 673 (foreman threw a switch in such a manner as to injure a subordinate while pushing a car); *Hughlett* v. *Ozark Lumber Co.* (1893) 53 Mo. App. 87 (oiler of machinery injured by superintendent's negligence in causing machinery to start by the manner in which he handled a new belt); *Erickson* v. *Milwaukee, L. S. & W. R. Co.* (1890) 83 Mich. 281, 47 N. W. 237 (foreman of gravel train caused an accident to a laborer by releasing a brake, and thereby suddenly widening the gap between a car from which he had or-

act in his representative capacity.[1] But the earliest case in which that theory was actually applied, with the result of preventing a servant from recovering damages, seems to be *Crispin* v. *Babbitt*.[2] This decision is, at all events, the leading authority on the subject, and the question whether the theory applied was correct virtually resolves itself into the question whether the opinion delivered by Rapallo, J., for the majority of the court, or the dissenting opinion of Earl, J., embodies the sounder views.

Minority opinions so seldom receive any attention from the judge who is intrusted with the task of stating the conclusions of the majority, that the omission of Judge Rapallo to notice Judge Earl's criticism of the theory which was deemed to be a bar to the plaintiff's action is not at all surprising. But it is less easy to understand why the lucid and forcible arguments of the latter judge should have made so little impression upon courts in other jurisdictions, that, so far as the number of decisions goes, the doctrine which he combated must now be regarded as the more authoritative. In order to draw the attention of the profession once more to the reasoning of this distinguished jurist, some lengthy extracts from his opinion are subjoined.[3]

dered the laborer to jump and the one to which he was to jump).

In Kentucky it has been declared that a subordinate may recover for injuries caused by the negligence of a superior servant, whether the negligent act was done by his own hand or by another under his orders. *Illinois C. R. Co.* v. *Coleman* (1900) 22 Ky. L. Rep. 878, 59 S. W. 13; *Illinois C. R. Co.* v. *Josey* (1901) 22 Ky. L. Rep. 1795, 54 L. R. A. 78, 61 S. W. 703 (negligent application of brake of hand car by section foreman).

[1] *Hann* v. *Oriental Print Works* (1875) 11 R. I. 152.

[2] (1880) 81 N. Y. 516, 37 Am. Rep. 521. The majority of the court indorsed a charge to the effect that, although the delinquent might, as manager, have represented the defendant, he did so only in respect of those duties which the defendant had confided to him as superintendent; and the trial judge's refusal to charge that, as to any other acts or duties performed by him, he was not to be regarded as the defendant's representative, was held to [illegible]or.

[3] If this fiction were literally applied, if it were held that every servant entering into the service of a master assumed all the risks incident to such service, then the master would not be responsible to such servant for his own negligence, as that would be as much an incident to the service as the negligence of a coservant. The maxim, *Volenti non fit injuria*, would shield the master. But the fiction is not applied to shield the master. He is held responsible for his own negligence, whether engaged in the discharge of the duties peculiar to him as master, or working side by side with his servants in the same kind of labor. So the fiction should not be applied to shield the master from responsibility for the negligence of the middleman standing in his place and representing him. Public policy does not require that the doctrine of *respondeat superior* should be thus far limited. It is not too much for the master to be responsible for his negligence. He is generally a person selected with care, of superior judgment and skill, and is, more generally than other servants, able to respond to his master for his own negligence. I can perceive no reason founded upon public policy, as there is none founded upon any principle of natural justice, for limiting the doctrine of *respondeat superior* in its application to the relation existing between a master and such an agent. The

His position seems to the present writer to be quite impregnable, but the current of judicial authority has set so strongly against his view that it will be worth while to supplement his arguments by pointing out that, quite apart from those objections which he urges against the theory of his associates, there are some serious, if not fatal, flaws in the reasoning by which that theory is supported.

The first of these flaws is the reliance placed upon the two rulings

master should be responsible for all his negligence while engaged in his service, because he stands in his place representing him as his *alter ego;* and I can perceive no reason founded on public policy or expediency for enforcing that doctrine in such a case in favor of strangers, which does not exist for enforcing it in favor of the other servants of the common master. A rule that a master shall be held responsible for some negligent acts of his representative, and not responsible for other negligent acts, done possibly at the same time, within the scope of his employment in the same service, would be illogical, perplexing, and inconvenient. Take the case of a general superintendent of a railway. It is conceded that, for negligence in his discharge of the absolute duties which a master owes to his servants, the master—the corporation—would be responsible. But suppose, instead of such duties, he should, in furtherance of his master's business, carelessly perform a mechanical act about which common laborers were also engaged. Would there be any reason, founded upon principle or public policy, for distinguishing the two cases, and imposing upon the master a liability in the one case, and not in the other? Suppose the superintendent carelessly ordered a train to be started, and some one was thus injured. The corporation would undoubtedly be liable for the damages. Would it not be thus liable if, instead of ordering the train to be started by others, he placed his own hand to the lever and carelessly started it himself? Would he be the responsible representative of the corporation in the one case, and not in the other? Suppose he was standing upon a train of cars, and carelessly started that train himself, causing an injury to someone, and at the same moment of time he carelessly ordered an engineer to start another train, also causing an injury. Would the corporation be liable for the damages in the one case, and not in the other? The question in all this class of cases, the negligent act and consequent injury being proved, is whether the servant whose act is complained of stood in the place of the master—represented him as his *alter ego.* That is always mainly a question of fact. If he did, then the rule of law to be applied is plain and simple, and is the same which would measure the responsibility of the master to a stranger in his service. On the one hand, it is claimed that, in determining the responsibility of the master in such cases, we must look solely at the duties which were devolved upon the servant whose acts are complained of; and that if we find that the duty which he was engaged in discharging when he committed the negligent act or wrong was one of those absolute duties which the master owed to his servants, then the master is responsible, no matter what was the grade or position of the servant. On the other hand, I claim the rule to be that, in determining the responsibility of the master for the negligent acts of his servant, we must look solely at the position of such servant, and we must consider the duties devolved upon him, solely for the purpose of determining such position; and if we find that he was the representative of the master, within the rules above stated, then the master must be held responsible for all his acts of negligence committed within the scope of the business intrusted to his hands as well to coservants as to strangers. It cannot be claimed that what John I. Babbitt did was an idle thing, having no pertinency to the business in hand. If he was there in defendant's works, as we have assumed the jury found, standing in his place and having the general charge of his business, then he was empowered to do whatever he saw fit in and about that business and in furtherance of its objects. Whatever he could order or employ another to do, he could do himself. Did he represent the defendant when he ordered the laborers to put the boat into the dry dock, and not represent him,

which are cited from other jurisdictions, one an Irish, and the other a Massachusetts, case.[4] In both of these the rationale of the decisions was simply that the delinquent was not a vice principal at all, and the question whether a vice principal may occupy a dual relation to his subordinates was not determined or even alluded to. It is submitted that cases in which representative capacity is denied altogether, and the character of the negligent act is for this reason a mere incidental detail, are not legitimate precedents to sustain a decision which makes the character of the act the point upon which the liability of the master hinges.[5]

Nor, at it seems to us, is Judge Rapallo more fortunate in the attempt which he makes to extract the doctrine enunciated by him from an earlier case in New York itself. There is a flagrant *non sequitur* in that passage of his opinion in which *Flike* v. *Boston & A. R. Co.*[6] is cited. After stating its effect he proceeds thus: "The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employee performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. *The converse of this proposition necessarily follows.* If the act is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow servant for its improper performance." The sentence which we have italicised, whether it be viewed from the standpoint of abstract principle or in connection with prior decisions of the same court, to say nothing of those in other jurisdictions, certainly cannot be accepted as a statement of a self-evident conclusion. If it were not for the position thus taken by so many eminent judges, one would be at a loss to understand how the doctrine that a master remains liable for the performance of certain obligations, even though the servant intrusted with the performance may not have been a vice principal for general

a few minutes later, when he put his hands to the engine to further the same work? If he had ordered another servant to do this careless act, the defendant would have been liable, and does the defendant escape liability because John did the act himself? I say no." *Crispin* v. *Babbitt* (1880) 81 N. Y. 516, 531, 37 Am. Rep. 521.

[4] *Albro* v. *Agawam Canal Co.* (1850) 6 Cush. 75; *Conway* v. *Belfast & N. Counties R. Co.* (1877) Ir. Rep. 11 C. L. 353.

[5] It may be noticed in passing that there is a similar misuse of a precedent in *National Fertilizer Co.* v. *Travis* (1899) 102 Tenn. 16, 49 S. W. 832, which cites *Boyce* v. *Fitzpatrick* (1881) 80 Ind. 526, where the delinquent was simply held to be a fellow servant of the plaintiff, and no allusion was made to a dual relation.

[6] (1873) 53 N. Y. 549, 13 Am. Rep. 545.

purposes could ever have been supposed to involve the corollary that a vice principal for general purposes is a vice principal only when he is in the discharge of one of those obligations. From such a corollary an obvious way of escaping is indicated by the consideration that, logically speaking, the conceptions of a liability traced home to the master through the particular act which caused the injury, and of liability referable to the official position of the delinquent which constitutes him a general agent of the master, are neither essentially incompatible nor mutually exclusive in such a sense that a court must elect between them. In fact, it may fairly be maintained that the New York court of appeals, by its language in three decisions which are of later date than the *Flike Case* and which recognize, without any suggestion of a qualification or restriction, the responsibility of a master for the defaults of a general manager, has by implication conceded that the "converse" adverted to in Judge Rapallo's argument does not "follow necessarily" from the theory on which he relies.[7]

Surely there could be no more striking proof of the commanding influence of the court which is mainly responsible for the adoption of the doctrine of the dual capacity of vice principal than the fact that so many other judges should have been content to follow a decision based upon reasoning which not only ignores the possibility that there may well be two principles upon which the question whether an employee represents the master or not may be determined, but even fails to take into consideration prior rulings of the same

[7] In *Malone* v. *Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573, the court, while holding that the position of the delinquent was that of foreman merely, having no general charge except such as is common to those acting in that capacity, and that the defendants were present and had the general charge and responsibility for the different branches of their business, added: "If it was claimed that Bagley's (the foreman's) position and responsibilities were different from that named as foreman, and that the defendants had transferred the charge and direction of any branch of the business and of the duties upon him, it would have been a proper question for the jury, if, indeed, there was any evidence to warrant the claim."

In *Corcoran* v. *Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369, the precise point of view is more disputable. But, at all events, there are reasonable grounds for arguing that its rationale is rather that the non-delegable duty there violated was among those with which a functionary assumed to be a vice principal was intrusted, than that this functionary was conceived to be a vice principal merely because he was a special agent for the performance of that duty.

In *Hussey* v. *Coger* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556, it was laid down, *arguendo*, that, where an employer exercises no personal supervision over the work, but devolves its whole management and control upon the superintendent, who is authorized to employ and discharge workmen, to regulate and direct the manner of their work, to provide the means and appliances necessary to its prosecution, and to determine the time and place of its performance, the superintendent is a vice principal.

court, which, by a reasonable intendment, may be construed as conceding the concurrent existence of those principles.

There is still another point in which the opinion of the majority seems to be open to attack. It loses sight of the fact that the essence of the conception of an *alter ego*, or vice principal, as such a functionary was understood in the earlier cases, was simply this: that the law of agency, which, as a general rule, was superseded by the doctrine of common employment where a fellow servant was the delinquent, remained operative where that servant exercised such complete control over the work to be done that he was, simply as a matter of fact, the master's substitute or deputy.[8] Under these circumstances, it is plain that the effect of declaring a master not to be liable for some acts of a vice principal which are undoubtedly within the scope of his powers amounts to what is nothing more or less than the introduction of an entirely novel principle into the law of agency. To justify such a modification of that law, it is submitted that arguments addressed more directly to the real question involved than those of Judge Rapallo may fairly be demanded. A court which asks us to adopt the doctrine that the servant's right to recover should be made to depend solely upon the conception of a special agency as regards the performance of certain duties of a non-delegable character is at least bound to demonstrate, by some satisfactory reason, that the duties to which that agency is restricted are the only ones in regard to which a master can be deemed to have a representative.[9] Until such a reason has been produced it seems not too much to say that the decision in *Crispin* v. *Babbitt* rests upon no more solid foundation than a couple of irrelevant precedents and a transparently fallacious piece of dialectic legerdemain by which the rule in the *Flike Case*, primarily intended, as the opinion shows, to provide an additional offensive weapon for the servant, was converted into an instrument for the curtailment of the rights which he already enjoyed.[10]

[8] See especially *Gallagher* v. *Piper* (1864) 16 C. B. N. S. 669, 33 L. J. C. P. N. S. 329, and the other English cases cited in § 526, *ante*.

[9] The reason for which the perplexed inquirer is looking is certainly not supplied by the suggestion made in one case, that the injured servant is no worse off than he would have been if the vice principal, instead of undertaking the work himself, had ordered one of his subordinates to do it, and the injury had resulted from the default of that subordinate. *Quinn* v. *New Jersey Lighterage Co.* (1885) 23 Blatchf. 209, 23 Fed. 363. The essential question is simply whether the servant's implied assumption of certain risks can reasonably be said to cover any of the acts done by a superior employee who, as regards most of his functions, is conceded to represent the master; and there is no legal analogy, so far as the writer is aware, which would justify a court in taking into account the extent of the injury or benefit which would accrue to the servant, according as the question is answered in one way or the other.

[10] The special difficulty involved in the

Very little light is thrown upon the logical foundations of the doctrine of dual capacity by any of the cases outside of New York. None of them, it seems to us, really go to the root of the matter.[11]

b. With reference to the superior servant doctrine.—One conceivable view of the relation of an employee who exercises control to his master and his subordinates is that, assuming the basis of the superior servant doctrine to be the non-delegable quality of the duty of giving such orders as will not expose servants to unnecessary dangers (§ 522, *id. ante*), a controlling employee should be treated as a special agent for the performance of that duty alone. The corollary from this theory would clearly be that negligent acts done while he

acceptance of a theory which in many instances would absolve the master even for the injuries produced by negligent orders has been already adverted to in § 543, *supra*.

[11] Until last year the utterances of the supreme court of Pennsylvania were such that it might apparently have been numbered among the opponents of the New York theory. In *Prevost* v. *Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88, the concurrent existence of two tests of vice principalship was thus distinctly recognized: "A vice principal for whose negligence an employer will be liable to other employees must be either, first, one in whom the employer has placed the entire charge of the business, or of a distinct branch of it, giving him, not mere authority to superintend certain work or certain workmen, but control of the business, and exercising no discretion or oversight of his own; . . . or, secondly, one to whom he delegates a duty of his own, which is a direct, personal, and absolute obligation, from which nothing but performance can relieve him." This passage was quoted with approval in *Ricks* v. *Flynn* (1900) 196 Pa. 263, 46 Atl. 360; but its effect is so much cut down by the comments of the court that the law in this state would now seem not to be materially different from that in New York. The *Prevost Case*, it is now declared, should be construed as embodying a doctrine subject to a qualification which is deemed to have been established by *Ross* v. *Walker* (1891) 139 Pa. 49, 21 Atl. 157, 159, where it was laid down that a servant intrusted with the performance of the various non-delegable duties is a vice principal while he is in discharge of those duties, and that, as to any other acts, he is not the master's representative. But it is submitted that the citation of this case as an authority to sustain the position which the court adopts —*viz.*, that a vice principal by virtue of his position does not represent the master as to merely manual acts—is as improper, though not for the same reason, as the citation, in *Crispin* v. *Babbitt*, of the Massachusetts and Irish cases mentioned in the note above. In *Ross* v. *Walker* the question whether the delinquent was a vice principal by virtue of his position was not involved, the court even refusing to consider it; and the observations made *arguendo* manifestly had reference to a representative capacity conceived of as arising out of a restricted agency in respect to one or more particular non-delegable duties.

In Minnesota the principle that there are two distinct tests of representative capacity has been declared quite recently. "It has been settled by this court that an employee becomes a vice principal, as respects another servant, only when he is intrusted with the performance of some absolute and personal duty of the master himself, or the general management and control of the master's business, or some branch of it." *O'Neill* v. *Great Northern R. Co.* (1900; Minn.) 82 N. W. 1086, citing *Brown* v. *Minneapolis & St. L. R. Co.* (1884) 31 Minn. 553, 18 N. W. 834. The position taken, as expressed in the syllabus written by the court itself, was that the road master of a railway company, directing the work of clearing away a bridge, is not the vice principal of the company to the extent that his omission to give a particular warning of a detail thereof which portends danger would render the company liable for his omissions in that respect. It was fully rec-

was participating in manual labor would not be done in his representative capacity. The position of the courts which, while applying the superior servant doctrine, except from its operation acts not done in the exercise of authority, is, therefore, stronger, in a sense, than that of the courts whose decisions were reviewed in the preceding subsection, inasmuch as it does not necessarily involve the anomaly of declaring that there are some acts as to which, although they are within the scope of his authority, and he is not even forbidden to do them, a general agent does not represent the master.

But this hypothesis of a special agency in respect to the duty of giving orders does not by any means represent the only possible theory as to a superior servant's relation to his employer. It is clear from the decisions cited in § 546, *supra*, that some at least of the courts which apply the superior servant doctrine proceed upon the assumption that, as to all matters within the scope of their authority, foremen of the lower grades are as much general agents for the protection of their subordinates as are the superintendents of an entire business or a principal department of it, when acting within the scope of their much wider authority. If this is really the juridical situation, the essential ground upon which the master's liability or nonliability will depend must obviously be the same in the courts which accept the superior servant doctrine as in those which reject it. In both classes of courts, therefore, the refusal to allow recovery under the circumstances must bring us face to face with the same difficulty, *viz.*, that such refusal is only justifiable on the assumption that the duty of a vice principal to avoid injuring his subordinates by manual acts is not one of those which the master, who would admittedly have been under a similar duty if he had himself participated in the work, may be conceived to have delegated to his deputy.

ognized that such an act would have been treated as official if the delinquent had been a vice principal by virtue of his position; and the doctrine was applied that, except in cases of general managers of a whole business or a department of it, the distinction upon which the master's liability rests is that which exists between a general warning and one as to the dangers of the transitory class which arise during the progress of the work. This theory of responsibility is, however, not construed in this state as enabling a servant to recover where the negligent act was purely a manual one, committed while the vice principal was participating in the labor of his subordinates. *Soutar* v. *Minneapolis International Electric R. Co.* (1897) 68 Minn. 18, 70 N. W. 796. The court therefore merely declines to go to the same length as those whose decisions are referred to at the beginning of § 543, *supra*.

In *Jackson* v. *Norfolk & W. R. Co.* (1897) 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258, it was distinctly recognized that the case of a general or departmental manager constitutes an exception to the principle that the final test of representative capacity is whether the negligent act represented a breach of one of the non-delegable duties, as that term is generally understood.

and that no reasons have ever been judicially suggested why this assumption, rather than its converse, should be entertained. In default of such reasons, the present writer has no hesitation in saying that he considers the rulings of the Illinois and Tennessee courts, as stated in § 544, *supra*, to be less correct in principle than those of the Ohio, Missouri, and Texas courts cited in § 546, *supra*.

CHAPTER XXX.

SUMMARY OF DECISIONS BY THE VARIOUS COURTS WITH REGARD TO THE RELATION OF SUPERIOR SERVANTS TO THEIR SUBORDINATES.

548. Introductory statement.
549. Decisions in each jurisdiction.

548. Introductory statement.— In the present chapter it is proposed to give a succinct summary of the effect of the decisions which have been rendered in various jurisdictions with respect to the specific application of the doctrines discussed in chapter XXVIII., *ante*.

An inspection of the dates of these decisions shows that, broadly speaking, the American courts, as a whole, followed very closely in the steps of the English judges up to about the year 1870. That is to say, setting aside the few states in which the theory that any superior servant was a vice principal (see chapter XXVIII., *ante*) had been avowedly adopted, the only qualification of the doctrine of common employment which had been suggested or allowed was the case in which a general manager was the delinquent, and the same difference of opinion upon this point existed here as in the mother country. See chapter XXVIII., *ante*.

Whether the judgment of the House of Lords in the famous case of *Wilson* v. *Merry*,[1] which was at first mentioned with approval in several American cases, provoked a reaction against the rigorous doctrine applied in it, or the social and economic conditions of the United States operated so as to modify the trend of judicial ideas, it is, at all events, sufficiently obvious to a student of the reports, that, during the last thirty years of the nineteenth century, there was a marked tendency to temper the strictness of the doctrine of common employment in various directions. An important step was taken in the *Flike Case*,[2] in which it was, for the first time, distinctly laid down that, however low the rank of the delinquent, the master is responsible, if the negligent act involved a breach of certain duties declared to be absolute and non-delegable. But this doctrine was, in some measure, a sort of two-edged sword; for it was afterwards con-

[1] (1868) L. R. 1 H. L. Sc. App. Cas. [2] (1873) 53 N. Y. 549, 13 Am. Rep. 326, 19 L. T. N. S. 30. See § 529, *ante*, 545.

strued, in the *Crispin Case*,[3] and in the decisions which followed it, in such a manner as to deprive the servant of a remedy for certain kinds of negligence, even when committed by a general manager. (See §§ 538–547, *ante*.) But this construction was, as we have seen, not adopted in all jurisdictions; and, in view of this limited acceptance, and the comparative rarity of the circumstances under which the rule in the *Crispin Case* becomes applicable, the doctrine that the character of the negligent act is a controlling consideration has been, on the whole, a distinct gain to the servant.

Whatever he may have lost by it was, in any event, more than compensated by the extension of the principle that a general manager is the master's *alter ego* to cases in which the delinquent was the manager of a distinct department. This theory seems to have been first propounded in the *Ross Case*.[4] It was afterwards explained and limited in the *Baugh Case*,[5] and is now firmly established not merely in the Federal courts, but in a large number of the state courts also. (See chapter XXVIII., *ante*.)

So far as the present position of the law is concerned, it is clear that its most marked feature is the disposition of the judges to refer the liability of the master in all cases to the character of the negligent act, and to disregard altogether the superiority of the delinquent's rank as a test of representative capacity. It is scarcely possible, however, to deny that a development of doctrine along this line alone may be productive of much injustice to the servant, and the writer has already expressed his opinion (§ 547, *ante*), that the disuse of the test which is thus excluded is an unwarrantable innovation in the law of agency.

549. Decisions in each jurisdiction.—In the subjoined note the writer has endeavored to exhibit the effect of the decisions bearing on the status of superior servants in such a manner as to indicate, with as much precision as is possible under the circumstances, the nature and extent of the fluctuations of judicial opinion, and the present position of the law in each separate jurisdiction.

If it is desired to ascertain the facts involved in any particular decision, it can be traced through the index of cases to the section where it is discussed in the preceding chapters.[1]

[3] (1880) 81 N. Y. 516, 37 Am. Rep. 521.

[4] (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184.

[5] (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

[1] *The United Kingdom.*—Several cases have been cited in § 526, *ante*, in which the doctrine of the vice principalship of a general manager was recognized by English judges, but, as stated in § 529, the law was declared in a different sense by the House of Lords in *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App.

Cas. 326, 19 L. T. N. S. 30. See also § 531.

The doctrine of departmental control is impliedly condemned in the same case (§ 532, *ante*); but it has never really been discussed as a distinct and specific conception. That superior servants of a lower grade than general managers could be vice principals is a theory which has never been countenanced in England. It has been declared that there can be no recovery for the negligence of the following employees:

An "underlooker" in a mine. *Hall* v. *Johnson* (1865) 3 Hurlst. & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 13 Week. Rep. 411.

An underground manager of a mine. *Wright* v. *Roxburgh* (1864) 2 Macph. Sc. Sess. Cas. 3d series, 748; *Wilson* v. *Sneddons* (1866) 4 Macph. Sc. Sess. Cas. 3d series, 736; *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30. The last-mentioned case definitely settles this to be the law in the United Kingdom, and overrules some earlier Scotch cases to the contrary. *Somerville* v. *Gray* (1863) 1 Sc. Sess. Cas. 3d series, 768; *Hardie* v. *Addie* (1858) 20 Sc. Sess. Cas. 2d series, 553.

The foreman of a gang engaged in excavating. *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 334, 19 L. T. N. S. 30, per Lord Cranworth, *arguendo*, page 334.

The chief engineer of a steamer. *Searle* v. *Lindsay* (1861) 11 C. B. N. S. 429, 31 L. J. C. P. N. S. 106, 8 Jur. N. S. 746, 5 L. T. N. S. 427, 10 Week. Rep. 89.

The captain of a ship. *Hedley* v. *Pinkney & Sons S. S. Co.* [1894] A. C. 222, Affirming [1892] 1 Q. B. 58 and overruling *Ramsay* v. *Quinn* (1874) Ir. Rep. 8 C. L. 322; *Leddy* v. *Gibson* (1873) 11 Sc. Sess. Cas. 3d series, 304.

The traffic manager of a railway. *Conway* v. *Belfast & N. Counties R. Co.* (1877) Ir. Rep. 11. C. L. 345, Affirming (1875) Ir. Rep. 9, C. L. 498.

In Scotland a strong tendency towards the superior servant doctrine was at first exhibited, and one of the earlier decisions, *Dixon* v. *Rankin* (1852) 14 Sc. Sess. Cas. 2d series, 420, was strongly relied on in the leading Ohio case of *Cleveland, C. & C. R. Co.* v. *Keary* (1854) 3 Ohio St. 201 (see § 522, *ante*). This tendency seems to have been only partially checked by the judgment of the House of Lords in *Bartonshill Coal Co.* v. *Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767; for it will be observed that one of the decisions cited above, in which an underground manager in a mine was held to be a vice principal, bears the date of 1863. The law was only settled definitely on the same basis as that of England by *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30.

The particular decisions with regard to general managers in Scotland have been discussed in §§ 526 and 529, *ante*.

British Colonies.—In these the English cases are, of course, followed. The following have been held to be mere servants:

The foreman of a pile-driving gang. *Drew* v. *East Whitby Twp.* (1881) 46 U. C. Q. B. 107.

The superintendent of structures on a railway. *Carney* v. *Caraquet R. Co.* (1890) 29 N. B. 425.

A civil engineer superintending the construction of a railway for nonresident contractors, who are represented by a general agent. *McBride* v. *Brogden* (1876) 3 New Zealand C. A. 271.

The mate of a ship. *Sanderson* v. *Smith* (1882) 3 New So. Wales L. R. 31.

As to the cases on the position of general managers, see §§ 526, 529, *ante*.

A foreman of a street railway company. *Dixon* v. *Winnipeg Electric Street R. Co.* (1897) 11 Manitoba Rep. 528.

Federal Courts.—The Federal decisions are singularly conflicting, and their significance as authorities can perhaps be shown most clearly by considering them with reference to the two leading cases in which the Supreme Court has explained its views.

Several cases preceding the judgment in the *Ross Case* (see *infra*) permitted recovery under circumstances in which the master would now be absolved in any court which was not an avowed adherent of the superior servant doctrine (§§ 521, *et seq.*, *ante*), and are, therefore, no longer law so far as the Federal courts are concerned.

In *McMahon* v. *Henning* (1880) 1 McCrary, 516, 3 Fed. 353, a yard master was held to be a vice principal.

In *Gravelle* v. *Minneapolis & St. L. R. Co.* (1882) 3 McCrary, 352, 10 Fed. 711, a jury was told that, if the plaintiff was a subordinate of an assistant yard master with respect to the duties which he was then performing, he was not a fellow servant of such yard master.

In *Thompson* v. *Chicago, M. & St. P.*

R. Co. (1883) 4 McCrary, 629, 14 Fed. 364, it was laid down that the general rule as to common employment is subject to this exception among others, that, where the employer places one employee under the control and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary perils, of the existence and extent of which he is not advised, the master is liable. In this case a road master was assumed to be a vice principal.

In *Miller* v. *Union P. R. Co.* (1883) 5 McCrary, 300, 17 Fed. 67, the master was held liable for the negligence of a foreman of carpenters, who ordered a subordinate into a dangerous position.

In *Brown* v. *The Bradish Johnson* (1873) 1 Woods, 301, Fed. Cas. No. 1, 992, it was laid down that a mariner who is injured in the service of the ship can recover damages in the nature of extra wages, where there has been some carelessness or other fault on the part of the officers of the ship; his rights, in the absence of such fault, being limited to free medical attendance until he is cured.

In another case in the same circuit a vessel was held liable for the expenses of a sailor, incurred during his recovery from an injury caused by the misconduct of his officers, as well as for the wages accruing during the same period. *Brown* v. *The D. S. Cage* (1872) 1 Woods, 401, Fed. Cas. No. 2,002 (liability for wages conceded).

In *The Chatsop Chief* (1881) 7 Sawy, 274, 8 Fed. 163, it was held that a fireman of a steam tug, injured through a collision caused by incompetence of the master, could recover, the broad ground being taken that he was an inferior servant injured by the misconduct of a superior one.

In *Peterson* v. *The Chandos* (1880) 4 Fed. 645, Deady, D. J., although the case was decided on another point, considered that, on account of the dependent position of a seaman, and of the impossibility of his leaving the service, like a workman on land, when he is dissatisfied with the competency of his coemployees, it was unjust to apply the doctrine of common employment to a case where a seaman was injured by the carelessness of the mate in putting up a rotten crane line. (This *dictum* was disapproved in *Benson* v. *Goodwin* [1888] 147 Mass. 237, 17 N. E. 517.)

In *Daub* v. *Northern P. R. Co.* (1883) 18 Fed. 625, a deckhand caught round the leg by a headline which he was paying out, owing to the negligence of the mate in not stationing himself in such a position as to be able to observe any accident which might render it necessary to stop the ship instantly. (Also disapproved in *Benson* v. *Goodwin* [1888] 147 Mass. 237, 17 N. E. 517.)

But the tendency exhibited by these cases was not universal, as a division foreman of bridges on a railway was, in 1882, held to be a mere servant in *Yager* v. *Atlantic, M. & O. River R. Co.* 4 Hughes, 192; and the same defense was admitted in the case of a mate of a ship. *The E. B. Ward, Jr.* (1884) 20 Fed. 702; *Malone* v. *Western Transp. Co.* (1873) 5 Biss. 315, Fed. Cas. No. 8996; *The City of Alexandria* (1883) 17 Fed. 390.

In *Union P. R. Co.* v. *Fort* (1873) 17 Wall. 553, 21 L. ed. 739, the employer was held liable for injuries received by a boy in obeying the order of a foreman. But the rationale of this decision is that the risk undertaken was outside the scope of the contract of service. See § 465, *ante*. It is not material, therefore, to inquire whether it is or is not in harmony with later decisions not involving this element.

The actual scope of the decision in *Chicago, M. & St. P. R. Co.* v. *Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, is, first, that the head of any distinct department of a business is a representative of the master; and secondly, that under this doctrine a railway company is liable for the negligence of a conductor. But a good deal of the language used by Mr. Justice Field in the majority opinion was apparently susceptible of the construction that he intended to adopt a theory of vice principalship not materially different from that discussed in chapter XXVIII., D, *ante*; and before the *Baugh Case* had explained the real scope of the decision, several rulings based on an erroneous idea of its effect had been made, both in the Federal and the state courts. Confining our attention for the present to the former courts, it seems certain that a master would not now be held liable by one of them, as he was between the dates of the *Ross* and *Baugh Cases*, for the negligence of the following employees:

A gang foreman in a machine factory. *Mason* v. *Edison Mach. Works* (1886) 24 Blatchf. 93, 28 Fed. 228.

A foreman of carpenters. *Pullman's*

Palace Car Co. v. *Harkins* (1893) 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. 992.

An engineer who, in accordance with the company's rules, has taken charge of the forward section of a train which has broken apart. *Newport News & M. Valley Co.* v. *Howe* (1892) 3 C. C. A. 121, 6 U. S. App. 172, 52 Fed. 362.

In *Haas* v. *Balch* (1893) 6 C. C. A. 201, 12 U. S. App. 534, 56 Fed. 98, a foreman of a gravel train seems to have been viewed as a vice principal (as respects an assurance of safety).

A section foreman was held to be a vice principal in *Northern P. R. Co.* v. *Peterson* (1892) 2 C. C. A. 157, 4 U. S. App. 574, 51 Fed. 182, where the court of appeals went so far as to lay it down that the test for determining whether a person occupies the relation of vice principal or fellow servant is not whether he has charge of an important department of the master's service, but whether his duties are exclusively supervision, direction, and control of the work, and over subordinate employees engaged therein. This decision was reversed in 1895 by the Supreme Court (162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843), the *Baugh Case* having been decided in the meantime. See further as to such employees, *infra*.

Possibly the *Baugh Case* has not impliedly overruled the decisions declaring employers liable for the negligence of the following employees:

The foreman of a quarry. *Reed* v. *Stockmeyer* (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186, Adirming, on this point (1893) 55 Fed. 259.

A foreman in charge of the erection of a building. *Heckman* v. *Mackey* (1888) 35 Fed. 353.

A road master (apparently of a division only). *Atchison, T. & S. F. R. Co.* v. *Wilson* (1891) 1 C. C. A. 25, 4 U. S. App. 25, 48 Fed. 57.

A foreman of a construction crew. *Lindvall* v. *Woods* (1891) 44 Fed. 855, where it was left to the jury to say whether the foreman of several gangs engaged in constructing a railway was a vice principal, the judge charging them that a master is responsible for the negligence of an employee vested with the entire control and supervision of a particular work to be done. This charge was approved in (1891) 1 C. C. A. 37, 4 U. S. App. 49, 48 Fed. Rep. 62. In the case of the same name in (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020, arising out of the same accident, the foreman was held to be a mere servant, and the further ground was taken that the trestle which fell was not a structure furnished for the laborers to work upon, but was itself a part of what was to be done in the construction of the road.

A pilot in command of a vessel. *The Titan* (1885) 23 Blatchf. 177, 23 Fed. 413.

A captain of a ship. *The A. Heaton* (1890) 43 Fed. Rep. 592; *The Transfer No. 4* (1894) 9 C. C. A. 521, 20 U. S. App. 570, 61 Fed. 364, Reversing (1893) 55 Fed. 98 (*Baugh Case* not cited though it was decided in the previous year). The case of *Quinn* v. *New Jersey Lightcrage Co.* (1885) 23 Blatchf. 500, 23 Fed. 363, in which such liability was denied, turned on the fact that the captain was engaged in manual labor. The theory of dual capacity is also the ground of the decision in *The Queen* (1889) 40 Fed. 691, though this case probably carries that theory further than is justifiable under the principles accepted by most courts. See §§ 543-547, *ante*.

A yard master was held to be a vice principal, in *Hardy* v. *Minneapolis & St. L. R. Co.* (1888) 36 Fed. 567, and the same ruling has been made since the *Baugh Case*. See *infra*.

That a foreman of construction on a railway is a vice principal was assumed by the Supreme Court itself in *Coyne* v. *Union P. R. Co.* (1890) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382, but his precise functions are not stated.

One case which, at first sight, might seem to have been superseded by the later rulings of the Supreme Court, may be upheld as really embodying the principle that the duty of furnishing appliances is nonassignable. *The Julia Fowler* (1892) 49 Fed. 277 (seamen recovered for injuries caused by defective rope furnished by chief officer of ship).

On the other hand, some of the cases decided during this period also took a correct view of the effect of the *Ross Case*, the master being held not liable for the negligence of the following employees:

The engineer . . a detached engine. *Howard* v. *Denver & R. G. R. Co.* (1886) 26 Fed. 837.

The foreman of a gang engaged in excavating work. *Anderson* v. *Winston* (1887) 31 Fed. 528.

A "wreck master" having full control of members of wrecking crews, not excluding road masters, when they are

present. *Barquon* v. *Omaha & St. L. R. Co.* (1890) 41 Fed. 697. This case is susceptible of being reconciled with the cases *infra* to the opposite effect, on the supposition of a different arrangement which made the delinquent a real head of a department, when the occasions for his services arose; otherwise the case must be treated as overruled, both generally by the *Baugh Case*, and as to the specific facts by *McGrath* v. *Texas & P. R. Co.* (1894) 9 C. C. A. 133, 23 U. S. App. 86, 60 Fed. 555, cited *infra*.

An engineer in charge of the motive power of an elevator. *Wolcott* v. *Studebaker* (1887) 34 Fed. 8.

The foreman of a master stevedore. *The Wm. F. Babcock* (1887) 31 Fed. 418 (hatch left open).

In 1893 came the Supreme Court's explanation of its real position in *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, an extract from which has already been given in § 534, *ante*. The court declined to extend the principle of the *Ross Case* so as to cover the engineer of a detached engine, and declared that the doctrine of departmental control, as formulated in that case, merely enabled the servant to recover for the negligence of an employee in complete control of one of the principal departments of a large concern, and did not imply that the master was liable for the acts of all servants controlling a separate piece of work in one of those departments. See § 524, *ante*.

In later decisions, accordingly, the action has been declared not to be maintainable, where the delinquent was one of the following employees:

The foreman of a gang assisting regular section crews as occasion required. *Northern P. R. Co.* v. *Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

A section foreman. *Martin* v. *Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603; *Northern P. R. Co.* v. *Charless* (1896) 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 818; *Dorrers* v. *Spencer* (1895) 17 U. S. C. A. 215, 25 U. S. App. 411, 70 Fed. 480; *Kansas & A. Valley R. Co.* v. *Waters* (1895) 16 U. S. C. A. 609, 36 U. S. App. 31, 70 Fed. 28; *Wright* v. *Southern R. Co.* (1897) 80 Fed. 260.

A divisional road master. *Martin* v. *Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603.

A foreman in the construction of a bridge, with two superiors over him. *Kelly* v. *Jutte & F. Co.* (1899) 98 Fed. 380.

A wreck master. *McGrath* v. *Texas & P. R. Co.* (1894) 9 U. S. C. A. 133, 23 U. S. App. 86, 60 Fed. 555.

An acting foreman of a wrecking gang. *Flippin* v. *Kimball* (1898) 31 C. C. A. 282, 59 U. S. App. 1, 87 Fed. 258.

A yard master. *Cincinnati, N. O. & T. P. R. Co.* v. *Gray* (1900) 50 L. R. A. 47, 41 U. S. C. A. 535, 101 Fed. 623. Affirming (1899) 97 Fed. 245.

A section foreman. *Lochhaum* v. *Oregon R. & Nav. Co.* (1900) 44 C. C. A. 220, 104 Fed. 852.

A foreman of a drill crew in a railway yard. *Central R. Co.* v. *Keegan* (1895) 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269.

A yard foreman. *Hunt* v. *Hurd* (1900) 39 U. S. C. A. 226, 98 Fed. 683; *Central R. Co.* v. *Keegan* (1895) 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269.

A foreman of a switching crew. *Harley* v. *Louisville & N. R. Co.* (1893) 57 Fed. 144.

A foreman of car repairers. *Grady* v. *Southern R. Co.* (1899) 34 C. C. A. 494, 92 Fed. 493.

The foreman of a gang taking down a building. *Cleveland, C. C. & St. L. R. Co.* v. *Brown* (1896) 20 C. C. A. 447, 34 U. S. App. 759, 73 Fed. 970. Reversing on rehearing (1893) 6 C. C. A. 142, 18 U. S. App. 10, 56 Fed. 804.

The temporary boss of a bridge gang, who was himself a laborer. *Texas & P. R. Co.* v. *Rogers* (1893) 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378.

A foreman in the construction of a bridge, with two superiors over him. *Kelly* v. *Jutte & F. Co.* (1899) 98 Fed. 380.

One of several foreman in a railway machine-shop. *Gaynon* v. *Durkee* (1898) 31 C. C. A. 306, 52 U. S. App. 587, 87 Fed. 302.

A foreman in charge of the repairs of machinery in a mill. *Stevens* v. *Chamberlin* (1900) 40 C. C. A. 421, 100 Fed. 378.

A foreman supervising laborers constructing a sewer. *Minneapolis* v. *Lundin* (1893) 7 U. S. C. A. 344, 19 U. S. App. 245, 58 Fed. 525.

The foreman of a gang of stevedores. *The Louisiana* (1896) 21 C. C. A. 60, 41 U. S. App. 324, 74 Fed. 748; *The Kensington* (1898) 91 Fed. 681.

A gang foreman in a mine. *Alaska Treadwell Gold Min. Co.* v. *Whelan*

(1897) 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40.

An underground boss in a mine. *What Cheer Coal Co.* v. *Johnson* (1893) 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. 810.

In one case a railway company was held liable for the negligence of a yard master. *Great Northern R. Co.* v. *McLaughlin* (1895) 17 C. C. A. 330, 44 U. S. App. 200, 70 Fed. 569; but it seems at least an open question whether this is a proper inference from the *Baugh Case*. In *Cincinnati, N. O. & T. P. R. Co.* v. *Gray* (1900) 50 L. R. A. 47, 41 C. C. A. 535, 101 Fed. 623, such functionaries were denied to be vice principals; but the other decision of the court of appeals was not cited.

In *Bowes* v. *Hopkins* (1898) 28 C. C. A. 524, 56 U. S. App. 217, 84 Fed. 767, it was not determined whether the lower court was right in declaring, as it had done, that a road master was a vice principal, and the case was decided in favor of the defendant on the ground that, even if there was negligence, he was not the culpable party.

The cases cited in § 535, note 1, subd. (h), *ante*, following the *Ross Case* as to the point that conductors are vice principals, have been, as there mentioned, virtually, if not actually, overruled by the decision in *New England R. Co.* v. *Conroy* (1899) 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85, and need not be again noticed in the present summary. The vice principalship of a conductor was again denied in *Maher* v. *Union P. D. & G. R. Co.* (1901) 45 C. C. A. 301, 106 Fed. 309.

The doctrine that the mere possession of a power of direction does not constitute a superior servant a vice principal was again applied quite recently in a case where a foreman was injured by the negligence of an engineer. *Briegal* v. *Southern P. Co.* (1900) 39 C. C. A. 359, 98 Fed. 958.

A general foreman, employed by contractors, and having charge of the work, of putting in the foundations for a wharf, and of all employees engaged in the work, with power to employ and discharge, was declared not to be a vice principal in *McDonald* v. *Buckley* (1901) 48 C. C. A. 372, 109 Fed. 290. But this seems to be an extreme decision, as the foreman was representing an absent employer in the management of the operatives.

As already stated at the beginning of this subdivision, the earlier cases are conflicting as to the relation of mates of vessels to their subordinates; but since the *Ross Case*, there can no longer be a question that, in the Federal courts, they are regarded as mere servants, under ordinary circumstances. *The Egyptian Monarch* (1888) 36 Fed. 773; *Carlson* v. *United N. Y. Sandy Hook Pilots* (1899) 93 Fed. 408; *The Job T. Wilson* (1897) 84 Fed. 204; *The Miami* (1899) 35 C. C. A. 281, 93 Fed. 218. *Fleming* (1898) 87 Fed. 757; *The Walla Walla* (1891) 46 Fed. 198.

The ruling in *Halverson* v. *Vice* (1876) 3 Sawy. 502, Fed. Cas. No. 5,970, that a ship owner is not liable for a mate's negligence in not examining an appliance, is, however, not law under the modern doctrine as to nonassignable duties. See chapter XXXI., *post*.

The decisions made on the authority of the *Ross Case* as to the status of captains were, as we have seen, conflicting. Whether they should be regarded as vice principals, or not, still remains doubtful even after the *Baugh Case* and the other later utterances of the Supreme Court. Recovery was denied in *The Ravensdale* (1894) 63 Fed. 624; *Olson* v. *Oregon Coal & Nav. Co.* (1899) 96 Fed. 109; *The Job T. Wilson* (1897) 84 Fed. 204.

But in the first case, the delinquent was merely the captain of a lighter, and his position did not involve the discharge of the functions usually associated with the masters of vessels. In all of them, moreover, the negligence was such as might be considered unofficial in the sense in which that term is understood by many Federal courts. See § 543, *ante*. These rulings, therefore, are not entirely conclusive. It can scarcely be denied that there is a certain inconsistency in refusing to treat them as at least departmental vice principals when so far that character is ascribed to various classes of employees whose functions are much less responsible than those of the master of a vessel.

The liability of an employer for the negligence of a general manager is fully recognized by the Federal courts. *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914 (see § 533, *ante*); *Northern P. Coal Co.* v. *Richmond* (1893) 7 C. C. A. 485, 15 U. S. App. 262, 58 Fed. 756; *Northwestern Fuel Co.* v. *Danielson* (1893) 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 915; *Lund* v. *Hersey Lumber Co.* (1890) 41 Fed. 262.

The doctrine of the dual capacity of a vice principal has been recognized by the court of appeals. *Reed* v. *Stockmeyer*

(1900) 20 C. C. A. 381, 31 U. S. App. 727, 74 Fed. 186; *Great Northern R. Co. v. McLaughlin* (1895) 17 C. C. A. 330, 14 U. S. App. 189, 70 Fed. 669; *The Miami* (1899) 35 C. C. A. 281, 93 Fed. 218. Affirming (1898) 87 Fed. 757; and by the lower courts. *Quinn v. New Jersey Lighterage Co.* (1885) 23 Blatchf. 209, 23 Fed. 363; *Olson v. Oregon Coal & Nav. Co.* (1890) 96 Fed. 109; *The Ida T. Wilson* (1897) 84 Fed. 201.

In *Northern P. R. Co. v. Peterson* (1892) 2 C. C. A. 157, 4 U. S. App. 574, 51 Fed. 182, a railway company was declared liable for an act of mutual negligence done by a section foreman. The decision was reversed by the Supreme Court (1894) 162 U. S. 340, 40 L. ed. 994, 16 Sup. Ct. Rep. 813, but merely on the ground that the delinquent was not a vice principal. The difference of opinion as to the distinction between official and nonofficial acts was referred to in the argument, but no ruling was made as to this point.

District of Columbia.—An employee appointed by a railway company to supervise and manage a quartz mine, with authority to employ and discharge laborers, is a vice principal. *Wedgle v. Washington & G. R. Co.* (1886) 5 Mackey, 144.

Alabama. Under the common law it was settled that even an employee supervising half a railroad was not a vice principal. *Mobile & M. R. Co. v. Smith* (1877) 59 Ala. 245.

In later cases recovery was denied for the negligence of the conductor. *Georgia P. R. Co. v. Davis* (1890) 92 Ala. 309, 9 So. 252 (intimating that *Mobile & M. R. Co. v. Smith* had gone to the "extreme verge of soundness"); and of the foreman of a gang of men employed in the construction of a telegraph line. *Postal Teleg. Cable Co. v. Hulsey* (1896) 115 Ala. 193, 22 So. 854 (a decision both with reference to the common law and the employers' liability act).

Arizona.—This court has held, following the *Ross Case, supra*, that the conductor of a work train is a vice principal. *McGill v. Southern P. Co.* (1893; Ariz.) 33 Pac. 821; except when a superior is on the train. See subsequent report of same case (1896; Ariz.) 44 Pac. 302.

Arkansas.—In *Jones v. Phillips* (1882) 39 Ark. 17, 43 Am. Rep. 264, it was laid down, *arguendo*, that superiority of rank is not a test of the representative capacity of an employee; and, pursuant to this theory, the conductor of a work train was in 1883, held not to be a vice principal. *St. Louis, I. M. & S. R. Co. v. Lochelford* (1883) 42 Ark. 417.

The question did not come before the Supreme Court again until 1893, in which year several judgments were rendered which modified the earlier rulings on lines indicated by the *Ross Case, supra*, and the decisions based upon it. In *Lloyd v. St. Louis & S. F. R. Co.* (1893) 58 Ark. 66, 22 S. W. 1089, a foreman of bridge builders on a railway was held to be a vice principal. Besides the *Ross Case*, other decisions were relied upon, which were supposed to have established a general rule that, where supervision is necessary to the safety of workmen, it is the master's duty to bestow it, the corollary drawn being that he is responsible for the negligence of any agent to whom the duty is intrusted. This is virtually the superior servant doctrine (chapter XXVIII., D, *ante*), and only the authorities based upon that doctrine support this sweeping statement of the court. The learned judge who wrote the opinion was certainly mistaken in thinking that the rulings which he cites as to general managers (*Quincy Min. Co. v. Kitts* [1879] 42 Mich. 34, 3 N. W. 240) or as to train despatchers (*Hoon v. Michigan C. R. Co.* [1883] 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502), are pertinent precedents for the general rule formulated. The scope of those rulings is much narrower than is here represented (chapter XXVIII., F, *ante*). Nor can even the *Ross Case* itself be properly vouched in aid of the specific ruling of the court. The cases cited in chapter XXVIII., F, *ante*, show very plainly that a foreman of the grade of the delinquent is not a vice principal under any proper conception of the doctrine of departmental control.

A similar criticism applies to *St. Louis, I. M. & S. R. Co. v. Torrey* (1893) 58 Ark. 217, 24 S. W. 241, supposing the rationale of that case to be that a vice principal (there a foreman of bridge construction) was not a representative of the master in respect to a negligent act characteristic of a servant. But possibly the nature of the act is intended to be the sole essential ground of the decision.

In *Fordyce v. Briney* (1893) 58 Ark. 206, 24 S. W. 250, it seems to be assumed that the foreman of a railway roundhouse was a departmental vice principal.

In *Kansas City, Ft. S. & M. R. Co. v. Hammond* (1894) 58 Ark. 324, 24 S. W.

723, it was held, on the authority of the *Bloyd Case* (1893) 58 Ark. 66, 22 S. W. 1089, that the superintendent in charge of a quarry owned by a railway company was a vice principal. This is a legitimate application of the doctrine of departmental control if the superintendent exercised control unrestricted except as regards the general manager of the company; but the report does not show as clearly as might be wished the precise nature and extent of the powers vested in the delinquent.

In *Ft. Smith Oil R. Co.* v. *Storer* (1893) 58 Ark. 168, 24 S. W. 106, an employee in charge of the oil department of a compress company seems to have been viewed as a departmental manager; but the main stress, perhaps, was intended to be laid on the non-delegable quality of the duty violated.

From the foregoing summary it would appear reasonable to conclude that the Arkansas court, while it is theoretically an adherent of the doctrine of departmental control, has applied that doctrine to employees of lower grade than is warrantable under the latest and best considered decisions of the Federal courts, whose views as to the proper limits of this doctrine are of strongly persuasive, if not of controlling, authority in the other jurisdictions where it has been adopted. Under these circumstances the proper classification of the Arkansas cases becomes a matter of some difficulty. But having regard to the actual facts, and the position of the employees held to be vice principals, from the *Bloyd Case* downwards, it seems justifiable, upon the whole, to say that, even if this state cannot be described as one of those which proceed upon the theory that all directing employees represent the master, its decisions are most correctly placed in the same list as those which illustrate that theory. See § 524, *ante*.

The dual capacity of superior servants was recognized in *St. Louis, I. & T. R. Co.* v. *Torrey* (1893) 58 Ark. 217, 24 S. W. 244.

California.—At an early date the common law was superseded in this state by the Code provision (§ 1970—see § 653a, *post*) which relieves employers from liability for the negligence of a coservant "in the same general business." These words have been thought by the supreme court to have been intended to sweep away the distinctions created by the adjudged cases in favor of the servant, on the ground of the negligent servant's superior position. *Congrave* v. *Southern P. R. Co.* (1891) 88 Cal. 360, 26 Pac. 175. Such a theory, if rigidly applied, would clearly absolve the master from responsibility for the negligence even of a general manager; and at one period there was a strong tendency to adopt this extreme view. But, on the whole, the statute has been treated as merely declaratory of the common law, the result being that this court, like those of nearly all the other states, holds a master to be liable for the negligence of a general manager. *Ryan* v. *Los Angeles Ice & Cold Storage Co.* (1896) 112 Cal. 244, 32 L. R. A. 524, 44 Pac. 471. See § 527, *ante*, for a review of the decisions.

Whether the doctrine of departmental vice principalship has been adopted in this state is a matter of doubt as the decisions stand. In one case a railway company was required to answer for the negligence of a road master, an official who, in some states, has been held a vice principal (see § 535, *ante*); but the rationale of the decision was that the plaintiff had not been warned of a special danger incident to the place of work. *Elledge* v. *National City & O. R. Co.* (1893) 100 Cal. 282, 34 Pac. 720. In another case the master was held liable for the negligence of an assistant foreman in a factory. *Foley* v. *California Horseshoe Co.* (1896) 115 Cal. 184, 47 Pac. 42. But the precise effect of this decision is not very clear. See § 534, note 5, *ante*.

The master's liability for the acts of the following supervising employees of lower grades has been declared:

A conductor. *Congrave* v. *Southern P. R. Co.* (1891) 88 Cal. 360, 26 Pac. 175.

A section foreman. *Dares* v. *Southern P. Co.* (1893) 98 Cal. 19, 32 Pac. 708.

A foreman in a mine. *Stephens* v. *Doe* (1887) 73 Cal. 26, 14 Pac. 378 (presumably not in full control; see above).

The foreman supervising the silver-room department of smelting works. *Nixon* v. *Selby Smelting & Lead Co.* (1894) 102 Cal. 458, 36 Pac. 803.

The foreman of a farm. *Voyes* v. *Wood* (1894) 102 Cal. 389, 36 Pac. 766 (presumably not in full control; see above).

A gang foreman of stevedores. *McDonald* v. *Hazletine* (1878) 53 Cal. 35.

The mate of a ship. *Livingston* v. *Kodiak Pkg. Co.* (1894) 103 Cal. 258, 37 Pac. 149.

The superintendent of the construction of a bridge. *Donnelly* v. *San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559.

The foreman of construction of a trestle. *Callan* v. *Bull* (1896) 113 Cal. 593, 45 Pac. 1017.

A foreman in a quarry which is managed by a superintendent. *Donovan* v. *Ferris* (1900) 128 Cal. 48, 60 Pac. 519.

The theory that a vice principal should be regarded as a mere servant when he is doing a servant's work has not been discussed in any of the cases. In two cases the essence of the decision in this point of view may be said to be that foremen whose rank is lower than that of general managers are vice principals in regard to the performance of non-delegable duties. *Higgins* v. *Williams* (1896) 114 Cal. 176, 45 Pac. 1041; *Elledge* v. *National City & O. R. Co.* (1893) 100 Cal. 282, 34 Pac. 720. (See above.) The theory on which two others turn is that certain foremen of this grade were not vice principals to the negligent act which caused the injury. *Donnelly* v. *San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559 (answering that all was clear below when a workman was about to throw down a heavy article); *Callan* v. *Bull* (1896) 113 Cal. 593, 45 Pac. 1017 (neglect to provide a scaffold of sufficient strength during the progress of the work). But in the latter of these cases some language is used which shows a decided leaning toward the doctrine of *Crispin* v. *Babbitt*. (See §§ 544, 547, *ante*.)

Colorado.—A master is held to be liable for the negligence of the following employees:

A manager. *Colorado Mill & Elevator Co.* v. *Mitchell* (1899) 26 Colo. 284, 58 Pac. 28; *Lantry* v. *Silverman* (1892) 1 Colo. App. 404, 29 Pac. 180.

A departmental manager,—as, an employee in full charge of the sinking of a mine shaft. *Deep Min. & Drainage Co.* v. *Fitzgerald* (1895) 21 Colo. 533, 43 Pac. 210.

The superintendent of the construction of a railway. *Denver, S. P. & P. R. Co.* v. *Driscoll* (1889) 12 Colo. 520, 21 Pac. 708.

The general foreman of tracklayers, under a superintendent of construction. *Colorado Midland R. Co.* v. *O'Brien* (1891) 16 Colo. 219, 27 Pac. 701; *Colorado Midland R. Co.* v. *Naylon* (1892) 17 Colo. 501, 30 Pac. 249.

A road master was assumed to be a vice principal in *Burlington & M. River R. Co.* v. *Budin* (1895) 6 Colo. App. 275, 40 Pac. 503.

A conductor was assumed to be a vice principal in *Denver, T. & G. R. Co.* v. *Simpson* (1891) 16 Colo. 55, 26 Pac. 339.

The doctrine that a vice principal is a mere servant when he does manual work is applied in one of the above cases. *Deep Min. & Drainage Co.* v. *Fitzgerald* (1895) 21 Colo. 533, 43 Pac. 210.

Connecticut.—A master is liable for the negligence of a general manager. *Gerrish* v. *New Haven Ice Co.* (1893) 63 Conn. 9, 27 Atl. 235.

The doctrine of departmental vice principalship seems also to be recognized in this state, as the *Ross Case* was relied upon in *Darrigan* v. *New York & N. E. R. Co.* (1884) 52 Conn. 295, 52 Am. Rep. 590 (delinquent was a train despatcher). But the court in its argument wavers between this conception and that of a non-delegable duty intrusted to the despatcher. See § 577 (a), *post*.

The mere fact that the negligent servant was the superior of the injured one will not enable the latter to recover. *Wilson* v. *Willimantic Linen Co.* (1883) 50 Conn. 433, 47 Am. Rep. 653; *Sullivan* v. *New York, N. H. & H. R. Co.* (1892) 62 Conn. 209, 25 Atl. 711 (gang foreman not a vice principal).

Delaware.—A general manager has been held to be a vice principal. *Foster* v. *Pusey* (1888) 8 Houst. (Del.) 168, 14 Atl. 545.

The status of superior servants of lower grade has not been discussed.

Florida.—The subject of vice principalship has apparently not been discussed in this state, all the employer's cases of injuries to servants turning upon the question of common employment merely. (See chapter XXVII., *ante*.)

Georgia.—A general manager is deemed to be a vice principal. *Atlanta Cotton Factory Co.* v. *Speer* (1882) 69 Ga. 137, 47 Am. Rep. 750 (assumed); *Krogg* v. *Atlanta & W. P. R. Co.* (1886) 77 Ga. 202; *McDonald* v. *Eagle & P. Mfg. Co.* (1881) 67 Ga. 761 (1882) 68 Ga. 839.

A departmental manager is a vice principal. *Taylor* v. *Georgia Marble Co.* (1895) 99 Ga. 512, 27 S. E. 768; *Spencer* v. *Brooks* (1895) 97 Ga. 681, 25 S. E. 480 (conductor was delinquent; *Ross Case* [§ 532, *ante*] followed); *Au-*

gusta v. *Owens* (1900) 111 Ga. 464, 36 S. E. 830 (superintendent of quarry owned by a city); *Chesney* v. *Ocean S. S. Co.* (1893) 92 Ga. 726, 19 S. E. 33 (employee of steamship company superintending the loading of a ship); *Woodson* v. *Wm. Johnston & Co.* (1899) 109 Ga. 454, 34 S. E. 587 (same description of employee,—called here a "walking boss"); *Blackman* v. *Thomson-Houston Electric Co.* (1897) 102 Ga. 64, 29 S. E. 120 (general foreman of power house of electric company).

No action can be maintained for the negligence of the following superior servants of the lower grades:

A workman with two or three under him, engaged in erecting a building. *McDonald* v. *Eagle & P. Mfg. Co.* (1881) 67 Ga. 761 (1882) 68 Ga. 839 (refusing to treat such an employee as a general superintendent).

A gang boss on the construction of a building. *Cates* v. *Ilner* (1898) 104 Ga. 679, 30 S. E. 884.

A room foreman in a factory. *McGovern* v. *Columbus Mfg. Co.* (1886) 80 Ga. 227, 5 S. E. 492.

A foreman of a squad of men receiving timbers which are being hoisted by a derrick. *Gunn* v. *Willingham* (1900) 111 Ga. 427, 36 S. E. 804.

An operator of a machine. *Hamby* v. *Union Paper Mills Co.* (1900) 110 Ga. 1, 35 S. E. 297 (helper injured).

In one case a doctrine which was virtually the same as that of superior and subordinate (§§ 521 *et seq.*, *ante*), was enunciated. *Atlanta Cotton Factory Co.* v. *Speer* (1882) 69 Ga. 137, 47 Am. Rep. 750, where the master was held liable for the negligence of the immediate overseer of a girl of fifteen years of age, in allowing her to play with her companions in a room to which the superintendent had forbidden them to be taken. If it was intended by this ruling to formulate a principle of universal applicability, as between master and servant, the case is clearly overruled by the four cases last cited above. But it was recently explained that, when the court laid it down that "the agent who represents the corporation as master over other employees for the time occupies the position of the corporation for such time as to such subordinates," all that was meant was that the corporation was liable where the injured employee was a child who was without access to the general superintendent, and who received her orders solely from the manager of the branch of the business in which she was engaged. *Southern Agricultural Works* v. *Franklin* (1900) 111 Ga. 319, 36 S. E. 693. Obviously, however, such an explanation is anything but satisfactory, for, if the mere fact of an absence of personal communication between a servant and the general manager is to make the intermediate superior a vice principal, there is no logical ground upon which a court can decline to accept the superior servant doctrine without qualification. The scope of the *Speer Case*, therefore, must be even narrower than that suggested. Its true rationale should rather be sought in the theory, exemplified in numerous cases, that the obligations of employers to minors of tender years are more extensive than those to which they are subject with regard to servants of full age. In other words, the general doctrine that a master is not liable for an injury caused by the negligence of a fellow servant does not apply to the case of a child who was injured through the negligence of a superintendent whose orders the child was bound to obey. *Southern Agricultural Works* v. *Franklin* (1900) 111 Ga. 319, 36 S. E. 693, explaining the effect of *Augusta Factory* v. *Barnes* (1884) 72 Ga. 228, 53 Am. Rep. 838, to be that the [illegible] company's agent, in the case of a minor employee, owed the employee a higher degree of care and duty, which required the agents in authority over her to look after her safety while under their charge, and in the performance of her duty. (There the servant was not only a minor, but was also directed to undertake new risks, so that the case for the servant was really stronger than is stated). It was considered that the doctrine of *Scudder* v. *Woodbridge* (1846) 1 Ga. 195, that the defense of common employment was not available where the injured person was a slave, was applicable to minors of tender age. As regards the *Speer Case* itself, a court which rejects the doctrine of superior and subordinate might clearly hold an employer liable upon the specific facts there in evidence, by construing them as indicative of a breach of the non-delegable duty of instructing a young employee as to the dangers of the place of work. (See §§ 578, 579, *post*.) But this theory was not relied upon.

Illinois.—This is one of the states which has unreservedly accepted the doctrine of superior and subordinate (chapter XXVIII., D, *ante*). Employers

have been held responsible for the negligence of the following servants:

A general superintendent. *Kewanee Boiler Co.* v. *Erickson* (1898) 78 Ill. App. 35.

The foreman of a steel company. *Illinois Steel Co.* v. *Schymanowski* (1896) 162 Ill. 447, 44 N. E. 876.

The foreman of a brick company's clay mine. *Chicago Anderson Pressed Brick Co.* v. *Sobkowiak* (1889) 34 Ill. App. 312. Affirmed in (1894) 148 Ill. 573, 36 N. E. 572 (vice principalship not for jury in this instance).

The foreman of a meat packing establishment. *Libby, McN. & L.* v. *Scherman* (1893) 146 Ill. 540, 34 N. E. 801, Affirming (1892) 50 Ill. App. 123.

The foreman of a foundry. *Fitzgerald* v. *Honkomp* (1892) 44 Ill. App. 365.

A yardmaster. *Chicago, R. I. & P. R. Co.* v. *Touhy* (1887) 26 Ill. App. 99. *Norris* v. *Illinois C. R. Co.* (1899) 88 Ill. App. 614.

The foreman of a wrecking crew. *Wabash, St. L. & P. R. Co.* v. *Hawk* (1887) 21 Ill. 259, 12 N. E. 253.

The foreman of a railway lumber yard. *Chicago & A. R. Co.* v. *May* (1884) 108 Ill. 288.

A foreman of track repairers. *Chicago, St. L. & P. R. Co.* v. *Gross* (1890) 133 Ill. 37, 24 N. E. 563, Affirming (1889) 35 Ill. App. 178.

A section foreman. *Chicago & A. R. Co.* v. *Goltz* (1897) 71 Ill. App. 414.

The foreman of an electric railway company at its car shed. *Metropolitan West Side Elev. R. Co.* v. *Skola* (1900) 183 Ill. 454, 56 N. E. 171.

The "starter" of a street railway. *West Chicago Street R. Co.* v. *Dwyer* (1894) 57 Ill. App. 440 (probably a vice principal).

A foreman of one of the gangs engaged on the construction of a bridge. *Pittsburg Bridge Co.* v. *Walker* (1897) 170 Ill. 550, 48 N. E. 915, Affirming (1897) 70 Ill. App. 55.

The foreman of a gang of carpenters. *Leiter* v. *Kinmare* (1896) 68 Ill. App. 558.

The foreman of a gang engaged in hoisting a heavy article. *Fraser* v. *Hood* (1889) 33 Ill. App. 153; *Fraser* v. *Schroeder* (1896) 163 Ill. 459, 45 N. E. 288.

A pit boss in a mine. *Consolidated Coal Co.* v. *Wombacher* (1890) 134 Ill. 57, 24 N. E. 627, Affirming (1889) 31 Ill. App. 288.

The foreman of a gang engaged in excavating. *Chicago & T. R. Co.* v. *Simmons* (1882) 11 Ill. App. 147.

A foreman of car repairers. *St. Louis, I. & T. H. R. Co.* v. *Holman* (1894) 53 Ill. App. 617.

The foreman of a dredge. *Chicago Dredging & Dock Co.* v. *McMahon* (1889) 30 Ill. App. 358.

The feeder of a planing machine (as regards a boy under his orders). *Hunter* v. *Clark* (1884) 15 Ill. App. 470.

An assistant superintendent on a railway. *Chicago, R. & Q. R. Co.* v. *McLallen* (1876) 84 Ill. 109.

A foreman supervising the construction of a city sewer. *LaSalle* v. *Kostka* (1901) 190 Ill. 130, 60 N. E. 72, Affirming (1900) 92 Ill. App. 91; *Chicago* v. *Cronin* (1900) 91 Ill. App. 466.

The operator of a machine. *Norton Bros.* v. *Nadebok* (1901) 190 Ill. 595, 54 L. R. A. 842, 60 N. E. 843 (as to his "helper").

An assistant mine manager. *Consolidated Coal Co.* v. *Gruber* (1900) 188 Ill. 584, 59 N. E. 254.

A foreman in a sugar refinery. *Groszewski* v. *Chicago Sugar Ref. Co.* (1899) 84 Ill. App. 583.

A superior servant is a vice principal only as to servants under his control. *Lincoln Coal Min. Co.* v. *McNally* (1884) 15 Ill. App. 181.

It might be thought that courts which have imposed liability for the negligence of the employees above enumerated would have had no hesitation in holding railway companies liable for the defaults of conductors. But the precise extent of the responsibility for such employees is, as the cases stand, somewhat obscure. The supreme court has held the conductor of a wrecking train to be a vice principal. *Abend* v. *Terre Haute & I. R. Co.* (1884) 111 Ill. 202, 53 Am. Rep. 616; and the same ruling has been made by the court of appeals with regard to the conductor of a gravel train. *Chicago, B. & Q. R. Co.* v. *Blank* (1887) 24 Ill. App. 438. On the other hand, the court of appeals has declared a railway company not liable for the negligence of the conductor of a construction train. *Chicago & A. R. Co.* v. *McDonald* (1887) 21 Ill. App. 409; and the principle of this case has been approved by the supreme court to the extent that it has declared it to be a question for the jury whether such a conductor is a vice principal as to one of the laborers. *Mobile & O. R. Co.* v. *Massey* (1894) 152 Ill. 144, 38 N. E. 787, Affirming (1893) 52 Ill. App. 556 (omission to

read running orders led to a collision). The more recent decisions of the supreme court seem to regard the company's liability as being dependent simply upon the answer to the question whether, irrespective of the kind of train which he controlled, the act of the conductor was official or not. In one it was held error to instruct a jury on the theory that, as matter of law, a conductor who is also the foreman of a work train represents the company for all purposes. *Mobile & O. R. Co.* v. *Godfrey* (1895) 155 Ill. 78, 39 N. E. 590. In another the court refused to disturb the finding of the court of appeals that the negligence of a conductor of a freight train in permitting it to run past a switch on which he had been directed to await the passage of another train is that of a fellow servant, and not of a vice principal of the fireman, notwithstanding a rule of the company requiring trains to be run under the directions of the conductor, except when his directions conflicted with the rules or involved risk and hazard, in which case the engineer would be held equally responsible. *Meyer* v. *Illinois C. R. Co.* (1899) 177 Ill. 591, 52 N. E. 848, Affirming (1895) 65 Ill. App. 531.

In the case last cited the court seems to have contravened the principle enunciated by itself (§ 543, *ante*), that any act of negligence involving an exercise of authority is official. Most of the decisions, however, merely go to the extent of treating as a bar to the action the fact that the negligent act was done by the delinquent employee while participating in the work of his subordinates. *Hall* v. *Beckstein* (1898) 173 Ill. 187, 50 N. E. 711 (1897) 69 Ill. App. 616; *Illinois C. R. Co.* v. *Swisher* (1895) 61 Ill. App. 611; *Clay* v. *Chicago, B. & Q. R. Co.* (1894) 56 Ill. App. 235; *Chicago & W. I. R. Co.* v. *Mossig* (1893) 50 Ill. App. 663; *Chicago Architectural Iron Works* v. *Nagel* (1898) 80 Ill. App. 492; *Chicago* v. *Cronin* (1900) 91 Ill. App. 466.

For explanation of the cases in which the servant was allowed to recover under such circumstances, see § 545, note 1, *ante*.

Indiana.—In this state the doctrine that a master is not rendered liable merely by reason of the superior rank of the delinquent was carried so far at one time that the master mechanic of a railway was held not to be a vice principal. *Columbus & I. C. R. Co.* v. *Arnold* (1869) 31 Ind. 174, 99 Am. Dec. 615. This decision, which was based upon the opinion of the House of Lords in *Wilson* v. *Merry* (§ 527, *ante*), was afterwards declared, somewhat guardedly, to be "an extreme case, perhaps carrying the doctrine beyond its proper limits." *Indiana Car. Co.* v. *Parker* (1885) 100 Ind. 181. In a still later decision it was merely described as "an extreme case," and declared to have been greatly modified by later rulings. *Nall* v. *Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 260, 28 N. E. 183, 611. It has never been expressly overruled, therefore, but the decisions cited below show that the general principle it embodies is no longer law in Indiana. Upon the specific facts it is discredited by *Taylor* v. *Evansville & T. H. R. Co.* (1891) 121 Ind. 124, 6 L. R. A. 584, 22 N. E. 876. See *infra*.

A general manager was treated as a vice principal in *Mitchell* v. *Robinson* (1881) 80 Ind. 281, 41 Am. Rep. 812.

A possible illustration of the doctrine of departmental control is furnished by *Drinkout* v. *Eagle Mach. Works* (1883) 90 Ind. 423, where the delinquent was the foreman of the foundry department in machine works. But liability was really predicated rather from the nature of the negligent act. The same remark seems applicable to *Louisville, N. A. & C. R. Co.* v. *Graham* (1899) 124 Ind. 89, 24 N. E. 668, where the foreman of the construction of a tunnel allowed the place of work to become unsafe. Less equivocal recognitions of the doctrine are the following decisions, imposing liability for the negligence of the following employees:

A master mechanic. *Taylor* v. *Evansville & T. H. R. Co.* (1889) 121 Ind. 124, 6 L. R. A. 584, 22 N. E. 876.

A foreman in full control of the work of clearing away *debris* which is endangering a railway bridge. *Nall* v. *Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 260, 28 N. E. 183, 611.

A division superintendent of a railway. *Louisville, N. A. & C. R. Co.* v. *Heck* (1898) 151 Ind. 292, 50 N. E. 988.

A street commissioner superintending the construction of a bridge. *Lebanon* v. *McCoy* (1895) 12 Ind. App. 500, 40 N. E. 700.

The inspector of municipal waterworks, supervising the construction of a trench. *Ft. Wayne* v. *Christie* (1901) 156 Ind. 172, 59 N. E. 385.

That mere superiority of rank will not constitute a servant a vice principal, the rule being the same, whether

the injured servant is an adult or a minor, is well settled. *Pittsburgh, C. & St. L. R. Co.* v. *Adams* (1886) 105 Ind. 151, 5 N. E. 187. Hence, all these employees below the grade of departmental managers are treated as mere servants:

A conductor. *Yeager* v. *St. Louis, A. & T. H. R. Co.* (1864) 22 Ind. 26, 85 Am. Dec. 409; *Louisville, N. A. & C. R. Co.* v. *Southwick* (1896) 16 Ind. App. 486, 44 N. E. 263.

A section foreman. *Justice* v. *Pennsylvania Co.* (1891) 130 Ind. 321, 30 N. E. 303.

A foreman controlling a gang in one of the tunnels of a cement company. *Ross* v. *Union Cement & Lime Co.* (1906; Ind.) 58 N. E. 500.

The foreman of the woodshop in a car factory. *Indiana Car Co.* v. *Parker* (1884) 100 Ind. 181.

The superintendent of machinery in a factory. *Boyce* v. *Fitzpatrick* (1884) 80 Ind. 526.

The foreman of a gang lifting machinery. *Robertson* v. *Chicago & T. R. Co.* (1896) 146 Ind. 486, 45 N. E. 655.

An employee controlling an engine cleaner while he is instructing him in his duties. *Spencer* v. *Ohio & M. R. Co.* (1892) 130 Ind. 181, 29 N. E. 915.

A "bank boss" in a mine. *Brazil & C. Coal Co.* v. *Cain* (1884) 98 Ind. 282.

The foreman of a gang removing a telegraph line. *American Teleph. & Telg. Co.* v. *Bower* (1898) 20 Ind. App. 32, 49 N. E. 182.

Negligence committed in doing manual work which has no immediate connection with the characteristic functions of a vice principal, viewed as a supervising and directing agent, is deemed to be nonofficial. *Taylor* v. *Evansville & T. H. R. Co.* (1889) 121 Ind. 124, 6 L. R. A. 584, 22 N. E. 976; *Drinkout* v. *Eagle Mach. Works* (1883) 90 Ind. 423; *Indianapolis & St. L. R. Co.* v. *Johnson* (1885) 102 Ind. 352, 26 N. E. 200; *Salem Stone & Lime Co.* v. *Chastain* (1894) 9 Ind. App. 453, 36 N. E. 910 (complaint demurrable which alleges that the foreman of a stone company injured a subordinate by prying off a large piece of rock). In the first case the employer was held liable for the special reasons noted in § 545, note 4, *ante*, where an extract from the opinion is given. In the last three cases, it is possible that the delinquent was not regarded as a vice principal by virtue of his rank, and that the rationale of the decision was merely the nature of the act.

Iowa.—The superior servant doctrine was categorically rejected by a decision which declared a petition to be demurrable which seeks recovery on the theory that the delinquent servant had "charge and control" of the plaintiff. *Peterson* v. *Whitebreast Coal & Min. Co.* (1879) 50 Iowa, 673, 32 Am. Rep. 143 (approved in *Newbury* v. *Getchel & M. Lumber & Mfg. Co.* [1896] 100 Iowa, 441, 69 N. W. 743). The effect of this decision was subsequently stated to be that a mere foreman, as the word is generally understood,—that is, a laborer with power to superintend the labor of those working with him,—is a coemployee, so far as his own labor is concerned. *Baldwin* v. *St. Louis, K. & N. R. Co.* (1885) 68 Iowa, 37, 25 N. W. 918. Hence, liability has been denied where the delinquents were the following employees:

A foreman of track repairers. *Haben* v. *Burlington & M. River R. Co.* (1866) 20 Iowa, 562.

A machinist who occasionally called in other employees of a railway company to his assistance. *Hathaway* v. *Illinois C. R. Co.* (1894) 92 Iowa, 337, 60 N. W. 651.

A foreman superintending the construction of a house for a contractor. *Bean* v. *Null* (1884) 65 Iowa, 407, 21 N. W. 700 (presumably not in complete control; see cases cited below as to general and departmental managers).

A foreman of car repairers. *Foley* v. *Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 644, 21 N. W. 124.

An employee who, in the absence of the superintendent of a mine, gave the others occasional directions as to their work, and whose regular functions were to take charge of the tools, and keep the time of the men. *Wilson* v. *Duncraft Red-Stone Quarry Co.* (1889) 77 Iowa, 429, 42 N. W. 360.

A master is held liable for the negligence of a general manager. *Newbury* v. *Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743; and of a departmental manager. *Newbury* v. *Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743 (mill manager of lumber company); *McCarthy* v. *Chicago, R. I. & P. R. Co.* (1891) 83 Iowa, 485, 50 N. W. 21 (plaintiff entered into dangerous place by foreman superintending the construction of a railway bridge); *Baldwin* v.

St. Louis, K. & N. W. R. Co. (1888) 75 Iowa, 297, 39 N. W. 507 (employee controlling the lumber yard of a railway company); *Hathaway* v. *Des Moines* (1896) 97 Iowa, 333, 66 N. W. 188 (in entire charge of municipal street-work).

In this state the theory of dual capacity is, perhaps, not finally settled. The court has very distinctly recognized the applicability of both the alternative tests of vice principalship which are supplied by the official position of the delinquent, and the nature of the negligent act. See *Newberg* v. *Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743, holding that a master is liable for negligence in giving orders when the employee is a vice principal, and then only. But in the only case which touches on the doctrine of dual capacity, it was left undetermined whether a foreman of carpenters employed by a firm of contractors was a vice principal by virtue of his official position. *Barnicle* v. *Connor* (1900) 110 Iowa, 238, 81 N. W. 452, and the position taken was that there could not in any event be a recovery, as the negligent act was done while he was participating in manual labor. But the language used by the court can scarcely bear any other construction except that the doctrine was accepted.

Kansas.—In one of the earlier cases a petition was held demurrable on the ground that it merely averred that the plaintiff, a brakeman, was injured by the negligence of his conductor, and did not allege that the company was negligent in employing such conductor. *Dow* v. *Kansas P. R. Co.* (1871) 8 Kan. 642. The court was inclined to except from the operation of the doctrine of coservice only the higher officers who had authority to hire and discharge the other employees.

Other cases involving delinquencies of superior servants were made to turn upon the non-delegability of certain duties, irrespective of rank. *Kansas P. R. Co.* v. *Salmon* (1875) 14 Kan. 512; *Atchison, T. & S. F. R. Co.* v. *Moore* (1883) 29 Kan. 632; *St. Louis & S. F. R. Co.* v. *Weaver* (1886) 35 Kan. 412, 11 Pac. 408. But in the last-named case the *Ross Case* was cited by the court with approval, *arguendo*, and it was laid down that an employer was liable for the negligence of "one having the general management or control of some portion of the master's business."

It has also been held that something more than the mere possession of a power of control is required to warrant the inference that the delinquent was a vice principal. *Kansas P. R. Co.* v. *Little* (1877) 19 Kan. 267, where it was declared that the superintendent in full charge of the construction of a culvert is in a different position from a mere foreman working with the other employees under a common principal. Here, however, the default was in respect to defective machinery, and the decision in the servant's favor might have been put on that ground.

Some years later, however, a doctrine not distinguishable from that of superior and subordinate was applied in *Hannibal & St. J. R. Co.* v. *Fox* (1884) 31 Kan. 586, 3 Pac. 320, where an action was sustained for the negligence of a foreman of car repairers in not protecting a subordinate from moving cars.

In *Missouri P. R. Co.* v. *Peregoy* (1887) 36 Kan. 424, 14 Pac. 7, where a foreman of a railway machine shop was held to be a vice principal, the court seem to have had in mind a doctrine of no wider scope than the *Little Case* (1877) 19 Kan. 267, as it approved the following charge: "If Wirth was vested with full power to command the services of the deceased, and directed what he should do and how he should do it, and the whole management thereof and the direction of the deceased were vested in said Wirth, the defendant and superior servants reserving no discretion in themselves as to the direction of the work, then the act of Wirth is the act of the defendant, and not of a fellow servant."

The default was in respect to the quality of the machinery furnished in a case where a foreman of a gang hoisting stone with a derrick was held to be a vice principal. *Union P. R. Co.* v. *Fray* (1890) 43 Kan. 750, 23 Pac. 1039. This ruling is, therefore, of a somewhat ambiguous import in the present connection. The same remark is applicable to *Rouse* v. *Downs* (1897) 5 Kan. App. 549, 47 Pac. 982 (roadmaster constructed switch improperly).

But under the most recent decisions in which employers were held liable, it is no longer doubtful that the superior servant doctrine is a part of the law of this state. It has been laid down that whoever has full and unrestricted authority to direct and command is a vice principal. *Walker* v. *Gillett* (1898) 59 Kan. 214, 52 Pac. 442 (conductor), following the *Ross Case*, and refusing to accept the restrictions subsequently for-

mulated in the *Baugh Case.* (§§ 532, 534, *ante.*) Upon the authority of this case, employers have been held liable for the negligence of the following employees:

A foreman of carpenters in a car factory. *Kansas City Car & Foundry Co.* v. *Secrist* (1898) 39 Knn. 778, Appx.

A foreman in smelting works, who has absolute control of ton roasters and the workmen engaged thereon, and assigns them, at his discretion, to whatever duties he may think fit. *Consolidated Kansas City Smelting & Ref. Co.* v. *Peterson* (1899) 8 Kan. App. 316, 55 Pac. 673.

A "head miller" in general charge of a mill. *Mirick* v. *Morton* (1901) 62 Kan. 870, 64 Pac. 609.

This is probably one of the states in which an employer is not absolved on the ground that the negligence of the vice principal was committed in doing work usually done by a servant. See *Consolidated Kansas City Smelting & Ref. Co.* v. *Peterson* (1899) 8 Kan. App. 316, 55 Pac. 673.

Kentucky.—The net result of the Kentucky cases is the establishment of three rules of a highly artificial character, which have no counterpart in any other jurisdiction.

(a) *Rule as to servants working in different departments.*— Where the negligent and injured servants are in different departments, the master is responsible for the act of the former. Here the difference of department is sufficient of itself to exclude the defense of common employment, and neither the degree of negligence nor the superiority of rank enter, as material factors, into the case. *Louisville & N. R. Co.* v. *Fulbern* (1869) 6 Bush, 574, 99 Am. Dec. 690 (engineer killed by negligence of section foreman).

In one case liability was imposed for the reason that the servants were "in different spheres, and neither could, or was required to know, whether the other was properly doing his duty." *Illinois C. R. Co.* v. *Hilliard* (1896) 99 Ky. 684, 37 S. W. 75.

An instruction that there must be gross negligence on the part of the servants in charge of a passenger train in order to find for plaintiff, an engineer and fellow servant injured by reason of such negligence, was more favorable to defendant than the law authorized, as ordinary negligence was sufficient to make defendant liable. *Louisville & N. R. Co.* v. *Hiltner* (1900) 21 Ky. L. Rep. 1826, 56 S. W. 651; judgment reversed on rehearing (1900) 22 Ky. L. Rep. 1141, 60 S. W. 2, but not on this point.

In another case the court, in holding that an engineer on one train was not a coservant of the conductor of another train, by whose negligence he was killed, said: "Appellee's intestate undertook to serve the company on the train of Anderson, or to act as engineer upon such trains as might be required by the company. He was placed where he had no power to control, advise with, or resist the acts of Armstrong, and was unable to know what orders had been given the latter as to the movements of his train, or the skill and prudence with which these orders were obeyed; he had no voice in his employment, or the right to determine his skill and judgment in its exercise. Is it not more reasonable to make the company, whose duty it is to employ careful and skilled agents for the conduct of its business, and when it alone controls such agents, liable for this neglect of duty, than to adjudge that a mere subordinate, who has no means of knowing the qualifications of the agent for such a position, or voice in his selection as such, and without the means or power to resist or control his action, is without remedy, except as against the party committing the negligent act? If Cavens had been on the same train with Armstrong and in a condition, by reason of his equality with him as an employee, to watch over and provide against his negligence, the reasons then for refusing to make the company liable would apply; but when on different trains, and with no opportunity to exercise this watchful care over each other, the reason for releasing the company from responsibility ceases to exist, and in such cases those controlling and directing the movements of one train with reference to those upon another and different train must be regarded as the agents of the company." *Louisville, C. & L. R. Co.* v. *Carens* (1873) 9 Bush, 566.

The engineers of two different trains were held not to be coservants in *Cincinnati, N. O. & T. P. R. Co.* v. *Roberts* (1901) 23 Ky. L. Rep. 264, 62 S. W. 901.

A brakeman may recover of the master for the ordinary neglect of the servants charged with the duty of keeping the roadbed in repair. *Chesapeake & N. R. Co.* v. *Venable* (1901) 23 Ky. L. Rep. 427, 63 S. W. 35.

In a case where an engineer who saw

a fence builder on the track did not apply brakes until the train was within about 100 yards of him, the question of negligence was held to be for the jury. *Louisville & N. R. Co.* v. *Simpson* (1900) 23 Ky. L. Rep. 1075, 64 S. W. 750.

Where a conductor of a train on one division of a railroad was injured by the gross negligence of the servants in charge of a train on another division of the same road at a point where the two divisions crossed, the company was held liable. *Louisville & N. R. Co.* v. *Edmonds* (1901) 23 Ky. L. Rep. 1049, 64 S. W. 727.

(b) *Rule as to servants of coequal grade in the same department.*—Even though the negligence of the delinquent servant may have been gross, the action is barred by the defense of common employment, where he is in the same department, or the same "field of labor" as the injured servant, and not of a higher grade than the latter.

In most of the cases where this rule was applied, the negligent and injured servants were on an equality. *Ft. Hill Stone Co.* v. *Orm* (1886) 84 Ky. 183 (workman at foot of incline in quarry killed by wilful negligence of workman at the top in allowing loaded car to run down); *Casey* v. *Louisville & N. R. Co.* (1886) 84 Ky. 79 (here the negligent servant and the plaintiff's intestate were laborers at work on a railway, transporting earth on a small truck to the cars, and by turns acting as brakeman, and the death was caused by the wilful neglect of the former while he was handling the brakes); *Volz* v. *Chesapeake & O. R. Co.* (1893) 95 Ky. 188, 24 S. W. 119 (member of gang of pile drivers, injured by gross neglect of a fellow workman in prematurely letting fall the hammer); *Cincinnati, N. O. & T. P. R. Co.* v. *Roberts* (1901) 23 Ky. L. Rep. 264, 62 S. W. 901 (engineer on one of two engines attached to the same train was injured by the negligence of the engineer on the other); *Illinois C. R. Co.* v. *Stewart* (1901) 23 Ky. L. Rep. 637 63 S. W. 596 (two switchmen held to be coservants); *Potter* v. *Louisville & N. R. Co.* (1899) 20 Ky. L. Rep. 1842, 50 S. W. 1 (two cars were started down an incline, and the men on the second one allowed it to run so fast that it collided with the first); *Southern R. Co.* v. *Clifford* (1901) 23 Ky. L. Rep. 111, 62 S. W. 514 (brakeman, and a fireman in the discharge of his ordinary duty of receiving signals from the brakeman and repeating them to the engineer, held to be coequal fellow servants).

But the result of the rule is, of course, the same where the injured servant was the higher in rank. *Edmonson* v. *Kentucky C. R. Co.* (1899) 20 Ky. L. Rep. 12, 6, 49 S. W. 200, Reversing on rehearing (1898) 46 S. W. 679; former appeal (1894) 16 Ky. L. Rep. 459, 28 S. W. 789 (conductor held not to be entitled to recover for negligence of engineer); *Linck* v. *Louisville* [illegible] *R. Co.* (1899) 107 Ky. 370, 54 S. W. 184 (railroad company not liable for the death of a train conductor caused by the negligence of the engineer, though the conductor was at the time acting as brakeman).

When a number of persons contract to perform service for another, the employees not being superior or subordinate, the one to the other, in its performance, and one receives an injury by the neglect of the other in the discharge of his duty, they are regarded as substantially the agents of each other, and no recovery can be had against the employer. *Louisville, C. & L. R. Co.* v. *Carens* (1873) 9 Bush. 566.

(c) *Rule as to superior and subordinate servants in the same department.*—A master is liable for injuries caused by the gross or wilful negligence, but not by the ordinary negligence, of a superior coemployee of the injured servant in the same department. *Louisville & N. R. Co.* v. *Collins* (1865) 2 Duv. 114, 87 Am. Dec. 486 (laborer usually employed in loading cars injured by gross negligence of engineer while he was assisting the latter to right an overturned locomotive); *Louisville & N. R. Co.* v. *Robinson* (1868) 4 Bush. 507 (brakeman on freight train run over in a yard through the gross negligence of a switchman and the engineer of a passenger train); *Louisville & N. R. Co.* v. *Brooks* (1885) 83 Ky. 129 (brakeman killed by wilful negligence of engineer); *Louisville & N. R. Co.* v. *Moore* (1886) 83 Ky. 675 (brakeman injured by wilful neglect of conductor); *Louisville & N. R. Co.* v. *Sheets* (1890) 11 Ky. L. Rep. 781, 13 S. W. 248 (yard switchman held not to be a fellow servant of an engineer of an ordinary train); *Louisville & N. R. Co.* v. *Rains* (1893) 15 Ky. L. Rep. 423, 23 S. W. 505 (engineer of a train following another injured by the gross negligence of conductor of the latter in failing to set proper danger signals); *Chesapeake, O. & S. W. R. Co.* v. *Hoskins* (1897) 19 Ky. L. Rep. 1359, 43 S. W. 484 (similar facts); *Louisville & N. R. Co.*

v. *Sanders* (1898) 19 Ky. L. Rep. 1941, 44 S. W. 644 (laborer on trestle killed by gross negligence of his foreman or some other superior coemployee); *Louisville & N. R. Co.* v. *Adams* (1899) 106 Ky. 859, 51 S. W. 577 (plaintiff allowed to recover for the death of his intestate, a brakeman, caused by the gross negligence of the engineer); *Greer* v. *Louisville & N. R. Co.* (1893) 94 Ky. 169, 21 S. W. 649; *Louisville & N. R. Co.* v. *Slack* (1899) 20 Ky. L. Rep. 1200, 49 S. W. 3 (held to be gross negligence on the part of an engineer to start a train suddenly and without a signal, immediately after a brakeman has made a coupling, and before he has had time to withdraw); *Richards* v. *Louisville & N. R. Co.* (1899) 20 Ky. L. Rep. 1478, 49 S. W. 419 (moving train ahead without waiting for signals; brakeman run over); *Cincinnati, N. O. & T. P. R. Co.* v. *Palmer* (1895) 98 Ky. 382, 33 S. W. 199 (porter had his hand crushed through the negligence of the engineer in running his engine too rapidly against a car to be coupled); *Louisville & N. R. Co.* v. *Sarrant* (1894) 96 Ky. 197, 27 S. W. 999 (error not to instruct jury as to this point); *Louisville & N. R. Co.* v. *Brantley* (1894) 96 Ky. 297, 28 S. W. 477 (where the precise relations of the delinquent and injured servants are not stated); *Eastern Kentucky R. Co.* v. *Powell* (1895) 17 Ky. L. Rep. 1051, 33 S. W. 629 (instruction making company liable for ordinary negligence only was disapproved); *Illinois C. R. Co.* v. *Coleman* (1900) 22 Ky. L. Rep. 878, 59 S. W. 13 (same point); *Louisville & N. R. Co.* v. *Hawkins* (1899) 21 Ky. L. Rep. 354, 51 S. W. 426 (negligent employee was foreman of a gravel train); *Louisville & N. R. Co.* v. *Bass* (1897) 19 Ky. L. Rep. 1474, 43 S. W. 463 (negligent employee was a section foreman); *Illinois C. R. Co.* v. *Josey* (1901) 22 Ky. L. Rep. 1795, 61 S. W. 703 (section foreman applied brake of hand car without giving notice of his intention); *Louisville & N. R. Co.* v. *Hurst* (1892) 14 Ky. L. Rep. 632, 20 S. W. 817 (negligent employee was foreman of a switching crew); *Lawrence* v. *Hagemeyer & Co.* (1892) 93 Ky. 591, 20 S. W. 704 (negligent employee was foreman of a sawmill).

In a recent case an engineer of a train which had accidentally broken into two sections was considered to be, while he was backing the engine to find the other part of the train, a superior servant in charge of the engine, and therefore a vice principal as respects a brakeman on the engine. *Southern R. Co.* v. *Barr* (1900) 21 Ky. L. Rep. 1615, 55 S. W. 900.

The test of common employment, when viewed under this particular aspect, is that the injured servant shall be "in a condition, by reason of his equality with him as an employee, to watch over and provide against his negligence." *Edmonson* v. *Kentucky C. R. Co.* (1899) 105 Ky. 479, 49 S. W. 200, 448. Compare § 522 (c), note 6, *ante*.

In this connection it seems to be a conclusive presumption that the subordinate is not in a common employment with his superior, for the reason that his subordinate position implies that he has no opportunity to exercise a watchful care "over" the superior, that he has no knowledge or means of knowledge of such superior's qualifications, nor any authority to resist him or control his actions. *Louisville & N. R. Co.* v. *Collins* (1865) 2 Duv. 114, 87 Am. Dec. 486; *Louisville, C. & L. R. Co.* v. *Cavens* (1873) 9 Bush, 559.

In some of the above-cited cases, it will be observed, the servants were upon different trains, and, as the master's liability is predicated solely upon the degree of negligence and the superiority of rank, it follows that such servants are assumed to be in the same department.

It is held that the absence of slight care by superiors in the management of a railway train is gross negligence, and will render the company liable for consequent injuries sustained by a brakeman, without his fault. *Greer* v. *Louisville & N. R. Co.* (1893) 94 Ky. 169, 21 S. W. 649. Thus, evidence that when an engine was within a yard of a coach, to which plaintiff was preparing to couple it, the engineer put on steam and pushed it back so fast that plaintiff's hand was caught in trying to make the coupling, and that plaintiff did not have time to drop the link and pull out his hand, requires the submission to the jury of the question of gross negligence of the engineer. *Cincinnati, N. O. & T. P. R. Co.* v. *Palmer* (1895) 98 Ky. 382, 33 S. W. 199. So, permitting the movement of a train after an employee has gone between the cars by the conductor's direction, for the purpose of coupling them, is gross negligence on the part of the conductor, which will render the company liable for injuries thereby inflicted. *Louisville & N. R. Co.* v. *Mitchell* (1888) 87 Ky. 327, 8 S. W.

706. So, it is gross negligence for an engineer to attempt to run his engine upon a switch without a signal from plaintiff, the switchman, to move forward; so that the railroad company is liable for an injury to plaintiff's foot resulting therefrom. *Illinois C. R. Co.* v. *Stewart* (1901) 23 Ky. L. Rep. 637, 63 S. W. 596. So, a cause of action for injuries to a brakeman is stated by a petition alleging that the plaintiff, in anticipation of the throwing of a switch, at the suggestion of the fireman who had charge of the engine, climbed upon the pilot, and rode down to the switch; that suddenly, and without warning, and negligently, the air brakes were applied, causing a sudden check of the train, and throwing him from the engine; and that the air brakes were then suddenly released, and the engine run over and injured his foot and leg, necessitating their amputation. *Louisville & N. R. Co.* v. *Foard* (1898) 104 Ky. 456, 47 S. W. 342. So, where a freight train parts, it is gross negligence to back the engine rapidly at night in search of the lost cars. *Southern R. Co.* v *Barr* (1900) 21 Ky. L. Rep. 1615, 55 S. W. 900 (collision by which brakeman was killed). So, where a brakeman who had been run over had fainted from the loss of blood resulting from his injury, and fallen from the running board of the engine upon which he had mounted after he was injured, the engineer, not being able to see him, was not negligent in running the engine upon him; but, when he was under the engine, and it had stopped, the engineer was guilty of gross negligence in backing the engine without knowing where he was, and without a signal from another switchman to do so, especially after the other switchman urged him to stop, and told him plaintiff was under the engine. *Illinois C. R. Co.* v. *Stewart* (1901) 23 Ky. L. Rep. 637, 63 S. W. 596. So, where a gravel train was being operated with the caboose instead of the engine in front, and in making a running switch, in violation of the rules of the company, the caboose was cut off, causing plaintiff, a laborer on the train, to be thrown from the train and injured as he was attempting, without warning of what was being done, to pass to the caboose from the next car, the question whether there was gross negligence was properly submitted to the jury. *Illinois C. R. Co.* v. *Walters* (1900) 22 Ky. L. Rep. 137, 56 S. W. 706. So, where the servants in charge of a train saw a bridge watchman on his tricycle on a trestle, approaching the bridge, when the train was three quarters of a mile away, it was their duty to use proper care to avoid running him down, especially after they saw a signal from him, and saw that he was trying to reach a cage in front of him, provided for the safety both of himself and his tricycle. *Louisville & N. R. Co.* v. *Seibert* (1900) 21 Ky. L. Rep. 1503, 55 S. W. 892.

But the general rule thus laid down and exemplified seems rather difficult to reconcile with the ruling that gross negligence is not shown by evidence which merely shows that an engineer might, if he had looked, have observed a brakeman lying in an unconscious state near the track. *Robinson* v. *Louisville & N. R. Co.* (1894) 15 Ky. L. Rep. 626, 24 S. W. 625.

The foreman of a crew of laborers engaged in shoving a loaded push car over a trestle at a fast gait is not guilty of such gross negligence as will authorize a recovery from the railroad company for an injury to one of the laborers from having his foot run over by the car, by ordering the laborers to shove the car faster,—especially where it was necessary to hurry the car over the trestle that an expected train might pass safely. *Louisville & N. R. Co.* v *Bass* (1897) 19 Ky. L. Rep. 1474, 43 S. W. 663.

The petition of one who was injured by the fall of a timber insecurely placed by the boss on a car near which he was working, occasioned by the movement of the train, directed by the boss, after telling the workmen to continue the work, sufficiently states the cause of action by charging gross negligence in running and operating the train. *Louisville & N. R. Co.* v. *Hawkins* (1899) 21 Ky. L. Rep. 354, 51 S. W. 426.

The mere fact that it was possible for trainmen to see a part of the body of a servant, while the latter was passing between cars, where he was injured, was not sufficient to authorize the submission to the jury of the question whether they did see him, when there was no reason to expect his presence there. *Louisville & N. R. Co.* v. *Hocker* (1901) 23 Ky. L. Rep. 982, 64 S. W. 638.

In one case it was held that, if the plaintiff seeks to avail himself of the damage act, providing for a right of action in case the injured person should die, he must prove that the negligence was wilful; and that, unless death results, the common law rule governs

Cincinnati, N. O. & T. P. R. Co. v. *Palmer* (1895) 98 Ky. 382, 33 S. W. 199 (in this case separate instructions were given as to gross and wilful negligence).

In another case it was laid down that the rule that a servant cannot recover from the master for an injury caused by the neglect of his fellow servant applies as well to an action under the statute for wilful neglect as to a common-law action for neglect. *Edmonson* v. *Kentucky C. R. Co.* (1899) 105 Ky. 479, 49 S. W. 20, 448, Reversing on Rehearing (1898) 46 S. W. 679. The statute has been construed as but enlarging the common-law rule, or providing a remedy unknown to the common law; while, "at the same time, the doctrine of the text-books as to the liability of the employer for the acts of those in his employment, except as to the degrees of negligence, must prevail." *Casey* v. *Louisville & N. R. Co.* (1880) 84 Ky. 79. The doctrine of common employment under this statute is not altered by the Kentucky Constitution of 1891, § 241 providing generally that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the corporations and persons so causing the same." *Edmonson* v. *Kentucky C. R. Co.* (1899) 105 Ky. 479, 49 S. W. 200, 448. That there was no such alteration was assumed in *Volz* v. *Chesapeake & O. R. Co.* (1893) 95 Ky. 188, 24 S. W. 119, though the point was not directly raised.

The doctrine of dual capacity was rejected in *Illinois C. R. Co.* v. *Coleman* (1900) 22 Ky. L. Rep. 878, 59 S. W. 13.

Louisiana.—A general manager is a vice principal. *Mattise* v. *Consumers' Ice Mfg. Co.* (1894) 46 La. Ann. 1535, 16 So. 400.

The position of superior employees of lower grades is determined by the doctrine of the *Ross Case*, as it was understood by some courts before it was explained by the *Baugh Case* (§ 534, *ante*),—that is to say, as being very nearly, if not quite, equivalent to the doctrine of superior and subordinate. Liability has been imposed for the negligence of the following employees:

A conductor. *Dobson* v. *New Orleans & W. R. Co.* (1900) 52 La. Ann. 1127, 20 So. 670; *Van Amburg* v. *Vicksburg, S. & P. R. Co.* (1885) 37 La. Ann. 650, 55 Am. Rep. 517; *Wilson* v. *Louisiana & N. W. R. Co.* (1899) 51 La. Ann. 1133, 25 So. 961.

An employee supervising the work of taking down a building. *Paren* v. *Sellers* (1887) 39 La. Ann. 1011, 3 So. 362.

A yard master. *Metivier* v. *Texas & P. R. Co.* (1898) 50 La. Ann. 466, 23 So. 461.

A foreman in full control of the work of constructing a line of telegraph. *Lowers* v. *Cumberland Teleph. & Teleg. Co.* (1900) 52 La. Ann. 2153, 28 So. 307.

A foreman of car repairers. *Stucke* v. *Orleans R. Co.* (1898) 50 La. Ann. 188, 23 So. 342.

A foreman superintending the loading of a ship was treated as a vice principal in *Anderson* v. *Elder* (1901) 105 La. 672, 30 So. 120.

Maine.—A general manager is a vice principal. *Mayhew* v. *Sullivan Min. Co.* (1884) 76 Me. 100; *Donnelly* v. *Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 119, 37 Atl. 874; *Lasky* v. *Connahan P. R. Co.* (1891) 83 Me. 461, 22 Atl. 367; *Doughty* v. *Penobscot Log Driving Co.* (1884) 76 Me. 143 (*arguendo*).

The doctrine of departmental control was recognized in *Doughty* v. *Penobscot Log Driving Co.* (1884) 76 Me. 143.

The principle that mere superiority of rank does not constitute a vice principal has been applied in the case of the following employees:

A road master. *Lawler* v. *Androscoggin R. Co.* (1873) 62 Me. 463, 16 Am. Rep. 492.

The conductor of a construction train. *Cassidy* v. *Maine C. R. Co.* (1884) 76 Me. 488.

The foreman of a locomotive shop. *Beaulieu* v. *Portland Co.* (1860) 48 Me. 291.

The foreman in charge of the "grinder" crew in a mill. *Cowan* v. *Umbagog Pulp Co.* (1897) 91 Me. 26, 39 Atl. 340.

A foreman superintending the digging of a sewer or trench. *Conley* v. *Portland* (1886) 78 Me. 217, 3 Atl. 658; *Dube* v. *Lewiston* (1891) 83 Me. 211, 22 Atl. 112.

The foreman of a gang repairing a dam for a lumber company. *Doughty* v. *Penobscot Log Driving Co.* (1884) 76 Me. 143.

Maryland.—It seems doubtful whether this court has ever really recognized the doctrine that even general managers are vice principals. See § 530, *ante*, for a review of the cases. But it is at least certain that the following employees, who are elsewhere held to be departmental vice principals in some, if not most, jurisdictions, are regarded as mere servants:

A division superintendent in full control of his section of a railway. *North Pk & W. R. Co.* v. *Hoover* (1894) 79 Md. 253, 25 L. R. A. 711, 29 Atl. 994.

The master mechanic of a railway company. *Shoock* v. *Northern C. R. Co.* (1856) 5 Md. 462.

A captain of a tug boat belonging to an elevator company. *Baltimore Elevator Co.* v. *Veal* (1880) 53 Md. 438, 5 Atl. 338.

The foreman of a gravel train. *O'Donnell* v. *Baltimore & O. R. Co.* (1863) 20 Md. 212, 83 Am. Dec. 549.

An employee superintending the construction of a bridge, with several gang foremen under him, has also been held not to be a vice principal. *State use of Hamelin* v. *Malster* (1881) 57 Md. 287.

Massachusetts.—The decisions in this state are clearer and more consistent than in any other, as they proceed upon the theory that no servant, however high his rank and complete his control over his master's business, is ever a vice principal merely by virtue of his official position. Liability has been denied where the delinquents were the following employees, which are enumerated, roughly speaking, according to a descending scale:

A general manager. *Albro* v. *Agawam Canal Co.* (1850) 6 Cush. 75; *King* v. *Boston & W. R. Corp.* (1851) 9 Cush. 112; *Floyd* v. *Sugden* (1883) 134 Mass. 563; *Wechsler* v. *Speirs Mfg. Co.* (1899) 172 Mass. 375, 52 N. E. 518.

The captain of a ship. *Johnson* v. *Boston Tow-Boat Co.* (1883) 135 Mass. 209, 46 Am. Rep. 458.

A foreman of a factory (not clear whether he was in full control). *McGuerty* v. *Hale* (1894) 161 Mass. 51, 36 N. E. 682.

A foreman superintending the construction of a building. *Sumnersell* v. *Fish* (1875) 117 Mass. 312; *Daffin* v. *Upton* (1873) 113 Mass. 544.

The foreman of the work in the yard of a manufacturing company. *Moody* v. *Hamilton Mfg. Co.* (1893) 159 Mass. 70, 34 N. E. 185.

A foreman superintending the digging of a sewer or trench. *Flynn* v. *Salem* (1883) 134 Mass. 351; *O'Connor* v. *Roberts* (1876) 120 Mass. 227; *Zeigler* v. *Day* (1877) 123 Mass. 152.

The mate of a ship. *Benson* v. *Goodwin* (1888) 147 Mass. 237, 17 N. E. 517; *Kallock* v. *Herring* (1894) 161 Mass. 369, 37 N. E. 450.

A foreman of stevedores. *Daley* v. *Boston & L. R. Co.* (1888) 147 Mass. 101, 16 N. E. 690.

The superintendent of blasting at a quarry. *Keaney* v. *Shaw* (1882) 133 Mass. 501.

A conductor. *Whitmore* v. *Boston & M. R. Co.* (1890) 150 Mass. 477, 23 N. E. 220.

A section foreman. *Clifford* v. *Old Colony R. Co.* (1886) 141 Mass. 561, 6 N. E. 751.

A brakeman in charge of a section of a train temporarily divided. *Hayes* v. *Western R. Corp.* (1849) 3 Cush. 270.

A mason with a "tender" working under him. *Kennedy* v. *Spring* (1893) 160 Mass. 203, 35 N. E. 779.

Michigan.—A general manager is a vice principal. *Quincy Min. Co.* v. *Kitt.* (1879) 12 Mich. 34, 3 N. W. 210 (*comparando*); *Slater* v. *Chapman* (1887) 67 Mich. 523, 35 N. W. 106; *Shumway* v. *Walworth & V. Mfg. Co.* (1894) 98 Mich. 411, 57 N. W. 251; *Ryan* v. *Bagaley* (1883) 50 Mich. 179, 45 Am. Rep. 35, 15 N. W. 72; *Harrison* v. *Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034 (*aff'g cobb*).

The doctrine of departmental control is extended somewhat further in this state than the decisions of the Supreme Court of the United States seem to warrant,—a railway company having been held liable for the negligence not only of a division superintendent (*Town* v. *Michigan C. R. Co.* [1890] 84 Mich. 214, 47 N. W. 665); and of a train despatcher (*Hunn* v. *Michigan C. R. Co.* [1889] 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502), but also of an assistant road master (*Harrison* v. *Detroit, L. & N. R. Co.* [1890] 79 Mich. 109, 7 L. R. A. 623, 44 N. W. 1034 [see § 535, *ante*]; *Dunn* v. *Michigan C. R. Co.* [1892] 93 Mich. 363, 17 L. R. A. 636, 53 N. W. 397 [see § 533, *ante*]); and a yard master (*Lyttle* v. *Chicago & W. M. R. Co.* [1890] 84 Mich. 289, 47 N. W. 571); but in the last case the negligence was a breach of two non-delegable duties, and it may be that the decision was intended to be based on that ground alone.

In some of its decisions this court has contrived to come very near the superior servant doctrine; but they are susceptible of explanation on another footing. Thus in one case it was broadly laid down that "where the superior servant, by means of an authority which he exercises by delegation of the master, wrongfully exposes the inferior servant to risks and injury, the master must respond;" and on this ground a

railway company was held liable for the act of a conductor of a construction train in ordering a young and inexperienced laborer to do dangerous work outside the scope of his employment. *Chicago & N. W. R. Co.* v. *Bayfield* (1877) 37 Mich. 205. The effect of this case, however, is greatly restricted by the remark of the same court in *Wheeler* v. *Rose* (1893) 95 Mich. 250, 54 N. W. 870, in commenting on this case that if the plaintiff had been a man of full age and experience, and familiar with the work, recovery could not have been sustained. The rationale of the case, therefore, is rather the fact that the risk was not assumed, than the superior position of the servant. Moreover, the order had reference to the performance of work outside the scope of the servant's contractual duties, and it would seem that, under such circumstances, all courts, whether they accept or reject the superior servant doctrine, hold the master responsible wherever the injury was the result of obedience to a command given by an employee controlling the injured servant, irrespective of whether such employee was a vice principal or not, as that term is construed in other connections. See § 165, *ante*.

In *Rodman* v. *Michigan C. R. Co.* (1884) 55 Mich. 57, 54 Am. Rep. 348, 20 N. W. 788, two of the judges in an equally divided court were for holding a railway company responsible to a brakeman for the negligence of a conductor in undertaking to operate an engine himself. The ground taken by Champlin, J., for himself and his colleague, was that he was a vice principal, as being charged with a non-delegable duty, conceived to be imposed on the company, of seeing that the men under his control were performing their respective functions. Such a theory, if it is strictly and literally construed, leads up to a doctrine practically indistinguishable from that discussed in chapter XXVIII. (D) *ante*. But here, as in the *Bayfield Case* (1877) 37 Mich. 205, *supra*, the language used is to be construed with reference to the contention of the plaintiff that he was entitled to recover on the ground that the act of the conductor had subjected him to risks outside the scope of his employment. The very broad theory laid down by Champlin, J., cannot, it seems, be regarded as committing him to the doctrine that a conductor is a vice principal under ordinary circumstances. So far as this case, therefore, decides anything it is not really in conflict with the Michigan decisions, *infra*, declaring a conductor to be a fellow servant of his subordinates. But the facts were clearly discussed by the learned judge from a standpoint which was, to some extent, at least, an improper one. The duties of the brakeman were in no respect changed because the conductor handled the engine himself, and it is only when there is such a change, that a servant can be said, in the true sense of the phrase, to be exposed to risks outside his employment. The brakeman in this case was precisely in the same position as if any other incompetent person had done what the conductor did. Even supposing that such a situation might import liability, that liability would clearly be predicated on a ground of the failure to have a competent engineer,—altogether a different theory from the one put forward by Champlin J. See the opinion delivered by Cooley, Ch. J. A subordinate decision, holding the conductor of a construction train to be a vice principal, is also to be explained as an illustration of the doctrine applicable in regard to risks outside the scope of the original employment. *Erickson* v. *Milwaukee, L. S. & W. R. Co.* (1890) 83 Mich. 281, 47 N. W. 237.

That this court has never had any intention of adopting the superior servant doctrine is put beyond controversy by its refusal to sustain an action for the negligence of the following employees:

The captain of a ship. *Caniff* v. *Blanchard Nav. Co.* (1887) 66 Mich. 638, 33 N. W. 744 (mate injured).

A conductor. *La Pierre* v. *Chicago & G. T. R. Co.* (1894) 99 Mich. 212, 58 N. W. 60; *Jarman* v. *Chicago & G. T. R. Co.* (1893) 98 Mich. 135, 57 N. W. 32.

A section foreman. *Hammond* v. *Chicago & G. T. R. Co.* (1890) 83 Mich. 334, 47 N. W. 965; *Timm* v. *Michigan C. R. Co.* (1893) 98 Mich. 226, 57 N. W. 116; *Corrigan* v. *Lake Shore & M. S. R. Co.* (1896) 110 Mich. 71, 67 N. W. 1097.

The foreman of a ballasting train on a railway. *Schroeder* v. *Flint & P. M. R. Co.* (1894) 103 Mich. 213, 29 L. R. A. 321, 61 N. W. 663.

A foreman of car repairers. *Peterson* v. *Chicago & N. W. R. Co.* (1887) 67 Mich. 102, 34 N. W. 260.

A foreman supervising the erection of an elevator. *Andre* v. *Winslow Bros.*

Elevator Co. (1898) 117 Mich. 560, 76 N. W. 86.

A shift boss in a mine. *Petaja* v. *Aurora Iron Min. Co.* (1895) 106 Mich. 463, 32 L. R. A. 135, 64 N. W. 335, Affirmed on rehearing (1895) 106 Mich. 469, 32 L. R. A. 438, 66 N. W. 951.

One of several foremen in a sawmill, under the direction of the general manager. *Lopan* v. *Hall* (1901) 128 Mich. 523, 87 N. W. 619.

Minnesota.—Masters are held liable for the negligence of general managers. *Hess* v. *Adamant Mfg. Co.* (1896) 66 Minn. 79, 68 N. W. 774.

As regards departmental managers, the language used in *Cook* v. *St. Paul, M. & M. R. Co.* (1885) 31 Minn. 45, 24 N. W. 311, seems scarcely susceptible of any other construction than that a railway company is liable for the negligence of such a functionary. Yet, a few years before, it had been held that a road master was a mere servant. *Brown* v. *Winona & St. P. R. Co.* (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484. As there was no question in the latter case of a violation of any duty classed among those that are non-delegable, it would seem that the two rulings are in conflict, unless the latter one may be supposed to have had reference to the general road master of the line, and the earlier one to a divisional road master. So far as the report shows, however, such a ground of differentiation was not in the mind of the court. The doctrine of the earlier of the above two cases was again applied in *O'Neil* v. *Great Northern R. Co.* (1900) 80 Minn. 27, 51 L. R. A. 532, 82 N. W. 1086; but here again the precise official position of the road master is not apparent from the report.

Until quite recently it could not be said that this court had shown any tendency toward the adoption of the superior servant doctrine. It refused to allow recovery for the negligence of the following employees:

The foreman of graders on one of the sections of railroad under construction. *Lindrall* v. *Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020.

An assistant engineer supervising graders. *Cornelison* v. *Eastern R. Co.* (1892) 50 Minn. 23, 52 N. W. 224.

A foreman subject to the orders of a yard master. *Fraker* v. *St. Paul, M. & M. R. Co.* (1884) 32 Minn. 54, 19 N. W. 349.

The foreman of a railway roundhouse. *Gonsior* v. *Minneapolis & St. L. R. Co.* (1887) 36 Minn. 385, 31 N. W. 515.

A section foreman. *Olson* v. *St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117, 35 N. W. 866. As to road masters, see above.

But four years ago the case of *Carlson* v. *Northwestern Teleph. Exch. Co.* (1896) 63 Minn. 138, 65 N. W. 914, seemed to foreshadow a new departure. The court held merely that a foreman in charge of the excavation of a ditch, with power to employ and discharge subordinates, was a vice principal in respect to the act of ordering a laborer to work in a place of unusual danger in the ditch, without giving him proper warning as to the perils to which he would be exposed. Upon such facts, the case may obviously be kept out of the category of those which embody the superior servant doctrine, by referring the ruling to the conception of a breach of the non-delegable duty of instruction. But it will be seen from the extract from the opinion which was quoted in § 522, *d, ante*, that the decision was sustained by reasoning which, if carried to its logical conclusions, would render the mere exercise of a power of control a test of representative capacity. It remains to be seen whether the court will take any further steps in this direction. In *O'Neil* v. *Great Northern R. Co.* (1900) 80 Minn. 27, 51 L. R. A. 532, 82 N. W. 1086, there is an unmistakable reversion of the doctrine of the earlier rulings cited above, but it does not refer to the language used in the *Carlson Case*.

The doctrine of dual capacity has been applied in *Soutar* v. *Minneapolis Interurban Electric Co.* (1897) 68 Minn. 18, 70 N. W. 796; *Holtz* v. *Great Northern R. Co.* (1897) 69 Minn. 524, 72 N. W. 805. As to its limits, see *O'Neil* v. *Great Northern R. Co.* (1900) 80 Minn. 27, 51 L. R. A. 532, 82 N. W. 1086 (§ 547 (a) *ante*).

Mississippi.—In this state *Wilson* v. *Merry* (§ 529, *ante*) has been expressly approved in *Lagroue* v. *Mobile & O. R. Co.* (1890) 67 Miss. 592, 7 So. 432. *Hood* v. *Mississippi C. R. Co.* (1874) 50 Miss. 178. But, of these cases, the first merely denied liability for the negligence of a section foreman, and the second absolved the company where the delinquent was a conductor. The broad rule impliedly adopted by the approval thus expressed of the English decision was, therefore, not required for the purposes of either decision; and, when the

Constitution of 1890, § 193, and the Code of 1892, § 3559, introduced what was virtually the superior servant doctrine, it was still, perhaps, an open question whether a general or departmental manager would have been held a vice principal or not.

Missouri. In the earlier decisions in this state we find the superior servant doctrine categorically rejected, the Ohio rulings (see *post*) being disapproved in *McDermott* v. *Pacific R. Co.* (1860) 30 Mo. 115 (denying a chief engineer of a railway company to be a vice principal). *Rohback* v. *Pacific R. Co.* (1862) 13 Mo. 187. These cases were approved in 1873. *Brothers* v. *Carter* (1873) 52 Mo. 372, 14 Am. R. p. 424, where it was laid down that a master is not liable for injuries received by a servant, caused by the negligence of a coservant, unless the latter is not possessed of the ordinary skill and capacity for the business intrusted to him, and unless his employment is attributable to the want of ordinary care on the part of the master.

In 1876 a conductor was held to be, prima facie, a mere servant. *McGowan* v. *St. Louis & I. M. R. Co.* (1876) 61 Mo. 528, as was also a gang foreman of carpenters at a bridge. *Lee* v. *Detroit Bridge & Iron Works* (1876) 62 Mo. 565; while in *Marshall* v. *Schricker* (1876) 63 Mo. 308, the doctrine is laid down, upon a review of all the previous authorities in Missouri, that the exercise of control does not make the employee a vice principal (foreman of blasting operations held a mere servant).

The law remained the same up to 1879, in which year it was held erroneous to instruct a jury to the effect that an employee acting for and in the employ of the defendant in its yard at B., his duties being to direct and control assistant brakemen in said yard, deceased being one of such, was a vice principal. *Rains* v. *St. Louis, I. M. & S. R. Co.* (1879) 71 Mo. 164, 36 Am. Rep. 459.

The case which may be said to mark the passage from a rejection to an acceptance of the superior servant doctrine, which, at least up to quite recently, has been consistently applied, is *Dowling* v. *Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298. The opinion professes to rely upon the earlier cases in Missouri; but in view of their plain purport, as set forth above, it is impossible to claim that there is not a complete discontinuity of theories at this stage of the development of the law in that state. The decision was that the master was liable for the consequence of obedience to the order of a foreman in charge of the construction of a turntable, whose directions the general superintendent had directed the plaintiff to follow. From a perusal of the opinion, it seems apparent that this conclusion was reached by a dialectic process which is responsible for a good deal of faulty judicial ratiocination, *viz.*, indulging the assumption that because, among the various grounds for denying liability in a previous case, the court may have mentioned the absence of a certain element, it therefore meant to commit itself to the doctrine that, if that element had been present, its decision would have been different. When the explicit language used in the cases above cited is examined, it is submitted that there is no sufficient ground for inferring that the representative capacity of the foreman in this instance would have been conceded at any earlier period in this state, although it may have been noted in one of those cases, *McGowan* v. *St. Louis & I. M. R. Co.* (1876) 61 Mo. 528, that "there was no proof that the conductor had the superintendence or control over the men, or the work, or power to provide or replace the machinery," and in another of the cases, *Marshall* v. *Schricker* (1876) 63 Mo. 309, that "the employer cannot be charged with the negligence of one who was merely a foreman over the plaintiff, not engaged in a distinct department of the general service, but in the same work with plaintiff, and not charged with any executive duties or control over plaintiff which would constitute him the agent of the employer." The consideration by which the court seeks to fortify its conclusion in the *Dowling Case*, *viz.*, that, as the superintendent had instructed plaintiff to do whatever the foreman might order him to do, the accident was in effect a direct consequence of an order given by the superintendent, is really of no importance. That it cannot be conceded to bear the weight here ascribed to it is at once apparent if we remember that such an instruction is impliedly or expressly given in every instance where servants are working under foremen of the lower grades. The actual or supposed giving of such an instruction may possibly be adduced as one of the grounds for adopting the superior servant doctrine; but it cannot be made to

serve as a bridge to span the chasm between that doctrine and the one which denies the possession of control to be a test of representative capacity.

But, however this case may be explained, it is certain that a doctrine involving precisely the same results as that prevailing in Ohio, which was explicitly repudiated in the earlier decisions, has been applied in a large number of cases. Employers have been held liable for the negligence, not merely of the higher grades of employees, such as a master mechanic (*Tabler* v. *Hannibal & St. J. R. Co.* [1887] 93 Mo. 79, 5 S. W. 810), but also for the defaults of such servants as a foreman in charge of a roundhouse (*Dayharsh* v. *Hannibal & St. J. R. Co.* [1890] 103 Mo. 570, 15 S. W. 554); a conductor (*Waller* v. *Missouri P. R. Co.* [1891] 109 Mo. 350, 19 S. W. 58 [see, however, the *Grattis Case* (1899) 153 Mo. 380, 48 L. R. A. 399, 55 S. W. 108, *infra*]); a roadmaster (*Hake* v. *St. Louis, K. & N. R. Co.* [1885] 88 Mo. 300; *Foster* v. *Missouri P. R. Co.* [1893] 115 Mo. 165, 21 S. W. 916); a division road master (*Browning* v. *Wabash Western R. Co.* [1894] 124 Mo. 55, 24 S. W. 731, 27 S. W. 644); a yard master (*Renfro* v. *Chicago, R. I. & P. R. Co.* [1885] 86 Mo. 302); a foreman of a switching crew (*Taylor* v. *Missouri P. R. Co.* [1891; Mo.] 16 S. W. 206); a section foreman (*Schroeder* v. *Chicago & I. R. Co.* [1891] 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094, and the other cases cited in § 524, note 2, subd. [f]); a foreman of car repairers (*Moore* v. *Wabash, St. L. & P. R. Co.* [1885] 85 Mo. 588; *Renfro* v. *Chicago, R. I. & P. R. Co.* [1885] 86 Mo. 302); a foreman of gang loading railway cars (*Higgins* v. *Missouri P. R. Co.* [1891] 43 Mo. App. 547; *Proctor* v. *Missouri, K. & T. R. Co.* [1890] 42 Mo. App. 124); a foreman of a gang constructing a turntable (*Dowling* v. *Allen* [1881] 74 Mo. 13, 41 Am. Rep. 298 [1885] 88 Mo. 293); a foreman of a gang removing the roof of a building (*Sullivan* v. *Hannibal & St. J. R. Co.* [1891] 107 Mo. 66, 17 S. W. 748); a foreman in charge of the removal of an embankment (*Bradley* v. *Chicago, M. & St. P. R. Co.* [1896] 138 Mo. 293, 39 S. W. 763); one of several subordinate foremen in a quarry (*Cox* v. *Sycnite Granite Co.* [1890] 39 Mo. App. 424); a foreman at a foundry in charge of the work of unloading barges (*Devany* v. *Vulcan Iron Works* [1877] 4 Mo. App. 236); a foreman supervising excavation of reservoir (*Hall* v. *St. Joseph Water Co.* [1892] 48 Mo. App. 356).

The authority of these decisions, however, seems to be greatly shaken by the recent case in which it was held that a conductor was prima facie a mere fellow servant of an engineer and fireman, and that it was therefore error to instruct the jury on the theory that he was a vice principal in charge of a department. *Grattis* v. *Kansas City, P. & G. R. Co.* (1900) 153 Mo. 380, 48 L. R. A. 399, 55 S. W. 108 (signal to go ahead). This ruling embodies the precise doctrine of the *McGowan Case* (1876) 61 Mo. 528, which was in fact relied upon by the court, and, in view of the long line of cases just cited, must be regarded as one of the most extraordinary examples of a judicial *volte-face* which can be produced from the reports. The decisions which had laid down in such clear and unambiguous terms that all superior servants were vice principals were quietly ignored, and the decision is based apparently upon the ground that, because it is practically impossible to determine what are departments of the service within the meaning of the doctrine which declares that when they are different, there is no common employment (see chapter XXVII., C, *ante*), it is therefore preferable to adopt some other test of representative capacity than that which depends on the question whether the delinquent was a head of a department. But there are two obvious flaws in this singular argument. In the first place, there is no warrant in the cases, as they stand, for saying that the departments with which the doctrine of departmental control is concerned (chapter XXVIII., F, *ante*) have been conceived of as being coextensive or identical with the departments the diversity of which takes the delinquent and injured servants out of the category of coemployees. This is a point which no judge has yet undertaken to elucidate, and as long as it remains in obscurity it cannot legitimately be made the basis of any argument like that of the Missouri court. So far as any reasonably precise intercuces can be drawn from a comparison of the two kinds of departments, it seems most probable that, if there should ever be any necessity to decide the matter, it would be found that they do not connote coextensive subdivisions of the master's business. But such an investigation would be a frivolous waste of time and labor, for it is much better to re-

gard the word "department" as at best a rough means of identifying the conception to which it is intended to refer the master's responsibility, and to determine that responsibility by means of the tests supplied by the elementary considerations for which, according to circumstances, the word may stand.

In the second place, the introduction of the conception of headship of department was wholly irrelevant in a state in which the superior servant doctrine had been so unreservedly adopted. The error of the trial court in this respect was obvious, and, in view of the earlier decisions, the proper course would have been simply to declare the essential incorrectness of the charge in this regard, unless it was intended to inaugurate a wholly new series of cases in which the superior servant doctrine should find no place. But if this is the purpose of the court, it is certainly being attained in a very curious fashion.

Both during the earlier and later periods defined by the rejection and acceptance of the superior servant doctrine, the master has been held liable for the acts of a general manager, or other employee in full control of a business or an independent piece of work. *Brothers* v. *Cartter* (1873) 52 Mo. 372, 14 Am. Rep. 424; *Whalen* v. *Centenary Church* (1876) 62 Mo. 326; *Gormly* v. *Vulcan Iron Works* (1876) 61 Mo. 492; *Dowling* v. *Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298; *Hyatt* v. *Hannibal & St. J. R. Co.* (1885) 19 Mo. App. 294.

The doctrine of dual capacity was recognized, *obiter*, in *Moore* v. *Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588; *Rowland* v. *Missouri P. R. Co.* (1886) 20 Mo. App. 463.

But the actual decisions on the subject confine its operation within very narrow limits. *Dowling* v. *Hannibal & St. J. R. Co.* (1887) 103 Mo. 570, 15 S. W. 551; *Hutson* v. *Missouri P. R. Co.* (1892) 50 Mo. App. 300; *Russ* v. *Wabash Western R. Co.* (1892) 112 Mo. 45, 18 L. R. A. 823, 20 S. W. 472; *Hughlett* v. *Ozark Lumber Co.* (1893) 53 Mo. App. 87.

As to the significance in this state of the possession or nonpossession of the power of discharge, see § 523, *ante*.

Montana.—In 1896 it was held that the effect of the adoption of the new constitution was to abrogate the Compiled Stat. 1887, § 697, which, while the state was still under a territorial government, had introduced a rule of liability virtually the same as the superior servant doctrine. *Criswell* v. *Montana C. R. Co.* (1896) 18 Mont. 167, 33 L. R. A. 554, 44 Pac. 525. This ruling reversed the judgment in the same case ([1895] 17 Mont. 189, 42 Pac. 767) by which liability had been imposed for the negligence of a conductor, on the supposition that the rights of the plaintiff, a brakeman, were determined by the provisions of the act. Under the common-law principles thus restored to operation, it has been held that no action can be sustained for the negligence of a section foreman. *Hastings* v. *Montana Union R. Co.* (1895) 18 Mont. 493, 46 Pac. 264. Or of a foreman of a gang assisting regular section crews as occasion required. *Goodwell* v. *Montana C. R. Co.* (1896) 18 Mont. 293, 45 Pac. 210.

Nebraska.—In this state the superior servant doctrine prevails, and employers have been held liable for the negligence, not only of general managers (*Crystal Ice Co.* v. *Sherlock* [1893] 37 Neb. 19, 55 N. W. 294), but also of the following employees:

The foreman in charge of a gravel train. *Union P. R. Co.* v. *Doyle* (1897) 50 Neb. 555, 70 N. W. 43.

The conductor of a work train. *Chicago, St. P. M. & O. R. Co.* v. *Lundstrom* (1884) 16 Neb. 254, 49 Am. Rep. 718, 20 N. W. 198; *Burlington & M. River R. Co.* v. *Crockett* (1886) 19 Neb. 138, 26 N. W. 921.

A conductor. *Clark* v. *Hughes* (1897) 51 Neb. 780, 71 N. W. 776.

A car repairer deputed to instruct a new workman. *Chicago, B. & Q. R. Co.* v. *Sullivan* (1889) 27 Neb. 679, 43 N. W. 415.

The foreman of a gang repairing structures along a railway. *Sioux City & P. R. Co.* v. *Smith* (1888) 22 Neb. 775, 36 N. W. 285.

A gang foreman under an electric company. *New Omaha Thomson-Houston Electric Light Co.* v. *Baldwin* (1901) 62 Neb. 180, 87 N. W. 27.

The foreman of a pile driving crew. *Fremont, E. & M. Valley R. Co.* v. *Leslie* (1894) 41 Neb. 159, 59 N. W. 559.

The doctrine of dual capacity was repudiated in *Crystal Ice Co.* v. *Sherlock* (1893) 37 Neb. 19, 55 N. W. 294; *New Omaha Thomson-Houston Electric Light Co.* v. *Baldwin* (1901) 62 Neb. 180, 87 N. W. 27 (for facts in both cases, see § 544, *ante*).

New Hampshire.—A general manager is possibly regarded as a vice principal. *Noyes* v. *Glen Mfg. Co.* (1891) 67

N. H. 287, 30 Atl. 344. But the evidence here was held not to show negligence.

There is no liability for the negligence of the lower grades of superior servants—as a section foreman. *Hanley* v. *Grand Trunk R. Co.* (1882) 62 N. H. 274.

New Jersey.—The question whether general managers are vice principals has been discussed in § 539, *ante*, where it has also been pointed out that the doctrine of non-delegability of duties has been applied to an unwonted set of facts in a recent case.

There is no liability for the negligence of the following superior servants of lower grades than general managers:

A foreman in full charge of the work of constructing a sewer. *Curley* v. *Hoff* (1899) 62 N. J. L. 758, 42 Atl. 731; approving *Wilson* v. *Merry* (§ 529, *ante*).

A foreman of driller in a mine. *Gilmore* v. *Oxford Iron & Nail Co.* (1892) 55 N. J. L. 39, 25 Atl. 707.

A foreman superintending the erection of a gas-holder. *Melaughlin* v. *Camden Iron Works* (1897) 60 N. J. L. 557, 38 Atl. 677.

A foreman supervising the building of a boat, and working with his subordinates. *Olsen* v. *Nixon* (1898) 61 N. J. L. 671, 40 Atl. 691.

A "district manager" of a telephone company, in charge of a crew stringing wires. *Knutter* v. *New York & N. J. Teleph. Co.* (1902) 67 N. J. L. 646, 58 L. R. A. 808, 52 Atl. 565.

In *Curley* v. *Hoff* (1899) 62 N. J. L. 758, 42 Atl. 731, it was said that the statement of the court in *Van Steenburgh* v. *Thornton* (1895) 58 N. J. L. 166, 33 Atl. 380, that the master was liable for the negligence of the boss foreman, was really not relevant, the real ground of liability being the master's knowledge of the conditions.

New Mexico.—A section foreman is not a vice principal. *Atchison, T. & S. F. R. Co.* v. *Martin* (1893) 7 N. M. 158, 34 Pac. 536, Affirmed in (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603. Nor is a pit boss of a mine, working under a general superintendent. *Descrant* v. *Cerrillos Coal R. Co.* (1898) 9 N. M. 495, 55 Pac. 290.

New York.—The doctrine that a general manager is a vice principal was fully recognized in *Malone* v. *Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573; *Corcoran* v. *Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369; *Hoyt* v. *Coger* (1889) 112 N. Y. 611, 3 L. R. A. 559, 20 N. E. 553; *Eagan* v. *Tucker* (1879) 18 Hun, 397; *Fort* v. *Whipple* (1877) 11 Hun, 586. Possibly in these last two cases the essential ground of the decision may really have been the breach of a non-delegable duty; but as they antedate *Crispin* v. *Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521, they are more probably intended as applications of the doctrine accepted in the three rulings of the court of appeals cited above. Whether this is so or not, it is clear that the operation of that doctrine is considerably circumscribed by the case just cited. See §§ 543, 547, *ante*. The decision in *Pantzar* v. *Tilly Foster Iron Min. Co.* (1885) 99 N. Y. 368, 2 N. E. 24, holding the defendant liable for the negligence of its general superintendent, is really based upon the theory that the non-delegable duty of inspection was violated.

The terminology appropriate to, and usually associated with, the doctrine of departmental control, is not, so far as the writer knows, found in the New York reports, but there are some rulings bearing upon the subject.

In 1868 it was held that a railway company was not liable for the negligence of its superintendent of bridges. *Warner* v. *Erie R. Co.* 39 N. Y. 468. But the conclusion was based on arguments which could preclude recovery for the negligence of any agents of a company except the directors (see § 530, *ante*), and is therefore inconsistent with the cases as to general managers, cited above.

In *Brick* v. *Rochester, N. Y. & P. R. Co.* (1885) 98 N. Y. 211, the delinquent was superintending the reconstruction of an old road, and, from his functions as stated, would undoubtedly have been held in some jurisdictions to be a departmental manager. But the case actually turned on the nature of the negligent act. See § 513, *ante*.

In *McCampbell* v. *Cunard S. S. Co.* (1893) 69 Hun, 131, 23 N. Y. Supp. 477, a dock superintendent of a steamship company was treated as a vice principal, but this decision was reversed in (1895) 144 N. Y. 552, 39 N. E. 637, on the ground of the character of the negligent act.

In another case a railway company was held liable for the negligence of the superintendent of its grain elevator. *Jetlorern* v. *Central Vermont R. Co.* (1890) 123 N. Y. 281, 25 N. E. 373; but here the real rationale of the deci-

sion was the breach of the non-delegable duty of inspecting the place of work.

A telegraph operator has been held not to be a vice principal, as he merely has to exercise some discretion within a department. *Monaghan* v. *New York C. & H. R. R. Co.* (1887) 45 Hun, 113.

In this state the superior servant doctrine has never obtained the slightest footing. Employers have been held not liable for the negligence of the following employees below the rank of general managers:

A wreck master. *Beilfus* v. *New York, L. E. & W. R. Co.* (1883) 29 Hun 556.

A yard master. *McCosker* v. *Long Island R. Co.* (1881) 84 N. Y. 77.

A conductor. *Sherman* v. *Rochester & S. R. Co.* (1853) 15 Barb. 574 (1858) 17 N. Y. 153; *Wooden* v. *Western N. Y. & P. R. Co.* (1895) 147 N. Y. 508, 42 N. E. 199. Reversing (1891) 43 N. Y. S. R. 218, 16 N. Y. Supp. 841 (1892) 46 N. Y. S. R. 77, 18 N. Y. Supp. 768.

A locomotive engineer. *Watts* v. *Beard* (1897) 18 App. Div. 243, 45 N. Y. Supp. 873 (foreman injured).

A section foreman. *Barringer* v. *Delaware & H. Canal Co.* (1879) 19 Hun. 216.

A foreman of car repairers. *Keenan* v. *New York, L. E. & W. R. Co.* (1895) 145 N. Y. 190, 39 N. E. 711.

A foreman superintending the construction of a building. *Kiffin* v. *Wendt* (1899) 39 App. Div. 229, 57 N. Y. Supp. 109.

A foreman of a gang of carpenters. *Malone* v. *Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573; *Jenkins* v. *Mahopac Iron Ore Co.* (1890) 32 N. Y. S. R. 866, 10 N. Y. Supp. 484.

A division superintendent of railway bridges. *Neubauer* v. *New York, L. E. & W. R. Co.* (1885) 101 N. Y. 607, 4 N. E. 125.

A foreman supervising the construction of a bridge arch. *Hofeagle* v. *New York C. & H. R. R. Co.* (1874) 55 N. Y. 608.

A gang foreman on a bridge. *Ludlow* v. *Groton Bridge & Mfg. Co.* (1896) 11 App. Div. 452, 42 N. Y. Supp. 343.

A foreman superintending the placing of a bridge pier. *Ulrich* v. *New York C. & H. R. R. Co.* (1898) 25 App. Div. 465, 51 N. Y. Supp. 5.

A foreman superintending the erection of a scaffold. *Moore* v. *McNeil* (1898) 35 App. Div. 323, 54 N. Y. Supp. 956.

A foreman in charge of a derrick. *Scott* v. *Sweeney* (1884) 34 Hun, 292.

A foreman of bricklayers. *White* v. *Eidlitz* (1897) 19 App. Div. 256, 46 N. Y. Supp. 184.

A superintendent of repairs to a ship. *Hussey* v. *Coger* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556.

A foreman supervising the erection of an elevator. *Whalley* v. *Sprague Electric Elevator Co.* (1896) 1 App. Div. 264, 37 N. Y. Supp. 174.

The foreman of the work of drawing one of the shafts for a tunnel. *Riley* v. *O'Brien* (1889) 53 Hun, 147, 6 N. Y. Supp. 129.

A foreman superintending the digging of a trench. *Collins* v. *Crimmins* (1895) 11 Misc. 24, 31 N. Y. Supp. 860; *Schott* v. *Onondaga County Sav. Bank* (1900) 49 App. Div. 503, 63 N. Y. Supp. 631.

A foreman of a gang engaged in excavating work. *Daley* v. *Brown* (1899) 45 App. Div. 428, 60 N. Y. Supp. 840.

A foreman supervising the loading of an elevator. *Dencefeld* v. *Baumann* (1899) 40 App. Div. 502, 58 N. Y. Supp. 110.

A foreman under a master stevedore. *Kenny* v. *Cunard S. S. Co.* (1885) 20 Jones & S. 434 (1885) 23 Jones & S. 558; *Tully* v. *New York & T. S. S. Co.* (1896) 10 App. Div. 463, 42 N. Y. Supp. 29.

A foreman under a master stevedore. *O'Connor* v. *Hall* (1900) 52 App. Div. 428, 65 N. Y. Supp. 136.

The foreman of a quarry. *Cullen* v. *Norton* (1891) 126 N. Y. 1, 26 N. E. 905.

A foreman of blasting operations in a public work. *Perry* v. *Rogers* (1898) 157 N. Y. 251, 51 N. E. 1021, Reversing (1895) 91 Hun, 243, 36 N. Y. Supp. 208; *Vanecuso* v. *Cataract Constr. Co.* (1895) 87 Hun, 519, 34 N. Y. Supp. 273; *Vitto* v. *Keegan* (1897) 15 App. Div. 329, 44 N. Y. Supp. 1; *Capasso* v. *Woolfolk* (1900) 163 N. Y. 472, 57 N. E. 760, Reversing (1898) 25 App. Div. 234, 49 N. Y. Supp. 409.

The captain of a ship. *Longblia* v. *State* (1887) 105 N. Y. 159, 11 N. E. 371; *Scarff* v. *Metcalf* (1887) 107 N. Y. 211, 13 N. E. 796; *Gabrielson* v. *Waydell* (1892) 135 N. Y. 1, 17 L. R. A. 228, 31 N. E. 963; *Geoghegan* v. *Atlas S. S. Co.* (1895) 146 N. Y. 369, 40 N. E. 507.

The mate of a ship. *Geoghegan* v. *Atlas S. S. Co.* (1895) 146 N. Y. 369, 40 N.

E. 507; *Scarff* v. *Metcalf* (1887) 107 N. Y. 211, 13 N. E. 796; *Olson* v. *Clyde* (1884) 32 Hun, 425.

It should be noted that, in all the more recent of the above cases, the essential ground of the decision is rather the character of the negligent act than the official position of the delinquent, which, since the ruling in *Crispin* v. *Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521 (see §§ 543, 547, *ante*), is treated as being of secondary importance.

North Carolina.—In the earliest case in which the proper inference to be drawn from the exercise of the control by the delinquent was considered (*Dobkin* v. *Richmond & D. R. Co.* [1879] 81 N. C. 446, 31 Am. Rep. 512), a railway company was held liable for the negligence of an employee who was superintendent, engineer, conductor, and fireman of a gravel train. The court, as is evident from its opinion, had no intention of going any further in ascribing a representative capacity to superior servants than the point fixed afterwards by the *Ross Case*, as afterwards explained by the *Baugh Case* (see Federal cases, *supra*). The servant, it was declared, "does not undertake to incur the risks that may result from the negligence of the master, or such person to whom he may choose to delegate his authority in that branch or department of business in which he is engaged. To impute the negligence of such an agent to the master, he must be more than a mere foreman to oversee a batch of hands, direct their work under the supervision of the master, see that they perform their duty, and, in case of dereliction, report them. He must have entire management of the business, such as the right to employ hands and discharge them, and direct their labor, and purchase materials, etc. He must be an agent clothed in this respect with the authority of the master, to whom the laborers are put in subordination, and to whom they owe the duty of obedience. Such an agent is what is known as a 'middleman,' who, as well as the laborer, is the servant of the master, and although he may work with the laborer in furthering the common business of the master, he is yet not a 'fellow servant' in the sense of that term as used by the courts, because he represents the master in his authority to direct, control, and manage the business."

In a case decided two years later, it was remarked, *arguendo*, that an employer was liable for "the defaults of a superior whose commands and directions the injured servant was bound to obey. *Corbin* v. *Richmond & D. R. Co.* (1881) 84 N. C. 309, 37 Am. Rep. 620. But the real point on which this case turned was negligence in respect to defective appliances, and therefore the precise question whether the delinquent, an engineer in charge of a train, was a vice principal or not, was not settled.

If this question had been presented, it would almost certainly have been determined against the plaintiff; for some years afterwards the doctrine of the *Dobkin Case* (1879) 81 N. C. 446, 31 Am. Rep. 512, was reiterated, and it was declared that, in order to be regarded as a vice principal, a superior servant must be something more than a mere foreman. *Kirk* v. *Atlanta & Char-Line R. Co.* (1885) 94 N. C. 625, 55 Am. Rep. 621 (acting yard master denied to be a vice principal); *Wasson* v. *Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698 (conductor held to be a vice principal). In the former case the court even professes to rely on the English case of *Feltham* v. *England* (1866) L. R. 2 Q. B. 33, 36 L. J. Q. B. N. S. 14, 15 Week. Rep. 151, 7 Best. & S. 676; but this ruling, as we have seen (§ 529, note 2, *ante*), goes much further than any North Carolina decision in denying the servant indemnity for the acts of a superior. Moreover, it is difficult to see any rational ground on which a yard master can be held not to be a vice principal, if that character is ascribed to a section foreman, as was done in the very next year. The court considered such an employee to be something more than a mere foreman within the meaning of the rule laid down in the *Dobkin Case* (1879) 81 N. C. 446, 31 Am. Rep. 512, inasmuch as he was "charged with authority to employ, control, and command the plaintiff, as to the labor he should do in the railroad, and to discharge him from such service." *Patton* v. *Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 863. Other later cases assuming or holding a section foreman to be a vice principal are *Logan* v. *North Carolina R. Co.* (1895) 116 N. C. 940, 21 S. E. 959; *Styles* v. *Richmond & D. R. Co.* (1896) 118 N. C. 1084, 24 S. E. 740; *Johnson* v. *Southern R. Co.* (1898) 122 N. C. 955, 29 S. E. 781.

The principle of the *Dobkin Case* is also held to render a railway company liable for the negligence of a conductor.

Mason v. *Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698 (1894) 114 N. C. 718, 19 S. E. 362; *Shadd* v. *Georgia, C. & N. R. Co.* (1895) 116 N. C. 968, 21 S. E. 551; *Purcell* v. *Southern R. Co.* (1896) 119 N. C. 728, 26 S. E. 161.

Whether a foreman of carpenters was a vice principal was held not to be established by the evidence set out on the record in *Turner* v. *Goldsboro Lumber Co.* (1896) 119 N. C. 387, 26 S. E. 23.

The inference from the above cases would seem to be that this court, although it disclaims the theory that the mere exercise of control constitutes a vice principal, can scarcely be placed in any other class than that of the adherents of the superior servant doctrine. Neither by the Federal courts nor by any of the state courts which have elaborated the doctrine of departmental control is a section foreman held to be a vice principal.

It has quite lately been held that an employee controlling a small gang, but not invested with the power of discharge, is a mere coservant of his subordinates. *Bryan* v. *Southern R. Co.* (1901) 128 N. C. 387, 38 S. E. 914.

A superior servant is a vice principal only as to servants under his control (§ 514, *ante*). *Wright* v. *Northampton & H. R. Co.* (1898) 122 N. C. 852, 29 S. E. 100.

The doctrine of dual capacity was rejected in *Purcell* v. *Southern R. Co.* (1896) 119 N. C. 728, 26 S. E. 161.

North Dakota.—Section 1130 of the Civil Code of Dakota, reproducing the provisions of the California Code (see *supra*), has been expressly held to be merely declaratory of the common law. *Elliot* v. *Chicago, M. & St. P. R. Co.* (1889) 5 Dak. 523, 3 L. R. A. 363, 41 N. W. 758. Under this Code it has been held that a foreman of a pile-driving gang is not a vice principal. *Ell* v. *Northern P. R. Co.* (1891) 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222.

Ohio.—This is one of the states in which the superior servant doctrine has been adopted. Employers have been held liable for the negligence of the following employees:

A general manager. *Cleveland, C. & C. R. Co.* v. *Keary* (1854) 3 Ohio St. 201.

A conductor. *Cleveland, C. & C. R. Co.* v. *Keary* (1854) 3 Ohio St. 201, and other cases cited under § 523, note 2, subd. (c), *ante*.

A foreman of car repairers. *Lake Shore & M. S. R. Co.* v. *Laralley* (1880) 36 Ohio St. 221.

The foreman of a quarry. *Berea Stone Co.* v. *Kraft* (1877) 31 Ohio St. 287, 27 Am. Rep. 510.

A locomotive engineer (as regards a laborer under his directions). *Baltimore & O. R. Co.* v. *Sutherland* (1894) 1 Toledo Leg. News, 388.

A mine boss. *Wellston Coal Co.* v. *Smith* (1901) 65 Ohio St. 70, 55 L. R. A. 99, 61 N. E. 143.

A superior servant is regarded as a vice principal, even as to servants not under his control. *Pittsburg, Ft. W. & C. R. Co.* v. *Devinney* (1867) 17 Ohio St. 197.

The doctrine of dual capacity was rejected in *Berea Stone Co.* v. *Kraft* (1877) 31 Ohio St. 287, 27 Am. Rep. 510.

Oregon.—An employer is liable for the negligence of a general manager. *Anderson* v. *Bennett* (1888) 16 Or. 515, 19 Pac. 765, but not for that of superior servants of lower grade,—as a section foreman. *Brunell* v. *Southern P. Co.* (1899) 34 Or. 256, 56 Pac. 129.

Pennsylvania.—In this state a master is liable for the negligence of a general manager. *Frazier* v. *Pennsylvania R. Co.* (1860) 38 Pa. 104, 80 Am. Dec. 467; *Hoover* v. *Carbon County Electric R. Co.* (1899) 191 Pa. 146, 43 Atl. 74; *Duffy* v. *Oliver Bros.* (1890) 131 Pa. 203, 18 Atl. 872; *Ardesco Oil Co.* v. *Gilson* (1869) 63 Pa. 150; *Mullan* v. *Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2; *Prevost* v. *Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88; *New York, L. E. & W. R. Co.* v. *Bell* (1886) 112 Pa. 400, 4 Atl. 50; *Lewis* v. *Seifert* (1887) 116 Pa. 628, 11 Atl. 514.

Under the doctrine of departmental control employers have been held answerable for the defaults of an employee superintending the construction of a railway tunnel. *Tissue* v. *Baltimore & O. R. Co.* (1886) 112 Pa. 91, 56 Am. Rep. 310, 3 Atl. 667.

Of the master mechanic of a railway company. *New York, L. E. & W. R. Co.* v. *Bell* (1886) 112 Pa. 400, 4 Atl. 50.

Of the superintendent of labor of a large steel company. *Durst* v. *Carnegie Steel Co.* (1896) 173 Pa. 162, 33 Atl. 1102.

That a departmental manager is a vice principal was also recognized in *Ardesco Oil Co.* v. *Gilson* (1869) 63 Pa. 150; *Prevost* v. *Citizens' Ice & Refrig-*

erating Co. (1898) 185 Pa. 617, 40 Atl. 88; *Lewis v. Seifert* (1897) 116 Pa. 628, 11 Atl. 511.

Whether a head stevedore of a steamship company is a vice principal was held, under the circumstances stated in § 535, note 1, subd. (k), *ante*, to be a question for the jury. *Hulton v. Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2.

There is no liability for the negligence of the following employees of lower grade than departmental managers:

A section foreman. *Spincake v. Philadelphia & R. R. Co.* (1892) 148 Pa. 184, 23 Atl. 1096.

An assistant foreman of a contractor for structural ironwork. *McGinley v. Leeering* (1893) 152 Pa. 366, 25 Atl. 824.

A foreman of a gang engaged in removing stone from the side of a railway. *Kinney v. Corbin* (1890) 132 Pa. 341, 19 Atl. 141.

A gang foreman in a factory. *National Tube Works Co. v. Bodell* (1880) 96 Pa. 175; *Duncan v. A. & P. Roberts Co.* (1900) 194 Pa. 563, 45 Atl. 330.

A foreman of a lathe. *Faber v. Carlisle Mfg. Co.* (1889) 126 Pa. 387, 17 Atl. 621.

A foreman of masons. *Weger v. Pennsylvania R. Co.* (1867) 55 Pa. 460.

A foreman of gang engaged in excavation work. *Darst v. Carnegie Steel Co.* (1896) 173 Pa. 162, 33 Atl. 1102.

A slate-picker boss in a mine. *McCool v. Lucas Coal Co.* (1892) 150 Pa. 638, 24 Atl. 350.

An engineer in charge of the engine room and freezing department of an ice company. *Prevost v. Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88.

A foreman of mines, appointed under the statutes. See cases cited in § 520, note 1, subd. (n), *ante*.

A foreman of a gang of men erecting a telegraph line along a railway. *Johnson v. Western N. Y. & P. R. Co.* (1901) 200 Pa. 314, 49 Atl. 794.

Rhode Island.—Much of the language used in *Wann v. Oriental Print Works* (1875) 11 R. I. 152, indicates a leaning towards the adoption of the superior servant doctrine; but there the superior servant, an engineer, was really held to be, as regards his fireman, a representative of the master merely for the reason that his order took the subordinate (a fireman) outside the scope of his original employment. See § 465, *ante*.

In a later case the superior servant doctrine as expounded in the *Ross Case* (§ 532, *ante*) was repudiated. *Hanna v. Granger* (1894) 18 R. I. 507, 28 Atl. 659 (delinquent was engineer of a steam roller). There the court declared that the decisive test of liability was the character of the negligent act; and primarily on this special ground it has subsequently been held that there can be no recovery for the defaults of the following employees:

The foreman of a gang engaged in excavating. *Larich v. Hobbs* (1891) 18 R. I. 513, 28 Atl. 661.

A foreman of a foundry. *De Wan v. Builders Iron Foundry* (1893) 18 R. I. 514, 27 Atl. 328, 28 Atl. 661.

A foreman of construction. *Franken v. Sheldon* (1897) 20 R. I. 258, 38 Atl. 370.

The foreman of a gang engaged in removing telegraph poles. *Morgridge v. Providence Teleph. Co.* (1898) 20 R. I. 386, 39 Atl. 328.

South Carolina.—The doctrine of representative capacity as deducible from the discharge of a non-delegable duty was recognized in *Gunter v. Graniteville Mfg. Co.* (1882) 18 S. C. 262, 44 Am. Rep. 573; *Losure v. Graniteville Mfg. Co.* (1882) 18 S. C. 275. But it was not until 1884 that this court had any occasion to express its opinion as to the relation of superior servants to their subordinates. In *Couch v. Charlotte, C. & A. R. Co.* (1884) 22 S. E. 557, it inclined to the view that in the control and direction of his gang, a section foreman was in the peformance of the duties of the company, and to that extent its representative, but recovery was refused on the ground that an order to get down and push behind a car did not require the servant to do anything outside the scope of his employment, and that the case was therefore controlled by the principle that ordinary risks are assumed.

In *Boatwright v. Northeastern R. Co.* (1886) 25 S. C. 128, the *Ross Case* (§§ 532, 535, *ante*) was followed, and the refusal of the trial judge to charge that a conductor was a fellow servant of a brakeman was approved. The negligence here was in failing to procure suitable coupling appliances from a stock supplied by the company, so the question of non-delegable duties was not involved.

In *Coleman v. Wilmington, C. & A. R. Co.* (1886) 25 S. C. 446, 60 Am. Rep. 516, a conductor of a material train was held to be a vice principal as respects a laborer, the court considering that the

delinquency alleged,—that of failing to readjust a switch,—constituted a breach of the duty to provide a safe and suitable track.

But these cases are no longer law, as the doctrine enunciated by the Supreme Court of the United States in the *Conroy Case* has been explicitly adopted, and a conductor is denied to be a vice principal.

Hicks v. *Southern R. Co.* (1901) 63 S. C. 559, 38 S. E. 725, 41 S. E. 753, held that it was error to introduce into a requested instruction a modification embodying the superior servant doctrine.

In *Wilson* v. *Charleston & S. R. Co.* (1897) 51 S. C. 79, 28 S. E. 91, it is apparently assumed by the court that a yard master, while performing his ordinary duties of making up and controlling the movements of trains, is a fellow servant of a car cleaner; but it is not clear from the statement of facts whether the injured person was a subordinate of the yard master or not.

On the ground that no breach of non-delegable duties was shown, it was held that there could be no recovery for the negligence of a conductor of one train in failing to give notice to the men on another train which was following his that there were "loose" cars on the track. *Jenkins* v. *Richmond & D. R. Co.* (1893) 39 S. C. 507, 18 S. E. 182. See § 514, *ante*.

From the above summary of the effect of the decisions it is extremely difficult to say what is precisely the position of this court in regard to the representative capacity of delinquent employees. But the *obiter dictum* as to the status of section foremen in the *Couch Case* (1884) 22 S. C. 557, taken in connection with the fact that the *Ross Case* is relied on in the two rulings with respect to conductors, may be regarded as indicating an adoption of the doctrine of departmental control (chapter XXVIII., P. *ante*). So far as railway companies are concerned, the question has ceased to be of any practical importance, as they are prevented by the Const. of 1895, art. IX., § 15, from availing themselves of the defense of coservice, where the injury was the result of the negligence of a superior agent or officer of the defendant. See chapter XXXIX., *post*.

South Dakota.—The relation of supervising employees to subordinates has not been discussed in any reported case. But the doctrine of non delegable duties was recognized in *Gates* v. *Chicago, M. & St. P. R. Co.* (1892) 2 S. Dak. 422, 50 N. W. 907.

Tennessee.—This is one of the states where the superior servant doctrine prevails. A master is held to be liable for the negligence of the following employees:

A general manager. *Washburn* v. *Nashville & C. R. Co.* (1859) 3 Head, 638, 75 Am. Dec. 784; *Haynes* v. *East Tennessee & G. R. Co.* (1866) 3 Coldw. 222.

A telegraph operator (as being a helper to the superintendent). *East Tennessee, V. & G. R. Co.* v. *De Armond* (1887) 86 Tenn. 73, 5 S. W. 600 (conductor injured).

A conductor of a train. *Illinois C. R. Co.* v. *Spence* (1893) 93 Tenn. 173, 23 S. W. 211.

An engineer in charge of a train. *East Tennessee & W. N. C. R. Co.* v. *Collins* (1886) 85 Tenn. 227, 1 S. W. 883.

An engineer in charge of a part of a divided train, where it is his duty under the rules to assume control. *Louisville & N. R. Co.* v. *Hartin* (1889) 87 Tenn. 398, 3 L. R. A. 282, 10 S. W. 772.

A foreman of a fertilizer company's business. *National Fertilizer Co.* v. *Travis* (1899) 102 Tenn. 16, 49 S. W. 832.

A section foreman. *Gann* v. *Nashville, C. & St. L. R. Co.* (1893) 101 Tenn. 389, 47 S. W. 493; *Illinois C. R. Co.* v. *Bolton* (1897) 99 Tenn. 273, 41 S. W. 442; *Louisville & N. R. Co.* v. *Bowler* (1872) 9 Heisk. 866.

A track foreman on an electric street railway. *Chattanooga Electric R. Co.* v. *Lawson* (1898) 101 Tenn. 406, 47 S. W. 493.

But in *Knox* v. *Southern R. Co.* (1898) 101 Tenn. 375, 47 S. W. 491, the court refused to hold that a "boss wiper" who had certain duties of a higher grade than those of an ordinary wiper, such as opening the doors, giving the signal for the moving of the engine, and ordering the hands to go and adjust the turntable, "stood in the place and stead of the master" in the discharge of his duties.

A superior servant is a vice principal only as to servants under his control (§ 514, *ante*). *East Tennessee, V. & G. R. Co.* v. *Rush* (1885) 15 Lea, 145; *Nashville, C. & St. L. R. Co.* v. *Wheless* (1882) 10 Lea, 741, 43 Am. Rep. 317; *Coal Creek Min. Co.* v. *Davis* (1891) 90 Tenn. 711, 18 S. W. 387.

In other recent cases the master's responsibility has been contracted by the adoption of the theory of dual capacity, which has been applied in several cases.

Nashville, C. & St. L. R. Co. v. *Handman* (1884) 13 Lea, 423; *Ulen* v. *Goosman* (1893) 92 Tenn. 385, 21 S. W. 760; *Gann* v. *Nashville, C. & St. L. R. Co.* (1898) 101 Tenn. 380, 47 S. W. 493; *National Fertilizer Co.* v. *Travis* (1899) 102 Tenn. 16, 49 S. W. 832.

Texas.—An employer is liable for the negligence of a general manager. *Galveston, H. & S. A. R. Co.* v. *Smith* (1890) 76 Tex. 611, 13 S. W. 562; *Sulphur Lumber Co.* v. *Kelley* (1895) Tex. Civ. App.) 30 S. W. 696.

In the earlier cases all employees of lower grades than general managers were held to be mere servants,—as a conductor. *Robinson* v. *Houston & T. C. R. Co.* (1877) 46 Tex. 540. And a captain. *Price* v. *Houston Direct Nav. Co.* (1877) 46 Tex. 537.

But afterwards the court adopted the doctrine that the possession of a power of control, if accompanied by a power of hiring and discharging the injured person, constitutes an employee a vice principal. See § 523, note 6, *ante*.

It had been explained that, when it was laid down in an earlier case (*Missouri P. R. Co.* v. *Williams* [1889] 75 Tex. 4, 12 S. W. 835) that an employee who has charge of a special department of the employer's business, with the power to hire the servants in his department, is not a fellow servant of those under his control, this did not imply that the department of the business must necessarily be a principal one; but that the rule is applicable to any special business of the empdoyer, which is carried on by a number of employees under another who has power to employ and discharge them. *Ft. Worth & D. C. R. Co.* v. *Peters* (1894) 87 Tex. 222, 27 S. W. 257.

Employers have been held liable for the negligence of the following employees.

A master mechanic. *Douglas* v. *Texas Mexican R. Co.* (1885) 63 Tex. 561.

The foreman of a railway company's paint shop. *International & G. N. R. Co.* v. *Hinzie* (1891) 82 Tex. 623, 18 S. W. 681.

A superintendent of the work of constructing a bridge. *San Antonio & A. P. R. Co.* v. *McDonald* (1895) Tex. Civ. App.) 31 S. W. 72.

A night yard master. *Texas & P. R. Co.* v. *Reed* (1895) 88 Tex. 439, 31 S. W. 1058.

A yard foreman. *San Antonio & A. P. R. Co.* v. *Reynolds* (1895) Tex. Civ. App.) 30 S. W. 846.

A section foreman. *Missouri P. R. Co.* v. *James* (1888) Tex.) 10 S. W. 332; *Sweeney* v. *Gulf, C. & S. F. R. Co.* (1892) 84 Tex. 433, 19 S. W. 555; *Gulf, C. & S. F. R. Co.* v. *Wells* (1891) Tex.) 16 S. W. 1025.

A foreman of the construction of a telegraph line. *Postal Teleg. Cable Co.* v. *Coole* (1900) Tex. Civ. App.) 57 S. W. 942.

A foreman of a sawmill. *Sulphur Lumber Co.* v. *Kelley* (1895) Tex. Civ. App.) 30 S. W. 696.

A conductor, as having no power of discharge, was denied to be a vice principal, in *Campbell* v. *Cook* (1894) 86 Tex. 630, 26 S. W. 486.

The doctrine of dual capacity is rejected in Texas. See § 516, *ante*.

Utah.—This court has adopted the superior servant doctrine, and has held masters liable for the negligence of the following employees:

A general manager. *Reddon* v. *Union P. R. Co.* (1887) 5 Utah, 344, 15 Pac. 262.

A conductor. *Openshaw* v. *Utah & W. R. Co.* (1889) 6 Utah, 132.

A foreman of a switching crew. *Armstrong* v. *Oregon Short Line & U. N. R. Co.* (1893) 8 Utah, 420, 32 Pac. 693.

An underground foreman of a mine. *Cunningham* v. *Union P. R. Co.* (1885) 4 Utah, 206, 7 Pac. 795; *Tetlow* v. *Brooklyn Lead Min. Co.* (1886) 4 Utah, 468, 11 Pac. 612.

A foreman of a railway gravel pit. *Anderson* v. *Ogden Union R. & Depot Co.* (1892) 8 Utah, 128, 30 Pac. 305.

Vermont.—The superior servant doctrine was disapproved in *Davis* v. *Central Vermont R. Co.* (1882) 55 Vt. 84, 45 Am. Rep. 590 (*arguendo*); but the actual point settled by that case is that certain duties of the master are non-delegable. It overruled a former decision to the effect that the master mechanic was not a representative of the defendant company. *Hard* v. *Vermont & C. R. Co.* (1860) 32 Vt. 473.

Virginia.—The earliest case in which the relation of a superior servant to a subordinate was directly presented was *Woon* v. *Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401, where a brakeman was injured through a detailment caused partly by the way in which the train was made up, and partly by the excessive speed at which it was run. The court held that a conductor in control of men on a material train, and of its makeup generally, is not a fellow servant of a brakeman, but his

superior, holding "a position wherein he exercises discretionary authority," and charged with "duties for the proper performance of which the law holds the company itself responsible, any negligence on his part in this behalf is the negligence of the company itself." This case was said, in *Norfolk & W. R. Co. v. Nuckols* (1895) 91 Va. 193, 21 S. E. 342, to have been really decided on the ground that the negligence of the master was one of two concurring causes of the accident. But the instruction which it was held error to refuse unquestionably embodies the superior servant doctrine.

In 1887, following the *Moon Case* (1884) 78 Va. 745, 49 Am. Rep. 401, a section foreman was held not to be a fellow servant of a section man in regard to the duty of signaling the approach of a train. *Torian v. Richmond & A. R. Co.* (1887) 84 Va. 192, 4 S. E. 339.

During the following years we find reported several cases holding railway companies liable for the negligence of conductors. *Johnson v. Richmond & A. R. Co.* (1888) 84 Va. 713, 5 S. E. 707 (conductor ordered inexperienced brakeman, a boy sixteen years of age, to couple cars, and failed to place himself in such a position as to be able to give signals which would have brought the cars gently together); *Lyers v. Richmond & D. R. Co.* (1888) 84 Va. 679, 5 S. E. 582 (brakeman caught between the lumber projecting from one car and another car which he was coupling to it cried out for help, and the conductor, without waiting to see whether the cars were connected, ordered the engineer to go ahead quickly, the result being that the brakeman fell when released through the taking up of the slack, and was run over); *Richmond & D. R. Co. v. De Watts* (1894) 90 Va. 405, 18 S. E. 837 (assumed, but case turned on contributory negligence); *Richmond & D. R. Co. v. Brown* (1893) 89 Va. 749, 17 S. E. 132 (order to unload car in an unnecessarily dangerous manner by crossing a track where a train might be expected to pass); *Richmond & D. R. Co. v. Williams* (1889) 86 Va. 165, 9 S. E. 990 (demurrer to evidence properly overruled where a brakeman was injured by the negligence of his conductor in ordering him to ascend a defective ladder while the train was standing, and in starting the train knowing the dangerous position in which the brakeman was placed).

The argument of the court in *Norfolk & W. R. Co. v. Donnelly* (1892) 88 Va. 853, 14 S. E. 692, evinced a strong disposition on its part to discard the superior servant doctrine altogether, and to adopt the rule that the character of the delinquent servant's act is the true test by which to determine whether the relation of coservice exists. But the change of opinion thus foreshadowed did not immediately take effect, for in 1895 a yard master was assumed, for the purposes of a decision, to be a vice principal. *Norfolk & W. R. Co. v. Brown* (1895) 91 Va. 668, 22 S. E. 496. See also *Norfolk & W. R. Co. v. Lindamood* (1892; Va.) 14 S. E. 694, where it is distinctly implied that the plaintiff might have recovered if his decedent had been subject to the control of the delinquent servant.

In 1896 a stone company was held liable for the negligence of the foreman in full charge of its quarry. *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232 (breach of duty to warn). But this is a decision which might possibly have been arrived at without reference to the superior servant doctrine.

The definite abandonment of that theory seems to be indicated by two decisions in 1897, denying the right to recover for the negligence of a gang boss in locomotive works. *Richmond Locomotive & Mach. Works v. Ford* (1897) 94 Va. 627, 27 S. E. 509. And of a gang foreman in quarry. *Moore Lime Co. v. Richardson* (1897) 95 Va. 326, 28 S. E. 334.

So also, in 1898, when a mining boss was held to be a vice principal in respect to the performance of nonassignable duties, and a mere servant as regards duties affecting the administration of the work. *Russell Creek Coal Co. v. Wells* (1898) 96 Va. 416, 31 S. E. 614.

Finally, the decisions as to conductors were overruled by *Norfolk & W. R. Co. v. Houchins* (1897) 95 Va. 398, *sub nom. Norfolk & W. R. Co. v. Swaine*, 46 L. R. A. 359, 28 S. E. 578. The court of appeals considered that the *Ross Case* (§§ 522, 535, *ante*), had been "completely overturned" by later decisions. So far as regards the decisions rendered up to the time when this opinion was expressed, such a statement is clearly erroneous, as will be apparent from an examination of *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914. But the statement correctly describes

what is probably the actual effect of the *Conroy Case* (§§ 535, note 1, subd. (c), *ante*).

The doctrine of a dual capacity was recognized in *Southern R. Co.* v. *Yauzy* (1900) 98 Va. 692, 37 S. E. 285.

Washington.—That a general manager was a vice principal was recognized in *Bateman* v. *Peninsular R. Co.* (1898) 20 Wash. 133, 54 Pac. 996; *McDonough* v. *Great Northern R. Co.* (1896) 15 Wash. 244, 46 Pac. 334.

Following the principle of the *Ross Case* (§§ 532, 535, *ante*), this court also holds employers liable for the negligence of managers of departments, by giving that expression a more liberal construction than it receives in some jurisdictions. Thus the servant has been allowed to recover where the delinquent was one of the following employees:

An assistant superintendent in charge of the lumber yard of a sawmill company. *Zintek* v. *Stimson Mill Co.* (1893) 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055 (1894) 9 Wash. 395, 37 Pac. 34.

The superintendents of each of two mining tunnels which are being excavated in the same hill. *Uren* v. *Golden Tunnel Min. Co.* (1901) 24 Wash. 261, 64 Pac. 174.

The foreman of an important piece of railway construction work, carried on at a distance from the headquarters of the general road master of the line. *McDonough* v. *Great Northern R. Co.* (1896) 15 Wash. 244, 46 Pac. 334 (see § 535, *ante*).

Either a captain or a mate of a ship. *Keating* v. *Pacific Steam Whaling Co.* (1899) 21 Wash. 415, 58 Pac. 224. But this ruling, so far as the mate is concerned, is clearly inconsistent with any reasonable construction of the doctrine of departmental control.

Employers are not liable for the negligence of the following employees below the grade of departmental managers:

A "fire boss," whose duty it is merely to direct the miners to leave dangerous places at which gas accumulates, but who has no control over their work. *Morgon* v. *Carbon Hill Coal Co.* (1893) 6 Wash. 577, 34 Pac. 152, 772 (no right, at the time of the accident, to control the action of the other miners, even if a vice principal at other times).

A "pit boss" in a mine. *Hughes* v. *Oregon Improv. Co.* (1898) 20 Wash. 294, 55 Pac. 119.

A "top boss" in a mine. *Hughes* v. *Oregon Improv. Co.* (1898) 20 Wash. 294, 55 Pac. 119.

The doctrine of dual capacity is recognized in this state. *Sayward* v. *Carlson* (1890) 1 Wash. 29, 23 Pac. 830.

West Virginia.—Upon the authority of the *Ross Case* (§§ 532, 535, *ante*) a conductor was in several decisions held to be a vice principal. *Madden* v. *Chesapeake & O. R. Co.* (1886) 28 W. Va. 610, 57 Am. Rep. 695 (breach of rules as to running orders caused a collision). *Haney* v. *Pittsburgh, C. C. & St. L. R. Co.* (1893) 38 W. Va. 570, 18 S. E. 748 (collision caused by conductor's neglect of signal to reduce speed). In one of them, even as to a brakeman on another train. *Daniel* v. *Chesapeake & O. R. Co.* (1892) 36 W. Va. 397, 16 L. R. A. 383, 15 S. E. 162 (track not kept clear for other trains; but this construction of the *Ross Case* is inconsistent with a later decision of the Supreme Court of the United States; see § 514, *ante*).

In another decision a railway company was even made to answer for the negligence of a section foreman. *Cromwell* v. *Pittsburgh, C. & St. L. R. Co.* (1888) 30 W. Va. 798, 6 S. E. 31. But the *Ross Case* plainly did not warrant such a ruling, though, as we have already seen, a similar misconception as to its meaning prevailed even in some of the Federal courts for several years. See *supra*.

None of these cases are any longer law in this state. A conductor is held not to be a departmental vice principal, but merely an employee who performs a particular piece of work in the operating department. *Jackson* v. *Norfolk & W. R. Co.* (1897) 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258 (negligent order to engineer while brakeman was coupling). There the rule was adopted that the nature of the function discharged at the time of the injury is the true test, except where the supervising employee is a general or departmental manager. The court seems to have assumed that the *Ross Case* was overruled by *Northern P. R. Co.* v. *Hambly* (1894) 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983, and *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914. This theory, if such was the basis of the decision, is not justified by anything said in the cases cited, but it embodies what is now the doctrine of the Supreme Court of the United States with regard to the status of conductors. See *supra*.

Wisconsin.—General managers are vice principals. *Klochinski* v. *Shores Lumber Co.* (1896) 93 Wis. 417, 67 N. W. 934 (negligent act here was held to be nonofficial); *Schultz* v. *Chicago, M. & St. P. R. Co.* (1879) 48 Wis. 375, 4 N. W. 399.

The doctrine of departmental control does not seem to have been explicitly adopted in this state, but a captain of ship, who is, for all practical purposes, at all events, a departmental manager as respects the lastness of a ship owner (see § 535, note 1, subd. (1), *ante*), has been held to be a vice principal. *Thompson* v. *Hermann* (1879) 47 Wis. 602, 32 Am. Rep. 784, 3 N. W. 579. *Contra*, *Mathews* v. *Case* (1884) 61 Wis. 491, 50 Am. Rep. 151, 21 N. W. 513, where a captain was declared to be a mere fellow servant of his mate.

In two other cases railway companies were held liable for the negligence of a foreman in full charge of a pile driver. *Schultz* v. *Chicago, M. & St. P. R. Co.* (1879) 48 Wis. 375, 4 N. W. 399; and of a master mechanic. *Brabbits* v. *Chicago & N. W. R. Co.* (1875) 38 Wis. 289. But these decisions were probably based rather on the ground of a breach of a non-delegable duty, than on the theory of departmental control.

A master is not required to answer for the negligence of a foreman of a water company in charge of the pipe laying. *Johnson* v. *Ashland Water Co.* (1890) 77 Wis. 51, 45 N. W. 807. Nor a foreman of a switching crew in a railway yard. *Flannagan* v. *Chicago & N. W. R. Co.* (1880) 50 Wis. 462, 7 N. W. 337. Nor of a conductor. *Home* v. *Chicago & N. W. R. Co.* (1883) 58 Wis. 525, 17 N. W. 420. Nor of a foreman subordinate to a master carpenter. *Peschel* v. *Chicago, M. & St. P. R. Co.* (1885) 62 Wis. 338, 21 N. W. 269.

The dual capacity of vice principals is recognized in *Dreyer* v. *American Exp. Co.* (1882) 55 Wis. 453, 13 N. W. 471; *Klochinski* v. *Shores Lumber Co.* (1896) 93 Wis. 417, 67 N. W. 934.

Wyoming.—A gang boss in a railway shops under a master mechanic, is not a vice principal. *McBride* v. *Union P. R. Co.* (1889) 3 Wyo. 247, 21 Pac. 687

CHAPTER XXXI.

VICE PRINCIPALSHIP AS DETERMINED WITH REFERENCE TO THE CHARACTER OF THE ACT WHICH CAUSED THE INJURY.

550. Introductory.

A. MASTER LIABLE FOR ANY NEGLIGENCE WHICH INVOLVES THE BREACH OF ONE OF HIS PERSONAL DUTIES.

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553. Subsidiary consequences deduced from the general principle.
554. Rationale of the doctrine of non-delegable duties.
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580. Duty to warn as to dangers of the transitory class, occasionally supervening during the progress of the work.
581. Duty to inspect instrumentalities; generally.
582. Duty to inspect instrumentalities at the time they are first brought into use.
583. Duty to inspect instrumentalities during the time they are kept in use.
584. Duty to inspect instrumentalities belonging to another person, but temporarily used by the master.

550. Introductory.—In the following chapter it is proposed to review the cases which illustrate the various aspects of a theory which produces results sometimes coincident with, and sometimes different from, those which are obtained by the application of the principles discussed in the preceding chapter,—the theory, namely, that the question whether a delinquent servant was or was not a vice principal as regards the injured person is ultimately determinable by the character of the act which caused the injury.[1]

The practical effect of this theory is that the defense of common employment is excluded, or allowed to prevail, according as the delinquency in question was or was not a breach of what the law regards as a "direct, personal, and absolute obligation, from which nothing but performance can relieve" the master.[2]

The subjoined table of cases, arranged according to states, is designed merely to indicate the present territorial limits of this theory, so far as it has actually received judicial recognition. The separate lists of authorities do not pretend to be exhaustive as regards each particular jurisdiction.[3]

[1] It may be observed in this place that the formal adoption of the principle is of comparatively recent date, the first case in which it was explicitly enunciated being *Flike* v. *Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545. In *Wright* v. *New York C. R. Co.* (1862) 25 N. Y. 562, the question whether the negligence of an agent intrusted with the function of hiring a servant was a vice principal was apparently viewed as debatable.

[2] The phrase as quoted is taken from *Prevost* v. *Citizens' Ice & Refrigerating Co.* (1898) 185 Pa. 617, 40 Atl. 88.

[3] *Federal courts.*—*Hough* v. *Texas &*

In some respects the test thus furnished has greatly simplified the subject, and tempered the harshness of the doctrine of common em-

P. R. Co. (1879) 100 U. S. 213, 25 L. ed. 612; *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Northern P. R. Co.* v. *Herbert* (1886) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Union P. R. Co.* v. *Daniels* (1894) 152 U. S. 684, *sub nom. Union P. R. Co.* v. *Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 756; *Northern P. R. Co.* v. *Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Western Coal & Min. Co.* v. *Ingraham* (1895) 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219; *Minneapolis* v. *Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 215, 58 Fed. 525; *Woods* v. *Lindrall* (1891) 1 C. C. A. 34, 4 U. S. App. 49, 48 Fed. 73; *Texas & P. R. Co.* v. *Thompson* (1895) 17 C. C. A. 524, 30 U. S. App. 549, 70 Fed. 941, 17 C. C. A. 526, 30 U. S. App. 553, 71 Fed. 531; *Atchison, T. & S. F. R. Co.* v. *Mulligan* (1895) 14 C. C. A. 547, 34 U. S. App. 1, 67 Fed. 569.

District of Columbia.—*Mackey* v. *Baltimore & P. R. Co.* (1890) 8 Mackey, 282; *Baltimore & P. R. Co.* v. *Elliott* (1896) 9 App. D. C. 341.

Alabama.—*Wolker* v. *Bolling* (1853) 22 Ala. 294; *Tyson* v. *South & North Ala. R. Co.* (1878) 61 Ala. 554, 32 Am. Rep. 8.

Arkansas.—*Little Rock & M. R. Co.* v. *Borry* (1893) 58 Ark. 198, 25 L. R. A. 386, 23 S. W. 1097; *Fones* v. *Phillips* (1882) 39 Ark. 17, 43 Am. Rep. 264.

California. — *Sanborn* v. *Madera Flume & Trading Co.* (1886) 70 Cal. 261, 11 Pac. 710; *Beeson* v. *Green Mountain Gold Min. Co.* (1880) 57 Cal. 20; *Elledge* v. *National City & O. R. Co.* (1893) 100 Cal. 282, 34 Pac. 720; *Donnelly* v. *San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559; *Daves* v. *Southern P. Co.* (1893) 98 Cal. 19, 32 Pac. 708; *Nixon* v. *Selby Smelting & Lead Co.* (1894) 102 Cal. 458, 36 Pac. 803. In the last-cited case it was said that the case of *McKune* v. *California Southern R. Co.* (1885) 66 Cal. 302, 5 Pac. 482; and *Brown* v. *Sennett* (1885) 68 Cal. 225, 9 Pac. 74, were perhaps inconsistent with the doctrine that the character of a duty performed by a supervising officer is the test by which it is determined whether he is a vice principal or a mere servant, and had been criticised and doubted, if not overruled.

Colorado. — *Wells* v. *Coe* (1886) 9 Colo. 159, 11 Pac. 50; *Grant* v. *Varney* (1895) 21 Colo. 329, 40 Pac. 771; *Denver Tramway Co.* v. *Crumbaugh* (1897) 23 Colo. 363, 48 Pac. 503.

Connecticut.—*Darrigan* v. *New York & N. E. R. Co.* (1885) 52 Conn. 285, 52 Am. Rep. 590; *McElligott* v. *Randolph* (1891) 61 Conn. 157, 22 Atl. 1094; *Wilson* v. *Willimantic Linen Co.* (1883) 50 Conn. 433, 47 Am. Rep. 653.

Delaware.—*Murphy* v. *Hughes* (1898) 1 Penn. (Del.) 250, 40 Atl. 187; *Foster* v. *Posey* (1888) 8 Houst. (Del.) 168, 14 Atl. 545.

Florida.—*Duval* v. *Hunt* (1884) 34 Fla. 85, 15 So. 876.

Georgia.—*Chesney* v. *Ocean S. S. Co.* (1893) 92 Ga. 726, 19 S. E. 33.

Idaho.—*Palmer* v. *Utah & N. R. Co.* (1887) 2 Idaho, 290, 13 Pac. 425.

Illinois.—*Chicago & N. W. R. Co.* v. *Swett* (1867) 45 Ill. 197, 92 Am. Dec. 206; *Chicago, B. & Q. R. Co.* v. *McLallen* (1876) 84 Ill. 109; *Pullman Palace Car Co.* v. *Laack* (1892) 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285; *Chicago & I. R. Co.* v. *Kneirim* (1894) 152 Ill. 458, 39 N. E. 324; *Chicago & I. R. R.* v. *Maroney* (1897) 170 Ill. 520, [illegible] E. 953; *Norton* v. *Volzke* (18[illegible] 8 Ill. 402, 41 N. E. 1085; *Chi[illegible]* *I. R. Co.* v. *Scanlan* (1897) 170 [illegible], 48 N. E. 826; *Edward Hines Lumber Co.* v. *Ligos* (1898) 172 Ill. 315, 50 N. E. 225.

Indiana.—*Atlas Engine Works* v. *Randall* (1885) 100 Ind. 293, 50 Am. Rep. 798; *Cleveland, C. C. & St. L. R. Co.* v. *Ward* (1897) 147 Ind. 256, 45 N. E. 325, 46 N. E. 462; *Capper* v. *Louisville, E. & St. L. R. Co.* (1885) 103 Ind. 305, 2 N. E. 749; *Indiana Car Co.* v. *Parker* (1885) 100 Ind. 181; *Justice* v. *Pennsylvania Co.* (1892) 130 Ind. 321, 30 N. E. 303; *Robertson* v. *Chicago & E. R. Co.* (1896) 146 Ind. 486, 45 N. E. 655; *Kerner* v. *Baltimore & O. S. W. R. Co.* (1897) 149 Ind. 21, 48 N. E. 364; *New Pittsburgh, Coal & Coke Co.* v. *Peterson* (1893) 136 Ind. 398, 35 N. E. 7; *Ohio & M. R. Co.* v. *Pearcy* (1891) 128 Ind. 197, 27 N. E. 479; *Cincinnati, H. & D. R. Co.* v. *McMullen* (1889) 117 Ind. 439, 20 N. E. 287.

Iowa.—*Braun* v. *Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5; *Fink* v. *Des Moines*

ployment. But, on the other hand, it has created several new and extremely embarrassing problems, and has even, by being treated as the

Ice Co. (1892) 84 Iowa, 321, 51 N. W. 155.

Kansas.—Kansas P. R. Co. v. *Salman* (1875) 14 Kan. 512; *Atchison, T. & S. F. R. Co.* v. *Moore* (1883) 29 Kan. 632; *Kelley* v. *Ryus* (1892) 48 Kan. 120, 29 Pac. 144; *Atchison, T. & S. F. R. Co.* v. *McKee* (1887) 37 Kan. 592, 15 Pac. 484; *Missouri P. R. Co.* v. *Dwyer* (1886) 36 Kan. 58, 12 Pac. 352; *St. Louis & S. F. R. Co.* v. *Weaver* (1886) 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408.

Kentucky.—McLeod v. *Ginther* (1882) 80 Ky. 339; *Louisville, C. & L. R. Co.* v. *Carens* (1873) 9 Bush. 559; *Kentucky C. R. Co.* v. *Corr* (1897) 19 Ky. L. Rep. 1172, 43 S. W. 193.

Louisiana.—Stucke v. *Orleans R. Co.* (1898) 50 La. Ann. 188, 23 So. 342; *Ferris* v. *Hernsheim Bros.* (1899) 51 La. Ann. 178, 24 So. 771.

Maine.—Shanny v. *Androscoggin Mills* (1876) 66 Me. 420; *Small* v. *Allington & C. Mfg. Co.* (1901) 94 Me. 551, 48 Atl. 177.

Massachusetts.—Ford v. *Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598; *Wheeler* v. *Wason Mfg. Co.* (1883) 135 Mass. 294. See, however, § 560, *infra*.

Michigan.—Shumway v. *Walcarth & N. Mfg. Co.* (1894) 98 Mich. 411, 57 N. W. 251; *Harrison* v. *Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034; *Schroeder* v. *Flint & P. M. R. Co.* (1894) 103 Mich. 213, 29 L. R. A. 321, 61 N. W. 663; *Van Dusen* v. *Letellier* (1889) 78 Mich. 492, 44 N. W. 572; *Fox* v. *Spring Lake Iron Co.* (1891) 89 Mich. 387, 50 N. W. 872.

Minnesota.—Brayn v. *Winona & St. P. R. Co.* (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484; *Lindvall* v. *Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020; *Tierney* v. *Minneapolis & St. L. R. Co.* (1885) 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. 229; *Carlson* v. *Northwestern Teleph. Exchange Co.* (1896) 63 Minn. 428, 65 N. W. 914.

Missouri.—Long v. *Pacific R. Co.* (1877) 65 Mo. 225; *Condon* v. *Missouri P. R. Co.* (1883) 78 Mo. 567; *Bowen* v. *Chicago, R. & K. C. R. Co.* (1888) 95 Mo. 268, 8 S. W. 230; *Moore* v. *Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588; *Schaub* v. *Hannibal & St. J. R. Co.* (1891) 106 Mo. 87, 16 S. W. 924; *Herder* v. *Buck's Stove & Range Co.* (1896) 136 Mo. 3, 37 S. W. 115; *Coontz* v. *Missouri P. R. Co.* (1894) 121 Mo. 652, 26 S. W. 661.

Montana.—Kelley v. *Cable Co.* (1887) 7 Mont. 70, 14 Pac. 633.

Nebraska.—Chicago, B. & Q. R. Co. v. *Kellogg* (1898) 54 Neb. 127, 74 N. W. 454.

New Hampshire.—Jaques v. *Great Falls Mfg. Co.* (1891) 66 N. H. 482, 13 L. R. A. 824, 22 Atl. 552.

New Jersey.—Maher v. *Thropp* (1896) 59 N. J. L. 186, 35 Atl. 1057.

New Mexico.—Cerrillos Coal R. Co. v. *Deserant* (1897) 9 N. M. 49, 49 Pac. 807. Following *Northern P. R. Co.* v. *Herbert* (1886) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590.

New York.—Flike v. *Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545; *Booth* v. *Boston & A. R. Co.* (1878) 73 N. Y. 38, 29 Am. Rep. 97; *Hofnagle* v. *New York C. & H. R. R. Co.* (1874) 55 N. Y. 608; *Benzing* v. *Steinway* (1886) 101 N. Y. 549, 5 N. E. 449; *Corcoran* v. *Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369; *Loughlin* v. *State* (1887) 105 N. Y. 159, 11 N. E. 371; *Hankins* v. *New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. R. A. 396, 37 N. E. 466; *Crispin* v. *Babbitt* (1880) 81 N. Y. 521, 37 Am. Rep. 521; *Wann* v. *Delaware & H. Canal Co.* (1883) 91 N. Y. 495.

North Carolina.—Chesson v. *John L. Roper Lumber Co.* (1896) 118 N. C. 59, 23 S. E. 925.

North Dakota.—Ell v. *Northern P. R. Co.* (1891) 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222; *Cameron* v. *Great Northern R. Co.* (1898) 8 N. D. 124, 77 N. W. 1016.

Oregon.—Anderson v. *Bennett* (1888) 16 Or. 515, 19 Pac. 765; *Hast* v. *Ivers* (1898) 34 Or. 247, 54 Pac. 950.

Pennsylvania.—Ross v. *Walker* (1890) 139 Pa. 42, 21 Atl. 157, 159; *Prescott* v. *Ball Engine Co.* (1896) 176 Pa. 459, 35 Atl. 224; *Lehlering* v. *Struthers* (1893) 157 Pa. 312, 27 Atl. 720.

Rhode Island.—Mulvey v. *Rhode Island Locomotive Works* (1883) 14 R. I. 204; *Hanna* v. *Granger* (1894) 18 R. I. 507, 28 Atl. 659; *Di Marcho* v. *Builders Iron Foundry* (1893) 18 R. I. 514, 27 Atl. 328, 28 Atl. 661.

South Carolina.—Jenkins v. *Richmond*

only admissible gauge of liability, operated so as to narrow the servant's rights of recovery.[4]

A. Master liable for any negligence which involves the breach of one of his personal duties.

551. Generally.— The principle stated in the preceding section will, in the first place, be considered under the form which it assumes when it is treated as constituting a reason for excluding the defense of common employment.

For the purposes of the application of that principle it is assumed that an implied incident of the contract of employment is that the master undertakes, as regards the servant, certain obligations which are spoken of as "personal duties;"[1] "positive duties;"[2] "personal, positive duties;"[3] "duties which the master owes personally and absolutely to his servants;"[4] "duties which a master owes, as such, to a servant entering his employment;"[5] or "absolute, personal duties."[6]

& D. R. Co. (1893) 39 S. C. 507, 18 S. E. 182; *Canter* v. *Graniteville Mfg. Co.* (1882) 18 S. C. 270, 44 Am. Rep. 573; *Carter* v. *Oliver Oil Co.* (1891) 34 S. C. 211, 13 S. E. 419; *Wholey* v. *Bartlett* (1894) 42 S. C. 454, 20 S. E. 745; *Wilson* v. *Charleston & S. R. Co.* (1897) 51 S. C. 79, 28 S. E. 91.

South Dakota.—Gates v. *Chicago, M. & St. P. R. Co.* (1892) 2 S. D. 422, 50 N. W. 907.

Texas.—Houston & T. C. R. Co. v. *Marcelles* (1883) 59 Tex. 334; *Texas & P. R. Co.* v. *O'Fiel* (1890) 78 Tex. 486, 15 S. W. 33; *Texas & P. R. Co.* v. *Kirk* (1884) 62 Tex. 227; *Galveston, H. & S. A. R. Co.* v. *Smith* (1890) 76 Tex. 611, 13 S. W. 562.

Utah.—Trihay v. *Brooklyn Lead Min. Co.* (1886) 4 Utah, 468, 11 Pac. 612; *Chapman* v. *Southern P. Co.* (1895) 12 Utah, 30, 41 Pac. 551.

Vermont.—Davis v. *Central Vermont R. Co.* (1882) 55 Vt. 84, 45 Am. Rep. 590, overruling *Hard* v. *Vermont & C. R. Co.* (1860) 32 Vt. 493; *Houston* v. *Brush* (1894) 66 Vt. 331, 29 Atl. 380.

Virginia.— Moon v. *Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401; *Torian* v. *Richmond & A. R. Co.* (1887) 84 Va. 192, 4 S. E. 339; *Russell Creek Coal Co.* v. *Wells* (1898) 96 Va. 416, 31 S. E. 614; *Richmond Granite Co.* v. *Bailey* (1896) 92 Va. 554, 24 S. E. 232.

Washington.— Ogle v. *Jones* (1897) 16 Wash. 319, 47 Pac. 747.

West Virginia.—Jackson v. *Norfolk & W. R. Co.* (1897) 43 W. Va. 38, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258; *Cooper* v. *Pittsburgh, C. & St. L. R. Co.* (1884) 24 W. Va. 37.

Wisconsin.—Brabbits v. *Chicago & N. W. R. Co.* (1875) 38 Wis. 239; *Hulehan* v. *Green Bay, W. & St. P. R. Co.* (1887) 68 Wis. 520, 32 N. W. 529; *Cadden* v. *American Steel Barge Co.* (1894) 88 Wis. 409, 60 N. W. 800; *McMahon* v. *Ida Min. Co.* (1897) 95 Wis. 308, 70 N. W. 478.

[4] See §§ 543-547, *ante*. As to the difficulty which is frequently experienced in distinguishing between the cases referable to this conception and those based upon the official position of the delinquent, see § 539, *ante*.

[1] *Schaub* v. *Hannibal & St. J. R. Co.* (1891) 106 Mo. 87, 16 S. W. 924.

[2] *Baltimore & O. R. Co.* v. (1893) 149 U. S. 368, 37 L. ed. Sup. Ct. Rep. 914; *Hess* v. *Rose, al* (1896) 160 Ill. 621, 43 N. E. 743.

[3] *Lewis* v. *Seifert* (1887) 116 Pa. 628, 647, 11 Atl. 514.

[4] *Lindvall* v. *Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020.

[5] *Northern P. R. Co.* v. *Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

[6] *Minneapolis* v. *Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525.

The existence of such duties being predicated, it follows, as a necessary corollary from the quality ascribed to them, that the master must, at his peril, see that they are discharged with reasonable care, whether he undertakes their performance himself, or employs an agent to perform them in his stead. The judicial statements of the doctrine thus deduced are couched in extremely varied phraseology, but may be conveniently classified under a few main groups. So far as the actual liability of the employer is concerned, it is, of course, quite immaterial from which standpoint the position of the employee who represents him is considered; and, as might be expected, a court is apt to pass from one form of expression to the other in the course of the same discussion. They all connote the conception that of the duties imposed by the law upon an employer "he cannot relieve himself except by performance."[7]

552. Various forms in which the master's responsibility is stated.—Having regard to the diverse language in which the principle now under review has been formulated, it will be convenient to distribute the judicial statements into several distinct groups.

1. In one group of statements prominence is given to the conception that the character of the negligent act is, in every case, the test of vice principalship.[1]

[7] *Atchison, T. & S. F. R. Co.* v. *Sceley* (1894) 54 Kan. 21, 37 Pac. 104.

[1] "The question turns rather on the character of the act than on the relations of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor." *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 368, 387, 37 L. ed. 772, 781, 13 Sup. Ct. Rep. 914.

"Whether the master is liable for the negligence of a servant intrusted with the discharge of one of the absolute, personal duties which the law imposes on him is determined in any given case by the nature of the act in the performance of which he was guilty of the negligence. If he was engaged in discharging an absolute duty of the master, the latter is liable; otherwise he is not." *Minneapolis* v. *Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525.

"In every case the position of vice principal must be determined by ascertaining whether the act performed or duty omitted is one the doing of which is charged upon the master and delegated to the servant,—in other words, whether the servant has been put in the place of the master as to the particular service performed or omitted. If he has, and his act or omission, while in that particular service, involves a duty owing by the master to the servant, the master is liable for injury resulting from such act or omission, if the injured servant is free from negligence and has not assumed the hazard." *New Pittsburgh Coal & Coke Co.* v. *Peterson* (1894) 136 Ind. 398, 35 N. E. 7.

"Whenever it is sought to hold the master liable for the act or neglect of his foreman, the question to be first considered is whether the negligence complained of relates to anything which it was the duty of the principal to do. If it does, then the principal is liable; for he must see, at his peril, that his own obligations to his workmen are properly discharged. If it does not, he is not liable; for all his workmen are liable to each other for the consequences of their negligence, respectively, and he does not insure them against each other

2. In another, an affirmation of the crucial importance of the character of the negligent act appears in connection with an assertion that the rank, title, or official position of the offending servant, and the degree of control exercised by him over the plaintiff, are not material factors in the determination of the master's liability.[2]

by the mere fact of employing them." *Ross* v. *Walker* (1890) 139 Pa. 42, 21 Atl. 157, 159.

"The test as to whether an employee is the representative of the master is not whether such employee has the power to employ or discharge hands, or to purchase or change machinery, for, while these are some of the duties of the master, they are not all his duties; and hence an employee who is not intrusted with either of these powers may still be the representative of the master. The true test is whether the person in question is employed to do any of the duties of the master." *Gunter* v. *Graniteville Mfg. Co.* (1882) 18 S. C. 270, 44 Am. Rep. 573.

"The question as to whether the relation of fellow servants exists in a given case is, in our opinion, determined by an inquiry into the nature of the service at the particular time in question. If, at the time the offending servant performed the act by which another servant was injured, he was in the performance of a duty which the master owed to his servants, he was not a fellow servant; for the rule is fundamental that the master cannot rid himself of the duty he owes to his servants by delegating his authority to another, and if he attempts to do so, the person to whom he delegates the power to act is a vice principal, and not a fellow servant. On the other hand, if at the time of the alleged negligence the servant was not engaged in the performance of a duty which the master owed to his servants, but was in the discharge of a duty which the servant acting owed to the master, he will be held to be a fellow servant with others engaged in the same common business, and the master will not be liable for any injury inflicted upon such fellow servant by reason of his negligence." *Justice* v. *Pennsylvania Co.* (1892) 130 Ind. 321, 30 N. E. 303.

"A railroad corporation may be controlled by competent, watchful, and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and order its affairs and business, in all of its departments, are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the company's service. But the obligation still remains to provide and maintain in suitable condition, the machinery and apparatus to be used by its employees,—an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least, in the organization of the corporation, who are invested with controlling or superior authority in that regard represent its legal personality; their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant who has been injured, without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation." *Hough* v. *Texas & P. R. Co.* (1879) 100 U. S. 213, 218, 25 L. ed. 612, 615.

"The test of liability is not the safety of the place or appliance at the time of the injury, but the character of the duty, the negligent performance of which caused the injury." *Sofield* v. *Guggenheim Smelting Co.* (1900) 64 N. J. L. 605, 50 L. R. A. 417, 46 Atl. 711.

The true rule "makes the character of the act or omission wherein the negligence exists the test of the master's responsibility therefor." *McElligott* v. *Randolph* (1891) 61 Conn. 157, 22 Atl. 1094.

"The test must always be whether the negligent act or omission was in discharge of the master's or the servant's duty." *Curley* v. *Hoff* (1899) 62 N. J. L. 758, 42 Atl. 731.

[2] The true rule is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed.

Flike v. *Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545; quoted in *Crispin* v. *Babbitt* (1880) 81 N. Y. 521, 37 Am. Rep. 521.

In *Fuller* v. *Jewett* (1880) 80 N. Y. 46, 36 Am. Rep. 575, the court, after citing earlier cases, proceeded thus: "We understand the principle of these cases to be that acts which the master, as such, is bound to perform for the safety and protection of his employees, cannot be delegated so as to exonerate the former from liability to a servant who is injured by the omission to perform the act or duty, or by its negligent performance, whether the nonfeasance or misfeasance is that of a superior officer, agent, or servant, or of a subordinate or inferior agent or servant to whom the doing of the act, or the performance of the duty, has been committed. In either case, in respect to such act or duty the servant who undertakes, or omits to perform it, is the representative of the master, and not a mere coservant with one who sustains the injury. The act or omission is the act or omission of the master, irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do by selecting competent servants, or otherwise to secure the safety of his employees. It is sometimes difficult to determine what is the master's duty, within the rule. But when it is ascertained that the negligence by which an employee is injured relates to this duty, then there is no middle ground, and the case cannot be determined upon any distinction founded upon the particular grade, office, or function of the negligent servant or agent."

"The true test, it is believed, whether an employee occupies the position of a fellow servant to another employee, or is the representative of the master, is to be found, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant, by which another employee is injured; or, in other words, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master." *Schroeder* v. *Flint & P. M. R. Co.* (1894) 103 Mich. 213, 29 L. R. A. 321, 61 N. W. 663.

The test whether or not an employee by whose negligence another employee was injured was a fellow servant of the latter is not "a difference in rank, or the power to control and direct or discharge from service the employee injured," but "whether the act or omission resulting in injury involved a duty owing by the master to the injured employee." *Robertson* v. *Chicago & E. R. Co.* (1896) 146 Ind. 486, 45 N. E. 655.

"For failure or negligence in the discharge of these personal duties of the master, resulting in injury, the master is liable whether he acts in person or by other servants. If he acts by servants in such cases, it makes no difference as to the grade of the servant. The servant is identified with the master. The master's duties are cast upon him and for his default the master is liable, and in these cases the doctrine of 'fellow servants,' so called, has no application whatever." *Schaub* v. *Hannibal & St. J. R. Co.* (1891) 106 Mo. 87, 16 S. W. 924.

"It is not the law that the mere fact that an appliance furnished by the master to his servants to be used by them in the prosecution of their work has been constructed by one who has been a fellow servant, engaged in the same kind of work with the servant who is injured, exonerates the master from liability for the consequences of a defectiveness of the appliance. On the contrary the law is that the duty of the master to furnish reasonably safe tools, machines, and appliances to his servants, to be used by them in the prosecution of the work assigned to them, is absolute in its nature, and personal to the master to the extent of using due care to accomplish the end named. As this duty is personal to the master, it is entirely immaterial to what grade of servants or employees he delegates its performance. He may delegate it to his general agent, who has the general superintendence of his work and the duty of employing and discharging hands, and the entire control over their movements and operations; or he may delegate it to one of the common laborers who are to use the appliance. He may delegate it to a trained mechanic, or he may select a laborer utterly without skill. In either case, as the duty is personal to him, he becomes responsible for its proper performance to the extent of using reasonable care and diligence to the end that it is properly performed. In any of these cases the particular agent, employee, or servant, to whom he delegates this duty, becomes, for that reason, and

3. In another it is laid down that the mere employment of a competent person to perform the duty which was omitted is not sufficient to absolve the master from responsibility.[3]

4. In another we find a simple affirmative of the representative character of the employee who is intrusted with the performance of one of the non-delegable duties.[4]

as to it, his vice principal, and is taken out of the category of fellow servants in respect of any other servants who are injured through the defectiveness of the appliance." *Jones* v. *St. Louis, N. & P. Packet Co.* (1891) 43 Mo. App. 398.

For other examples of the same turn of expression, see *Stoekmeyer* v. *Reed* (1893) 55 Fed. 259; *Hankins* v. *New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. R. A. 396, 37 N. E. 466; *Harrison* v. *Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034; *Lindvall* v. *Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020; *Carlson* v. *Northwestern Teleph. Exchange Co.* (1896) 63 Minn. 428, 65 N. W. 914; *Kerner* v. *Baltimore & O. S. W. R. Co.* (1897) 149 Ind. 21, 48 N. E. 364; *Capper* v. *Louisville, E. & St. L. R. Co.* (1885) 103 Ind. 305, 2 N. E. 749; *Peirce* v. *Oliver* (1897) 18 Ind. App. 87, 47 N. E. 485; *Jenkins* v. *Richmond & D. R. Co.* (1893) 39 S. C. 507, 18 S. E. 182; *Galveston, H. & S. A. R. Co.* v. *Smith* (1890) 76 Tex. 611, 13 S. W. 502; *Jackson* v. *Norfolk & W. R. Co.* (1897) 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258; *Ell* v. *Northern P. R. Co.* (1891) 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222; *Dares* v. *Southern P. Co.* (1893) 98 Cal. 19, 32 Pac. 708; following *Collier* v. *Steinhart* (1875) 51 Cal. 116.

[3] *Van Dusen* v. *Letellier* (1889) 78 Mich. 492, 44 N. W. 572.

[4] "If, instead of personally performing these [personal] obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such." *Northern P. R. Co.* v. *Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

"If a person employs another to perform a duty which he would have to discharge if another were not employed to do it for him, such employee, as to that service, stands in the master's stead with relation to other persons." *Moore* v. *Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588.

"At common law, whenever the master delegates to any officer, servant, agent, or employee, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employee stands in the place of the master and becomes a substitute for the master, a vice principal and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts, or was guilty of the negligence." *Atchison, T. & S. F. R. Co.* v. *Moore* (1883) 29 Kan. 632.

"It is clear upon principle that where the duty rests directly on the master, and he authorizes an agent or servant to perform that duty, he is bound to answer to a servant injured by the negligent performance of the duty." *Indiana Car Co.* v. *Parker* (1885) 100 Ind. 181.

"One who is placed in charge of a force of men engaged in any of those occupations, whose duties are limited to carrying on the work, or directing it, whether actively assisting therein or not, and who is invested with no authority, or charged with no duty, in furnishing places or appliances for the work, or in the employment or retention of employees, is himself usually a mere coemployee. His duties require him to use, or superintend and direct the using of places and appliances, and to control employees furnished by the master. If, however, he is given additional authority, and is charged with the duty of furnishing places to work and appliances for the work, and is authorized to employ and discharge operatives, he is, as to such things, not a coemployee, but speaks and acts as a master." *Nall* v. *Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 260, 28 N. E. 183, 611.

"If the master has delegated to a servant or employee the care and management of the entire business, or a distinct department of it, the situation be-

5. In another the non-delegable quality of the master's personal duties is emphasized.[5]

ing such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master, then such superior servant stands in the place of the master, and the rule of *respondeat superior* applies." *Harrison* v. *Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034.

Where injuries are caused by negligence of a servant who is charged with the performance of duties which by law it is incumbent on the master to perform, in legal contemplation his negligence is the negligence of the master. *Baltimore & O. R. Co.* v. *McKenzie* (1885) 81 Va. 71.

In *Riley* v. *West Virginia, C. & P. R. Co.* (1885) 27 W. Va. 145, the correct rule on this subject, as deduced from the more recent and better-considered American cases, was said to have been that stated in Wood on Master & Servant, § 438, as follows: "Whenever the master delegates to another the performance of a duty to his servants, which the master had impliedly contracted to perform in person, or which rests upon his as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent; and to the extent of the discharge of those duties by the middleman, he stands in the place of the master, but as to all other matters he is a mere coservant; and the question is not whether the master reserved any oversight or discretion to himself, but whether he did in fact clothe the middleman with power to perform his duties to the servant injured."

See also *Corcoran* v. *Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369; *Loughlin* v. *State* (1887) 105 N. Y. 159, 11 N. E. 371; *Lindvall* v. *Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020; *Mackey* v. *Baltimore & P. R. Co.* (1890) 8 Mackey, 282.

[5] "No duty required of him [the master] for the safety and protection of his servants can be transferred, so as to exonerate him from such liability." *Northern P. R. Co.* v. *Herbert* (1886) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590, Affirming (1882) 3 Dak. 38, 13 N. W. 349.

"The nonfulfilment of a positive duty cannot be excused by the delegation of its performance to another." *Pennsylvania R. Co.* v. *LaRue* (1897) 27 C. C. A. 363, 55 U. S. App. 20, 81 Fed. 148.

"An employer is not relieved from responsibility to an employee, who has been injured in consequence of his failure to make the working place reasonably safe, by proof that he employed a competent superintendent or foreman, supplied him with necessary appliances, and gave him all needful instructions for the purpose." *Baird* v. *Reilly* (1899) 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884.

"No duty belonging to the master to perform for the safety and protection of his servants can be delegated to any servant of any grade, so as to exonerate the servant from responsibility to a coservant who has been injured by its nonperformance." *Munn* v. *Delaware & H. Canal Co.* (1883) 91 N. Y. 495.

"A master is never exonerated by the negligent omission of subordinates to perform duties which are imposed on him in his character as master, resulting in injury to his employees." *Bailey* v. *Rome, W. & O. R. Co.* (1893) 139 N. Y. 302, 34 N. E. 918.

In *Ford* v. *Lake Shore & M. S. R. Co.* (1891) 124 N. Y. 493, 12 L. R. A. 454, 26 N. E. 1101, the court, after stating that a want of care on the master's part may appear from various derelictions of specific duties, said: "These are the master's duties, and responsibility cannot be evaded by their delegation to agents. As to such acts the agent occupies the master's place, and the latter is deemed present and liable for the manner in which they are performed."

"The duty of the master to exercise reasonable care that the machinery, appliances, and place to work, supplied to the servant, are reasonably safe, is personal, and cannot be delegated to another so as to relieve the master from liability for its nonperformance." *Edward Hines Lumber Co.* v. *Ligas* (1898) 172 Ill. 315, 50 N. E. 225, Affirming (1897) 68 Ill. App. 523.

The master "cannot avoid the liability by deputing another to perform these duties in his stead." *Brown* v. *Winona & St. P. R. Co.* (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484.

"While the master may delegate the [*i. e.*, a personal] duty to other employees, he cannot thereby escape liability for its nonperformance." *Cadden* v.

6. In another, the language takes the shape of a declaration that coservice will not defeat the action where the delinquent was discharging one of the personal duties of the master.[q]

American Steel Barge Co. (1894) 88 Wis. 409, 60 N. W. 800.

Similarly the courts have spoken of an "obligation not satisfied by devolving it upon a subordinate" (*Baird* v. *Reilly* [1899] 35 C. C. A. 78, 63 U. S. App. 457, 92 Fed. 884); of "duties to those serving him, which he cannot devest himself of by any delegation to others." (*Indiana Car Co.* v. *Parker* [1885] 100 Ind. 181, quoting from an essay by Judge Cooley, in 2 Southern Law Review, N. S. 114 [p. 1239]); of "a duty which the master cannot rid himself of by casting it upon an agent, officer, or servant employed by him" (*Indiana Car Co.* v. *Parker* [1885] 100 Ind. 181); of "duties of which the master cannot relieve himself by any delegation" (*Quincy Min. Co.* v. *Kitts* [1879] 42 Mich. 34, 3 N. W. 240); of "a primary duty, of which the master cannot relieve himself by clothing some general agent with the power, and charging him with the duty, of making performance for him" (*Ticiney* v. *Minneapolis & St. L. R. Co.* [1885] 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. 229).

For other examples of the same form of statement, see the following cases: *Comben* v. *Belleville Stone Co.* (1896) 59 N. J. L. 226, 36 Atl. 473; *Indiana Car Co.* v. *Parker* (1885) 100 Ind. 181; *Brazil Block Coal Co.* v. *Young* (1889) 117 Ind. 520, 20 N. E. 423; *Johnson* v. *Chesapeake & O. R. Co.* (1892) 36 W. Va. 73, 14 S. E. 432; *Van Steenburgh* v. *Thornton* (1895) 58 N. J. L. 66, 33 Atl. 380; *Benzing* v. *Steinway* (1886) 101 N. Y. 549, 5 N. E. 449; *Union P. R. Co.* v. *Daniels* (1894) 152 U. S. 684, *sub nom. Union P. R. Co.* v. *Snyder* 38 L. ed. 597, 14 Sup. Ct. Rep. 756, Affirming (1890) 6 Utah, 357, 23 Pac. 762; *Chicago G. W. R. Co.* v. *Healy* (1898) 30 C. C. A. 11, 57 U. S. App. 513, 86 Fed. 245; *Pike* v. *Chicago & A. R. Co.* (1890) 41 Fed. 95; *Smith* v. *Hillside Coal & I. Co.* (1898) 186 Pa. 28, 40 Atl. 287; *Balhoff* v. *Michigan C. R. Co.* (1895) 106 Mich. 606, 65 N. W. 592; *Carlson* v. *Northwestern Teleph. Exchange Co.* (1896) 63 Minn. 428, 65 N. W. 914; *Donnelly* v. *San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559; *Addicks* v. *Christoph* (1899) 62 N. J. L. 786, 43 Atl. 196; *Galveston, H. & S. A. R. Co.* v. *Smith* (1890) 76 Tex 611, 13 S. W. 562.

[q] "If an employee sustains an injury through the negligence of a coemployee while such coemployee is performing the duties of the master, the master cannot defeat his recovery on the ground that they are fellow servants." *Wilson* v. *Charleston & S. R. Co.* (1896) 51 S. C. 79, 28 S. E. 91.

"The negligence of a fellow servant or coemployee, acting as such, will not authorize a recovery in any case, although the fellow servant or coemployee may be a superior officer, an agent, or a foreman: but, if the superior agent is charged with the performance of the master's duty, then, in so far as that duty is concerned, his acts and his negligence are the acts and the negligence of the master, and not simply those of a coemployee or fellow servant." *Krueger* v. *Louisville, N. A. & C. R. Co.* 111 Ind. 52, 11 N. E. 957.

Compare *Stucke* v. *Orleans R. Co.* (1898) 50 La. Ann. 188, 23 So. 342.

The elementary conception underlying this form of statement is observable in the declaration that a servant does not assume the risks of negligent acts of this class on the part of the injured servant. *Monmouth Min. & Mfg. Co.* v. *Erling* (1894) 148 Ill. 521, 36 N. E. 117, Affirming (1892) 45 Ill. App. 411.

Commenting upon the last two of these alternative modes of statement, in *Rogers* v. *Ludlow Mfg. Co.* (1887) 144 Mass. 201, 59 Am. Rep. 68, 11 N. E. 77, the court said: "As a corporation must act by natural persons, and as all large corporations carry on their business by means of servants of different grades, it is manifest that, if it is held that they are all fellow servants, and that a corporation can delegate the whole duty of hiring and superintending its servants, and of providing its machinery and of keeping it in repair, to one or more principal servants, such as superintendents or managers the corporation may escape all responsibility for injuries caused by defective machinery, except in the few cases where it can be shown that these principal servants were incompetent, or that the directors of the corporation, or its principal officers, knew that the subordinate

553. Subsidiary consequences deduced from the general principle.—From the principle that the master's liability is a peremptory inference of law when the evidence shows that the injury was caused by a violation of one of his non-delegable duties, several consequences follow.

1. If a master has no representative to discharge the non-delegable duties which he does not undertake to discharge in person, he is no less culpable than where the representative actually appointed for that purpose performs his functions negligently.[1]

2. The master is none the less responsible, because he did not know that his agent was habitually careless and unfit for his position.[2]

3. The mere fact that a vice principal has given orders which, if they had been executed, would have averted the catastrophe from which injury resulted, will not discharge his employer from liability. Empty orders will not suffice.[3]

4. The fact that the delinquent was not the sole person to whom the performance of a non-delegable duty was intrusted, as respects the plaintiff, will not avail the master.[4]

servants were incompetent, or that the machinery used was defective. To avoid this result, some courts have held that superintendents or managers are not fellow servants with the men employed to work under them, or that servants employed in one department of the business are not fellow servants with those employed in another. Other courts have held that they are all fellow servants, but that the master cannot avoid his obligation to see to it that reasonable care shall be exercised in procuring suitable machinery, in keeping it in repair, and in hiring and retaining competent servants, by employing a servant to do these things for him, and that if he does employ a servant for this purpose, and the servant does not use due care, the master is responsible."

[1] *Wilson* v. *Willimantic Linen Co.* (1883) 50 Conn. 433, 47 Am. Rep. 653; *Prescott* v. *J. Ottman Lithographing Co.* (1897) 20 App. Div. 397, 46 N. Y. Supp. 812.

[2] *Whaley* v. *Bartlett* (1894) 42 S. C. 454, 20 S. E. 745.

[3] *Mattise* v. *Consumers' Ice Mfg. Co.* (1894) 46 La. Ann. 1535, 16 So. 400.

"All the cases hold that it is not enough for the master to order safe machinery to be constructed, but he must exercise reasonable care to see that the machinery is in fact safe, after the order has been executed. It would be an easy matter for a master to escape liability if an order to construct safe machinery would be sufficient. That would be equivalent to exculpating him entirely from all liability in this regard." *Wilson* v. *Willimantic Linen Co.* (1883) 50 Conn. 433, 47 Am. Rep. 563 (appliance left incomplete).

Compare also *Flike* v. *Boston & A. R. Co.* (1893) 53 N. Y. 549, 13 Am. Rep. 545 (brakeman who had been hired to fill a vacancy did not arrive, and the train was sent out with an insufficient number of hands; see § 573, *infra*); *Anderson* v. *Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585 (assistant road master sent section foreman to repair defective track, but did not see that his orders had been carried out properly); *Galasso* v. *National S. S. Co.* (1898) 27 App. Div. 169, 50 N. Y. Supp. 417, Rehearing denied in 51 N. Y. Supp. 136; *Fuller* v. *Jewett* (1880) 80 N. Y. 46, 36 Am. Rep. 575, Affirming S. C. *sub nom. Sherenson* v. *Jewett* (1878) 16 Hun, 210 (here it was expressly said by the court of appeals that the superintendent of repairs was not negligent, as he had given proper orders, and the immediate cause of the injury was the failure of the mechanics to do their work properly); *McNamara* v. *Brooklyn City R. Co.* (1895) 11 Misc. 667, 32 N. Y. Supp. 913.

[4] *Cole Bros.* v. *Wood* (1894) 11 Ind.

5. The nondischarge of a personal duty is not excused by proof that the master enunciated a rule requiring employees to make a personal examination of appliances before trusting them.[5]

6. A custom to perform a personal duty through the agency of fellow servants is equally ineffectual to shield the master, if it is neglected.[6]

As to the effect of delegating personal duties to an independent contractor, see § 558, *infra*.

554. Rationale of the doctrine of non-delegable duties.—The establishment of the above doctrine has undoubtedly been brought about

N. E. 1074, the court remarked that the master "cannot shield himself from liability by dividing his [duties] and laying them on various subordinates."

[illegible] of the shop of a railway company [illegible] more [illegible] fellow servant of [illegible] injured by the explosion of [illegible] the master [illegible] personal supervision [illegible] Each, within his sphere as [illegible] of the company." *St. Louis, [illegible] S. R. Co.* v. *Harper* (1884) 44 [illegible].

Similarly in *[illegible]s* v. *Chicago & N. R. Co.* (1877) 38 Wis. 289, the contention was rejected that the defendant, although it might have been held liable if the nonrepair of the defective engine which caused the injury had been due to the negligence of its master mechanic, could not be required to answer for similar negligence on the part of the shop foreman. "Each, in his sphere," said the court, "was the agent of the defendant, charged with the performance of certain duties which the latter owed to the public and to its servants, and, on principle, it seems quite immaterial that one of them was subordinate to the other, or that he operated in a narrower field. The relations between them were not unlike those usually existing between the master mechanic and general manager or superintendent, or between the latter and the board of directors. The functions of a railway company must be performed by numerous servants or employees, and among these there must necessarily be a gradation of authority, arranged with reference to the business of the company. Where two of these are charged with the same duty, no good reason is perceived why the company should be held liable for the failure of one to perform such duty, and not for the failure of the other. In this case the master mechanic and foreman were each charged with the duty of causing all defective engines to be repaired; and the failure of either to do so after notice that an engine is out of repair and unsafe is negligence. On what principle can it be successfully maintained that the failure of the master mechanic to do so is to be imputed to the defendant as negligence, while the same failure by the foreman is his own negligence and not that of the defendant? I confess my inability to answer the question . . . It would be monstrous to allow the defendant to relieve itself from all liability for a breach of that duty by simply charging one of its inferior officers or servants with its performance. We hold, therefore, that the instruction was correct,—that notice to the foreman was notice to the defendant, that the negligence of the foreman was the negligence of the defendant, and that the latter is liable to the plaintiff for the injuries received by him because of such negligence."

[5] *Bailey* v. *Rome, W. & O. R. Co.* (1893) 139 N. Y. 302, 34 N. E. 918; *Bookrum* v. *Galveston, H. & S. A. R. Co.* (1900) Tex. Civ. App.) 57 S. W. 919.

[6] *Donnelly* v. *Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874.

In *Boelter* v. *Ross Lumber Co.* (1899) 103 Wis. 324, 79 N. W. 243 a servant was held not to be precluded from recovering for an injury sustained through the giving way of a wheel of the loaded wagon on which he was riding, due to the negligence of a fellow servant, who failed to observe a custom that the teamsters should look after their own wagons.

See, however, chapter XXXII., subtitle D, *post*.

a recognition of the fact that, unless the master's liability for the acts of a vice principal were admitted, the rule that dangers caused by the master's negligence are not among those assumed by the servant would, in the great majority of cases, be rendered nugatory.[1]

[1] In *Snow* v. *Housatonic R. Co.* (1864) 8 Allen, 441, 85 Am. Dec. 720, it was urged by the counsel for the defendant that the omission to repair the defect which occasioned the injury was the result of the negligence of the person whose duty it was to see that certain planks across the highway were kept in a safe and proper condition, and that the accident was therefore caused by the carelessness of a fellow servant. The answer of the court to this contention was as follows: "This argument leaves out of sight the real ground on which the liability of the defendants rests. If the argument is well founded, then it would follow that, as a corporation can act only by agents or servants, it would escape all responsibility for every species of injury caused by defective machinery and apparatus, or badly constructed tracks, or insufficient bridges, and other similar causes. So, an individual could avail himself of a similar immunity, if he conducted his business exclusively by agents or servants. But the rule of law does not lead to any such absurd result. The liability of the master or employer in such cases is founded, as has been already said, on the implied obligation of his contract with those whom he employs in his service. This requires him to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which he requires of them, and renders him liable for damages occasioned by a neglect or omission to fulfil this obligation, whether it arises from his own want of care, or that of his agents to whom he intrusts the duty. But it does not extend so far as to require of him that he should be responsible for the negligence of his servants, if of competent skill and experience, in using or managing the means and appliances placed in their hands in the course of their employment, if they are neither defective nor insufficient."

In *Gilman* v. *Eastern R. Co.* (1866) 13 Allen, 433, 90 Am. Dec. 210, after laying down the rule that the duty to have suitable instruments, whether persons or things, is non-delegable, the court proceeded: "To hold otherwise would be to exempt a master who selected all his machinery and servants through agents or superintendents, from all liability whatever to their fellow servants, although he had been grossly negligent in the selection or keeping of proper persons and means for conducting his business. In the case of a corporation, the president and directors, at least, cannot be deemed mere servants, but must be considered as representing the corporation itself."

"If the master suffers machinery, from wear and tear, or otherwise, to become so bad that the hazard is greatly increased, this increased hazard is not one of the negligent acts of the fellow workmen, for such acts are merely part of the ordinary risks incident to the employment. The increased hazard thus produced is the act of the master, and he thus enhances the risks which the servant agreed to take. He cannot then shift his responsibility by urging that the workman whom he employed was negligent. To hold that the master could do that would be to hold that he was under no obligation in respect to appliances and machinery." *Bridges* v. *St. Louis, I. M. & S. R. Co.* (1879) 6 Mo. App. 392.

"It appears, then, that part of the administrative functions of the corporation were confided to subagents and employees. Such practice may be, and probably is, necessary in the control and government of so large a corporation as a railroad usually is. But the performance of such delegated power by the subagent or employees is the act of the corporation, and the corporation is responsible for its faithful and prudent performance to the same extent as if the service were performed by the highest officer of the corporation." *Tyson* v. *South & North Ala. R. Co.* (1878) 61 Ala. 554, 32 Am. Rep. 8.

In *Brown* v. *Gilchrist* (1890) 80 Mich. 56, 45 N. W. 82, counsel went so far as to argue that, because the delinquent employee had absolute control and direction in and about the business, the defendants could not be held responsible and urged that "there is absolutely no ground . . . for any claim that either of the defendants was pres-

But there is some discrepancy in the explanations which are found in the books, with regard to its logical basis.

The most satisfactory standpoint seems to be obtained by considering it to be an application of the general principle of jurisprudence, that anyone upon whom a duty of an absolute quality is imposed must, at his peril, see that it is discharged in a reasonably careful manner, whether he undertakes its performance in person, or employs a deputy for that purpose.[2] That is to say, the care which a master is bound to use, he can exercise through another only at his own risk.[3]

It is manifest that, if the decisive elements are the nonperformance of an obligation, and the legal significance of the resulting conditions, as betokening care or the absence of care, the fact that those conditions may have been immediately due to the act of a human agent becomes an element in the investigation, as entirely neutral and unimportant as if the master had brought them about by his own management of an inorganic instrumentality, or of one of the lower animals. This point of view is distinctly apparent in the statement that, where the cause of action relied on is an alleged failure of the defendant to use reasonable care to provide safe materials for the plaintiff's work, the question to be decided is whether the defendant failed in that specific duty, and it is of no consequence how the materials furnished became dangerous, whether by the act of a fellow servant or otherwise.[4]

ent or superintending or directing in person the erection of this scaffold, or the selection of the materials of which it was composed." The comment of the court was as follows: "That is, because the defendants had delegated the authority to Mr. Reed to select proper materials, and to direct, control, and superintend the erection, they should escape liability. If this were the rule, then the more they remained away from their business,—the greater power and authority they gave a foreman or manager to select material, employ men to build a safe and proper scaffold, upon which other servants, who had no knowledge of the manner of its construction, were to be invited to work, the less the liability."

See also *Union P. R. Co.* v. *Erickson* (1894) 41 Neb. 1, 29 L. R. A. 137, 59 N. W. 347; and the passage quoted below from the opinion in *Indiana Car Co.* v. *Parker* (1885) 100 Ind. 181.

[2] See 1 Beven, Negl. pp. 493 *et seq.*; Shearm. & Redf. Neg. §§ 14, 176.

[3] *Van Steenburgh* v. *Thornton* (1895) 58 N. J. L. 160, 33 Atl. 380.

"The duty to exercise reasonable care to see that the place furnished for a servant to work in is reasonably safe is a positive obligation towards the servant; and the master is liable for any failure to discharge that duty, whether he undertakes that performance personally or through another servant." *Hess* v. *Rosenthal* (1896) 160 Ill. 621, 43 N. E. 743.

Compare also the statement that the fact that the insecure condition of a railroad track is remotely due to the negligence of some servant who failed to report its condition and put it in repair will not excuse the company from liability. *O'Donnell* v. *Allegheny Valley R. Co.* (1869) 59 Pa. 239, 98 Am. Dec. 336. The word "remotely" seems, however, to be used with some want of accuracy here. If the negligence of the servant is "remote" in the ordinary sense in which that term is used in discussions as to causation, it would clearly not be an element in the case at all, instead of being one which merely did not prevent liability from attaching.

[4] *Aceren* v. *Sears* (1892) 155 Mass. 303, 29 N. E. 472.

Compare also the following passage.

The applicability of this elementary conception, however, is not always brought out as clearly as might be desired in the passages in which judges have undertaken to state the grounds of the master's liability.

Thus, it is sometimes said that a servant who is intrusted with the discharge of one of the so-called non-delegable or nonassignable duties is an agent, not a servant, such agency being regarded as a deduction from the fact that the rule which imputes to servants an acceptance of the risks of a fellow servant's negligence ceases, under the supposed circumstances, to be operative because the reasons upon which its existence depends are not properly applicable. But the extract quoted below shows that the consideration by which the implication usually indulged as to such an acceptance of the risks is deemed to be overridden is really the absolute quality of the duties discharged by the agent.[5]

"Some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects." *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 368, 387, 37 L. ed. 772, 781, 13 Sup. Ct. Rep. 914.

[5] In *Indiana Car Co.* v. *Parker* (1885) 100 Ind. 181, the court said: "Where the duty is one owing by the master, and he intrusts its performance to an agent, the agent's negligence is that of the master. As the master is charged with the imperative duty of providing safe and suitable appliances, this duty he must perform; and if he intrusts it to an agent, and the agent performs it in his place, the agent's act is that of the master. In authorizing an agent to perform such an act, the principal is, in legal contemplation, himself acting when the agent acts, for he who acts by an agent, acts by himself. This principle does not conflict with any of the general rules we have stated, for the agent assumes, by authority, the master's place, and does what the law commands the master to do. He is, for the occasion, and in the eyes of the law, the master. If it be true that the agent's act is the master's act, then it must be true that the negligence involved in the act is that of the master himself. The rule which absolves the master from liability for the negligence of the fellow servant has no application whatever where the agent stands in the master's place. The reason of the rule fails, and where the reason fails, so does the rule itself. The reasons which support the rule are that servants take the risks of the employment upon which they enter, and that public policy requires that fellow servants should 'each be an observer of the conduct of the other.' *Farwell* v. *Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339. The first of these reasons completely fails when it is brought to mind that the servant does not assume the risk arising from unsafe and unsuitable machinery and appliances. The second as surely and completely fails when we affirm, as, under all the authorities, affirm we must, that the duty to provide safe appliances rests upon the master, and not on any servant, for, surely, servants are

Another explanation treats the master's liability as the result of the fact that the employees who discharge non-delegable duties are not in the same department as the employees who use the various instrumentalities which are the subject-matter of those duties.[6] To pronounce

not bound to be observers of the master's conduct. It is, therefore, not at all difficult to clearly discriminate and broadly mark the difference between a case where it is the master's duty, as master, that is neglected, and a case where it is the fellow servant's duty, as servant, that is negligently performed. A servant has a right, himself exercising ordinary care, to rely upon his master's care and diligence. He is not bound to watch his master as he is his fellow servant. The rights are reciprocal: the master has his duty, as the servant has his. When the master's duty is negligently done, he it is who is guilty of a breach of duty, although he acted through the medium of an agent. If the master were permitted to escape his duty by shifting it to an agent, the practical result would be his entire absolution from the duty which the law imposes. The law will not permit this result, for it will not permit a duty to be evaded, but will require performance by the person upon whom it has fixed it."

[6] "The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service, by turn, in each, as the convenience of the employer may require." *Ford* v. *Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598. Quoted with approval in *Hough* v. *Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612.

"All those by whom a corporation performs its work are its servants, and, thus, fellow servants each with the other. But the relation in which those who together manage the train and the track for the purpose of performing transportation stand each to the other is quite different from that which they bear to those who perform the work of its construction and repair; and they have a right to expect the suitable instrumentalities and appliances which it is the duty of the master to furnish." *Elmer* v. *Locke* (1883) 135 Mass. 575.

"That doctrine [the nonliability of the master for the negligence of a fellow servant] was never applied unless the one injured and the one at fault were engaged in the same general employment. Whatever conflict has arisen in cases has been as to what should be considered the same general employment. The rule adopted by the Federal courts, and in most of the states, and which seems to us most in consonance with reason and humanity, is that those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools, for labor, are engaged in a different employment from those who are to use the place or appliances when provided, and they are not, therefore, as to each other, fellow servants. In such case the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence." *Roux* v. *Blodgett & D. Lumber Co.* (1893) 94 Mich. 607, 615, 54 N. W. 492.

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To provide machinery and keep it in repair, and to use it for the purpose intended, are very distinct. They are not employments in the same common service, leading to the same common result. The one may be said to begin where the other ends. *Shauncy* v. *Androscoggin Mills* (1876) 66 Me. 420.

"In the present case the road master, the division road master, and the section foreman and his assistants were in one line of duty, while the trainmen

such a standpoint to be erroneous would scarcely be justifiable in view of the imposing array of authorities by whom it has been adopted. But it is certainly not free from objection, inasmuch as the conception of a difference of department is also suggestive of that class of cases

were in another, and a different, line of duty, and each set, within its own line of employment, represented the master as to the other set; and the members of one set were not mere fellow servants with the members of the other set. The principal ground upon which the doctrine has been established—that the master is not liable for any negligence that might take place as between mere fellow servants — is that such fellow servants work together in the same line of employment, are intimately acquainted with each other, and, knowing each other better than the master could possibly know any one of them, they take all risks of negligence on the part of their fellow servants; that if any servant chooses to work with a known incompetent or negligent fellow servant, without informing the master, he himself should take all the risks and consequences of his fellow servant's negligence and incapacity, the master being required only to use reasonable and ordinary care and diligence in the original employment and the subsequent retention of only such servants as are competent and habitually careful. *Dow v. Kansas P. R. Co.* (1871) 8 Kan. 642, 646. But where employees work in different lines of employment, one having no means of knowing anything about the business or qualifications of the other, and being wholly unacquainted with the other, they cannot be said to be fellow servants within the meaning of the foregoing rule: and this state of things fairly represents the condition of a railroad section foreman and an engineer on a freight train and the relation existing between them. Therefore, where a railroad company delegates, directly or indirectly, to a section boss or section foreman the duty of keeping a certain section of the railroad in proper condition and repair, and to warn trainmen in case of danger, and the section boss fails to perform his duty in these respects, and a trainman is injured by reason of such negligence, the railroad is responsible." *St. Louis & S. F. R. Co. v. Weaver* (1886) 35 Kan. 112, 57 Am. Rep. 176, 11 Pac. 408.

"There is a certain incongruity in holding that the duty to exercise reasonable care in providing reasonably safe appliances and machinery is a personal one, which cannot be delegated, and at the same time holding that, if the failure to exercise such reasonable care was the neglect of a fellow servant of the party injured, then the master is not liable; and it seems more correct to say that agents who are charged with the duty of supplying safe machinery and appliances are not, when so doing, in the true sense, to be regarded as fellow servants of those who are engaged in the use of the same." *Edward Hines Lumber Co. v. Ligas* (1898) 172 Ill. 315, 50 N. E. 225, Commenting on *Fraser v. Red River Lumber Co.* (1891) 45 Minn. 235, 47 N. W. 785.

A superior servant performing non-assignable duties was spoken of as being "in a different department" from men under him. *Moon v. Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401.

In *Cadden v. American Steel Barge Co.* (1894) 88 Wis. 409, 60 N. W. 800, the court, after declaring that the defendant must answer for the negligence of the workmen employed to build a scaffold, for the reason that the duty they were performing was non-delegable, continued thus: "The scaffold builders were not, in the true sense of the rule relied on, fellow servants with the plaintiff, who was using the scaffold, but were charged with the duty of the master to the servant, and were therefore engaged in a distinct and independent department."

In *Atchison, T. & S. F. R. Co. v. Sceley* (1894) 54 Kan. 21, 37 Pac. 104, an employee intrusted with the duty of inspecting cars was declared not to be in the same branch of the service as a brakeman, though the rest of the argument was based on the theory that the duty of inspection was nonassignable.

In *Gray v. Brassey* (1852) 15 Sc. Sess. Cas. 2d series, 135, one of the cases approved is *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, where the complaint was held good for the reason that it showed the injury to have been received owing to the negligence of a servant in another department with which the plaintiff had no concern, *viz.*, that of furnishing machinery.

in which the delinquent and injured servants were engaged in spheres of work so disconnected that neither can be deemed to have assumed the risks of the other's negligence. See chapter XXVII., *ante*. Merely for the purpose of securing greater verbal precision, therefore, it seems desirable that this conception should be reserved for the settlement of these cases alone. Moreover, if the phrase is used to describe these two distinct kinds of relations between delinquent and injured servants, we are confronted by the logical difficulty that the degree of disconnection which will prevent this implication may exist no less between two servants who are using instrumentalities, than between one servant belonging to this category and another who is discharging non-delegable duties with respect to those instrumentalities. This objection is not obviated by the fact that sometimes those relations may be such that it may be equally possible and proper to refer the master's liability either to the idea of a difference of department, as that phrase is commonly understood, or to the idea of the non-delegability of the duty omitted.[7]

555. Master sometimes liable both on account of the character of the negligent act and the official position of the negligent servant.— The performance of non-delegable duties is not infrequently intrusted to some employee who controls a larger or smaller number of subordinates. It follows, therefore, that, if such an employee causes injury to one of his subordinates by a delinquency in respect to one of those duties, and the nature and extent of the control exercised by him is such as to constitute him a vice principal, the master's liability may be inferred indifferently from his official position or from the

[7] In *Chicago & A. R. Co.* v. *Maroney* (1897) 170 Ill. 520, 48 N. E. 953, Affirming (1896) 67 Ill. App. 618, the appellate court decided in the plaintiff's favor on the ground that the carpenters who built a scaffold were not consociated with the plaintiff, a mason, who used it; while the supreme court sustained the action on the ground that the carpenters were discharging a non-delegable duty.

In *Chicago & N. W. R. Co.* v. *Jackson* (1870) 55 Ill. 492, 8 Am. Rep. 661, the court upheld a verdict for the plaintiff, using the following language: "This car was placed upon the road by someone superior to appellee in authority, and he was acting under such authority. The jury might reasonably infer that those placing it on the road knew its condition. He had no choice but to obey orders, and was compelled by those above him in authority to ascend the car, and again descend and uncouple the car from the engine when required. He was not, and could not be, responsible for the defect. Nor should he be held liable for the defective car, as he neither furnished it nor placed it upon the track. Nor should he be held responsible for the acts of those who did, as fellow servants, as the fault was not that of such a servant engaged in the same department of the common business. It was the act of a superior, in another department."

In *Moon* v. *Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401, a section foreman was held not to be a fellow servant of trainmen, on the double ground that he was in a different department and that he was responsible for the proper discharge of the nonassignable duty of keeping the track in safe condition.

character of the negligent act. This situation may present itself both in jurisdictions where the mere exercise of control is deemed to confer representative capacity,[1] and in jurisdictions where such capacity is admitted only in the case of agents managing an entire business, or a distinct department thereof.[2]

556. Doctrine of non-delegable duties applicable to artificial persons. Although a categorical affirmation of such a point might seem scarcely necessary, there is specific authority for the doctrine that a corporation is no less responsible than a natural person for the proper performance of an employer's absolute duties, although it is impossible for it to discharge those duties otherwise than through agents.[1] A limited company created under the provisions of the English companies act and similar statutes is also as much liable as an individual for its failure to perform any of the duties which a master owes to employees.[2]

The reasonable view of the situation obviously is that the impossibility of exercising personal control is an imperative ground for holding such artificial bodies liable, rather than for applying a less rigorous standard of responsibility.[3] Manifestly, if they could escape liability for the breach of an absolute duty on the plea that their agent was a fellow servant or coemployee of the party injured, they could never be held at all.[4]

557. Servants of contractors, when precluded from availing themselves of the doctrine in actions against their masters.— A contract for work to be done may be so worded that the principal has the right to prescribe the manner in which its various details are to be executed.

[1] See, for example, the following decisions in favor of servants injured by the negligence of their foreman in the matters indicated by the memoranda appended to the citations: *Bowen* v. *Chicago, B. & K. C. R. Co.* (1888) 95 Mo. 268, 8 S. W. 230 (bridge not repaired); *Union P. R. Co.* v. *Fray* (1890) 43 Kan. 750, 23 Pac. 1039 (derrick not repaired); *Browning* v. *Wabash Western R. Co.* (1893) 124 Mo. 55, 24 S. W. 731, Affirmed (1894) 27 S. W. 644 (brakestaffs removed from freight cars); *Taylor* v. *Missouri P. R. Co.* (1894; Mo.) 16 S. W. 206 (defective coupling furnished); *Banks* v. *Wabash Western R. Co.* (1890) 40 Mo. App. 458; *Richmond Granite Co.* v. *Bailey* (1896) 92 Va. 554, 24 S. E. 232 (rule abrogated).

[2] See the cases cited in §§ 520, 524, *ante*.

[1] *Ford* v. *Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598; *Hough* v. *Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612; *Corcoran* v. *Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369.

Instructions are erroneous which declare that a corporation is not liable for the negligence of any of its officers, except its board of directors. *Krueger* v. *Louisville, N. A. & C. R. Co.* (1887) 111 Ind. 51, 11 N. E. 957.

[2] *Wright* v. *Dunlop* (1893) 20 Sc. Sess. Cas. 4th series, 363.

[3] See *Brann* v. *Chicago, R. I. & R. Co.* (1880) 53 Iowa, 595, 36 Am. [illegible] p. 243, 6 N. W. 5.

[4] See *Moon* v. *Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401; *Flike* v. *Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545.

Compare also the cases cited in the preceding section.

If the contractor is thus required to act according to the principal's directions, the workmen are deemed to be so far the servants of the principal that the contractor is released from the duty to furnish them with suitable materials. But there is no such exemption where the provisions of the contract are merely that the work shall be executed under the supervision of an officer of the government, who shall prescribe the order in which the materials are to be placed; that no material shall be placed in the works without his knowledge; that the contractor will remove from the work any person not acceptable to the agents of the government; and that all material, supervision, and labor furnished by him shall be subject to the approval of the engineer officer in charge.[1]

558. Delegation of personal duties to an independent contractor, effect of.— It is apparent that the rule discussed in § 153, *ante*—that a master is not negligent in omitting to test appliances, if he purchases them from a reputable dealer *or* manufacturer—virtually creates an exception *pro tanto* to the operation of the doctrine of non-delegable duties; for, although the rationale of the decisions there cited is the absence of negligence, the rule virtually amounts to an assertion that a master may, to some extent, evade responsibility for the nonperformance of one of those duties, *viz.*, that of supplying proper instrumentalities, by procuring them from an independent contractor. Singularly enough, this aspect of the rule does not seem to have thus far attracted the attention of the courts.

As regards the cases in which the liability of a master for the default of an independent contractor in discharging a non-delegable duty is in question, they are so conflicting as to render it impossible to formulate any definite doctrine upon the subject.

In England the only decision directly in point seems to be a case in which Denman, J., sitting alone, held that a servant could not recover where a staging which gave way under him had been put up by a competent contractor.[1] If the failure of duty thus committed be regarded as one of management, the doctrine laid down in *Wilson* v. *Merry*[2] would obviously have freed the master from liability, even if the deputy had been another servant. But the learned judge seems

[1] *Callan* v. *Bull* (1896) 113 Cal. 593, 45 Pac. 1017.

[1] *Kiddle* v. *Lorett* (1885) L. R. 16 Q. B. Div. 605, 34 Week. Rep. 518. In line with this decision is the doctrine that neither the master himself nor an employee for whose acts it is sought to hold him responsible can be held negligent on the ground that they relied upon the assurance of an independent contractor that the place of work into which they were sending their servants was a safe one. *Moore* v. *Gimson* (1889) 5 Times L. R. 177, 58 L. J. Q. B. 169; *M'Innulty* v. *Primrose* (1897) 24 Sc. Sess. Cas. 4th series, 442.

[2] (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30. See § 529, *ante*.

to have intended [1] to enunciate a general principle, and would, so far as appears, have rendered a similar decision if the point had been taken that the delinquency which led to the injury was one having reference to original construction or the furnishing of appliances. If this be really the scope of the decision it would seem to be incorrect upon any reasonable construction of the opinions of the Law Lords in the case just mentioned. See § 566, *infra*.[3]

In Scotland the natural conception of a positive duty has been followed out to its logical conclusion in a case where it was laid down that, if the defect in an appliance (here a scaffold) could have been discovered by the exercise of reasonable care, a master is answerable for injuries caused by its unsafe condition, even though the master, not being properly skilled himself, may have intrusted the work of furnishing the appliance to a competent contractor.[4]

In one of the Federal circuit courts of appeals the doctrine has been laid down, without qualification, that a master is not relieved of a positive personal duty by letting work to a contractor.[5]

In a Georgia case in which no opinion is reported, the court has embodied its views in a syllabus which lays it down that a railroad company permitting another company to use a section of its main line to reach a terminal point is liable to one of its own employees for personal injuries from the negligence of the latter company in running its train over such section.[6]

In Illinois it has been held that persons who, under a license from the master, put in new burners in a brick kiln for the purpose of testing their advantages, are in the position of vice principals, so far as relates to making such apparatus suitable and safe for the employees, or giving notice of increased danger.[7]

Other cases with which it appears to conflict are *Hardaker* v. *Idle Dist.* [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196; *Groves* v. *Wimborne* [1898] 2 Q. B. 402, 67 L. J. Q. B. N. S. 862 (§ 565, note 5, *infra*).

[1] *Macdonald* v. *Wyllie* (1898) 1 Sc. Sess. Cas. 5th series, 339.

In another case it was considered doubtful whether the commissioners, by entering into a contract for the cleaning of the streets, could relieve themselves of their statutory duties and responsibilities. But the point was not ruled upon. *Stephens* v. *Thurso Police Comrs.* (1876) 3 Sc. Sess. Cas. 4th series, 542.

[3] *Toledo Brewing & Malting Co.* v. *Bosch* (1909) 41 C. C. A. 482, 101 Fed. 530 (plaintiff was injured by the fall of a heavy beam, due to the negligence of the contractor's servants in leaving it loose while repairs were being made).

[4] *Central R. & Bkg. Co.* v. *Passmore* (1892) 90 Ga. 203, 15 S. E. 760, following *Macon & A. R. Co.* v. *Hayes* (1873) 49 Ga. 355, 15 Am. Rep. 678.

[5] *Pullman Palace Car Co.* v. *Laack* (1892) 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285. One of the grounds on which the decision proceeded was that the licensees were discharging a positive duty owed by the master to his servants.

In another case the employer was held liable for defects in a scaffold, which had been constructed by a contractor for the brick work on a building, and which gave way under a stone

In Missouri it has been declared that a master cannot relieve himself of the duty of exercising ordinary care to provide reasonably safe appliances for his servants, by the employment of superintendents or independent contractors to provide such appliances.[8]

In New Hampshire it has been held that a railway company is liable for injuries received by a trainman by reason of defects negligently permitted to exist in the track of another company over which it has running powers, although the duty of keeping it in repair is devolved on the latter company, and the trainman is aware of the arrangement between the two companies.[9]

In New Jersey it has been held that a servant injured by an elevator which was in course of construction by an independent contractor on the master's premises could not recover.[10] But in such a case there was no delegation of a duty in the proper sense of the phrase, and the circumstances were governed by the principle that the dangerous agencies were, for the time being, quite out of the control of the plaintiff's master.

In New York the doctrine established is that an employer is not liable to a servant for the condition of a structure erected for the use of his servant by an independent contractor.[11] It will be observed from

setter, and the general principle was laid down that it does not matter whether the instrumentality furnished to an employee was constructed by the master himself, or was obtained by gift, or through a right arising from an established custom. *McBeath* v. *Rawle* (1901) 93 Ill. App. 212.

[8] *Herdler* v. *Buck's Stove & Range Co.* (1896) 136 Mo. 3, 37 S. W. 115; *Burnes* v. *Kansas City, Ft. S. & M. R. Co.* (1895) 129 Mo. 41, 31 S. W. 347; *Bartley* v. *Trorlicht* (1892) 49 Mo. App. 214 (elevator fell into disrepair). Citing *Northern P. R. Co.* v. *Herbert* (1886) 116 U. S. 647, 29 L. ed. 758, 6 Sup. Ct. Rep. 590. It was further held in this case that the fact that an elevator was leased with a building will not absolve the lessee from liability for injuries to his elevator boy by its fall, caused by the lessee's failure to use reasonable care to keep it in repair.

See also *Sackewitz* v. *American Biscuit Mfg. Co.* (1899) 70 Mo. App. 144, holding that there is a sufficient correspondence between a petition alleging that, while the plaintiff was in defendant's employment, she was required to work in a place rendered unsafe by the negligent acts of men engaged in repairing the building, and proof that plaintiff was injured by the negligent acts of one who had entered into a contract with defendants to repair the building.

Under a statute giving a right of action against the owner, agent, or operator of a mine, for injury caused by failure to furnish props, the owner is liable even though the mine is operated by another under a contract with the owner,—especially where such contract provides that the latter shall furnish timber for props. *Leslie* v. *Rich Hill Coal Min. Co.* (1892) 110 Mo. 31, 19 S. W. 308.

[9] *Story* v. *Concord & M. R. Co.* (1900) 70 N. H. 364, 48 Atl. 288.

[10] *Conway* v. *Furst* (1895) 57 N. J. L. 645, 32 Atl. 380.

[11] The question was very fully discussed in *Devlin* v. *Smith* (1881) 27 Hun, 206, Affirmed (1882) 89 N. Y. 470, 42 Am. Rep. 311. There the defendant was employed to paint a building, and not being able himself to build a scaffold, employed a skilful and competent person to build it. Held, that A was not liable for injuries received by one of his workmen through the giving way of the scaffold. The position taken in the lower court is shown by the following passage of the opinion delivered:

the extracts given from the opinion of the court of appeals in the note below that, while recognizing the antagonism between this doctrine and that of the non-delegable quality of certain duties, it contents itself with declaring the master's nonliability, and gives no reasons for its opinion.

In Pennsylvania it has been laid down, *arguendo*, in a compara-

"Whenever the employer has been held liable, not for his own negligence but for the negligence of another person, it was upon the ground that the latter was charged with his duties. . . . That is not the case where the employer, not having the requisite skill to do the work himself, intrusts the performance of it entirely to a competent and unexceptionable contractor. The employer cannot escape the responsibility of exercising due care by delegating that duty to an agent, but he can employ a competent and unexceptionable contractor to construct tools, machinery, etc., and such conduct would be the exercise of that care which the law requires. The employment of a contractor is not a delegation of the employer's duty. It is, when properly done, an exercise of the care, and a fulfilment of the duty which the law exacts. It would be unreasonable and unjust to hold an employer liable for the negligence of such a contractor so employed, for the employment of him would not be negligence, and the contractor's negligence could not be attributed to the employer, because no relation of agency would exist between them. Unless, therefore, the employer knew of the defect which caused the injury, or his ignorance thereof of itself indicated a breach of duty on his part, there would be nothing of which negligence could be predicated. . . . Smith, having used due care in procuring the scaffold, and having no knowledge nor any reason to apprehend that it was in any respect defective, he was justified in subjecting it to immediate use without inspection. It is true an inspection might have disclosed the fact that the support which gave way was fastened with nails instead of ropes. But no reason has been shown why that fact should have admonished Smith that the scaffold was unsafe. Not being an expert, his inspection must have been merely that of a common observer. If the defect in the scaffold would have been apparent to him, the deceased was equally bound to take notice of it; one was as competent to determine whether the fastenings referred to were sufficient or not, as the other."

The argument of the court of appeals proceeds upon much the same lines: "Under the recent decisions in this state, it may be that if Smith had undertaken to erect the scaffold through agents or workmen acting under his direction, he would have been liable for negligence on their part in doing the work, provided that in doing it they were not fellow servants of the party injured. But in this case he did not so undertake. Stevenson was not the agent or servant of Smith, but an independent contractor for whose acts or omissions Smith was not liable. *Blake* v. *Ferris* (1851) 5 N. Y. 48, 55 Am. Dec. 304. Smith received the scaffold from him as a completed work, and we do not think that it was negligence to rely upon its sufficiency, and permit his employees to go upon it for the purpose of performing their work. Stevenson was, as appears from the evidence, much more competent than Smith to judge of its sufficiency. He had undertaken to construct a first-class scaffold, and had delivered it to Smith in performance of this contract, and we do not think that Smith is chargeable with negligence for accepting it without further examination. All that such an examination would have disclosed would have been that the upright was nailed to the ledger, and Smith, not being an expert, would have been justified in relying upon the judgment of Stevenson as to the propriety of that mode of fastening. The defect was not such as to admonish Smith of danger."

To the same effect, see *Wittenberg* v. *Friederich* (1896) 8 App. Div. 433, 40 N. Y. Supp. 895, where a floor constructed by a subcontractor in a building which a contractor was erecting gave way and injured one of the latter's servants.

These cases seem inconsistent with *Wanamaker* v. *Rochester* (1892) 24 N. Y. S. R. 45, 17 N. Y. Supp. 321, where a municipality was held liable for inju-

tively late case that the master, as he owes to the servant the duty of providing a reasonably safe place in which to work, and reasonably safe appliances, is not relieved from liability [illegible] an injury resulting to a servant from neglect of such duty, by the fact that he delegated it to an agent or independent contractor.[12] But there is an earlier decision to the effect that, if a mechanic is under a contract for the work of constructing stills of sufficient strength for a certain purpose, and the details are left to his own judgment and skill, the employer cannot be visited with the consequences of his failure.[13] The task of reconciling the conflicting views thus evidenced must be left to the distinguished court which is responsible for them. To the present writer the more recent expressions of opinion appear to embody the correct doctrine. It is worth observing that, as the doctrine of non-delegable duties had not yet been formulated with much distinctness at the time the earlier case was decided, it is extremely probable that the effect of such a conception as qualifying the rule with regard to independent contractors was not considered at all by the court. Indeed, the opinion delivered gives no indication that this aspect of the relations of the parties was taken into account.

In Rhode Island a company has been held responsible for the negligence of an independent contractor in so constructing a crane that the hauling chains were not properly insulated from the current of electricity which operated it.[14]

Some language has been used by the supreme court of South Carolina which would seem to indicate that the master is not absolved from liability for conditions of the place, created by work which is being

ries caused by the caving-in of a trench made by an independent contractor. But there is no discussion of the general question involved in such a situation.

[12] *Trainor* v. *Philadelphia & R. R. Co.* (1890) 137 Pa. 148, 20 Atl. 632.

In *Ortlip* v. *Philadelphia & W. C. Traction Co.* (1901) 198 Pa. 586, 48 Atl. 497, the court said: "The use of the tracks was under the direct control of the company's superintendent, who retained and exercised the right to direct the management of the cars and signals. In all matters incident to the use of the track the contractors and their workmen represented the will of the company, and its responsibility remained."

[13] *Ardesco Oil Co.* v. *Gilson* (1870) 63 Pa. 146. The liability of the company was held to be for the jury, as there was evidence that the stills were made according to a plan directed by the president; but the court states the rule as to the result of employing a contractor in the most uncompromising terms. The court said: "It may be considered as now settled that, if a person employs others, not as servants, but as mechanics, or contractors in an independent business, and they are of good character, if there was no want of due care in choosing them, he incurs no liability for injuries resulting to others from their negligence or want of skill. *Painter* v. *Pittsburgh* (1863) 46 Pa. 213. If I employ a well known and reputable machinist to construct a steam engine, and it blows up from bad materials or unskilful work, I am not responsible for any injury which may result, whether to my own servant or to a third person."

[14] *Moran* v. *Corliss Steam Engine Co.* (1899) 21 R. I. 386, 15 L. R. A. 267, 43 Atl. 874 (the appliance became dangerous after being put into use).

done by a contractor.[15] But the precise position of the learned judge who wrote the opinion is not clearly defined.

In Texas it has been held that the duty of a railroad company to an employee to furnish safe appliances cannot be affected by a contract between it and a third person, to which the plaintiff was not a party, giving such person control of the cars and requiring him to make all repairs.[16] In this state a railway company has also been held liable where a derrick used by a contractor to unload stones from a car was inadequately secured and fell on a brakeman.[17]

In Virginia, on the general ground that the reconstruction of a railway bridge without the interruption of traffic is not an essentially hazardous undertaking, but may be effected with entire safety if ordinary care be used, a company has been held not liable for the negligence of a reputable contractor, employed to do the work.[18]

Whichever of the antagonistic views of the nature of the master's liability be taken, it is manifest that the general principles which determine the extent of the responsibility of an employer for the acts of an independent contractor involve the corollary that the owner of premises cannot dictate that his building shall be constructed of improper materials or upon an unsafe plan, and escape liability for injuries caused thereby because he made a contract with a third person to build it; nor can he, with knowledge of a weakness or defect threatening the strength of the building, set a man at work immediately under it, and shift all responsibility upon the builder.[19] Similarly it has been held, on the ground that the physical conditions created by the negligence are the necessary result of the work contracted for, that an employee of a street railway, which is relaying its rails under a municipal permit, may recover for injuries due to an obstruction in the track.[20]

A contractor is not exonerated from liability for injury to one of

[15] *Coulin* v. *Charleston* (1868) 15 Rich. L. 201.

[16] *Gulf, C. & S. F. R. Co.* v. *Shearer* (1892) 1 Tex. Civ. App. 343, 21 S. W. 133; *Gulf, C. & S. F. R. Co.* v. *Delaney* (1900) 22 Tex. Civ. App. 427, 55 S. W. 538. In the latter case the contract for ballasting a railroad track provided that "the contractor would carry on and prosecute the work in such manner" as the engineer of the railroad company should direct, and the injury was caused by a defect in a derrick used by the contractor in performing such work.

[17] *Gulf, C. & S. F. R. Co.* v. *Delaney* (1900) 22 Tex. Civ. App. 427, 55 S. W. 538.

[18] *Norfolk & W. R. Co.* v. *Stevens* (1899) 97 Va. 631, 46 L. R. A. 367, 34 S. E. 525 (train went through one of the spans, owing to the fact that the falsework had been taken away too soon). The court does not refer to any of the authorities opposed to its own conclusion, and contents itself with applying the general rule as to independent contractors, without noticing the possibility of an exception to that rule in the case of absolute duties.

[19] *Meier* v. *Morgan* (1892) 82 Wis. 289, 52 N. W. 171.

[20] *North Chicago Street R. Co.* v. *Dudgeon* (1900) 184 Ill. 477, 56 N. E. 796, Affirming (1898) 83 Ill. App. 528.

his employees by reason of a defect in an appliance, because the other party to the contract was to furnish suitable appliances, where the discretion was left to the contractor with reference to the appliances to be used.[21]

The rule that a master discharges his duty to a servant by furnishing an appliance made by a reputable manufacturer is only applicable where it appears that the appliance was made for the use to which it was put.[22]

559. Same subject continued. Opposing doctrines discussed.—The writer has no hesitation in saying that he considers the cases absolving the master from responsibility for the negligence of an independent contractor in this connection have been decided upon a false theory of the circumstances involved. It is a contradiction in terms to speak of an absolute duty as being susceptible of delegation. If it can be delegated in any particular instance, it ceases, *ex hypothesi*, to be absolute. That this is a necessary corollary of the theory that a duty is absolute has been fully recognized in many English and American cases, where the complainant was a stranger.[1] Why a different principle should be applied where the injury is received by a servant of the party subject to the duty is not apparent, and no court has yet furnished any reason for making such a distinction. On the other hand there is a consideration which points very strongly, if not conclusively to the conclusion that the case of a servant is precisely the one in which the courts should be most unwilling to allow the interposition of a contractor to shield the master. As has been shown elsewhere by the present writer (46 L. R. A. pp. 38–45, and pp. 107–119), a manufacturer who supplies a chattel to another person to be used in his business is not bound to indemnify the servants of the vendee for injuries which they receive owing to defects in the chattel. Manifestly the result of applying concurrently both this principle and also the principle that the master who purchases an appliance from a manufacturer is, as regards his servants, entitled to rely upon its being fit

[21] *McCall* v. *Pacific Mail S. S. Co.* (1898) 123 Cal. 42, 55 Pac. 706.

[22] *Slattery* v. *Walker & P. Mfg. Co.* (1901) 179 Mass. 367, 60 N. E. 782.

[1] *Hole* v. *Sittingbourne & S. R. Co.* (1861) 6 Harlst. & N. 488, 30 L. J. Exch. N. S. 81, 3 L. T. N. S. 750, 9 Week. Rep. 274 (railway company held liable for the act of a contractor in obstructing the navigation of a river while building a bridge); *Terry* v. *Ashton* (1876) L. R. 1 Q. B. Div. 314, 45 L. J. Q. B. N. S. 260, 34 L. T. N. S. 97, 24 Week. Rep. 581 (tenant who maintained a lamp over a footpath in a condition so defective as to be a dangerous nuisance was held answerable to a passer by injured by its fall, although he had hired a competent contractor to repair it); *Curtis* v. *Kiley* (1891) 153 Mass. 123, 26 N. E. 421 (similar facts); *Wilkinson* v. *Detroit Steel & Spring Works* (1889) 73 Mich. 405, 41 N. W. 490 (building so defectively constructed as to be a nuisance); and the other cases cited in 1 Shearm. & Redf. Neg. §§ 14, 176.

for the purposes contemplated, unless there is something to put him on inquiry as to its condition, is that those servants are usually left remediless if they are injured by reason of some dangerous property of the appliance. The writer sees no reason for modifying the opinion which he has already had an opportunity of expressing in other publications,—that such a conclusion is simply preposterous and disgraceful to any system of jurisprudence.[2] Either the vendor should no longer be allowed to shelter himself under the supposed circumstances by the defense of want of privity of contract, or it should be regarded as an implied term in the contract between the master and his servants that all appliances obtained from parties not in his service are free from all defects which can be prevented by the exercise of that degree of care and skill which is required of persons following the same line of business as the vendor. The latter method of escaping from the absurd predicament into which the law has got itself, at this meeting point of the principles under discussion, would seem to be the most desirable. Not only would it round off and render entirely consistent the doctrine of absolute duties, but it would obviate the almost insuperable practical difficulties which would, in many instances, block the attempts of servants to obtain redress from vendors of instrumentalities residing in distant localities. There would be no injustice to the master in such a rule, for he would still have his action over against the vendor of the defective appliance, and would almost invariably be more favorably situated than his servants for the enforcement of his rights.

560. Massachusetts doctrine.— In some of the decisions by this court the theory of non-delegable duties has been propounded in language not materially different from that which has been used by judges in other states.[1] More commonly, however, that theory is enunciated in

[1] 16 Law Quarterly Review, p. 189; 36 Canada L. J. p. 203.

[2] "For the management of his machinery and the conduct of his servants, he [the master] is not responsible to their fellow servants; but he cannot avail himself of this exemption from responsibility when his own negligence in not having suitable instruments, whether persons or things, to do his work, causes injury to those in his employ. He cannot divest himself of his duty to have suitable instruments of any kind, by delegating to an agent their employment or selection, their superintendence or repair. A corporation must, and a master who has an extensive business often does, perform this duty through officers or superintendents; but the duty is his, and not merely theirs, and for negligence of his duty in this respect he is responsible." *Gilman* v. *Eastern R. Co.* (1860) 13 Allen, 433, 90 Am. Dec. 210.

In *Ford* v. *Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598, it was held that instructions were properly refused which said the defendants would not be liable for negligence of persons examining a boiler. The court said: "The corporation is equally chargeable whether the negligence was in originally failing to provide, or in afterwards failing to keep, its machinery in safe condition. The duty is essentially the same . . . . The question was not whether the officers named knew, or might have

a form which is peculiar to this jurisdiction, the position taken being essentially this,— that the master's exercise or nonexercise of a proper supervision over the servants to whom he has delegated the performance of the duties which elsewhere are treated as absolute, without qualification, is the ultimate test to which the question of his responsibility for the negligence of those servants ought to be referred.[2]

known, of the defect, or of the incompetency of those who had charge of the repairs, but whether the corporation in any part of its organization, by any of its agents, or for want of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use."

See also the quotation from the opinions in *Snow* v. *Housatonic R. Co.* § 554, note 1, and in *Wheeler* v. *Wason Mfg. Co.* (1883) 135 Mass. 297.

[2] The most useful explanation of this theory, for the purpose of comparative jurisprudence, is contained in the following passage from the opinion of Field, J., in *Rogers* v. *Ludlow Mfg. Co.* (1887) 144 Mass. 198, 59 Am. Rep. 68, 11 N. E. 77. "As a corporation must act by natural persons, and as all large corporations carry on their business by means of servants of different grades, it is manifest that, if it is held that these are all fellow servants, and that the corporation can delegate the whole duty of hiring and superintending its servants, and of providing its machinery and of keeping it in repair, to one or more principal servants, such as superintendents or managers, the corporation may escape all responsibility for injuries caused by defective machinery, except in the few cases where it can be shown that these principal servants were incompetent, or that the directors of the corporation, or its principal officers, knew that the subordinate servants were incompetent, or that the machinery used was defective. To avoid this result, some courts have held that superintendents or managers are not fellow servants with the men employed to work under them, or that servants employed in one department of the business are not fellow servants with those employed in another. Other courts have held that they are all fellow servants, but that the master cannot avoid his obligation to see to it that reasonable care shall be exercised in procuring suitable machinery, in keeping it in repair, and in hiring and retaining competent servants, by employing a servant to do these things for him; and that if he does employ a servant for this purpose, and the servant does not use due care, the master is responsible. . . . The rule of *respondeat superior*, as applied to cases like the present, the exception of injuries caused by the negligence of a fellow servant, and the limitations of this exception have been established by courts upon consideration of public policy, as well as of the legal principles which govern cases somewhat analogous. If a master who takes no personal part in the management of his business has any duty to perform towards his servants, it is difficult to say that it is always wholly performed by doing two things, namely, by employing competent servants, and by furnishing ample means. In order that the business may be properly managed the servants should not only be competent but they should be numerous enough to do, and they should have the means of doing, whatever ought reasonably to be done; and such regulations should be established as will insure the requisite subordination and control, and the exercise of reasonable intelligence and care in the conduct of the business; and it is almost as difficult to define all the duties of the master in these respects as to define the duties of a person under other relations. If it is not the absolute duty of the master to furnish suitable machinery, and if he is not held to warrant that the servants he employs to furnish machinery or to keep it in repair shall always use reasonable care, then the duty of a master who does not personally conduct his business, if he is under any duty, we think, must be to use reasonable care in the management, and that is to exercise, or have exercised, a reasonable supervision over the conduct of his servants, as well as to use reasonable care in seeing that his servants are competent, and are furnished with suitable means for carrying on the business." The learned judge then reviewed some of the earlier cases and proceeded thus: "These decisions show that it is the duty of the master to exercise a reasonable supervision over the

This conception would seem to involve the result, that there is only one duty which is non-delegable in the sense in which that term is ordinarily understood,—the duty, namely, of efficient supervision over the agents whom he has appointed to represent him in seeing that the various instrumentalities of work are in a reasonably safe condition; and for this reason the Massachusetts decisions in regard to negli-

condition in which the machinery, structures, and other appliances used in his business are kept by his servants, and that he cannot wholly escape responsibility by delegating the performance of this duty to servants; that the negligence of his servants in repairing or in failing to repair machinery is not necessarily the negligence of the master, but that it is also to be determined in each case whether the master has exercised a reasonable supervision over his servants, and reasonable care in seeing that his machinery is kept in proper condition, although he may have employed competent servants and furnished them with suitable materials, and instructed them to keep the machinery in repair. As was said in *Johnson* v. *Boston Tow-Boat Co.* (1883) 135 Mass. 215, 46 Am. Rep. 458, 'the master is liable in all cases for his own negligence, and that may be shown by a defect of such a nature, or so long continued, as to be of itself evidence of negligence in the master; or the negligence of a servant may be of such a character that negligence of the master may be inferred from it.' We are aware that this rule is somewhat indefinite, and is, perhaps, not precisely that which generally prevails in the United States." *Northern P. R. Co.* v. *Herbert* (1886) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Benzing* v. *Steinway* (1888) 101 N. Y. 547, 5 N. E. 149.

The following extracts will also be found serviceable as elucidating still further the position of the court.

"Perhaps the whole question is whether the master has exercised reasonable care in employing competent servants, in providing suitable machines and implements, and in doing that part of his business which he has undertaken to do himself, and has exercised a reasonable supervision over his servants in the performance of the duties which he has intrusted to them. This is often a question for the jury. Courts have therefore held that they could not say, as matter of law, that a master was not responsible for injuries occasioned by defective machinery, when the defect was substantial and rendered the machine unfit for use, although it was through the neglect of a competent servant that the machine had not been repaired; and they have also held that, when the defect was one that must frequently arise from the use of the machine, and was such that the person employed to superintend the use of the machine should attend to in order to keep it in running order, the master performed his whole duty by furnishing suitable materials and employing competent servants to keep the machinery in repair. These decisions have been made in cases where it appeared that the defect in the machinery was unknown to the master. The general question is what, under the circumstances, the master ought reasonably to have known and done, and, in determining this, the nature of the defect, the length of time it has existed, and the means taken to remedy it, are important facts." *Rice* v. *King Philip Mills* (1887) 141 Mass. 236, 59 Am. Rep. 80, 11 N. E. 101.

"It is the duty of the master to exercise ordinary care in supplying and maintaining machinery, appliances, and instrumentalities; and if the servant exercising ordinary care is injured by a deficiency therein, he is entitled to recover damages. The servant charged with providing these appliances stands in the place of the master, and performs the duty incumbent on him. It is not sufficient that he is an intelligent and competent servant; if he neglects this, the master is still responsible, unless he shall himself have exercised a reasonable care and supervision over him in seeing that the machinery was in proper condition. Nor is it enough that the master has employed suitable servants, and furnished them with suitable materials, and instructed them to keep the machinery in repair. He must see that such servants do their duty." *Elmer* v. *Locke* (1883) 135 Mass. 575; *Daly* v. *Boston & L. R. Co.* (1888) 147 Mass. 101, 16 N. E. 690.

"The very nature of the implied con-

gence of the kind with which we are concerned in this chapter stand, in some respects, outside the general current of the authorities. But a connecting link between the doctrine thus formulated and the one which prevails in most American states is supplied by the consideration that it is only in cases which have relation to obligations which are commonly viewed as being non-delegable, that the ulterior duty of supervision is treated as a determinant factor. From the standpoint of other courts those cases may fairly be regarded as an

tract created by the hiring, whereby he undertakes to use proper care in always providing safe tools and appliances, is inconsistent with his delegation of the duty to a fellow servant, for whose negligence he is not to be responsible. His obligation involves the exercise of every kind of care and diligence which is necessary to give him knowledge of the condition as to safety of his machinery and appliances, so far as such knowledge is obtainable by reasonable effort. His duty relates to the condition of these articles when they come to the hands of his servants for use, and the performance of that duty must carry him just so far into details as it is reasonably necessary to go, in view of the nature and risk of the business, to enable him reasonably to protect his servants from a danger which he should prevent." *Moynihan* v. *Hills Co.* (1888) 146 Mass. 592, 16 N. E. 574.

In *Coates* v. *Boston & M. R. Co.* (1891) 153 Mass. 297, 10 L. R. A. 769, 26 N. E. 864, a case of an accident caused by the absence of a jaw-strap on a railway car, the court expressly refused to put its decision "on the identification of master and servant, and a union of the knowledge of the corporation and the command of the conductor in one person, by a fiction."

In *Babcock* v. *Old Colony R. Co.* (1890) 150 Mass. 467, 23 N. E. 325, the court in discussing the question whether there was evidence to warrant the judge in submitting to the jury the question whether the section master was so far charged with the duty of supervision that the defendant might be liable to one of its servants for his negligence, said: "It is well settled that one who is in some things a mere servant may be made the master's agent to perform duties which are primarily personal to the master. *Moynihan* v. *Hills Co.* (1888) 146 Mass. 586, 16 N. E. 574, and cases cited. If, in the present case, the section master was intrusted by the defendant with the performance of the duty, or a part of the duty, of supervision of the tracks which a reasonable regard for the safety of its employees required the corporation to perform, the defendant is liable for his negligence in the performance of it. There was evidence tending to show that different persons had some responsibility in representing the defendant in this respect. A part of the printed instructions to section masters was in these words: 'They will see that no wood, lumber, ties, or other obstructions are piled within 6 feet of the track.' It does not very clearly appear what other measures were taken by the defendant promptly to ascertain the existence of defects or obstructions along the track. The evidence on this branch of the case is rather meager, but we cannot say that there was not enough to warrant the judge in submitting the question to the jury under the instructions which he gave. It is the duty of a railroad corporation to use reasonable care and diligence to keep its tracks in a safe condition for its employees to work upon. So far as the work of keeping its tracks in repair is left to its servants, it is its duty to exercise reasonable supervision to see that the work intrusted to them is properly done. How far into details this supervision must go before the domain which belongs exclusively to the master is passed and the domain which may be left to servants is entered depends upon what it is reasonable to require of a master who is charged with the duty of providing safe works, machinery, tools, and appliances for his employees. In some cases this may be a difficult question to decide. But undoubtedly a jury may find that a railroad corporation should so far supervise the work of its servants in repairing its tracks as to see that a pile of sleepers 3 or 4 feet wide is not left for a long time within 18 inches of the rails in the freight yard of an important station."

Commenting on the exception taken to

thorities for the position that the obligations involved belong to the non-delegable category; and this is the footing upon which they have been, for the purposes of the present inquiry, collated, as to the facts involved, with the rulings in other jurisdictions.[3]

Contrast the cases cited in § 586, note 1, *post*.

561. Servants may act in a dual capacity.—In the last chapter (§§ 540 *et seq.*) we had occasion to cite a number of decisions in which employees who are deemed to be vice principals by virtue of the extent of the control exercised by them were viewed as persons whose negligence is or is not imputed to the master, according as they may or may not be discharging one of his absolute duties. The foundations of this theory, as was there shown, are by no means satisfactory; but no objection, either on the score of logic or otherwise, can be made to the theory of such a dual capacity in cases where the vice principalship of the delinquent employee is itself predicated solely from the fact that his delinquency was of such a nature as to constitute a breach of an absolute duty. The doctrine that a representative character is deducible from this circumstance obviously connotes by implication the doctrine that the delinquent employee is not, as regards any other kind of negligence, an agent of the master; and such is the effect of the cases.[1]

the refusal of the trial judge to instruct the jury that, if the defendant had used reasonable care in the supervision of the section men and of the use of the yard the plaintiff could not recover for the neglect of the section men in leaving the ties by the track, or the neglect of the yard master or the section master or road master in failing to have them removed, or to report that they were there, the court said: "This instruction could not properly be given, because it required of the corporation merely supervision of the section men and of the use of the yard, and disregarded the duty of the defendant to use reasonable care in looking after the condition of the road in other particulars. It may have been the duty of the yard master or the road master to exercise this supervision, and if he discovered neglect, to see that the road was not left in a dangerous condition on account of the neglect. Under the instructions requested the yard master or road master might have used reasonable care in the supervision of the section men, and been negligent in the performance of a part of the master's duty which was incidental to supervision, namely, the correction of the errors which supervision disclosed. We are of the opinion that the instructions were correct and sufficient."

See also *Sweat* v. *Boston & A. R. Co.* (1892) 156 Mass. 284, 31 N. E. 296; *Colton* v. *Richards* (1878) 123 Mass. 484; *Nevin* v. *Sears* (1892) 155 Mass. 303, 29 N. E. 472.

[3] It should be observed that the non-delegable quality of the duty of supervision, so far as it is connected with other duties of the same stamp, is sometimes asserted in the opinions of other courts beside Massachusetts.

"He [a master] cannot claim immunity upon the ground that he has exercised due care in selecting mechanics of competent skill in the construction of such machinery and buildings, but assumes the burthen of seeing that such mechanics actually exercise reasonable care and skill in the execution of their work." *Collyer* v. *Pennsylvania R. Co.* (1886) 49 N. J. L. 59, 6 Atl. 438.

[1] "One who has not the authority of a general vice principal may be intrusted by the master with the discharge of absolute personal duties that rest upon it, such as the duty to use reasonable care to employ competent and careful

Whether the negligent act in any particular instance did or did not amount to a breach of a non-delegable duty will be determined

fellow servants; and in such a case he may be termed a special vice principal. He stands in the place of the master when he is discharging one of these personal duties of the master, and the latter is liable for his negligence in the discharge of it; but in the performance of his other services as a general employee he is not the representative of the master, nor is the master liable for his negligence in the performance of them." *Minneapolis* v. *Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525.

"A servant is a vice principal only when he stands in place of the principal with reference to the principal's duty, or in the exercise of the principal's functions." *Hanna* v. *Granger* (1894) 18 R. I. 507, 28 Atl. 659.

"The relation of a foreman to the other workmen is that of a coemployee, except as to such acts performed by him as were embraced in the duties of the defendant." *Mahoney* v. *Vacuum Oil Co.* (1894) 76 Hun. 579, 28 N. Y. Supp. 196.

"If the principal be a corporation, or be unable for any reason to discharge these obligations in person, they must be discharged through an officer, agent or foreman. The person who is thus put in the place of the principal, to perform for him the duties which the law imposes, is a vice principal, and *quoad hoc* represents the principal, so that his act is the act of the principal. This is true, however, only when and so long as his acts are in discharge of the duties which the principal owes to his employees. Beyond this line he acts as a workman, and not as a vice principal." *Ross* v. *Walker* (1891) 139 Pa. 42, 21 Atl. 157, 159.

"The liability of the master, when the negligence is not his personal act or omission, but the immediate act or omission of a servant, turns upon the character of the act or omission complained of. If the coservant whose act or omission caused the injury is at the time representing the master, in doing the master's duty, the master is liable; if, on the other hand, he is simply performing the work of servant in his character as a servant or employee merely, the master is not liable. The injury in the last case supposed would, as between the master and the servant sustaining the injury, be attributable solely to the immediate author, and not to the master." *Vitto* v. *Keogan* (1897) 15 App. Div. 329, 44 N. Y. Supp. 1.

"It is not the rank of the employee or his authority over other employees, but the nature of the duty or service which he performs, that is decisive: that, whenever a master delegates to another the performance of a duty to his servant, which rests upon himself as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent; and to the extent of a discharge of those duties by the middleman, however high or low his rank, or however great or small his authority over other employees, he stands in the place of the master, but as to all other matters he is a mere coservant. It follows that the same person may occupy a dual capacity of vice principal as to some matters, and of fellow servant as to others. *Lindvall* v. *Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020.

"According to the firmly settled rule of law in this state, Helm, notwithstanding the higher grade of service in which he was employed, was a fellow servant with plaintiff in so far as he served in the places or with the machinery or appliances prepared and furnished by the defendant; and for the consequences to fellow servants of his negligence in the performance of such services in the places or with machinery or appliances thus prepared and furnished, the defendant is not responsible. But in so far as Helm was authorized and employed to prepare the places in which other servants were to work, or to furnish the machinery or appliances with which they were to work, he represented the corporate defendant, and his negligence in the performance of these services was the negligence of the defendant, for the injurious consequences of which to other servants, without their fault, it is responsible to the same extent it would have been if such places, machinery, and appliances had been prepared and furnished through the immediate agency of Mr. Rolf, the general superintendent, or by Mr. Bee, the special superintendent, of the silver room." *Nixon* v. *Selby Smelting & Lead Co.* (1894) 102 Cal. 458, 36 Pac. 803.

A Scotch case was sent back for re-

with reference to the principles established by the cases cited in the following subtitle.

562. Pleading.—A complaint alleging that the injury to the servant resulted from the breach of one or more of the absolute duties of the defendant is good against a demurrer.[1]

563. Burden of proof.— In the face of proof of injury from ill-con-

trial on the ground that the instructions had not been such as to make it clear to the jury that the defendant would be liable for the negligence of his underground manager in providing a defective rope only if such negligence was committed by him in his representative capacity, as performing a duty delegated to him by the master, and representing the master in the performance of that duty. *Wilson* v. *Sarchdons* (1866) 4 Sc. Sess. Cas. 3d series, 736.

See also, to the same effect, *Mechan* v. *Speirs Mfg. Co.* (1899) 172 Mass. 375, 52 N. E. 518; *Ford* v. *Fitchburg R. Co.* (1872) 110 Mass. 241, 14 Am. Rep. 598; *Hussey* v. *Cager* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556, Reversing (1886) 39 Hun, 639; *Scarff* v. *Metcalf* (1887) 107 N. Y. 211, 13 N. E. 796; *Donnelly* v. *San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559; *Calhan* v. *Ball* (1896) 113 Cal. 593, 45 Pac. 1017; *Jackson* v. *Norfolk & W. R. Co.* (1897) 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258; *Ell* v. *Northern P. R. Co.* (1891) 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222; *Chapman* v. *Southern P. Co.* (1895) 12 Utah, 30, 41 Pac. 551; *Small* v. *Allington & C. Mfg. Co.* (1901) 94 Me. 551, 48 Atl. 177.

The moment that an employee, not vice principal for general purposes, but who has authority to hire an emergency assistant, has completed such a hiring, and, after having resumed his place as servant, enters upon the performance of his work as such, he ceases to represent the master and becomes a coemployee of the emergency assistant for all purposes. *Burks* v. *Rochester R. Co.* (1899) 41 App. Div. 66, 58 N. Y. Supp. 210 (Former Appeal [1894] 77 Hun, 77, 28 N. Y. Supp. 314, Reversed [1895] 146 N. Y. 181, 40 N. E. 782).

Any liability beyond this "is inconsistent with the well settled rule of the master's duty. It adds to and alters it in ways that cannot be foreseen nor guarded against, and makes the master liable, however great may have been his care and diligence in selecting his servants. But it may be said that the converse makes the servant suffer. So it may. Accidents are continually happening from somebody's carelessness. The law gives a remedy in damages against the guilty party, but not against an innocent one. As to strangers, upon principles of public policy, it treats a master as guilty for the negligence of his servant; but public policy does not demand that he should be so treated as to his own servants, who have the option to examine their surroundings in his service and to receive pay according to the risk they incur. They may sue a fellow servant for his negligence; but to make the master liable for it, unless that servant is taking the place of the master, is contrary to reason and justice." *Hanna* v. *Granger* (1894) 18 R. I. 507, 28 Atl. 659.

[1] *Louisville, E. & St. L. Consol. R. Co.* v. *Miller* (1895) 140 Ind. 685, 40 N. E. 116; *Camp* v. *Hall* (1897) 39 Fla. 535, 22 So. 792; *Wallace* v. *Standard Oil Co.* (1895) 66 Fed. 260; *Chicago & N. W. R. Co.* v. *Swett* (1867) 45 Ill. 197, 92 Am. Dec. 206; *Nicholas* v. *Burlington, C. R. & N. R. Co.* (1899) 78 Minn. 43, 80 N. W. 776; *Hulehan* v. *Green Bay, W. & St. P. R. Co.* (1883) 58 Wis. 319, 17 N. W. 17; *Bessex* v. *Chicago & N. W. R. Co.* (1878) 45 Wis. 477.

"A declaration alleging that he [the defendant] carelessly and negligently permitted the track and a car to become and remain defective would be sustained by evidence that they became and remained defective through his personal carelessness and negligence in not discovering and remedying the defects, if he took upon himself that branch of the business; or by evidence that he assumed the general management and superintendence of the road and employed all the workmen, and that from gross negligence he employed no repair men, or an insufficient number, or unskilful ones, whereby the track and a car became and remained defective. In either case the defects were existing by reason of his own negligence." *Field* v. *Northern R. Co.* (1860) 43 N. H. 225.

structed and unsafe machinery furnished for the servant's use, a court will indulge in no presumption that the master performed his duties, or that coservants were negligent.[1] The act of a servant in repairing an appliance will be presumed to be that of a vice principal, where one of the principals testified that the appliance was repaired the evening before the accident by one of the hands, the presumption being that it was done by the direction of the principal.[2] In the absence of evidence showing who directed the use of a place of work at a time when it was in such an unsafe condition that it should not have been used at all, the negligence inferable from such use will be attributed to the master rather than to the fellow servants of the injured employee.[3] But if the immediate cause of the accident may, upon the evidence, have been the act of a fellow servant, and the servant seeks to recover on the ground that it was really due to negligence constituting a breach of a non-delegable duty, he will fail unless he satisfies the requirements of the ordinary rule that the burden of proving negligence be on the person who alleges it.[4]

564. Propriety of instructions.— Any instruction inconsistent with the doctrine of non-delegable duties is properly refused, and if such an instruction is given, it is a ground for reversing a verdict in favor of the defendant.[1]

[1] *Ellis* v. *New York, L. E. & W. R. Co.* (1884) 95 N. Y. 546.

[2] *Huth* v. *Dohle* (1898) 76 Mo. App. 671 (demurrer to evidence properly refused).

[3] *Stoker* v. *St. Louis, I. M. & S. R. Co.* (1891) 105 Mo. 192, 16 S. W. 591, First Appeal (1887) 91 Mo. 511, 4 S. W. 389 (train run over defective truck).

[4] In *Rose* v. *Boston & A. R. Co.* (1874) 58 N. Y. 217, where the train on which the plaintiff's intestate was a brakeman was sent out within three or four minutes after another train, and was itself followed by a third train at about the same distance of time, and the injury which caused the death of the brakeman resulting from the trains being sent out so near together, but by whose direction it did not appear, the plaintiff failed to make out a clear case, and the court rendered a decision based upon the theory that the company was not liable for negligence in not observing the regulations regarding the starting of trains, or in the disobedience.

Negligence of a car inspector as to the inspection of a car is not sufficiently shown, where there is no evidence that the inspection, as made, was not a proper one, or such as a man of ordinary prudence would have made under the circumstances. *Oglesby* v. *Missouri P. R. Co.* (1899) 150 Mo. 137, 51 S. W. 758, Reversing in Banc (1896) 37 S. W. 829.

[1] As, for example, an instruction which directs the jury to find for the defendant if he has used care in the selection of the appliance and of a competent inspector, and the plaintiff's injury was due to the negligence of such inspector in not making proper tests. *Texas & P. R. Co.* v. *Barrett* (1895) 14 C. C. A. 373, 30 U. S. App. 196, 67 Fed. 214. Or an instruction that a corporation is only liable for the negligence of its directors, and not for the negligence of any other officers, whatever their position and duties. Authorities cited in *Krueger* v. *Louisville, N. A. & C. R. Co.* (1887) 111 Ind. 51, 11 N. E. 957. Or an instruction that an appliance furnished by the master to his servants, to be used by them in the prosecution of their work, has been constructed by one who is a fellow servant engaged in the same kind of work with the servant who is injured (see chapter XXXII., subtitle C, *post*), exonerates

564a. Functions of court and jury.— (Compare § 511, *ante*, and § 594, *post*.)—If there is no dispute as to the facts, and the deduction to be drawn from these facts under the doctrines accepted in the jurisdiction where the cause of action arose is also clear, the question whether the negligent servant was a vice principal or not, as regards a certain act, is one of law.[1] But if the facts are in controversy, or the evidence is susceptible of two constructions, the proper course is for the court to define the relation of fellow servants and leave it to the jury to determine whether the employees in a particular case come within the definition.[2] In other words, the question whether a particular act was one incidental to the duty of the master, or to the duty of a servant, as such, is a mixed question of law and fact, to be sub-

the master from liability for the consequences of a defectiveness of the appliance. *Jones* v. *St. Louis, N. & P. Packet Co.* (1890) 43 Mo. App. 398. Or an instruction that if the fall of a roof in a mine was due to the negligence of the "mine boss," it was the negligence of a fellow servant. *Russell Creek Coal Co.* v. *Wells* (1898) 96 Va. 416, 31 S. E. 614.

See also, to the same general effect, *Mann* v. *Corliss Steam Engine Co.* (1899) 21 R. I. 386, 45 L. R. A. 267, 43 Atl. 874; *Rouse* v. *Downs* (1897) 5 Kan. App. 549, 47 Pac. 982; *Hess* v. *Rosenthall* (1896) 160 Ill. 621, 43 N. E. 743.

A railroad company, when sued by a stock and fuel agent for injuries due to a defective track, is not entitled to an instruction that the plaintiff could not recover if he were an employee of the company, and the injury was caused by the negligence of a servant of the company. *Texas & P. R. Co.* v. *Kirk* (1884) 62 Tex. 227.

Where the servant injured by the failure of his foreman to shore the sides of a trench properly had nothing to do with its excavation, being merely one of a gang sent, after it had been cut, to lay pipes along it, and there is no evidence tending to show that it became unsafe after he began work, it is not error to refuse to instruct the jury that, if they found from the evidence that the defendant had selected a foreman who was competent to take charge of the work, and had given him proper instructions, and if the cave-in occurred by reason of the foreman's subsequent neglect to shore up the trench, the neglect, if there was any, which caused the accident, was that of a coservant of the plaintiff, and the defendant was not responsible. *Baird* v. *Reilly* (1899) 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884.

In a case where no reliance is placed upon the latent character of the defects, an instruction is not exhaustive, and therefore erroneous, which allows a jury to infer that a master has sufficiently discharged his duty of furnishing his servant with a safe scaffold, when he intrusts the construction of it to a competent contractor. *Macdonald* v. *Wyllie* (1898) 1 Sc. Sess. Cas. 5th series, 339. But see §§ 558, 559, *supra*.

An instruction to the effect that if the room in question was a suitable place, and there were proper and suitable means of extinguishing fire, and the means of egress and escape were suitable and proper, and in order and ready for use, then the plaintiff could not recover, is sufficiently favorable to the plaintiff. *Keith* v. *Granite Mills* (1878) 126 Mass. 90, 30 Am. Rep. 666.

[1] *Callan* v. *Bull* (1896) 113 Cal. 593, 45 Pac. 1017; *Donnelly* v. *Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874.

[2] *Wilson* v. *Charleston & S. R. Co.* (1897) 51 S. C. 79, 28 S. E. 91. There the trial judge had erroneously ruled that the relation of the negligent and injured servants was one solely for the consideration of the jury. The following distinction was drawn by the supreme court: "Whether an engineer, brakeman, or switchman is, when exercising his ordinary duties, a fellow servant with a car cleaner, is a question of law. But whether, in a particular case, either of them was engaged in performing certain acts which the law requires of the master, and which would prevent

mitted to the jury as to the fact under legal rules, and its determination depends upon the circumstances of the case.[3] On the one hand, the jury must decide the master's liability where the vice principalship of the negligent employee would be a legitimate, though not a necessary, deduction from the evidence.[4] On the other hand, if the facts are not in dispute, and their significance is unambiguous, when considered in relation of the theory of vice principalship adopted in the jurisdiction where the case is tried, it is error to take the opinion of the jury.[5]

Where there is testimony going to show that the injury was caused by a breach of a non-delegable duty, it is error to take the case from

them from being fellow servants, is a question of fact to be determined by the jury."

In an action by an employee to recover of a railway company for injuries sustained by the giving way of a grab iron of a ladder on the side of the car, an instruction that defendant's duty to inspect the car was shown to have been performed by two inspectors when it was put in the train is erroneous, in declaring, as matter of law, that defendant had discharged its duty as to the inspection of the car. *Thompson* v. *Great Northern R. Co.* (1900) 79 Minn. 291, 82 N. W. 637.

[3] *Donnelly* v. *Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874.

[4] In an action against a gas company to recover for personal injuries resulting from the falling in of an overhanging bank of earth in a street excavation made for repairing a pipe, it appeared that the superintendent, after making the trench 2½ feet too far south, ordered the men, in order to avoid opening a new trench, to undermine the earth north to the pipe, and throw the dirt on the bank above the pipe. Held, that the question whether it was therein to be regarded as the *alter ego* of the company was for the jury, and a nonsuit was error. *Devine* v. *Tarrytown & I. Union Gaslight Co.* (1880) 22 Hun, 26. In another case the court, in holding that, where the question was whether the construction of a derrick by defendant's foreman, and the use of it by a servant of defendant, for whose death damages were claimed, made them fellow servants, an instruction that they were not fellow servants was error, said: "It is undoubtedly the duty of an employer, where he undertakes to supply his employees with machinery and other appliances to be used by them in the prosecution of his business, to exercise reasonable care and prudence in supplying such as will be safe and suitable for the purpose for which they are to be used. But whether that is the undertaking of the employer in any given case is a question of fact to be determined from the circumstances. He may undertake to provide the machinery and appliances themselves, or only the materials out of which they are to be constructed, leaving their construction to the same employees who are to use them when constructed. Thus, for example, a person employing others to erect a building, might undertake, on his own part, to put up and supply all the scaffolding necessary to be used in the progress of the work, and in that case he doubtless would be liable for injuries to his employees resulting from defects in the scaffolding which reasonable care and prudence would have obviated. But if his undertaking is merely to supply the materials out of which the employees erecting the building may put up their own scaffolding, his duty would only extend to the use of reasonable care and prudence in the choice of materials and the selection of his servants." *Shield* v. *Moran* (1882) 10 Ill. App. 618.

[5] *McGivity* v. *Athol Reservoir Co.* (1892) 157 Mass. 183, 29 N. E. 510, holding it to be a question of law whether an employee, in setting a post for one of the guy ropes of a derrick, acted as a fellow servant of the plaintiff, or for the master in discharge of the master's duty to see that suitable appliances were supplied.

the jury.[6] On the other hand, there is no error, under such circumstances, in refusing to say, as a matter of law, that the plaintiff cannot recover.[7]

B. What duties are deemed to be non-delegable.

565. Duties imposed by statute.— So far as it is possible to extract any general rule from the cases, it may, perhaps, be said that the courts proceed upon the theory that, unless the legislature has either expressly, or by reasonable implication, declared its intention in this regard, a duty imposed upon a master by a statute should be treated as delegable or non-delegable, according as it belonged to one category or the other under the common-law doctrines which previously prevailed in the particular jurisdiction to which the statute applies.

a. Quality of duty unchanged by statute.—On the one hand, the logical consequence of the doctrine that duties pertaining to maintenance are, as a class, delegable (see § 618, *post*), is considered to be that, in so far as the performance of duties prescribed by statute constitutes a part of the operation of a going concern, they are delegable.[1]

[6] *Johnson* v. *Field-Thurber Co.* (1898) 171 Mass. 481, 51 N. E. 18; *Scandell* v. *Columbia Constr. Co.* (1900) 50 App. Div. 512, 64 N. Y. Supp. 232; *Kelly* v. *Ryus* (1892) 48 Kan. 120, 29 Pac. 144.

[7] *Herbert* v. *Northern P. R. Co.* (1882) 3 Dak. 38, 13 N. W. 349. Affirmed in (1883) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590 (brake defective through negligence of car repairer); *McCauley* v. *Southern R. Co.* (1897) 10 App. D. C. 560; *Mackey* v. *Baltimore & P. R. Co.* (1890) 8 Mackey, 282; *Leonard* v. *Kinnare* (1898) 174 Ill. 532, 51 N. E. 688, Affirming (1897) 75 Ill. App. 145; *Brickner* v. *New York C. R. Co.* (1870) 2 Lans. 506; *Bernardi* v. *New York C. & H. R. R. Co.* (1894) 78 Hun, 454, 29 N. Y. Supp. 230; *Schulz* v. *Rohe* (1893) 4 Misc. 384, 24 N. Y. Supp. 118; *Richards* v. *Hayes* (1897) 17 App. Div. 422, 45 N. Y. Supp. 234; *Cavanagh* v. *O'Neill* (1898) 27 App. Div. 48, 50 N. Y. Supp. 207; *Carter* v. *Oliver Oil Co.* (1891) 34 S. C. 211, 13 S. E. 419; *Luehke* v. *Chicago, M. & St. P. R. Co.* (1883) 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870; *McMahon* v. *Ida Min. Co.* (1897) 95 Wis. 308, 70 N. W. 478.

[1] See remarks of Lord Chelmsford in *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30 (p. 341 of Law Reports), with regard to the effect of the act of 23 & 24 Viet. chap. 151, §§ 10 and 22, requiring mine owners to keep up an adequate amount of ventilation, and imposing a penalty for a breach of this provision.

The other law lord declined to express any opinion on this point. But the reasoning and the decision in *Hedley* v. *Pinkney & Sons S. S. Co.* [1894] A. C. 222, Affirming [1892] 1 Q. B. 58, are quite in harmony with this view. There it was held that a ship is "seaworthy" within the provisions of the English merchant shipping act (39 & 40 Viet. chap. 80), if it is properly equipped for the safety of the crew in the first instance, and that the mere neglect of the captain to use the equipment furnished will not render her unseaworthy in such a sense as to render her owner liable as for an infringement of the act. The fault in such a case was regarded as being entirely that of the captain, a mere co-servant of the members of the crew. The plaintiff, who was injured by the omission to secure properly a movable section of the ship's railing, contended, without success, that the case came within the 5th section of the merchant shipping act 1876, which provides that in every contract of service, express or implied, between the owner of a ship

On the other hand, the acts which have been passed in most of the American states for the purpose of securing the safer operation of mines are held to prescribe duties of the absolute class.[2]

and the master or any seaman thereof, there should be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship that he and the master should use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same.

In the court of appeal, Kay, L. J., reasoned thus: "Leaving a door open or a bolt unshot or a movable railing out of position, as in this case, clearly would not make the ship unseaworthy within that definition. The ship here had all the necessary equipment ready to be used she was a perfect machine. It was a case of negligence in not using a perfect machine properly. I do not think it can be said that the negligence of the master in allowing a door to be left open or a bolt to be left unshot, or not having a railing placed in position, which was ready to hand, not stowed away in the hold where it could not be got at, or for any other reason unavailable, amounts to a breach of the obligation to keep the ship seaworthy under the act."

In the House of Lords the same view prevailed. Lord Herschell said: "It is quite clear . . . that the Prodano was not unseaworthy at the time she left the port of London. After she left that port her hull and equipment remained precisely what they were at the time of her departure. She was in all respects efficiently equipped. The fault was in not making use of the equipment with which she had been furnished. Under circumstances such as these, I do not think it can be said that there has been a failure to keep her in a seaworthy condition for the voyage, within the meaning of the enactment. Following, as it does, the obligation that the owner and the master, and every agent charged with the loading of the ship or the preparing thereof for sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage, I think the words 'to keep her in a seaworthy condition for the voyage during the same,' point to an obligation of the same character, and not to a neglect properly to use the appliances on board a vessel well equipped and furnished. There is ample scope for the operation of the words in question, even though this construction be put upon the enactment. If any of the necessary appliances were lost or destroyed in the course of the voyage, it would, no doubt, be the duty of the master to use all reasonable means to supply others in their place, just as it might be his duty during the voyage to restore the hull or machinery, if damaged, to a condition suited to the perils to be encountered. But if the appellant's argument were to prevail, it would have a much wider scope than I am able to gather from the words of the enactment was intended by the legislature. The failure properly to secure many parts of the ship which are, in ordinary practice, open from time to time, would no doubt diminish the safety of those serving on board her, and be a source of danger to them; but I do not think it could reasonably be said that because in such a case a bolt was not securely fixed the vessel thereupon became unseaworthy. In truth the point is only of importance because of the limitation which the law at present imposes upon a liability of an employer for accidents due to the negligence of his servants; but for this limitation, I do not think it would have occurred to anyone to maintain that there had been, in the present case, a breach of the implied obligation created by § 5 of the merchant shipping act 1876."

[2] *Cherokee & P. Coal & Min. Co. v. Button* (1896) 3 Kan. App. 292, 45 Pac. 100 (decision upon Kan. Gen. Stat. 1889, par. 3850, which, in order to promote the health and safety of the persons employed in coal mines, provides that the owner, agent, or operator shall employ a competent and practical inside overseer, who shall keep a careful watch over the ventilating apparatus, the airways, traveling ways, pumps and pump timbers, drainage, and roofs of tunnels, and that there shall be sufficient manholes and proper signaling apparatus on manholes on the traveling ways; and also prescribes that safety lamps and sufficient timber for props shall be furnished); *Sommer v. Carbon Hill Coal Co.* (1898) 32 C. C. A. 156, 59 U. S. App. 519, 89 Fed. 51 (coal miner does not assume the risk of negligence of the

A similar doctrine prevails with respect to statutory duties imposed on railway companies to fence their tracks,[3] and to block the frogs in their yards so as to prevent the catching of feet therein.[4] Similarly, it has been denied that a statutory duty to fence dangerous machinery can be delegated so as to relieve the master from responsibility for its negligent performance by the agent.[5]

b. Quality of duty altered.—On the one hand, the rule which absolves a master from liability for negligence in the erection of a scaffold, where such erection is a part of the work, has been changed by the New York labor law (Laws 1897, chap. 415, § 18), providing that any person employing or directing another to perform labor of any kind in the erection of a building shall not furnish unsafe scaffolding. His duty is not discharged sufficiently by furnishing a sufficient quantity of suitable materials.[6]

person having charge of the ventilation of the mine, where a statute requires the mine owner to provide for proper ventilation); *Costa* v. *Pacific Coast Co.* (1901) 26 Wash. 138, 66 Pac. 398 (gas tester held to be a vice principal as regards the miners); *Linton Coal & Min. Co.* v. *Persons* (1894) 11 Ind. App. 264, 39 N. E. 214 (holding that the owner of a mine does not, by employing a mining boss, relieve himself from liability for failure of the latter to use reasonable care to make the mine safe to work in, under Ind. Rev. Stat. 1894, §§ 7472, 7473, providing for the employment of such boss, and that for any violation of the act the owner shall be liable to any person who is injured thereby).

[3] *Atchison, T. & S. F. R. Co.* v. *Reesman* (1894) 23 L. R. A. 768, 9 C. C. A. 20, 19 U. S. App. 596, 60 Fed. 370.

[4] *Ashman* v. *Flint & P. M. R. Co.* (1892) 90 Mich. 567, 51 N. W. 645 (railway company held guilty of actionable negligence, under Mich. Laws 1883, p. 191, where a frog was suffered to remain unfilled so long that knowledge of its condition might be presumed); *LeMay* v. *Canadian P. R. Co.* (1890) 17 Ont. App. Rep. 293 (see § 567, note 1, *infra*).

[5] In *Groves* v. *Wimborne* (1898) 2 Q. B. 402–410, 67 L. J. Q. B. N. S. 862, Smith, L. J., said: "But in my judgment the defense of common employment only applies where the action is by a servant against the master and is founded upon the negligence or misconduct of his fellow servant. In such a case the doctrine of common employment attaches. In the present case, which is an action founded upon the statute, there is no resort to negligence on the part of a fellow servant or anyone else. There being an unqualified statutory obligation imposed upon the defendant, what answer can it be to an action for breach of that duty to say that his servant was guilty of negligence, and therefore he was not liable? The defendant cannot shift his responsibility for the performance of the statutory duty on to the shoulders of another person. The case of *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 320, 19 L. T. N. S. 30, was relied upon as showing the contrary. But that case decided nothing of the kind. It simply decided that the law of Scotland with regard to the applicability of the doctrine of common employment where the fellow servant was in a position of superintendence was the same as that of England." Rigby, L. J., said: "Where an absolute duty is imposed upon a person by statute it is not necessary, in order to make him liable for breach of that duty, to show negligence. Whether there can be negligence or not, he is responsible *quacun que via* for nonperformance of the duty." Rigby, L. J., in *Groves* v. *Wimborne* (1898) 2 Q. B. 402, 67 L. J. Q. B. N. S. 862.

Where a statute requires the fencing of all gearing in manufacturing establishments, the negligence of certain employees in bending the rods which guarded gearing was held not to be chargeable to another employee who slipped, and, in falling, thrust his arm through the opening thus made. *Lore* v. *American Mfg. Co.* (1901) 160 Mo. 608, 61 S. W. 678.

[6] *McLaughlin* v. *Eidlitz* (1900) 50 App. Div. 518, 64 N. Y. Supp. 193; *Mc-*

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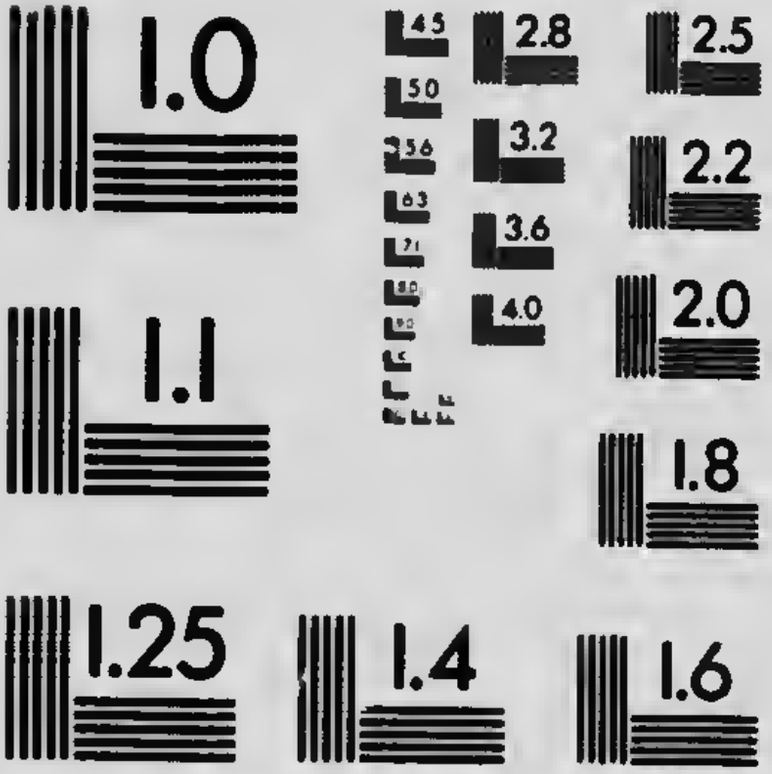

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On the other hand, certain statutes which require mine owners to take specified precautions have received a construction which apparently renders their obligations less onerous than they would have been, if common-law principles had been left to operate. This is virtually the effect of the acts in force in Pennsylvania and elsewhere, by which mine owners are required to appoint competent foremen to supervise the underground workings. As we have already seen, in § 520, note 1, subd. (o), *ante,* an appointment made in compliance with the terms of these acts relieves the employer of any further liability with regard to the defective condition of this mine, so far as that condition is the consequence of the nonperformance of duties of the class which the foreman is supposed to discharge.

566. Duty to see that the inorganic instrumentalities of the work are reasonably safe; general rule stated.— Subject to certain qualifications which will be explained in later sections, the doctrine which now prevails in the large majority of the American states may be enunciated in the following terms: A master must indemnify a servant who is injured by the negligence of a coservant, when the delinquency consisted in a failure to discharge properly either the function of furnishing the instrumentalities with which the business is carried on, or the function of keeping those instrumentalities up to the legal standard of safety while they continue to be used.[1]

Allister v. *Ferguson* (1900) 50 App. Div. 529, 64 N. Y. Supp. 197; *Stewart* v. *Ferguson* (1899) 44 App. Div. 58, 60 N. Y. Supp. 429, reiterating doctrine laid down in the first appeal (1898) 34 App. Div. 515, 54 N. Y. Supp. 615.

[1] "A railroad corporation may be controlled by competent, watchful, and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and orders its affairs and business, in all of its departments, are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the company's service. But the obligation still remains to provide and maintain, in suitable condition, the machinery and apparatus to be used by its employees,—an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least, in the organization of the corporation who are invested with controlling or superior authority in that regard represent its legal personality; their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant, who has been injured without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation." *Hough* v. *Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612. To the same effect, see *Northern P. R. Co.* v. *Herbert* (1886) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Northern P. R. Co.* v. *Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

"The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has the right to count on this duty, and is not required to as-

Many of the cases cited in the following sections directly suggest, by the facts involved, the difference, hereafter to be explained, (§§ 603, 612–615, *post*) between the position of servants who supply a stock of material, from which a selection is to be made as the work progresses, and of servants who make that selection; and this distinction is often expressly relied upon as the rationale of the judgments.[2] But the master cannot avail himself of the protection afforded by this distinction, where it is negligent, under the circumstances, to leave the task of selection to the particular servant or class of servants upon whom that function is necessarily thrown in the ordinary course of the master's business.[3] Such a situation indicates a lack of that effi-

sume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other, he may." *Ford* v. *Fitchburg R. Co.* (1872) 110 Mass. 240, 260, 14 Am. Rep. 598. The theory of the master's responsibility, however, which is now accepted in Massachusetts itself is somewhat different from this. See § 560, *supra*.

The doctrine of common employment is not applicable, "where injuries to servants or workmen happen by reason of improper and defective machinery and appliances, used in the prosecution of the work [of the corporation]." *Harper* v. *Indianapolis & St. L. R. Co.* (1871) 47 Mo. 567, 4 Am. Rep. 358.

[2] In *Lehigh Valley Coal Co.* v. *Warrek* (1898) 28 C. C. A. 540, 55 U. S. App. 437, 84 Fed. 866, the evidence was that, whenever plaintiff needed new blocks, he applied for them to the foreman, whereupon the [illegible] brought them; that, so far as plaintiff was informed, there was no [illegible] of new ones from which he could supply himself; that plaintiff, three days before the accident, and again two days before the accident, called the attention both of the foreman and of the outside superintendent to the condition of the blocks, and asked for sound ones; and that to his request both replied "All right," and the foreman expressly promised to "give him new blocks right away." The case was held by the court to be distinguishable from those cited by defendant's counsel, where the plaintiff had a stock of new appliances at hand from which to help himself.

See also, as illustrating the same point of view, *Thomas* v. *Ann Arbor R. Co.* (1897) 114 Mich. 59, 72 N. W. 30; *Bushby* v. *New York, L. E. & W. R. Co.* (1887) 107 N. Y. 374, 14 N. E. 407; *Woods* v. *Lindvall* (1891) 1 C. C. A. 37, 4 U. S. App. 49, 48 Fed. 62; *Mullane* v. *Houston, W. S. & P. Ferry R. Co.* (1897) 21 Misc. 10, 46 N. Y. Supp. 957. Affirming (1897) 20 Misc. 434, 45 N. Y. Supp. 1039; *Strauss* v. *Haberman Mfg. Co.* (1897) 23 App. Div. 1, 48 N. Y. Supp. 425; and the cases cited in § 617a, *post*.

Similarly, in *Mansfield Coal & C. Co.* v. *McEnery* (1879) 91 Pa. 185, 36 Am. Rep. 662, we find the court committing itself to this doctrine: If a railroad company exercises ordinary care and skill in the selection of employees to construct a bridge, it will not be responsible for defects resulting from its original construction.

[3] In *McElligott* v. *Randolph* (1891) 61 Conn. 157, 22 Atl. 1094, the court reasoned thus: "While it is true that the defendants intrusted the execution of the work upon which McElligott was engaged to a competent superintendent, provided him, McElligott, with colaborers who were fit and competent when under competent supervision, and had upon the premises appliances and appa-

cient supervision the maintenance of which must be shown before the master can be allowed to claim the advantage of the rule which precludes recovery for injuries caused by the negligence of a coservant in carrying out the details of the work. See chapter XLII., *post*.

It is observable, moreover, that the rule which absolves the master from liability for the condition of the place of work, on the ground that it is temporary and transitory, is not available as a defense, when the place is unsafe at the time the servant is brought to the place of work, and no warning is given him of the peril.[4]

567. Duty to see that the inorganic instrumentalities of work, as originally supplied, satisfy the legal standard of safety.—*a. English, Scotch, and colonial doctrine.*—Although the point has never been directly raised, or specifically decided in the same explicit language as in the United States, it would seem to be a legitimate deduction from the language used by the English, Scotch, and colonial judges, that a servant to whom a master intrusts the function of constructing or supplying any part of the plant is regarded by them as an agent, for whose negligence in discharging that function the master is responsible. As the correct doctrine upon this subject is a matter of con-

ratus suitable for the work, it is equally true that, during the progress of much of the work, and at the time of, and for a considerable time prior to, the accident, the work was wholly without competent superintendence; that there was even no one present who was possessed of mechanical skill; that the provision of suitable appliances was simply in the sense of there being such near at hand, mingled with others unsuitable; that those appliances which were in fact chosen and set apart for the work were mainly selected by unskilled factory hands, at random and without instructions, oversight, or examination; and that they were adjusted by like laborers with the like absence of instructions, oversight, and examination. The accident happened, in part, because a certain wooden horse or support was inadequate. Dunning, the superintendent, selected this particular appliance and directed its use. The wheel fell in fact because a certain rope was too small and inadequate. The defendants had done nothing to provide a suitable rope except to have upon the premises a stock of various kinds of rope, some suited to one purpose and some to another, and to allow any chance inexperienced laborer to select for each special use the one which his impulse dictated. Just here we touch upon the most significant and potent factor in the situation, namely, the entire absence of competent superintendence during all the later stages of the work. After Dunning's departure, about midnight, there was no one, either over or connected with the gang of men employed, who possessed any mechanical knowledge or skill. Had Dunning remained present, properly executing his master's duty intrusted to him, there would have been no such unintelligent, haphazard selection of apparatus, no such inadequate and unsuitable devices of support, as were instrumental in McElligott's death. Moreover, Dunning's departure in an instant transformed McElligott and his fellows from fit into unfit colaborers. The finding states explicitly that these men were incompetent for the work assigned them, without suitable supervision. During the hours, therefore, which succeeded Dunning's return home, McElligott was surrounded only by incompetent fellow workmen, and he went down to his death in consequence of constructions and mechanical adjustments made by his fellow servants, employed by the defendants to do, in company with him, what they were unfit to do. Plainly, therefore, the defendants' duties as masters of the deceased were not performed."

[4] *Hess* v. *Rosenthal* (1896) 160 Ill. 621, 43 N. E. 743.

siderable importance to lawyers practising in that part of the United States which is adjacent to Canada, the authorities have been analysed at considerable length and collated in the subjoined note.[1]

[1] As will be seen from the quotations from their opinions in § 529, *ante*, Lord Chelmsford and Lord Colonsay both distinctly conceded that a mine owner may be liable for defects in the general arrangement or system of ventilation, and contrasted such a cause of injury with that nader discussion. *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 344, 19 L. T. N. S. 30. The following remarks of the latter are also worth noting: "I think that there are duties incumbeat on masters with reference to the safety of laborers in mines and factories, on the fulfilment of which the laborers are entitled to rely, and for the failure in which the master may he responsible. A total neglect to provide any system of ventilation for the mine may be of that character. Culpable negligence in supervision, if the master takes the supervisioa oa himself, or, where he devolves it on others, the heedless selection of unskilful or incompeteat persons for the duty, or the failure to provide or supply the means of providing proper machinery or materials,—may furnish gromads of liability; and there may be other duties, varying according to the nature of the employment, wherein, if the master fails, he may be responsible."

Lord Cranworth in the course of his opinioa said: "If, indeed, the owners had failed to take reasonable care in causing the scaffold to be erected, the case would have been different; but of this there is no evidence. It certainly was not incumbent oa them personally to fix the scaffold. They discharged their duty whea they procured the services of a competent underground manager; and whether Wilsoa began to work with, or under, Neish before or after he had prepared the scaffold, was a matter of no importance. From the time when he began to work he was a fellow workman with him."

This decisioa, therefore, really goes no farther than to deny that there is such a functionary as a vice principal in matters conaected with the operati f a going concera, and leaves the ob ns of the master absolute, so far as r gards the original coadition of the plant and the capacity of the employees at the time when they are hired.

In a later appeal from Scotland the House of Lords held that a complaint alleging an injury from the defective splicing of a ship's tackle is demurrable unless at all events, it also avers that the splicing was defective at the time the vessel was equipped. *Gordon* v. *Pyper* (1892) 20 Sc. Sess. Cas. 4th series, 23. Lord Watson's position was that a mere defect in the splicing of a ship's tackle, which is obvious, does not constitute any default of duty on the part of the shipowner, if he provides the master and crew with the proper materials for correcting the defect in the course of the voyage.

In *Allen* v. *New Gas Co.* (1876) L. R. 1 Exch. Div. 251, 45 L. J. Exch. N. S. 668, 34 L. T. N. S. 541, Huddleston, B., after referring to the opinion of Lord Cairns in *Wilson* v. *Merry*, proceeded thus: "To establish, therefore, negligence against the defendants, the plaintiff must prove that the defendants undertook personally to superintend and direct the works, or that the persons employed by them were not proper and competent persons, or that the materials were inadequate, or the means and resources were unsuitable to accomplish the work. The onus is upon him, and failing to do so he fails to establish negligence. . . . By suitable means and resources, we think must be meant all that was necessary to carry on the business, including premises reasonably safe for that purpose,—as, for instance, in case of a mine, of a proper system of ventilation, as pointed out by Lord Colonsay in *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30: but there was no evidence to show that the premises of the defendants were dangerous, that these gates were defective in their original construction, or that they had not been perfectly safe when first put up. If they had fallen into a state of decay, and had been permitted to remain in that state, it could scarcely be said that that was the act of the defendants, but must have been that of the persons whom they must have employed, and there was no evidence to show that such persons were not proper and competent for the defendants to employ."

A similar position seems to be indicated by the following remark of Lord Wensleydale in an earlier Scotch ap-

b. American doctrine.—All the courts in the United States seem to be unanimous as to the doctrine that, where it is a question of the condition of the instrumentalities, animate or inanimate, when they first

peal: "All that the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or his workmen in a fit and proper manner." *Weems* v. *Mathieson* (1861) 4 Macq. 1 H. L. Cas. 215.

In *Hall* v. *Johnson* (1865) 3 Hurlst. & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 80, 11 L. T. N. S. 779, 13 Week. Rep. 411, the court emphasized the fact that the master was not shown to have been negligent in regard to putting his mine in proper order.

See also the cases cited in § 526, note 1, *ante*.

In one Scotch case, where a defective scaffold had been erected under the superintendence of the defendant's foreman, it was laid down that it is a master's duty to see that a scaffold to be used by masons is sufficient, even though he left the charge of erecting it to the masons themselves. *Cook* v. *Duncan* (1857) 20 Sc. Sess. Cas. 2d series, 180.

In another case a part of the judges, while denying that negligence was established by the evidence, admitted that the failure of a mining company to supply timber for the support of the roofs imported a breach of duty. *Stewart* v. *Coltness Iron Co.* (1877) 4 Sc. Sess. Cas. 4th series, 952. In another case it was held that a declaration which stated in substance that the plaintiff's son had been run over by a train, while acting as a flag boy at a crossing, and that the accident was due to the fact that a water tank had been erected in such a position that it was impossible for those in charge of the engine to see whether the line was clear, or to receive signals, could not be successfully demurred to on the ground that there was no averment that the engineers appointed to lay out the station yard and fix the site of the water tank were incompetent. *McKillop* v. *North British R. Co.* (1896) 23 Sc. Sess. Cas. 4th series, 768. The essence of the court's position was that the duty of placing a part of the permanent equipment of the station, so that the lives of employees should not be exposed to unnecessary and avoidable hazard, "is a duty incumbent on the employer, whether he be an individual, or a company acting through directors," and that, "while the company would of course be morally right in relying to a large extent on the judgment of engineers or practical men, it is not relieved of its responsibility by the mere fact that it had appointed competent engineers and managers to whose judgment it trusts." It was also considered that a railway company is no more able than a private company or a partnership to displace the responsibility for providing a sufficient machinery plant by delegating the duty of selection to a manager. In regard to this matter the directors of a railway company are in the same position as managing partners.

In another case it was held that a complaint which imputes fault to the master himself, as distinguished from his servants, in a matter which may fairly be described as his system of working, is not demurrable. *MacDonald* v. *Udston Coal Co.* (1896) 23 Sc. Sess. Cas. 4th series, 504 (injury caused by failure to prop a mine sufficiently).

In another case it was held erroneous to dismiss the action, where the failure to light the bottom of a shaft was relied on as the gravamen of the complaint. *Farnham* v. *New Bank Coal Co.* (1896) 23 Sc. Sess. Cas. 4th series, 722.

In *LeDay* v. *Canadian P. R. Co.* (1890) 17 Ont. App. Rep. 293, the duty violated was a statutory one; but the following remarks of Haggarty, C. J. O., are pertinent in the present connection: "I look upon the duty of seeing that a track is fit for use and properly safeguarded as required by law before its being used, as a duty which the company must perform at its peril, and that it will not excuse them to prove that they gave directions to have everything done rightly and legally. It might present a different aspect if the portion of road had been all right at its opening,—the frog duly packed,—and that by some servant's neglect it had not been repacked. The original omission to pack the frog cannot, as I think, be properly excusable as the negligent act of a servant in a common employment with plaintiff."

The line which the reasoning took in *Wilson* v. *Merry*, and the weight of judicial opinion, evidenced by the above cases, in favor of making a distinction between the quality of the duties of a master in respect to original construc-

became a part of the organism through which the master carries on his business, the master's liability is determined by the principle that he must answer for any negligence which may be committed by any

tion and subsequent maintenance, has cast doubt upon the correctness of some earlier decisions which seem to ignore that distinction.

In one it was broadly laid down that, in order to render a master liable for an injury to his servant, caused by the breaking of a machine belonging to the master, it is not sufficient to show that the machine was defectively constructed, but there must also be evidence that the master employed incompetent persons to construct the machine. *Potts* v. *Port Carlisle Dock & R. Co.* (1860) 8 Week. Rep. 524, 2 L. T. N. S. 283.

In another it was held that a workman cannot recover damages from his employers for injuries sustained by him while at work in their mill, and resulting from the building having been originally negligently constructed, unless personal negligence is proved against his employers themselves (or against some person acting by their orders), either in having given directions how the building should be constructed, or in having knowingly intrusted the execution of the work to an incompetent person. *Brown* v. *Accrington Cotton Spinning & Mfg. Co.* (1865) 3 Hurlst. & C. 511, 34 L. J. Exch. N. S. 208, 13 L. T. N. S. 94. There the accident was caused by the negligence of one Dean, the clerk of the works, employed by the defendant to supervise the contractors for the construction of the several parts of the building. The position of the judges is apparent from the following extracts. At one stage of the argument Martin, B., observed: "It is necessary to show either personal negligence on the part of the defendants or the workmen acting under their orders, or that the defendants employed workmen whom they knew to be unskilful. The plaintiff must establisa this,—that if persons building a house employ a man to superintend the works, and allow them to be completed without their personal superintendence, and, many months after the negligent act is done, the owners not being aware of it, the house falls and injures a person whom they employed to work there, they are responsible. That cannot be done without showing some contract or warrant to the person employed, that the state of the house was such that it was safe for him to work in it." The case of *Barton's Hill Coal Co.* v. *Reid* (1858) 3 Macq. H. L. Cas. 266, 288, 4 Jur. N. S. 767, being cited by counsel, the same learned judge remarked: "The question in that case was whether a master was liable for injury to a servant caused by the negligence of a fellow servant. In all the cases in which a master has been held liable for injury to a servant, there has been a want of reasonable care at the very time the accident happened, and which immediately and directly caused it; here it is sought to go far back, and I do not see the limit; it might be fifty years after the house was improperly built."

In summing up the conclusions of the court, he said: "It is enough to say that our judgment is founded on this,—that there was no evidence of personal negligence on the part of the company or any of the members of it; nor was it shown that there was negligence on the part of any person acting as their servant or under their orders, for which they are responsible, either by having given specific directions as to the mode in which the work should be done, or by having any reason to suppose that the person to whom they intrusted the duty of seeing that it was properly performed was not a person of ordinary competence."

In one Scotch case the court apparently argued upon the assumption that a defect in construction, if it was due to the negligence of a coservant, did not affect the master with liability. *Matthews* v. *M'Donald* (1865) 3 Sc. Sess. Cas. 3d series, 506.

On the whole, therefore, it may be asserted with reasonable confidence that the servant's right of recovery, in that country, remains, so far as the common law is concerned, exactly what it was when it was declared by Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, that the ruling in *Gray* v. *Brassey* (1852) 15 Sc. Sess. Cas. 2d series, 135, was in strict accordance with the English authorities. In the Scotch case referred to, the complaint was held to be relevant, inasmuch as the plaintiff would be entitled to recovery if he established his allegations that his injuries were due to the negligence of an

servant to whom he delegates the duty of furnishing those instrumentalities.[2]

In view of some of the decisions cited in § 558, *supra*, it is impossible to state the principle in a more general form than this.

Some courts seem to limit the application of this principle to cases in which the delinquent servants were invested with a controlling or superior authority in respect to the supply of the instrumentalities.[3] But this view is not supported by the authorities as a whole; nor is it consistent with the theory that the rank of the offender is entirely immaterial. See chapter XXX., subtitle C, *ante*.

employee whose functions were the providing of safe machinery for the employee who had to use it. The facts alleged were that a brake slipped down when plaintiff stepped on it, in consequence of there being no blocking on it.

In a recent Michigan case where a servant was injured, while working in a tunnel on the Canadian side of the St. Clair river, by reason of the high pressure of air maintained, an instruction that it was defendant's duty to adopt the proper system for maintaining the air pressure, and to use the proper locks on the valves of the machinery, or to give plaintiff warning of the danger, was held to be improper, for the reason that the law of Canada governing the case was that defendant had performed its duty when it employed competent persons to control the work, and authorized them to purchase suitable material and machinery. *Turner* v. *St. Clair Tunnel Co.* (1899) 121 Mich. 616, 47 L. R. A. 112, 80 N. W. 720, first appeal (1897) 111 Mich. 578, 36 L. R. A. 134, 70 N. W. 146. The court declined to admit that there was any distinction, as regards delegable quality, between the duty of furnishing a safe place of work and the duty of maintaining it. The conclusion thus arrived at is believed, for the reasons explained above, to be erroneous.

[2] In view of some of the decisions cited in § 558, *supra*, it is impossible to state the principle in a more general form than this.

"The principle upon which, as we take it, all the authorities agree, is that the master is under what may be termed an absolute duty to his servant of using care, to the end that the machinery put into the hands of his servant for use shall be reasonably safe, having regard to its nature and the purposes for which it is intended. This duty he may discharge, either by himself in person, or by a designated agent or servant. If he discharge it by an agent or servant, the latter becomes, in respect of it, his vice principal, wholly without reference to the rank which in other respects he occupies in his master's or principal's service." *Dutzi* v. *Geisel* (1886) 23 Mo. App. 676.

An appliance constructed to enlarge the capacity of the master's work stand, so far as the non-delegable quality of the duty to see that it is not defective in any respect, on the same footing as if it had been a part of the work when they first began to be operated. *Wilson* v. *Willimantic Linen Co.* (1883) 50 Conn. 433, 47 Am. Rep. 653 (operative injured by the fall of a countershaft on some new machinery—superintendent had been notified that collar was needed).

The selection of appliances out of a stock furnished by the master is a function usually regarded as characteristic of a mere servant (see § 57, *ante*), but in one case it was held, on the ground of his having discretionary authority in the premises, that a master was liable for the negligence of an employee in the choice and use of tackle for the purpose of lowering a heavy piece of machinery into its place. *Telander* v. *Sunlin* (1891) 44 Fed. 564. But this decision is scarcely consistent with the general current of the authorities, as the special factor relied upon for purposes of differentiation seems to be present in every instance where the master's duty has been denied to extend beyond the supply of the materials out of which the selection is to be made. See, however, *Great Northern R. Co.* v. *McLaughlin* (1895) 17 C. C. A. 330, 44 U. S. App. 189, 70 Fed. 669, note 7, subd. (j), *infra*.

[3] This form of expression is used in *Cooper* v. *Pittsburgh, C. & St. L. R. Co.* (1884) 24 W. Va. 37.

The rationale of the principle also indicates that its operation is not dependent upon the delinquent's possession of the power of discharging or employing other servants.[4]

The reason assigned for the principle, *viz.*, that, "were it [the rule] otherwise, the duty before us, one of the most important of those [the duties] owed by capital to labor, could be evaded by the capitalist employing only his own servants in the construction of his buildings and machinery," [5] sounds somewhat singular when we consider it in connection with that other rule which, according to some courts (see § 558, *supra*), allows capital to "evade the duty" in question by the simple expedient of abstaining from the "employment of his own servants"and intrusting the work to an independent contractor. A theory of absolute responsibility which may be so easily nullified is little better than a solemn farce. It is only proper, however, to mention that in the state in which the policy of holding capital to its obligations has been thus indorsed, there has been no explicit adoption of the theory which entirely exonerates a master who interposes an independent contractor between himself and his servants. Possibly this court may hereafter declare its views on this point in a form which will save it from the charge of inconsistency, from which it seems impossible to absolve the judges who accept that theory, and at the same time hold that the master must answer for the negligent construction of an instrumentality by any person in his service.

The decisions cited in the subjoined note are referred to as illustrations of the general principle enunciated above, for the reason that the use of some such word as "provide," "furnish," "supply," etc., in describing the duty incumbent on the master, may, in some sense, be said to show that the court had in mind the master's responsibility for the original condition of the instrumentalities. But, so far as most of the courts are concerned, it is immaterial whether the dereliction of duty was [illegible] to original supply or subsequent maintenance, and the absence [illegible]y practical necessity for differentiating between the existence [illegible] master's liability in one case or the other has naturally resulted [illegible] certain lack of precision in the phraseology employed. It is customary to predicate two distinct nondelegable duties in respect to what we have, for convenience sake, styled the unintelligent instrumentalities of work, *viz.*, the duty to provide "reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done," and the duty "to provide the servant with a reasonably safe place to work in, having

[4] *Allen* v. *Spokane Falls & N. R. Co.* (1899) 21 Wash. 324, 58 Pac. 244.

[5] *Indiana Car Co.* v. *Parker* (1885) 100 Ind. 181.

reference to the character of the employment."[6] But this division of duties scarcely satisfies the exigencies of a logical classification, for the reason that, in a large number of cases, it is difficult, if not impossible, to say with certainty whether the liability of the master for a defective apparatus should be treated as resulting from a violation of his duty to furnish that apparatus, or from a violation of his duty to see that the place of work, which was rendered dangerous by the apparatus was safe. The subjoined cases in which the master was held liable are therefore arranged, without regard to the supposed distinction of duties, under headings indicative of the nature of the abnormal danger from which the master's representative failed to protect the injured person. Whether it is explicitly so stated or not, the master was held responsible for the acts of the servants whose negligence was the cause of the various abnormally dangerous conditions mentioned in connection with the citations.[7] For other cases, see § 617, *post*.

[6] *Northern P. R. Co.* v. *Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

[7] (a) *Defective railway track and appurtenances.*—(Compare § 568, note 6, subd. (a), *infra*.) *Trask* v. *California Southern R. Co.* (1883) 63 Cal. 96; *Louisville, N. A. & C. R. Co.* v. *Graham* (1890) 124 Ind. 89, 24 N. E. 668; *Rouse* v. *Downs* (1897) 5 Kan. App. 549, 47 Pac. 982 (fireman injured by switch negligently constructed by division road master).

(b) *Inadequacy of safeguards against dangers from explosive substances.*—(Contrast §§ 600, 601, and 612a, note 1, subd. (c) *post*.) *Gilmore* v. *Northern P. R. Co.* (1884) 9 Sawy. 558, 18 Fed. 866 (no suitable appliances provided for thawing giant powder); *O'Donnell* v. *East River Gas Co.* (1895) 91 Hun. 184, 36 N. Y. Supp. 288 (duty to provide proper appliances held to have been violated, where an employee was injured while cleaning out a boiler, by an explosion of naphtha negligently left by a fellow servant in a pipe to which the hose used in cleaning out the boiler was attached. Fellow servant's negligence here was in regard to the use of the defective appliance for work distinct from that upon which the plaintiff was engaged, and the naphtha was exploded by the heat of an adjoining boiler); *Bernardi* v. *New York C. & H. R. R. Co.* (1894) 78 Hun. 454, 29 N. Y. Supp. 230 (no cars suitable for transporting dynamite were provided).

(c) *Defective appliances for protecting servants engaged in excavating.*—*Kranz* v. *Long Island R. Co.* (1890) 123 N. Y. 1, 25 N. E. 206 (servant ordered to perform work as a machinist in underground trenches, opened and prepared for him by other employees, held not a fellow servant of the latter). Followed in *Schmit* v. *Gillen* (1899) 41 App. Div. 302, 58 N. Y. Supp. 458 (servants opening a trench are not, as regards duty to sheath it properly, the fellow servants of other servants who lay pipes in it); *Van Steenburgh* v. *Thornton* (1895) 58 N. J. L. 160, 33 Atl. 380 (foreman of work of excavating a trench neglected to take measures to prevent the sides from falling in); *Lapoint* v. *Cook* (1899) 21 R. I. 158, 42 Atl. 519 (no materials furnished for the servant's protection); *Baird* v. *Reilly* (1899) 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884 (foreman, whose duty it is to shore a trench which is being dug for laying pipes, held not to be a coservant of one of the pipe layers, who has nothing to do with the work of excavation).

(d) *Defects in bridges, trestles, etc.*—A master is liable for the negligence of employees to whom he delegates the function of building bridges, etc. *Davis* v. *Central Vermont R. Co.* (1882) 55 Vt. 84, 45 Am. Rep. 590, Overruling *Hard* v. *Vermont & C. R. Co.* (1860) 32 Vt. 473.

Where contractors for the erection of a railway trestle constitute an employee

To render the master liable on the ground that an employee was negligent in furnishing defective materials, it must be shown that

their representative, and impose on him the duty, and confer on him the authority, to supervise, direct, and control its construction, and require the laborers to obey his orders and directions in the premises, that employee stands in the shoes of his employers, and they are responsible for the results of his negligence in the work so committed to his direction, supervision, and control. *Woods* v. *Lindrall* (1891) 1 C. C. A. 37, 1 U. S. App. 49, 48 Fed. 62, Affirming 41 Fed. 855. The supreme court of Minnesota had previously held that the injured servant in this case was not entitled to recover. *Lindrall* v. *Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020.

(e) *Defects in scaffolds, stagings, etc.*—(Contrast §§ 613-616, *post*) That the master is liable for the negligent selection of the materials to be used in constructing a scaffold has occasionally been expressly laid down. *Kansas City Car & Foundry Co.* v. *Sawyer* (1898) 7 Kan. App. 146, 53 Pac. 90; *Goldie* v. *Werner* (1893) 50 Ill. App. 297, Affirmed in (1894) 151 Ill. 551, 38 N. E. 95; *Kerr-Murray Mfg. Co.* v. *Hess* (1899) 38 C. C. A. 647, 98 Fed. 56 (servant charged by the master with providing lumber for the building of a scaffolding by his fellow servants is in that respect discharging a personal duty of the master); *McNamara* v. *Mac Donough* (1894) 102 Cal. 575, 36 Pac. 941 (carpenter deputed to construct scaffold for bricklayers and hod carriers). Other cases to the same effect are cited in § 617, note 2, *post*.

The doctrine thus exemplified is taken for granted in all those numerous cases in which for reasons to be hereafter explained, the master is not responsible for the improper construction of the scaffold out of the materials furnished. See §§ 614, 615, *post*.

The servants constructing a scaffold are deemed to be vice principals whenever the master undertakes to furnish it as a completed instrumentality. *Kilka* v. *Faxon* (1878) 125 Mass. 485; *Brickner* v. *New York C. R. Co.* (1879) 2 Lans. 506 (where scaffold erected by coservants collapses, injured person has a right to have the case submitted to the jury both on the theory that the master was negligent in furnishing a dangerous structure, and on the theory that he was negligent in knowingly keeping incompetent servants in his employ); *McCoon* v. *Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697 (completed scaffold furnished for particular work); *Ellis* v. *Northern P. R. Co.* (1900) 103 Fed. 416 (running board furnished by foreman of shops to a man engaged in repairing a locomotive was defective); *Sellick* v. *J. Langdon & Co.* (1891) 37 N. Y. S. R. 511, 13 N. Y. Supp. 858 (scaffold erected where its supports were liable to be struck by defendant's wagons); *Green* v. *Banta* (1882) 10 Jones & S. 156, *Chicago & A. R. Co.* v. *Scanlan* (1897) 170 Ill. 106, 48 N. E. 826, Affirming (1896) 67 Ill. App. 621 (foreman charged with duty of erecting scaffold, to be furnished in a complete condition to workmen, held to be a vice principal); *Chicago & A. R. Co.* v. *Maroney* (1897) 170 Ill. 520, 48 N. E. 953, Affirming (1896) 67 Ill. App. 618); *McBath* v. *Bawle* (1901) 93 Ill. App. 212 (stone setter used scaffold constructed by the contractor for the brick work); *Haworth* v. *Sowers Mfg. Co.* (1892) 87 Iowa, 765, 51 N. W. 68, 62 N. W. 325 (employee superintending erection of scaffold); *Swift & Co.* v. *Hyatt* (1898) 75 Ill. App. 348 (one injured by a fall from a scaffold, caused by the tipping of an unfastened ladder, placed in position before the servant was employed and directed to use it held to be entitled to recover therefor, although the ladder was placed by a fellow servant); *Thalea* v. *Centenary Church* (1876) 62 Mo. 326 (seems to be based on the unassignability of the duty to provide a safe scaffold, but the real ground of the decision is somewhat obscure); *Haworth* v. *Sowers Mfg. Co.* (1892) 87 Iowa, 765, 51 N. W. 68, 62 N. W. 325 (superintendent of construction of a building held to be a vice principal as regards the erection of a scaffold); *Brown* v. *Gilchrist* (1890) 80 Mich. [illegible], 45 N. W. 82 (foreman intrusted with the entire control of the erection of a scaffold.—injury was received after the scaffold was finished); *Kansas City Car & Foundry Co.* v. *Sawyer* (1898) 7 Kan. App. 146, 53 Pac. 90 (scaffold already complete when plaintiff was set to work on it).

That this was the character of the implied contract in regard to such a structure is equally inferable where it

was erected by a set of servants different from that to which the plaintiff belonged). *Chicago & I. R. Co.* v. *Moroney* (1897) 170 Ill. 520, 48 N. E. 953, Affirming (1896) 67 Ill. App. 618 (scaffold built by carpenter for masons to use); *McNamara* v. *MacDonough* (1891) 102 Cal. 575, 36 Pac. 941 (carpenter employed by the day by an architect having the management of the construction of a building for the owner, to erect a scaffolding for the use of masons and hod carriers employed in the construction of the building); *Cudden* v. *American Steel Barge Co.* (1894) 88 Wis. 409, 60 N. W. 800 (riveter upon the side of a vessel, who uses a scaffold, is not a fellow servant with the scaffold builders whom the master employs to adjust the scaffold for him, although the former indicates where it is to be placed).

Where, upon the trial of a case, it is shown that a defendant had in his employ a crew of men, whose exclusive work and duty it was to put up such staging and scaffolding as, from time to time, was needed for the use of workmen engaged in defendant's general work and business, the presumption arises that a staging found in position at the place where a workman is required to perform his work, and upon which he is obliged to stand to perform it, was built by one or more of the staging crew, and, as the men composing such a crew are not fellow servants of men engaged in the defendant's general work, any of the latter may, if injured by defects in the staging, recover damages. *Sims* v. *American Steel Barge Co.* (1894) 56 Minn. 68, 57 N. W. 322.

Sometimes the circumstance emphasized is that the scaffold was one erected for permanent use, and is therefore distinguishable from one erected as a part of the work merely. *Edward Hines Lumber Co.* v. *Ligas* (1898) 172 Ill. 315, 50 N. E. 225, Affirming (1896) 68 Ill. App. 523 (scaffold erected for permanent use in removing lumber from the top of a pile). See also cases cited in § 617, subd. 1, *post*. In *Hatton* v. *Hilton Bridge Constr. Co.* (1901) 167 N. Y. 590, 60 N. E. 1112, Affirming (1899) 42 App. Div. 398, 59 N. Y. Supp. 272, it was held that the defendant was answerable for the omission of the foreman in charge of the erection of a scaffold to use a clamp which, according to the plans furnished by the engineer, were to secure the rods by which the scaffold was suspended. The Supreme Court took the position that it was the duty of the defendant not only to prepare clamps which, if used, would have prevented the injury, but also, by a proper inspection of the work, to see that they were properly placed. The act of the foreman in omitting to use the clamps was considered to be negligence committed by him in the capacity of a vice principal, that status being ascribed to him because he was discharging a non-delegable duty. It was pointed out that the authorities do not hold that it is the master's duty, even during the progress of the work, to guard the servant from risks which are obvious, are unknown to the servant, and require mechanical knowledge to detect.

If the scaffold was unsafe for the work which the injured servant was ordered to do, the master cannot excuse himself on the theory that it was sufficient for the work for which it was originally erected. *Richards* v. *Hoges* (1897) 17 App. Div. 422, 45 N. Y. Supp. 231.

Sometimes the fact that the servants deputed to erect the scaffold did not possess sufficient skill to qualify them for doing the work properly furnishes an independent ground for compelling defendant to answer for the injuries caused by defects in the structure. *Donnelly* v. *Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 871 (owner of quarry, who employs common laborers engaged in stowing stone posts in a schooner to suspend a platform to be used in loading the vessel with heavy stone, and to select the gear by which the platform is suspended, held liable for injury to another employee while engaged in loading the vessel, caused by the breaking of a defective rope selected by them).

Compare *Brickner* v. *New York C. R. Co.* (1870) 2 Lans. 506, as stated *supra* in this subdivision of the note.

(f) *Defects in other structures.*—The delinquent employees in the following cases were held to be vice principals: *McCampbell* v. *Cunard S. S. Co.* (1893) 69 Hun, 131, 23 N. Y. Supp. 477 (omission of dock superintendent to have the wedge-shaped "mouthpiece" properly fastened to the skid or gangplank upon which trucks are drawn from a ship to a dock by stevedores is not a risk assumed by the latter); *Welty* v. *Lake Superior Terminal & Transfer R. Co.* (1898) 100 Wis. 128, 75 N. W. 1023 (servant who had to climb a railway semaphore was injured by its negligent construction); *Van Dusen* v. *Letellier*

(1889) 78 Mich. 492, 44 N. W. 572 (defects in lumber-yard dock, discoverable by reasonable care).

(g) *Unguarded openings in floors, etc.*—*Johnson* v. *Field Thatcher Co.* (1898) 171 Mass. 181, 51 N. E. 18 (no guards furnished by employer for trap door; coservant, in leaving trap door open, held not to be, as matter of law, guilty of negligence causing the injury).

(h) *Defective pipes, etc.*—*Beeson* v. *Green Mountain Gold Min. Co.* (1880) 57 Cal. 20 (defective pipe in mine, put up by a miner under the direction of the superintendent, caused a fire); *Nixon* v. *Selby Smelting & Lead Co* (1894) 102 Cal. 458, 36 Pac. 803 (servant scalded by the severing of a rubber hose improvised by the foreman of the silver-room of a smelting company for the purpose of conveying acid into the waste tank).

The negligence of a superintendent in turning steam into new pipes before they are in proper condition to receive it is a breach of the non-delegable duty to provide a reasonably safe place of work. *Meeker* v. *C. R. Remington & Son Co.* (1901) 62 App. Div. 472, 70 N. Y. Supp. 1070. On the first appeal recovery was denied on the ground that the superintendent was acting as a mere servant in what was done to test the pipe.

(i) *Defective appliances for loading and unloading vehicles.*—*Kain* v. *Smith* (1880) 80 N. Y. 458 (1881) 25 Hun, 146 (jigger used for loading heavy wheels defective to the knowledge of yard foreman).

A complaint alleging that a foreman selected unsafe skids for the purpose of unloading a car has been held not demurrable. *Great Northern R. Co.* v. *McLaughlin* (1895) 17 C. C. A. 330, 44 U. S. App. 189, 70 Fed. 669. But in view of the cases cited in § 617, *post*, this ruling can, it would seem, only be sustained on the ground that the negligent employee was a vice principal by virtue of his official position. Compare, however, *Telander* v. *Sunlin* (1891) 44 Fed. 564 (note 2, *supra*).

(j) *Defective locomotives.*—*Cumberland & P. R. Co.* v. *State* (1875) 44 Md. 283 (1876) 45 Md. 229 (agent for purchase of locomotive is a vice principal); *Krueger* v. *Louisville, N. A. & C. R. Co.* (1887) 111 Ind. 51, 11 N. E. 937 (tender with deck 3 or 4 inches higher than that of engine broke away from engine in consequence of the excessive lost motion thereby produced, and allowed plaintiff's decedent to fall on the

(k) *Defective railway cars.*—(See also §§ 582–584, *infra*.) *Louisville, E. & St. L. Consol. R. Co.* v. *Miller* (1895) 140 Ind. 685, 40 N. E. 116; *Chicago & N. H. R. Co.* v. *Jackson* (1870) 55 Ill. 492, 8 Am. Rep. 661; *Missouri P. R. Co.* v. *James* (1888; Tex.) 10 S. W. 332; *Redington* v. *New York, O. & W. R. Co.* (1895) 84 Hun, 231, 32 N. Y. Supp. 535 (cars too short for the load to be placed on them); *Toledo, W. & W. R. Co.* v. *Fredericks* (1871) 71 Ill. 294 (car with too short a drawbar sent out); *Taylor* v. *Missouri P. R. Co.* (1891; Mo.) 16 S. W. 208 (defective coupling furnished); *Troxler* v. *Southern R. Co.* (1899) 124 N. C. 189, 44 L. R. A. 313, 32 S. E. 550 (defective couplings); *Griffin* v. *Boston & A. R. Co.* (1889) 148 Mass. 143, 1 L. R. A. 698, 19 N. E. 166 (suitable links for coupling cars not furnished in sufficient number); *McIntyre* v. *Boston & M. R. Co.* (1895) 163 Mass. 189, 39 N. E. 1012 (not enough for a railway company to furnish suitable lumber for side stakes on flat cars); *Pennsylvania R. Co.* v. *La Rue* (1897) 27 C. C. A. 363, 55 U. S. App. 20, 81 Fed. 148 (standards used for retaining timber on flat car deemed to be part of its equipment, in such a sense that the duty to select proper ones is non-delegable), Followed in *Port Blakely Mill Co.* v. *Garrett* (1899) 38 C. C. A. 342, 97 Fed. 537; *Bushby* v. *New York, L. E. & W. R. Co.* (1887) 107 N. Y. 374, 14 N. E. 407 (servant, charged with duty of furnishing side stakes for a lumber car, held to be a vice principal); *Dougherty* v. *Rome, W. & O. R. Co.* (1892) 45 N. Y. S. R. 154, 18 N. Y. Supp. 841 (counsel for defendant had agreed that whatever was done to lengthen the drop stakes was merely part of the operation of loading the car. See § 610, note 1, subd. (c), *post*); *Indiana, I. & I. R. Co.* v. *Snyder* (1895) 140 Ind. 647, 39 N. E. 912 (timber known to be unsuitable put in handle of hand car).

On the ground that a conductor was a vice principal as regards the duty of providing a safe and suitable car for laborers who were being conveyed from the place of their work, a railway company has been held liable for injuries received by a laborer, owing to the failure of the conductor to fasten a gate on the platform of a car, as the rules of the company required. *Pendergast* v. *Union R. Co.* (1896) 10 App. Div. 207, 41 N. Y.

Supp. 927. But it is difficult to see how this decision can be sustained without breaking in upon the rule that the master is not liable where the proximate cause of the injury was the negligence of a fellow servant in respect to a detail of the work. See next chapter.

(l) *Defective ladders.*—*Ryan* v. *Miller* (1883) 12 Daly, 77.

(m) *Defective ropes, rigging, etc.*—*Indiana Car Co.* v. *Parker* (1885) 100 Ind. 181 (defective rope—condition known to foreman); *Thomas* v. *Ann Arbor R. Co.* (1897) 114 Mich. 59, 72 N. W. 40 (defective stock of rope selected); *The Julia Fowler* (1892) 49 Fed. 277 (defective rope used by chief officer of ship to suspend a triangle); *Lund* v. *Horsey Lumber Co.* (1890) 41 Fed. 202 (foreman furnished defective rope and tackle); *The Norway* v. *Jensen* (1869) 52 Ill. 373 (defective rigging furnished for a ship); *McElligott* v. *Randolph* (1891) 61 Conn. 157, 22 Atl. 1094 (defective rope); *Prescott* v. *Ball Engine Co.* (1896) 176 Pa. 459, 35 Atl. 224 (master held liable for negligence of rigger charged with the duty of keeping a supply of ropes from which a selection may be made).

See also subd. (f), *supra*, and the following subd.

(n) *Defective hoisting apparatus.*—*Higgins* v. *Williams* (1896) 114 Cal. 176, 45 Pac. 104 (foreman left out a peg from a pin holding apparatus in place); *Leonard* v. *Kinnare* (1898) 174 Ill. 532, 51 N. E. 688, Affirming (1897) 75 Ill. App. 145 (block and tackle improperly constructed by defendant's foreman); *Blomquist* v. *Chicago, M. & St. P. R. Co.* (1895) 60 Minn. 426, 62 N. W. 818 (derrick negligently constructed); *Houston* v. *Brush* (1894) 66 Vt. 331, 29 Atl. 380 (pin securing wheel of tackle block was not properly fastened); *Terrell Compress Co.* v. *Arrington* (1898; Tex. Civ. App.) 18 S. W. 59 (greasy plank furnished for hoisting purposes).

(o) *Other defects in machinery.*—*Donahue* v. *Brown* (1891) 154 Mass. 21, 27 N. E. 675 (machinery not prepared or arranged properly, so as to guard against the danger of its starting of itself); *Sayborn* v. *Madera Flume & Trading Co.* (1886) 70 Cal. 261, 11 Pac. 710 (appliance called a "sword," used for keeping open the channel made by a circular saw as the log moves onward, was known by the mechanic who fashioned it to be unsafe); *Hall* v. *Emerson-Stevens Mfg. Co.* (1900) 94 Me. 415, 47 Atl. 924 (grindstone not properly adjusted); *Stimper* v. *Fuchs & L. Mfg. Co.* (1898) 26 App. Div. 333, 49 N. Y. Supp. 785, Affirmed in (1900) 161 N. Y. 636, 57 N. E. 1125 (pump fell apart because not properly secured).

(p) *Additional cases recognizing the general principle are the following.*—*Bosworth* v. *Rogers* (1897) 27 C. C. A. 385, 53 U. S. App. 620, 82 Fed. 975; *Hackey* v. *Baltimore & P. R. Co.* (1890) 8 Mackey, 282; *McCauley* v. *Southern R. Co.* (1897) 10 App. D. C. 560; *Mullin* v. *California Horseshoe Co.* (1894) 105 Cal. 77, 38 Pac. 335; *Wells* v. *Co* (1886) 9 Colo. 159, 11 Pac. 50; *Herbert* v. *Northern P. R. Co.* (1882) 3 Dak. 38, 13 N. W. 349; *Chicago, R. & Q. R. Co.* v. *Avery* (1884) 109 Ill. 314; *Norton* v. *Volzke* (1895) 158 Ill. 402, 41 N. E. 1085; *Hess* v. *Rosenthal* (1896) 160 Ill. 621, 43 N. E. 743; *Kewanee Boiler Co.* v. *Erickson* (1898) 78 Ill. App. 35; *Krueger* v. *Louisville, N. A. & C. R. Co* (1887) 111 Ind. 51, 11 N. E. 957; *Pennsylvania Co.* v. *Whitcomb* (1887) 111 Ind. 212, 12 N. E. 380; *Louisville, N. A. & C. R. Co.* v. *Graham* (1890) 121 Ind. 89, 24 N. E. 668; *Nall* v. *Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 260, 28 N. E. 183, 611; *Louisville, E. & St. L. Consol. R. Co.* v. *Keller* (1895) 140 Ind. 685, 40 N. E. 116; *Kelley* v. *Ryan* (1892) 48 Kan. 120, 29 Pac. 144; *Finl* v. *Des Moines Ice Co.* (1892) 84 Iowa, 321, 51 N. W. 155; *Stucke* v. *Orleans R. Co.* (1897) 50 La. Ann. 188, 23 So. 342; *Rice* v. *King Philip Mills* (1887) 144 Mass. 229, 11 N. E. 101; *Seaver* v. *Boston & M. R. Co.* (1860) 14 Gray, 466; *King* v. *Boston & W. R. Corp.* (1851) 9 Cush. 112; *Moynihan* v. *Hills Co.* (1888) 146 Mass. 586, 16 N. E. 574; *Littlefield* v. *Edward P. Allis Co.* (1900) 177 Mass. 151, 58 N. E. 692; *Harrison* v. *Detroit, L. & N. R. Co.* (1890) 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034; *Rose* v. *Blodgett & D. Lumber Co.* (1893) 94 Mich. 607, 54 N. W. 492; *Brown* v. *Winona & St. P. R. Co.* (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484; *Kelly* v. *Erie Teleg. & Teleph. Co.* (1885) 34 Minn. 321, 25 N. W. 706; *Harper* v. *Indianapolis & St. L. R. Co.* (1871) 47 Mo. 567, 4 Am. Rep. 353; *Jones* v. *St. Louis, N. & P. Packet Co.* (1890) 43 Mo. App. 398; *Maher* v. *Thropp* (1896) 59 N. J. L. 186, 35 Atl. 1057; *Cole* v. *Warren Mfg. Co.* (1899) 63 N. J. L. 626, 44 Atl. 647; *Ranney* v. *Steinway* (1886) 101 N. Y. 547, 5 N. E. 449; *Sciolina* v. *Erie Preserving Co.* (1896) 7 App. Div. 417, 39 N. Y. Supp.

such employee was authorized to supply the materials which caused the injury.[5]

916; *Schulz* v. *Rohe* (1893) 4 Misc. 384, 24 N. Y. Supp. 118; *Ford* v. *Lyons* (1886) 41 Hun, 512; *Bernardi* v. *New York C. & H. R. R. Co.* (1894) 78 Hun, 454, 29 N. Y. Supp. 230; *O'Donnell* v. *East River Gas Co.* (1895) 91 Hun, 184, 36 N. Y. Supp. 288; *Gunter* v. *Graniteville Mfg. Co.* (1882) 18 S. C. 274, 44 Am. Rep. 573; *Ogle* v. *Jones* (1897) 16 Wash. 319, 47 Pac. 747.

Compare also the Maryland cases cited in § 530, *ante*.

[5] *Hoppin* v. *Worcester* (1885) 140 Mass. 223, 2 N. E. 779. There the committee on highways of a city directed the commissioner to erect a building to be used to contain a machine for crushing stone for the highways of a city. The commissioners employed A, a master builder, to furnish the labor and tools required in the erection of the building. The city paid A and the men employed by him for their services, and furnished all the materials used in the erection of the building. A directed B, one of the men employed by him, to erect a staging for the purpose of shingling the roof of the building, and to use therefor certain brackets which belonged to A. B used the brackets for the support of the staging. One of the brackets, being defective, broke, and the staging upon which C was working fell, and he was injured. Held, that C could not maintain an action against the city for his injury. The court said: "It is argued that Gates, in supplying the defective brackets, acted as the agent of the defendant in furnishing materials, and not as its servant to construct the staging, and was not, in that respect, a fellow servant with the plaintiff. But Gates had no authority from the defendant to furnish materials for it, and it was not as its agent for that purpose that he used his own brackets to support the staging. If not strictly tools required to be furnished by him, they are implements prepared and kept by him for the purpose of supporting stagings, which he might use under his contract with the defendant. He had no other authority from the defendant for furnishing them. The defendant employed him to furnish the labor and tools in the erection of the building from materials to be furnished by the defendant, and it provided for furnishing all materials needed. The negligence which the evidence tends to prove is that of servants in constructing an unsafe staging, and not that of the master in not furnishing proper materials."

In *Kimmer* v. *Weber* (1897) 151 N. Y. 417, 45 N. E. 860, one of the grounds on which recovery was denied was that it was not shown that the plumbers' scaffold, which gave way, was only part of the material furnished by the defendants or the foreman, or that they contemplated the use of it for the purpose to which it was put.

In *Keenan* v. *New York, L. E. & W. R. Co.* (1895) 145 N. Y. 190, 39 N. E. 711, where a foreman of car repairers was held not to be a vice principal in directing a subordinate to go on a track not ordinarily used for repairing purposes, and not protected by any rules, for the purpose of getting a car spring which he needed in his work, the court said: "It is admitted by the learned counsel for the appellant that there is no direct evidence in the case showing that it was any part of Tracy's duty to furnish materials required by the workmen under him, but he insists that the defendant having failed to designate any one person whose duty it should be to borrow springs from other cars for temporary use, and still continuing the business of car repairing, it not only acquiesced in the gang foreman procuring such materials, but impliedly authorized them to procure them wherever they could. The appellant's counsel also admits that Tracy was the fellow servant of the intestate in everything except in the performance of a duty which the law imposed upon the defendant, *viz.*, procuring materials for use. We are unable to adopt these views. It would lead to the establishment of an exceedingly unsafe rule to hold that a gang boss over forty or fifty men could, without direct authority from the company, change the safe and proper rules in pursuance of which the work in the repair yards was conducted, and direct workmen to prosecute their labors under cars standing on tracks other than the regular duly-protected repair tracks.

568. Duty to see that the inorganic instrumentalities are maintained in a suitable condition for the work to be done held to be non-delegable.—Most of the courts which apply the doctrine illustrated by the decisions cited under the last section have also adopted the doctrine that from the moment an instrumentality is, or by the exercise of reasonable care might have been, known to be defective, an absolute duty on the master's part arises either to remedy the defect or to cease using the instrumentality.[1] This principle may be expressed in the form

Tracy was in no legal sense the representative of the defendant when he suggested to the intestate that he should procure a spring from a car standing on track No. 8; he was a fellow servant making a very unwise and dangerous suggestion."

In *Callaway* v. *Allen* (1894) 12 C. C. A. 114, 24 U. S. App. 388, 64 Fed. 297, a master was declared not to be liable for an injury to an employee through the failure of an additional device provided by the employees in violation of the orders of the superintendent, for the purpose of making the work easier to themselves, although the ground of his prohibition was that it was a hindrance to the work, and not that it was unsafe. "As we understand the contention of the appellee," said the court, "it is this: That it is the absolute duty of the master to furnish safe and suitable machinery and appliances; that this duty cannot be delegated; and that, therefore, when the foreman, Thompson and Anderson, constructed this dangerous device, and used it, the receiver became liable for its use, though it was wholly unknown to him, and neither himself nor his general superintendent, nor superintendent of bridges and buildings, had provided it, or authorized its use. This contention, we think, is not maintainable. A railroad corporation must act through its agents, and where a railroad is in the hands of a receiver, the receiver represents the company, and acts through its agents in the same way. Of course, the receiver must use all reasonable care to provide suitable machinery. The evidence shows that he did so provide in this case. The employees, however, were not satisfied with it; and they themselves provided something in addition that would make the work of lifting timbers easier for them, though the evidence showed that it was rather a hindrance than a help to the progress of the work. It is true the superintendent of bridges knew that this device had been used, and its use had been forbidden by him; and he had very recently told foreman Anderson to throw it away, and that if he used it he should hold him responsible. . . . The objection to its use seemed to be founded wholly upon its want of effectiveness in aiding the work. No suggestion was made by Johnson or the men that it was not safe. The most that can be said of the superintendent is that he did not succeed in stopping the use of the device. Probably his objection that it retarded the work may have been the reason why the men afterwards tried to carry three stringers at a time instead of one and two, as they had done before. We do not think, under the circumstances, that the receiver should be held liable for the use of this device. He neither furnished it, nor authorized its use. It could not be expected that he or the superintendent should be present at all times and at all places to see that such a device was not used, or that they should take means to destroy it, or prevent its use by force. The orders of the superintendent were disobeyed and his wishes disregarded by the employees, and the responsibility for its use should rest with them."

[1] A master is "equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep its machinery in safe condition." *Ford* v. *Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598. Quoted with approval in *Hough* v. *Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612.

"It is well settled that it is the duty of the master to provide suitable and safe machinery and appliances for the use of his operatives; and we think it is also settled that his duty does not stop there, but that it is likewise his duty to keep such machinery in proper repair and safe working order; and if these duties, or either of them, are negligently performed, and one of the servants

that the duty of furnishing suitable and safe instrumentalities for the use of the servants includes the duty of maintaining them in safe condition,[2] or that the duty to provide safe instrumentalities is a continuous one.[3]

It follows, therefore, that the defense of common employment is not available where the defects which caused the injury would not have existed, if the servant whose appropriate function it was to keep the defective instrumentality up to the legal standard of safety and efficiency had adequately discharged his duty.[4] The master must, of course, also answer for defects resulting from the negligence of a servant in altering a machine. Compare § 570, *infra*.

It is proper to draw attention here to a doctrine to which we shall recur in a later subtitle (see § 812),—that, even if the dangerous conditions which caused the injury were originally due to negligence which is deemed characteristic of mere servants, as distinguished from a vice principal, the responsibility for those conditions is shifted to the master as soon as he has ascertained, or might by the exercise of reasonable care have ascertained, that they exist. The general principle which thus becomes controlling has been fully discussed in chapter X., *ante*.

The master is chargeable with knowledge which any employee intrusted with the duty of keeping instrumentalities in repair may acquire regarding their condition.[5]

thereby sustains an injury, the master is liable, even though he may have intrusted the performance of such duties to subordinates, by whatever name they may be called, and even though the master may have exercised due care in the selection of such subordinates." *Gunter* v. *Graniteville Mfg. Co.* (1882) 18 S. C. 274, 44 Am. Rep. 573.

The non-delegable quality of the duty to discontinue the use of instrumentalities known to be defective is seldom adverted to explicitly. See *Indiana Car Co.* v. *Parker* (1885) 100 Ind. 181; *Doing* v. *New York, O. & W. R. Co.* (1897) 151 N. Y. 579, 45 N. E. 1028 (duty to abandon a dangerous system). But the predication of such a quality is so obviously a necessary corollary of the existence of a duty as to maintenance, that specific authority for it is scarcely required.

[2] "Repairing" is, in a sense, "furnishing." *Tierney* v. *Minneapolis & St. L. R. Co.* (1885) 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. 229.

[3] *Indiana Car Co.* v. *Parker* (1885) 100 Ind. 181; *Nall* v. *Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 268, 28 N. E. 183, 611.

[4] An instruction that "the defendant would be responsible for the consequences of any want of diligence or due care or caution on the part of those whose duty it was to make repairs" is correct. *Cowan* v. *Umbagog Pulp Co.* (1897) 91 Me. 26, 39 Atl. 340.

[5] *Ohio & M. R. Co.* v. *Stein* (1894) 140 Ind. 61, 39 N. E. 246; *Strauss* v. *Haberman Mfg. Co.* (1897) 23 App. Div. 1, 48 N. Y. Supp. 425. See, generally, chapter X., subtitle D, *ante*. Even in cases where it may be conceded that there was no duty of regular inspection of the tools in use imposed upon the supervising officers of the defendant, and he trusts to the daily inspection of the man who uses the tools for information as to their condition of repair, yet, when such information is given to them, those officers, and not the plaintiff, are the proper agents to fulfil the master's duty in furnishing reasonably safe tools. *Lehigh Valley Coal*

The illustrative decisions cited below are arranged under headings which correspond as closely as may be to those employed for the purposes of classification in the preceding section, and indicate the nature of the specific dereliction of duty involved.[6] For other cases see §§ 582–584, *infra*.

Co. v. *Warrek* (1898) 28 C. C. A. 540, 55 U. S. App. 437, 84 Fed. 866.

[6] (a) *Defective railway tracks.*—In some cases under the head in which liability has been imposed, the delinquent has occupied a position higher than that of servants actually engaged in the manual work of repairing track. *Atchison, T. & S. F. R. Co.* v. *Moore* (1884) 31 Kan. 197, 1 Pac. 644 (road master was delinquent here); *Anderson* v. *Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585 (company held liable to a brakeman on the ground that the assistant road master had sent the section foreman to repair the track, but did not see that the defect was remedied); *Palmer* v. *Utah & N. R. Co.* (1887) 2 Idaho, 290, 13 Pac. 425 (station agent failed to report condition of track); *Nashville & C. R. Co.* v. *Elliott* (1860) 1 Coldw. 611, 78 Am. Dec. 506 (engineer did not report defects in track); *Colorado C. R. Co.* v. *Ogden* (1877) 3 Colo. 499 (assistant superintendent had notice that track was defective); *Bessex* v. *Chicago & N. W. R. Co.* (1878) 45 Wis. 477 (yard master is a vice principal as to the act of leaving a dangerous obstruction, like a pile of lumber, near the track).

But the application of the general principle is by no means restricted to such employees. That the master must answer for the negligence of the trackmen themselves, and more especially of the foremen of gangs engaged on repairs, has been frequently affirmed. *Louisville & N. R. Co.* v. *Ward* (1894) 10 C. C. A. 166, 18 U. S. App. 683, 61 Fed. 927 (dangerous hole left by ballasting crew); *Southerland* v. *Northern P. R. Co.* (1890) 43 Fed. 646 (pile of ashes left on the track); *Kansas City, Ft. S. & G. R. Co.* v. *Kier* (1889) 41 Kan. 661, 671, 21 Pac. 770 (brakeman stumbled over pile of cinders deposited near the track); *St. Louis & S. F. R. Co.* v. *Weaver* (1886) 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; *Kentucky C. R. Co.* v. *Ryle* (1892) 13 Ky. L. Rep. 862, 18 S. W. 938 (tie left on track threw brakeman off of a switch engine); *Snow* v. *Housatonic R. Co.* (1864) 8 Allen, 441, 85 Am. Dec. 720; *Bolhoff* v. *Michigan C. R. Co.* (1895) 106 Mich. 606, 65 N. W. 592 (failure to level depression caused derailment); *Drymala* v. *Thompson* (1879) 26 Minn. 40, 1 N. W. 255; (rail taken up without setting proper signals to warn approaching trains); *Hall* v. *Missouri P. R. Co.* (1881) 74 Mo. 298 (obstruction); *Vantrain* v. *St. Louis, I. M. & S. R. Co.* (1880) 8 Mo. App. 538 (dangerous hole left by section hands); *Fifield* v. *Northern R. Co.* (1860) 42 N. H. 225 (track allowed to become blocked with snow and ice); *Wellman* v. *Oregon, Short Line & U. N. R. Co.* (1892) 21 Or. 530, 28 Pac. 625 (failure to report defects); *Carlson* v. *Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 450, 28 Pac. 497 (track repairer killed by derailment of car, while he was being conveyed to his work); *Cairo* v. *Charlotte, C. & A. R. Co.* (1885) 23 S. C. 526, 55 Am. Rep. 28; *Gulf, C. & S. F. R. Co.* v. *Johnson* (1892) 1 Tex. Civ. App. 103, 20 S. W. 1123; *Moon* v. *Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401; *Baltimore & O. R. Co.* v. *McKenzie* (1885) 81 Va. 71 (night watchman, as well as section foreman, here held to be vice principal); *Bateman* v. *Peninsular R. Co.* (1898) 20 Wash. 133, 54 Pac. 996; *Hulehan* v. *Green Bay, W. & St. P. R. Co.* (1887) 68 Wis. 520, 32 N. W. 529 (obstruction).

In the following cases, also, the non-delegable quality of the duty of repairing tracks is asserted in perfectly general terms. *Illinois C. R. Co.* v. *Patterson* (1873) 69 Ill. 650; *Schaub* v. *Hannibal & St. J. R. Co.* (1891) 106 Mo. 87, 16 S. W. 924; *Wright* v. *Southern R. Co.* (1898) 123 N. C. 280, 31 S. E. 652 (1901) 128 N. C. 77, 38 S. E. 283; *Missouri P. R. Co.* v. *James* (1888: Tex.) 10 S. W. 332; *Texas & P. R. Co.* v. *Kirk* (1884) 62 Tex. 227; *Houston & T. C. R. Co.* v. *Dunham* (1878) 49 Tex. 181; *Galveston, H. & S. A. R. Co.* v. *Pitts* (1897: Tex. Civ. App.) 42 S. W. 255; *Torian* v. *Richmond & A. R. Co.* (1887) 84 Va. 192, 4 S. E. 339; *McClarney* v. *Chicago, M. & St. P. R. Co.* (1891) 80 Wis. 277, 49 N. W. 963 (snow was allowed to accumulate, and caused derailment).

The breach of the duty to keep an instrumentality in safe condition may obviously be committed not only by failing to repair it, but by removing from it some essential part, the want of which renders it

An action by a trainman for injuries received from a guy which the railroad company permitted a third person to stretch across the track does not present the question of common employment, since it involves the duty of the employer to provide safe tracks. *New York, N. H. & H. R. Co.* v. *O'Leary* (1899) 35 C. C. A. 562, 93 Fed. 737.

Where a defect in the planking over a railroad crossing, by reason of which a brakeman was injured while coupling cars, had existed for so long a time that the company may be presumed to have had notice of it, the fact that the section foreman was furnished with materials, and instructed generally to make repairs when needed, does not relieve the company from the charge of negligence. *Fluhrer* v. *Lake Shore & M. S. R. Co.* (1899) 121 Mich. 212, 80 N. W. 23.

In several of the above cases the abnormal danger, it will be observed, arose from the negligence of the trackmen in leaving temporary obstructions, etc., on the track. But according to one ruling the trackmen themselves are not vice principals in respect to the duty of remedying defects produced by the use of the track,—such as piles of ashes,—and the company should not be held liable unless the conditions have been brought to the knowledge of some supervising official, like the road master or one of his assistants, and he fails to see that the proper remedy is applied. *Anderson* v. *Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585 (Grant, J., dissented). It is submitted that this doctrine, which seems to represent the result of an attempt to compromise between the theory that the duty of repairing is non-delegable, and the theory that trainmen and trackmen are not in distinct departments, in such a sense that the former do not assume the risk of the latters' negligence, is wholly illogical.

Under the Massachusetts doctrine, explained in § 560, *supra*, it is held that, if a section master was intrusted by a railroad company with the performance of the duty, or a part of the duty of supervision of the tracks, which a reasonable regard for the safety of its employees required the corporation to perform, the company is liable for his negligence. *Babcock* v. *Old Colony R. Co.* (1890) 150 Mass. 467, 23 N. E. 325.

(b) *Dangerous conditions alongside or above railway tracks.*—A railway company is liable to a trainman for injuries due to an obstruction near a track, which fell after being allowed to remain an unreasonable time in such a position that, if it fell, it would necessarily endanger the safety of such a servant. That the derrick was originally set up by his fellow servants will not affect this result. *Holden* v. *Fitchburg R. Co.* (1880) 129 Mass. 268, 37 Am. Rep. 343.

In *Texas & N. O. R. Co.* v. *Echols* (1897) 17 Tex. Civ. App. 677, 41 S. W. 488, it was shown that a remnant stack of ties was liable to topple over and fall upon men at work, which rendered the premises unsafe. The court said that if, by the exercise of due care, "its servants and agents, charged with the duty of keeping the premises in a safe condition, knew or would have known of the dangerous condition in which the remnant stack of ties was left, in time to have removed the danger, and failed to do so, the company would be liable." The insecurity was deemed to be a merely temporary condition.

The plaintiff was also held entitled to recover in *Southern P. R. Co.* v. *Harkey* (1892; Tex.) 19 S. W. 392 (brakeman fell over a piece of timber lying near the track); *Lewis* v. *St. Louis & I. M. R. Co.* (1875) 59 Mo. 495, 21 Am. Rep. 385 (excavation left near track); *Gates* v. *Chicago, M. & St. P. R. Co.* (1892) 2 S. D. 422, 50 N. W. 907 (no one deputed to see that a derrick near a track was properly secured, when not in use; iron hook suspended from the arm struck plaintiff while standing on a passing car); *Donahue* v. *Boston & M. R. Co.* (1901) 178 Mass. 251, 59 N. E. 663 (pile of stones left near track); *Missouri P. R. Co.* v. *Bond* (1893) 2 Tex. Civ. App. 104, 20 S. W. 930 (pile of cinders left near the track).

The failure to see that the guy of a derrick, which extends across a railway track, is high enough to obviate the risk of injury to trainmen is negligence which is imputable to the railway company. *New York, N. H. & H. R. Co.* v. *O'Leary* (1899) 35 C. C. A. 562, 93 Fed. 737.

(c) *Defects in other kinds of tracks.*—Recovery was allowed in *Gunter* v. *Graniteville Mfg. Co.* (1882) 18 S. C.

262, 44 Am. Rep. 573; *Lasure* v. *Graniteville Mfg. Co.* (1882) 18 S. C. 275 (tramway on which plaintiff was wheeling bales of cotton collapsed).

(d) *Defective footpaths.*—A railroad company owes its employees the duty, not only to employ suitable persons to keep in repair walks upon which their duties call them, but also to use reasonable diligence to see that they perform their duty. *Sweat* v. *Boston & A. R. Co.* (1892) 156 Mass. 284, 31 N. E. 296.

(e) *Inadequacy of safeguards against dangers from explosive substances.*—(See also subd. (g), and § 579, *infra.*) In *McDonough* v. *Great Northern R. Co.* (1896) 15 Wash. 244, 46 Pac. 334, where the plaintiff was injured by striking his drill against an unexploded charge of dynamite. The court seems to base its decision both on the general ground that anything which the foreman did in the discharge of his functions, as a departmental vice principal, was constructively the act of the railway company (see §§ 532 *et seq.*, *ante*), and also on the special ground that he was intrusted with the particular nonassignable duty of seeing that the place of work was safe.

See also *Stewart* v. *New York, O. & W. R. Co.* (1889) 28 N. Y. S. R. 215, 8 N. Y. Supp. 19 (explosion of dynamite while being thawed).

(f) *Inadequacy of protection for servants engaged in excavation work.*—(See also § 579, *infra.*) It is only at his own risk that a person engaged in excavating a ditch can depute to another the task of keeping it in a safe condition for the servants whom he puts to work in it. *Van Steenburgh* v. *Thornton* (1895) 58 N. J. L. 160, 33 Atl. 380 (sewer trench fell in for want of adequate means to shore up the sides properly).

On the ground that the work was particularly dangerous, and the foreman was the only person on the ground who could discharge the duty of supervision, it has been held that the foreman of a gang of twenty-five or thirty men, who has charge of drilling, blasting, and removal of material from a bank of hardpan, and indicates the places where the men under him shall use their shovels, and who hires and discharges men, and alone gives orders,—is not, as matter of law, a fellow servant with those under him, and, as such, discharged from any duty of supervising in order to protect them against unnecessary dangers from the fall of loose earth. *Hill* v. *Winston* (1898) 73 Minn. 80, 75 N. W. 1030.

To the same effect, see *Pantzar* v. *Tilly Foster Iron Min. Co.* (1885) 99 N. Y. 368, 2 N. E. 24 (earthslide, danger of which was apparent to official in control); *Thompson* v. *Chicago, M. & St. P. R. Co.* (1883) 18 Fed. 239 (bank in process of excavation under road master's directions fell in); *Elledge* v. *National City & O. R. Co.* (1893) 100 Cal. 282, 34 Pac. 720 (road master held to be vice principal as regards keeping place of work safe for men blasting rock from a cliff).

(g) *Inadequacy of protection for servants working in mines.*—One employed to timber a drift in a mine, so as to provide and keep a safe place for other employees working therein, is a vice principal as to them. *Grant* v. *Laney* (1895) 21 Colo. 329, 40 Pac. 771; *Russell Creek Coal Co.* v. *Wells* (1898) 96 Va. 416, 31 S. E. 614; *Consolidated Coal Co.* v. *Schreiber* (1896) 65 Ill. App. 304.

A gas tester is a vice principal. *Costa* v. *Pacific Coast Co.* (1901) 26 Wash. 138, 66 Pac. 398.

A miner intrusted by the mine boss with the duty of making and maintaining safe entries is a vice principal. *Wellston Coal Co.* v. *Smith* (1901) 65 Ohio St. 70, 55 L. R. A. 99, 61 N. E. 143.

The negligence of the boss of an oil going shift to inform the members of an on-coming one of the existence of a "missed" hole is the negligence of the master, and not that of a fellow servant. *Shannon* v. *Consolidated Tiger & Poorman Min. Co.* (1901) 24 Wash. 119, 64 Pac. 169.

(h) *Defects in bridges.*—The defendant was held liable in *Chicago G. W. R. Co.* v. *Healy* (1898) 30 C. C. A. 11, 57 U. S. App. 513, 86 Fed. 245; *Chicago & N. W. R. Co.* v. *Swett* (1867) 45 Ill. 197, 92 Am. Dec. 206; *Toledo, P. & W. R. Co.* v. *Conway* (1873) 68 Ill. 560; *Bowen* v. *Chicago, B. & K. C. R. Co.* (1888) 95 Mo. 268, 8 S. W. 230; *Galveston, H. & S. A. R. Co.* v. *Daniels* (1892) 1 Tex. Civ. App. 695, 20 S. W. 955; *San Antonio & A. P. R. Co.* v. *Adams* (1894) 6 Tex. Civ. App. 102, 24 S. W. 839; *Davis* v. *Central Vermont R. Co.* (1882) 55 Vt. 84; 45 Am. R. 590 (road master was negligent). Contra, ruling *Hard* v. *Vermont C. R. Co.* (1860) 32 Vt. 473; *Bateman* v. *Peninsular R. Co.* (1898) 20 Wash. 133, 54 Pac. 996.

(i) — *in scaffolds, platforms, etc.*—(Contrast §§ 613–616, *post.*) *Cole* v. *Warren Mfg. Co.* (1899) 63 N. J. L. 626, 44 Atl. 647 (master liable for failure to maintain in safe condition a scaf-

fold furnished for the use of a millwright repairing a shaft); *Chesson* v. *John L. Roper Lumber Co.* (1896) 118 N. C. 59, 23 S. E. 925 (platform not repaired by carpenters employed for that purpose).

(j) — *in other structures.*—*Ferris* v. *Hornsheim Bros.* (1899) 51 La. Ann. 178, 24 So. 771 (judgment for defendant by judge sitting as jury—reversed on evidence showing that a stairway had not been kept in repair); *Van Dusen* v. *Letellier* (1889) 78 Mich. 492, 44 N. W. 372 (employee repairing docks in a millyard, held a vice principal).

A complaint for injuries to a servant, alleging that the latter, in the performance of his duty for defendant, was necessarily required to stand and work at and near an embankment of earth on defendant's land; that such embankment was supported by timbers, braces, and planks; that said supports gave way and broke by reason of their rottenness and insufficiency, thereby causing the injuries; that said supports had been allowed to remain for an unusually long time, and a much longer time than they should have been permitted to remain, and that they were not properly inspected by defendant, and had become worn and rotten,—sufficiently alleges that defendant was guilty of negligence in failing to furnish a safe place. *Nicholas* v. *Burlington, C. R. & N. R. Co.* (1899) 78 Minn. 43, 80 N. W. 776.

(k) *Defective method of loading cars.*—(Contrast cases cited in § 610, note subd. (e), and § 619, note 4, subd. (f), *post*). It has been held that a railway company is liable for an injury to a brakeman caused by his being thrown off a car and under the wheels by the negligent loading of smokestacks on the car by a station agent. *Atchison, T. & S. F. R. Co.* v. *Seeley* (1893) 54 Kan. 21, 37 Pac. 104. The court said: "An authority is cited, to the effect that, where the company has employed a competent inspector to see that the cars are properly loaded and in good condition, it cannot be held liable for the negligence of the inspector in failing to observe that the car was improperly loaded. *Dewey* v. *Detroit, G. H. & M. R. Co.* (1893) 97 Mich. 343, 22 L. R. A. 392, 16 L. R. A. 342, 52 N. W. 942, 56 N. W. 756. This authority is not satisfactory to us, nor in line with the decisions that have been cited. We are unable to see any reason for a distinction between the preparation and inspection of the car itself, as a fit instrumentality to be placed in a train, and the preparation and inspection of a loaded car to be placed in the train for transportation. Each is an instrumentality to be used in connection with the services necessary to be performed by the trainmen in its transportation, and no distinction between them is seen, so far as the obligation of the company or the safety of the employees engaged in handling it are concerned. The inspection in either case is made with reference to the same end, and the person to whom this duty is delegated stands in the place of the company, and the latter is responsible for his acts."

To the same effect, see *Irvine* v. *Flint & P. M. R. Co.* (1891) 89 Mich. 416, 50 N. W. 1008 (held to be the duty of a railroad company to see that its cars are so loaded that a brakeman will have reasonably safe access to the brakes; *Galveston, H. & S. A. R. Co.* v. *Farmer* (1889) 73 Tex. 85, 11 S. W. 156 (car loaded so that lumber projected over the end); *Redington* v. *New York, O. & W. R. Co.* (1895) 84 Hun, 231, 32 N. Y. Supp. 535 (loading a car held to be an act of the employer, where it makes coupling more dangerous than usual, and there are no rules providing for such a case).

(l) *Pitfalls.*—*Sumney* v. *Holt* (1883) 15 Fed. 886 (jury charged that a porter, whose duty it is to light the hatchways of a ship, is a vice principal); *Simmons* v. *Peters* (1897) 20 App. Div. 251, 46 N. Y. Supp. 800 (servant charged with the duty failed to light a gas jet which was intended solely to give employee a safe means of access to an elevator); *Gulf, C. & S. F. R. Co.* v. *Brentford* (1891) 79 Tex. 619, 15 S. W. 561 (no lights provided for place of work); *Sadowski* v. *Michigan Car Co.* (1890) 84 Mich. 100, 47 N. W. 598 (person employed to lay a water pipe in a ditch through a yard left the yard in a dangerous condition).

(m) *Want of adequate protection against injuries from falling bodies.*—*Northwestern Fuel Co.* v. *Danielson* (1893) 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 915 (fellow servants of a workman held to be the representatives of the employer in removing timbers standing over the head of such workman); *Wilson* v. *Willimantic Linen Co.* (1883) 50 Conn. 433, 47 Am. Rep. 653 (employee engaged in setting up machinery injured by a countershaft which fell owing to the negligence of the superintendent or overseer of re-

pairs in a factory); *Stephens* v. *Hudson Valley Knitting Co.* (1893) 69 Hun, 375, 23 N. Y. Supp. 656 (injury was caused by the fall of a pile of rolls of cloth); *Cavanagh* v. *O'Neill* (1898) 27 App. Div. 48, 50 N. Y. Supp. 207, Affirmed in (1900) 161 N. Y. 657, 57 N. E. 1106 (employee in a store injured by the fall of a dress form model); *Stimpson* v. *Fuchs & L. Mfg. Co.* (1898) 26 App. Div. 333, 49 N. Y. Supp. 785 (part of machine, not being properly secured, fell on plaintiff); *Blondin* v. *Oolitic Quarry Co.* (1894) 11 Ind. App. 395, 37 N. E. 812 (stone negligently set on edge by one servant fell on another working in the same yard); *Urey* v. *Golden Tunnel Min. Co.* (1901) 24 Wash. 261, 64 Pac. 174 (no precautions taken to prevent rocks taken out of a mining tunnel from rolling down on men working below); *Sackewitz* v. *American Biscuit Mfg. Co.* (1899) 78 Mo. App. 144.

It seems scarcely possible to reconcile some of the above cited cases with some of those cited in §§ 610, note 1, subd. (2), and 612a, note 1, subd. (c), *post*.

In *Freeman* v. *Glens Falls Paper Mill Co.* (1891) 61 Hun, 125, 15 N. Y. Supp. 657, it was held that a servant was entitled to recover for an injury caused by a barrel which fell on him. The theory on which the court proceeded was that the barrel had been left in a position which affected the safety of the place of work, and that this created a risk of which the plaintiff was shown by the evidence to be ignorant. This doctrine was not noticed on the second appeal ([1893] 70 Hun, 530, 24 N. Y. Supp. 403), which was taken from a judgment entered on a verdict for the defendant, which found the plaintiff to be negligent, and seems impossible to reconcile with the more recent rulings of the New York court of appeals.

In *Cole Bros.* v. *Wood* (1894) 11 Ind. App. 37, 36 N. E. 1074, it was held (Ross, J., *dissenting*) that a foreman in a manufacturing shop is a vice principal and not a fellow servant of an employee ordered by him to work in a space just large enough for one person to work in safety, with respect to his act in going into such place with another, without such employee's knowledge, where one of them comes in contact with and displaces certain tubing, causing it to fall and seriously injure such employee. The court distinguished *New Pittsburgh Coal & Coke Co.* v. *Peterson* (1894) 136 Ind. 398, 35 N. E. 7, on the ground that the acts there charged, *viz.*, the starting of machinery and the failure to warn the plaintiff, were such as naturally devolved on a fellow servant. The only principle on which this decision can be sustained, if at all, appears to be that the duty of notifying an employee of any increase of danger in his environment is nonassignable. See § 579, *infra*.

(n) *Want of adequate means to keep railway cars stationary when not in use.*—*Henry* v. *Wabash Western R. Co.* (1891) 109 Mo. 488, 19 S. W. 239 (railway company cannot relieve itself from liability for injuries to a locomotive fireman by a collision with a freight car placed on a side track, by delegating to a servant its duty of seeing that such car is properly supplied with brakes and that other means are used to prevent it from being removed by its own weight or by wind upon the main track).

(o) *Defective locomotives.*—In *Texas & P. R. Co.* v. *Barrett* (1897) 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, the following instruction was approved: "If the jury believe, from the evidence under the foregoing instructions, that the boiler which exploded and injured the plaintiff was defective and unfit for use, and that defendant's servants, whose duty it was to repair such machinery, knew or by reasonable care might have known of such defects in said machinery, then such neglect upon the part of its servants is imputable to the defendant: and if said boiler exploded by reason of said defects, and injured the plaintiff, the defendant would be responsible for the injuries inflicted upon plaintiff, if plaintiff in no way, by his own neglect, contributed to his injuries."

In *Fuller* v. *Jewett* (1880) 80 N. Y. 46, 36 Am. Rep. 575, Affirming *sub nom. Stevenson* v. *Jewett* (1878) 16 Hun, 210, an action against a railroad receiver to recover damages for the killing of a locomotive engineer by the explosion of a boiler, there was evidence that the boiler had been frequently reported and sent to the repair shops for repairs, and the defendant was held not to be exensed from liability by the facts that there was no negligence in employing the superintendent of repairs, or in making proper regulations, that the master mechanic in charge gave proper instructions for the repairing, and that the negligence was that of the workmen directed to make the repairs.

Where there is evidence that the en-

gine which caused the injury was out of repair, to the knowledge of the defendant's master mechanic, a trial judge is not justified in nonsuiting the plaintiff on the ground that the doctrine of common employment is applicable. The question still remains: Did the master exercise due care to furnish a safe appliance? *Kain* v. *Smith* (1881) 25 Hun, 146, Affirmed in (1882) 89 N. Y. 375; Reiterating doctrine of (1880) 80 N. Y. 458, Which Reversed (1877) 11 Hun, 552.

To the same effect are the following cases, in which the employees in charge of the roundhouse or other place where repairs of locomotives are executed were held to be vice principals as regards trainmen. *St. Louis, I. M. & S. R. Co.* v. *Harper* (1884) 44 Ark. 524 (foreman of shops and master mechanic both vice principals in allowing a defective engine to go out on the road); *Chicago & I. R. Co.* v. *Shannon* (1867) 43 Ill. 338; *Ohio & M. R. Co.* v. *Stein* (1891) 140 Ind. 31, 39 N. E. 246; *Krueger* v. *Louisville, N. A. & C. R. Co.* (1887) 111 Ind. 51, 11 N. E. 957; *Cone* v. *Delaware, L. & W. R. Co.* (1880) 81 N. Y. 206, 37 Am. Rep. 491, Affirming (1878) 15 Hun, 172; *Pennsylvania & N. Y. Canal & R. Co.* v. *Mason* (1885) 109 Pa. 296, 58 Am. Rep. 722; *Brabbits* v. *Chicago & N. W. R. Co.* (1875) 38 Wis. 289.

There is also authority for holding a railway company liable for the failure of an engineer to report that his engine was defective. *Texas & N. O. R. Co.* v. *Bingle* (1897) 16 Tex. Civ. App. 653, 41 S. W. 90, Writ of error denied in 91 Tex. 287, 42 S. W. 971, Former Appeal (1895) 9 Tex. Civ. App. 322, 29 S. W. 674 (company held to be bound by promise of engineer that repairs would be done); *Bridges* v. *St. Louis, I. M. & S. R. Co.* (1879) 6 Mo. App. 389. These decisions would hardly be concurred in by many of the courts which adopt the general principle under discussion. But the imposition of responsibility to the extent here predicated seems to be quite justifiable, on logical grounds, if the engineer be regarded as the person who, for the time being, is in full charge of the piece of machinery operated by him.

(p) *Defects in railway cars.*—That railway companies are responsible for the negligence of employees whose duty it is to keep cars in repair was held in the following cases: *Northern P. R. Co.* v. *Herbert* (1886) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590, Affirming (1882) 3 Dak. 38, 13 N. W. 349 (car repairer failed to remedy defects in brake); *Central Trust Co.* v. *Texas & St. L. R. Co.* (1887) 32 Fed. 448 (defect in brake due to negligence of foreman of roundhouse); *Mackey* v. *Baltimore & P. R. Co.* (1890) 8 Mackey, 282 (defective brakes); *Chicago & N. W. R. Co.* v. *Jackson* (1870) 55 Ill. 492, 8 Am. Rep. 661; *Chicago & E. I. R. Co.* v. *Driscoll* (1897) 70 Ill. App. 91; *Schaub* v. *Hannibal & St. J. R. Co.* (1891) 106 Mo. 87, 16 S. W. 924; *McNamara* v. *Brooklyn City R. Co.* (1895) 11 Misc. 667, 32 N. Y. Supp. 913; *Missouri P. R. Co.* v. *James* (1888; Tex.) 10 S. W. 332.

In *Rodney* v. *St. Louis S. W. R. Co.* (1895) 127 Mo. 676, 28 S. W. 887, 30 S. W. 150, the duty with respect to a car discovered to be defective was discussed as follows: "The defendant did not discharge its full duty to the plaintiff by inspecting and marking the car. The duty to furnish reasonably safe appliances and machinery for the use of its servants in the course of their employment was not only an imperative, but a continuous, duty. It ran, so to speak, with the defective car from the moment it was discovered to be defective, continually calling upon the master to repair it, or to warn those of its servants, whom it required in the course of their employment to handle it, of its dangerous character. These duties were not only imperative and continuous, but they were personal duties of the master, to whomsoever delegated, and if neglected by those to whom they were delegated, their negligence was the negligence of the master."

The failure of a conductor to see that, when the red light ordinarily carried in the caboose of his train was removed for repairs, it was replaced by another one, is the breach of a non-delegable duty. *Denver & R. G. R. Co.* v. *Sipes* (1899) 26 Colo. 17, 55 Pac. 1093.

Trainmen charged with the duty, upon discovering the defective condition of a car, to report it to the master for repair, and to discontinue the use of it until it is restored to a reasonably safe condition, are not fellow servants of a section foreman killed in consequence of their neglect. *Chicago & A. R. Co.* v. *Cullen* (1900) 87 Ill. App. 374, Affirmed in (1900) 187 Ill. 523, 58 N. E. 455.

Like principles are controlling where the defective apparatus is a hand car.

Banks v. *Wabash Western R. Co.* (1890) 40 Mo. App. 458. There the delinquent was the foreman of a section crew, and the decision as to such a functionary is, perhaps, not one which would everywhere receive approval. In some courts it would only be sustained, if at all, on the same ground as that suggested for the similar decision as to a locomotive engineer, in the preceding subdivision of this note.

Unless it is a part of the duty of the trainmen themselves to make the adjustment of the brake rods of a railway car, an improper adjustment is as much a breach of the non-delegable duty to keep the appliance in safe condition as if some part of it were defective in character, or wanting. *Woods* v. *Long Island R. Co.* (1899) 59 N. Y. 546, 54 N. E. 1095, Affirming (1898) 11 App. Div. 10, 42 N. Y. Supp. 140.

(q) *In other vehicles.*—*Boelter* v. *Ross Lumber Co.* (1899) 103 Wis. 324, 79 N. W. 243 (foreman permitted use of wagon reported to be unsafe).

(r) *Defective boilers.*—(See also subd. (k), *supra*.) *Mitchell* v. *Robinson* (1881) 80 Ind. 281, 41 Am. Rep. 812 (defective boiler exploded).

(s) *Defective hoisting apparatus.*—*Corcoran* v. *Holbrook* (1875) 59 N. Y. 517, 17 Am. Rep. 369 (mill owner was held liable for the negligence of his general agent in omitting to repair a chain by which an elevator was raised and lowered, after he had been notified that the apparatus was in a dangerous condition; *Morton* v. *Zwierzykowski* (1901) 192 Ill. 328, 61 N. E. 443, Affirming (1900) 91 Ill. App. 462 (defendant held liable for the negligence of an engineer in failing to attach a bucket securely); *Union P. R. Co.* v. *Fray* (1890) 43 Kan. 750, 23 Pac. 1039 (foreman in charge of derrick failed to keep it in safe condition).

In *Courtney* v. *Conrad* (1883) 17 J. & S. 286, the majority of the court held that the owner of a derrick was liable for the negligence of his foreman in beginning work with a derrick, the rigging of which was defective, owing to the fact that the ropes had been stretched by a rain which fell during the night before the accident. Sedgwick dissented on a ground which would probably be now deemed controlling in New York (see next chapter), *viz.*, that the plaintiff "accepted the risk that would be involved in arranging the derrick and several attachments from occasion to occasion."

(t) *Defective adjustment of the parts of machinery.*—*Eingartner* v. *Illinois Steel Co.* (1894) 94 Wis. 70, 34 L. R. A. 503, 68 N. W. 664 (oiler was injured through the negligence of a carpenter gang, whose duty it was to replace planks about a machine called the "bloom rolls," after their removal for the purpose of attaching new rolls); *Monmouth Min. & Mfg. Co.* v. *Erbug* (1894) 148 Ill. 521, 36 N. E. 117, Affirming (1892) 45 Ill. App. 411 (employer is not relieved from liability for injuries to an employee, caused by the sudden starting of machinery, due to the absence of a nut from an eyebolt used to hold a lever in place to keep the machinery stationary, where the nut had been gone for several weeks, and another employee having charge of the machinery knew of such defect, and did not report it or see that it was repaired).

Inspection and repair necessary to the safe support and maintenance of overhead shafting in a factory are not merely incidental to the running of the engine with which it is connected, within the rule that the inspection or repair incident to use by a servant of machinery is the servant's, not the master's, duty. *Huxtis* v. *James A. Banister Co.* (1899) 43 Atl. 651, 63 N. J. L. 465.

The tightening of a belt which is liable to slip is a part of the work which devolves on the master in the performance of his duty to keep the machinery in safe condition. *Ellis* v. *Pierce* (1898) 172 Mass. 220, 51 N. E. 974.

(u) *Other defects in machinery.*—*Darby* v. *Duncan* (1861) 23 Dunlop, Sc. Sess. Cas. 2d series, 529 (fencing round machinery allowed to become defective. See § 526, note 1, *ante*); *Fox* v. *Le Comte* (1896) 2 App. Div. 61, 37 N. Y. Supp. 316, (power press so defective that it moved without pressure on the treadle). *Carter* v. *Oliver Oil Co.* (1891) 34 S. C. 211, 13 S. E. 419 (servant whose duty it is to repair sacks, which are dangerous to use when torn, held to be a vice principal as regards another servant, who handles them in operating a machine); *Swift & Co.* v. *Short* (1899) 34 C. C. A. 545, 92 Fed. 567 (acts of fellow servants of a person injured by the flying of a shoe forming part of a clutch, from a rapidly revolving wheel, in wiring the shoe to make it safe, after it is cracked, held to be the act of the master); *Jaques* v. *Great Falls Mfg. Co.* (1894) 66 N. H. 482, 13 L. R. A. 824, 22 Atl. 552 (employer liable for an injury received by a weaver in conse-

dangerous in use.[7] An employee is a vice principal as regards the care and custody of dangerous instrumentalities which are given into his charge.[8]

569. Same duty held to be delegable.— The cases in which the doctrine that a master is not liable for the negligence of servants to whom he deputes the function of keeping the instrumentalities in a proper condition has been avowedly or impliedly adopted are collected in § 618, *post*.

quence of the unskilful manner in which the loom had been repaired by the mechanic to whom the duty of repairing had been assigned).

An injury received by one servant through the failure of another servant to keep the brake of a hoisting apparatus in repair would be regarded as due to the negligence of a vice principal. But if the injury is received by the negligence of the second servant in releasing the brake, while taking an active part in the working of the apparatus, the negligence is that of a mere fellow servant. *Fox* v. *Spring Lake Iron Co.* (1891) 89 Mich. 387, 50 N. W. 872.

A millwright called in to straighten a shaft and the servants of a mill architect and builder reconstructing the building were said to be probably not coservants in *Cole* v. *Warren Mfg. Co.* (1899) 63 N. J. L. 626, 44 Atl. 647.

(v) *Defective lighting of place of work.*—It has been held that the owner of a ship cannot escape his responsibility for the unlighted condition of a passageway to coal bunkers in use on a dark night while the ship is coaling, by furnishing lanterns to his servants without using any care to see that they are properly lighted. *The Saratoga* (1898) 87 Fed. 349. But this ruling is in conflict with the principle discussed in chapter XXXII., subtitle B, *post*. See, especially, § 610, note 1, subd. (r).

(w) *Other authorities for the general principle are the following: Wells* v. *Co.* (1886) 9 Colo. 159, 11 Pac. 50; *Denver Tramway Co.* v. *Cranehaugh* (1897) 23 Colo. 363, 48 Pac. 503; *Monmouth Min. & Mfg. Co.* v. *Erling* (1894) 148 Ill. 521, 36 N. E. 117; *Norton* v. *Volzke* (1894) 158 Ill. 402, 41 N. E. 1085; *Pullman Palace Car Co.* v. *Laack* (1892) 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285; *Tudor Iron Works* v. *Weber* (1889) 31 Ill. App. 306; *Atchison, T. & S. F. R. Co.* v. *Reagan* (1887) 37 Kan. 592, 15 Pac. 584; *Lawrence* v. *Hagemeyer & Co.* (1892) 93 Ky. 591, 20 S. W. 704; *Shanny* v. *Androscoggin Mills* (1876) 66 Me. 420; *Rice* v. *King Philip Mills* (1887) 144 Mass. 229, 59 Am. Rep. 80, 11 N. E. 101; *Fox* v. *Spring Lake Iron Co.* (1891) 89 Mich. 387, 50 N. W. 872; *Rowe* v. *Blodgett & D. Lumber Co.* (1893) 94 Mich. 607, 54 N. W. 492; *Sadowski* v. *Michigan Car Co.* (1891) 84 Mich. 100, 47 N. W. 598; *Anderson* v. *Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585; *Bridges* v. *St. Louis, I. M. & S. R. Co.* (1879) 6 Mo. App. 392; *Dutzi* v. *Geisel* (1886) 23 Mo. App. 676; *Benzing* v. *Steinway* (1886) 101 N. Y. 547, 5 N. E. 449; *Ballard* v. *Hitchcock Mfg. Co.* (1893) 71 Hun, 582, 24 N. Y. Supp. 1104; *Strauss* v. *Hakenjos Mfg. Co.* (1897) 23 App. Div. 1, 48 N. Y. Supp. 125; *Galassa* v. *National S. S. Co.* (1898) 27 App. Div. 169, 50 N. Y. Supp. 417. Rehearing denied in 28 App. Div. 624, 51 N. Y. Supp. 136; *Carter* v. *Olicer Oil Co.* (1891) 34 S. C. 211, 13 S. E. 419; *Houston & T. C. R. Co.* v. *Marcelles* (1883) 59 Tex. 334; *Pudjez* v. *Cutrer* (1893) 2 Tex. Civ. App. 569, 22 S. W. 237; *Chapman* v. *Southern P. Co.* (1895) 12 Utah, 30, 41 Pac. 551 (employee charged with the direction of work in the absence of a foreman, and with the duty of repairing machinery when needed, not a fellow servant of another employee, so far as his duty to make repairs is concerned); *Hockey* v. *Baltimore & P. R. Co.* (1890) 8 Mackey, 282.

A judgment for plaintiff is properly entered on a finding that the handle of a hammer used for breaking of stones was worm-eaten, and defective and broken. *Baltimore & O. S. W. R. Co.* v. *Laos* (1898) 20 Ind. App. 378, 49 N. E. 854.

[7] *Browning* v. *Wabash Western R. Co.* (1894) 124 Mo. 55, 24 S. W. 731, Affirmed in (1894) 27 S. W. 644 (engineer killed owing to the removal of brake stairs by a road master).

[8] *Rush* v. *Spokane Falls & N. R. Co.* (1900) 23 Wash. 501, 63 Pac. 500.

570. Duty to see that worn-out or otherwise defective parts of instrumentalities are replaced by suitable substitutes.— The quality of this duty may be said to depend upon the essential nature of the operation by which the replacement is effected in each particular instance.

In some cases that operation is, logically speaking, equivalent to a discharge of the function of supplying a suitable instrumentality. Under such circumstances the liability of the master for the negligence of an employee to whom that function is deputed cannot be consistently denied by any court which concedes the duty of supply to be non-delegable. For the purposes of this principle it is plainly immaterial whether the substitution is that of an entire instrumentality or merely one of its constituent parts.[1] Upon general principles it would seem that that species of replacement which would be incident to the preparation of instrumentalities as part of the work, or to any of the other operations discussed in chapter XXXII., would not constitute the exercise of a non-delegable function; but no case is known to the writer in which this precise point has been considered.[2]

In other cases the operation of replacement is associated with the function of maintenance in this respect,—that substitution represents the most appropriate, as possibly the only available, method by which a defective instrumentality can be prevented from falling below the legal standard of safety. So far, therefore, as the doctrine that this

[1] *Lehigh Valley Coal Co.* v. *Warrek* (1898) 28 C. C. A. 510, 55 U. S. App. 137, 84 Fed. 866 (blocks furnished for checking the speed of coal cars were defective to the knowledge of the superintendent); *Mulcey* v. *Rhode Island Locomotive Works* (1883) 14 R. I. 204 (superintendent had notice that an elevator chain was defective, but failed to furnish a new one).

An employee in charge of the mechanical department represents the master as regards the substitution of an essential part of the machinery. *Slattery* v. *Walker & P. Mfg. Co.* (1901) 179 Mass. 307, 60 N. E. 782 (larger sized check valve inserted in an air hoist).

"A machine may be so constructed, and its operation may be such, as to call for a frequent replacement of one or more of its constituent parts. Such parts, when adjusted in the machine, become as much a part of it as if included in the original construction and a defect in one of them is a defect in the machine. The duty of seeing that such parts are not defective is one incumbent on the master. It is not a matter of ordinary repair from day to day, which may be intrusted to a servant. The defendant could not, therefore, avoid responsibility by delegating this duty to persons whom it believed to be competent, and who in fact were competent to perform it. If the injury to the plaintiff was due to a defect in the punch, which might have been discovered by the exercise of reasonable care on their part, but was not, the defendant is liable for their negligence." *Toy* v. *United States Cartridge Co.* (1893) 159 Mass. 313, 34 N. E. 461.

See also the quotation from the opinion in *Moynihan* v. *Hills Co.* (1888) 146 Mass. 586, 16 N. E. 574, as given in § 619, *post*.

[2] The control of the repairs is deemed to be rather with those who are to provide the apparatus than with those who are to work with it, where the means of replacing defective parts are not supplied to the person in charge of it, until he asks for what is needed. *Daley* v. *Boston & A. R. Co.* (1888) 147 Mass. 101, 16 N. E. 690.

function is one pertaining to the absolute obligations of the master is not limited by the principle explained in §§ 605, 621, *post*, it is clear that the master must answer for the negligence of all employees whose duty it is to see that the instrumentalities or their parts are renewed, whenever this is the course which a prudent man would adopt under the circumstances.[3]

571. Duty to furnish proper medical treatment to sick or injured servants.— A shipowner cannot escape liability for the negligence of the captain of a ship in failing to follow the advice of a physician as to the proper treatment of a member of the crew who is injured in the course of his employment.[1]

572. Duty to hire suitable servants.— In the nature of the case this duty must be regarded as one which, for the purpose of practical litigation, has relation solely to original supply, or replacement. The maintenance of a human being in a condition of efficiency is not a function which can be viewed as the subject-matter of an obligation, in the same sense as that which is contemplated by the law where unintelligent agencies of work are concerned. To make out a certain parallelism between the two cases would doubtless be possible; but the analogies evolved by such an investigation would be of merely scholastic interest. For example, it may fairly enough be maintained that a master who, instead of resorting to the customary remedies of dismissal, suspension, or change of work, where a servant has become so "incapable, through bodily or mental infirmities, as to endanger" the safety of his colaborers, retains him in the same employment, is subject to the duty of seeing that everything is done that can reasonably be done under the circumstances to bring him back to health and vigor by appropriate treatment. But the writer is not aware that the enforcement of such a duty has ever been discussed. The obligation of the master to provide medical treatment for a sick or injured servant has never been viewed as one creating legal rights in favor of coservants, except under the special circumstances adverted to in the preceding section. The only absolute obligation, therefore, to which it is necessary to advert in the present connection is that of "exercising proper diligence in the employment of reasonably safe and competent men to perform their respective duties."[2]

The American courts are in full agreement as to the doctrine that

[1] See, for example, *Houston & T. C. R. Co.* v. *Dunham* (1878) 49 Tex. 181 (railroad company held liable for an injury to a brakeman, resulting from failure of the road master and section men to replace rotten ties with sound ones).

[2] *Scarff* v. *Metcalf* (1887) 107 N. Y. 211, 13 N. E. 796.

[3] Phrase used in *Northern P. R. Co.* v. *Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

the negligence of one who represents the employer in hiring and discharging men is chargeable to the employer.[2] The acceptance of this doctrine involves the consequence that it is quite immaterial whether the negligent person was a partner or an employee of the defendant, since the servant must succeed on either theory.[3] Negligence which consists in transferring persons already in the service from duties which they are competent to perform to duties for which they are unfitted is deemed to be a breach of the personal obligation now under

[2] *Olson* v. *Andrews* (1897) 168 Mass. 261, 47 N. E. 90; *Bosworth* v. *Rogers* (1897) 27 C. C. A. 385, 53 U. S. App. 620, 82 Fed. 975; *Baltimore & O. R. Co.* v. *Heathorne* (1896) 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 631; *Walker* v. *Bailey* (1853) 22 Ala. 294; *Tunnel* v. *South & North Ala. R. Co.* (1878) 61 Ala. 554, 32 Am. Rep. 8; *Matthews* v. *Ball* (1897; Cal.) 47 Pac. 773; *Murphy* v. *Hughes* (1898) 1 Penn. (Del.) 250, 40 Atl. 187; *Justice* v. *Pennsylvania Co.* (1892) 130 Ind. 521, 30 N. E. 303; *Quincy Min. Co.* v. *Kitts* (1879) 42 Mich. 34, 3 N. W. 240; *Brown* v. *Gilchrist* (1890) 80 Mich. 56, 45 N. W. 82; *Brown* v. *Winona & St. P. R. Co.* (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484; *Harper* v. *Indianapolis & St. L. R. Co.* (1871) 47 Mo. 567, 4 Am. Rep. 353 (company permitted engineers to allow their firemen to handle locomotives, and damage was caused by the incompetency of one of them); *Mann* v. *Delaware & H. Canal Co.* (1883) 91 N. Y. 495 (conductor put a man on the list of extra brakemen, without any inquiry as to his qualifications, or instructing him as to the rules of the company); *O'Laughlin* v. *New York C. & H. R. R. Co.* (1887) 27 N. Y. Week. Dig. 109, 9 N. Y. S. R. 381, Affirmed in (1889) 113 N. Y. 623, 20 N. E. 876; *Sullivan* v. *Metropolitan Street R. Co.* (1900) 53 App. Div. 89, 65 N. Y. Supp. 842 (special point raised was that the delinquent went beyond the scope of his proper duties); *Frazier* v. *Pennsylvania R. Co.* (1880) 38 Pa. 104, 80 Am. Dec. 467; *Texas Mexican R. Co.* v. *Whitmore* (1883) 58 Tex. 276 (foreman of bridge gang knew that engineer of pile driver was incompetent); *Galveston, H. & S. A. R. Co.* v. *Eckles* (1900) 21 Tex. Civ. App. 179, 60 S. W. 830 (yard master had power to discharge).

The New York cases cited above are in accord with the decision of the supreme court in *Wright* v. *New York C. R. Co.* (1858) 28 Barb. 80, which was not explicitly concurred in as to this point by the court of appeals, where it was observed ([1862] 25 N. Y. 562) that the responsibility of the master was a debatable question. But it was declined on the evidence that there was, at all events, no negligence as regards the selection of the delinquent servant.

These decisions may be regarded as having discredited *Kidwell* v. *Houston & G. N. R. Co.* (1877) 3 Woods, 313, Fed. Cas. No. 7,757, where, in discussing a contention of plaintiff's counsel that the averment in the petition, charging that the "master mechanic was advised of the habitual negligence and general bad habits of said car inspector, and that he failed and refused to discharge him," takes this case out of the general rule, as being equivalent to a charge that the company had employed an unskilful or incompetent car inspector, the court said: "The charge thus vaguely made, seems to me only to amount to a charge of negligence on the part of the master mechanic in not reporting the character of the car inspector to the officers of the company, and does not, therefore, constitute an exception to the general rule that a railroad company is not liable to one of its employees for the mere negligence of another employee. It does not appear that the master machinist was anything more than a fellow servant of the car inspector and the plaintiff without the power of appointment or removal. Under these circumstances the defendant company could not be made liable."

A complaint framed on the theory of negligence in retaining an incompetent servant need not contain a specific averment that he had authority, by virtue of his employment, to do the act which produced the injury. *Gulf, C. & S. F. R. Co.* v. *Pierce* (1891) 7 Tex. Civ. App. 597, 25 S. W. 1052.

[3] *McMahon* v. *Davidson* (1867) 12 Minn. 357, Gil. 232.

review. In such a case the inference of liability follows immediately upon proof that the official who made the transfer was acting within the scope of his powers.[4]

In the doctrine now under review, which was adopted at a very early stage in the development of the law of employers' liability, we find the first recognition of the fact that there is a logical inconsistency involved in declaring a master to be subject to an absolute duty, and yet not responsible for the negligence of the person to whom that duty has been delegated.[5] That the principle to which this fact points was applied to the duty of hiring suitable servants several years before the courts advanced to the conception of a generalization on the same lines, with respect to the entire class of absolute duties, seems to have been a result of the prominence which, from the very outset, was given to the conception that the doctrine of common employment is subject to the qualification that the servant, "when he engages to run the risks of his service, including those arising from the negligence of fellow servants, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care."[6]

[4] *Blackman* v. *Thomson-Houston Electric Co.* (1897) 102 Ga. 64, 29 S. E. 120; *Harper* v. *Indianapolis & St. L. R. Co.* (1871) 47 Mo. 567, 14 Am. Rep. 353 (engineer viewed as a vice principal in permitting a fireman to run his engine); *Lyttle* v. *Chicago & W. M. R. Co.* (1890) 84 Mich. 289, 47 N. W. 571 (promise of yard master that a fireman should not run an engine, held to be binding on a railway company).

[5] See the opinion of Shaw, Ch. J., in *Farwell* v. *Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339.

[6] *Hutchinson* v. *York, N. & B. R. Co.* (1850) 5 Exch. 343, 119 L. J. Exch. N. S. 296, 14 Jur. 837, per Alderson, B.

See *note* to 48 L. R. A. p. 369. The connection between the doctrine considered in its positive form and as a mere qualification of the doctrine of common employment is clearly indicated in *Walker* v. *Bolling* (1853) 22 Ala. 294. There Phelan, J. (p. 3[illegible], after stating the two doctrines established by the earlier cases to be that the master is bound to use ordinary care in providing competent servants, and that the servant impliedly stipulates to run the ordinary risks of the service, among which are to be considered acts of negligence on the part of a fellow servant, proceeded thus: "But the master does not discharge this duty—or, in other words, does not use due care when he exposes the servant to danger by associating with him, in a service of peril, those who are wanting in ordinary skill and prudence; and if the master chooses to do this, or his agent does it, the former will be held accountable, and it is no excuse for him to say, 'I delegated a duty arising from the relation I occupy, to a third person, who was in all respects competent to discharge it, and his neglect was one of the risks which the servant took.' The answer would be that the agent must be regarded as the master, and not as the servant, so far as this duty was concerned. In the present case, the evidence shows gross negligence and a criminal inattention to his duties, on the part of the engineer. It was the duty of the captain to protect the subordinate agents, employed in the common business, from the probable consequences of such neglect by the prompt discharge of the person who, by his carelessness and recklessness, was endangering the lives of all on board; and this duty, as we have already said, devolved upon him, not as the servant, but as the master—as the representative of the owner. This duty he did not discharge; and for the injurious consequences of this neglect the owner is responsible. . . . But

In one English case it was held that the master was not chargeable with the knowledge of his foreman that a subordinate was incompetent. The negligence of the foreman in retaining the subordinate, under such circumstances, is simply that of a fellow servant.[7] This ruling is an exemplification of the general principle established by *Wilson* v. *Merry*. See § 529, *ante*.

The non-delegable quality of the duty to hire competent servants is usually considered in connection with injuries received by a fellow servant of the one alleged to be incompetent. But this duty is also treated as absolute where the master has set a young and inexperienced servant to a task beyond his strength and skill. In such a case

an important inquiry meets us here, not embraced by these principles, and which we do not find to be covered by any of the adjudicated cases. It is this: When there is a general manager or superintendent of the service, with inferior agents or servants, or classes of agents or servants, under him, and such general manager or superintendent is invested by the common employer with the duty and authority of employing and dismissing those who are under him, are acts of negligence on the part of such general manager to be considered as falling within the ordinary risks of the service, for which the common employer is not responsible? And again: Even if other acts of negligence will be so regarded, are we so, likewise, to regard his acts of negligence in not exercising reasonable care and diligence, in not employing competent inferior officers and servants, or in not dismissing such as prove incompetent? In regard to all other acts of negligence on the part of the general manager or superintendent, I decline to express an opinion until the case arises. But with respect to the last-mentioned kind of negligence,—namely, that of failing to exercise reasonable care in procuring competent inferior officers and agents, where that falls within the scope of his duty, or in dismissing such as prove to be incompetent, I must hold that they cannot be included among the risks for which the master or common employer shall not be held responsible. To hold otherwise would be, as I maintain, to destroy the valuable general principle recognized and established in the very cases which have been quoted, in which it is held to be the duty of every master or principal to provide men of ordinary care and skill for each particular station, for the safety and protection, not only of strangers, but of those engaged in his service. This duty of the master is expressly retained in the very cases where he is held not to be subject further than this for injuries which may result to one servant from the acts of negligence of his fellow servant. Whether the master will do this or not is no part of the ordinary risks of the service; he is strictly held to the performance of it at all times. . . . It follows, also, that the law will not allow any shift by which that may be done indirectly which cannot be done directly; in other words, the law will not allow a master, whose duty it is to employ none but men of ordinary care and skill, in all branches of the service, to devolve the duty of making such employment on his general manager, who may be irresponsible, and by such means become irresponsible himself, for the neglect of this important duty. As to that much, the general manager must, upon principle, be held to be the agent of the master, not only to the work at large, but to his inferior officers and servants; and his neglects in this regard will be the neglects of the common employer, even as to them. If he employs or retains incompetent subordinates, the master will be responsible for such an act of negligence on the part of his general manager, even to a person engaged in the same service with the general manager."

See also the comments on this case in *Tyson* v. *South & North Ala. R. Co.* (1878) 61 Ala. 554, 32 Am. Rep. 8.

[7] *Smith* v. *Howard* (1870) 22 L. T. N. S. 130.

he cannot escape liability on the ground that the person directing the servant where to work was a fellow servant.[8]

573. Duty to employ servants sufficient in number for the work in hand.— Another absolute duty is that of seeing that the number of persons employed is sufficient to prevent each of them from being exposed to that class of risks which results from an inadequacy of the force available for the work in hand.[1]

Where no employee at all has been assigned for the performance of a duty connected with the operation of machinery the master cannot take advantage of the rule that the neglect of an employee who is furnished with the means and conveniences for keeping machinery in proper condition for safe operation, and charged with that duty, is not chargeable to the master in case of an injury to another employee.[2]

[8] *Noblesville Foundry & Mach. Co.* v. *Yeaman* (1891) 3 Ind. App. 521, 30 N. E. 10.

[1] In *Flike* v. *Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545, the leading case on this doctrine, it was contended by counsel for defendant (1) that the company was not liable, because the agent had, in fact, employed a third brakeman to go with this train, who, by reason of oversleeping, failed to get aboard in time, and hence, that the injury must be attributed to his negligence; and (2) that such negligence, if attributable to the general agent in not supplying his place with another man, must be regarded as committed while acting in the capacity of a mere coservant. But the court said: "Neither of these positions is tenable. The hiring of a third brakeman was only one of the steps proper to be taken to discharge the principal's duty, which was to supply with sufficient help and machinery, and properly despatch, the train in question, and this duty remained to be performed, although the hired brakeman failed to wake up in time, or was sick, or failed to appear for any other reason. It was negligent for the company to start the train without sufficient help. The acts of Rockefeller [the head conductor] cannot be divided up, and a part of them regarded as those of the company, and the other part as those of a coservant merely, for the obvious reason that all his acts constituted but a single duty. His acts are indivisible, and the attempt to create a distinction in their character would involve a refinement in favor of corporate immunity, not warranted by reason or authority. As well might the company be relieved if the train was started without an engineer, or without brakes, or with a defective engine. The same duty rested upon the company, though every man employed had died or run away during the night, and, if negligent in discharging it, either by acts of commission or omission, whether in employing improper help, or not enough of it, or in not requiring their presence upon the train, it is, upon every just principle, responsible for the consequences. Nor is the company relieved, although negligence may be imputed to the defaulting brakeman. The only effect of that circumstance would be to make the negligence contributory with the brakeman, but would not affect the liability of the company."

This case was followed in *Booth* v. *Boston & A. R. Co.* (1878) 73 N. Y. 38, 29 Am. Rep. 97 (involving similar facts); *Heiner* v. *Heuvelman* (1879) 13 Jones & S. 88.

See also, to the same effect, *Boden* v. *Denwolf* (1893) 56 Fed. 846; *Chveney* v. *Ocean S. S. Co.* (1893) 92 Ga. 726, 19 S. E. 33.

On the authority of this last case it has been held that an employer does not discharge his full duty in keeping a place reasonably safe by giving warnings of threatened or impending danger, when the employee charged with the duty of giving the warnings is so engrossed and busy with his other duties that he cannot properly and efficiently give the necessary warnings. *The Pioneer* (1897) 78 Fed. 600.

[2] *Prescott* v. *J. Ottman Lithographing Co.* (1897) 20 App. Div. 397, 46 N. Y.

574. Duty to frame rules and regulations for the conduct of the business.—All the American courts hold that the duty of framing such general rules and regulations as a prudent man would, under the circumstances, consider necessary for the elimination of dangers of certain classes, belongs to the category of those which the master cannot, except at his peril, assign to a servant.[1] If, therefore, he chooses to leave to an employee the regulation of matters which he ought to have provided for by specific rules, such employee will be regarded as his representative.[2]

Supp. 812 (no oiler appointed for machinery), Distinguishing *Webber* v. *Riper* (1888) 109 N. Y. 496, 17 N. E. 216, and similar cases. See § 621, *post*.

[1] "It is the duty of the master to supervise, direct, and control the operation and management of his business, so that no injury shall ensue to his employees through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, for whom he must stand sponsor." *Hunn* v. *Michigan C. R. Co.* (1889) 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502.

To the same effect, see *Northern P. R. Co.* v. *Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Dana* v. *New York C. & H. R. R. Co.* (1883) 92 N. Y. 639; *Sheehan* v. *New York C. & H. R. R. Co.* (1883) 91 N. Y. 332; *Slater* v. *Jewett* (1881) 85 N. Y. 61, 39 Am. Rep. 627; *Ford* v. *Lake Shore & M. S. R. Co.* (1891) 124 N. Y. 493, 12 L. R. A. 454, 26 N. E. 1101; *Bosworth* v. *Rogers* (1897) 27 C. C. A. 385, 53 U. S. App. 620, 82 Fed. 975; and the cases cited below.

The earliest suggestion of the doctrine seems to be that reported in *Little Miami R. Co.* v. *Stevens* (1851) 20 Ohio, 415, where the Ohio doctrine as to superior servants was laid down. Chief Justice Hitchcock thought that, on the facts, the case might be decided in the same way without running counter to *Farwell* v. *Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339, and others of a like character. He considered that the negligence was really that of the company itself, or its immediate agent, the superintendent, in omitting to see that the engineers and conductors of both trains had the same time cards.

[2] *Hannibal & St. J. R. Co.* v. *Fox* (1884) 31 Kan. 586, 3 Pac. 320 (car repairer held entitled to maintain an action, where the company had made no rules, and furnished no flags as signals, and left everything which concerned the work to the management of the foreman); *Pool* v. *Southern P. Co.* (1899) 20 Utah, 210, 58 Pac. 326 (similar facts); *Louisville, E. & St. L. Consol. R. Co.* v. *Hanning* (1892) 131 Ind. 528, 31 N. E. 187 (foreman of car repairers did not set a signal flag to protect a workman—no rules on the subject); *Luchke* v. *Chicago, M. & St. P. R. Co.* (1883) 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870 (employee not, as matter of law, free from liability, where the injury was due to a lack of proper precautions, though the immediate cause of the accident was his obedience to the order of his foreman, a fellow servant, in directing him to work, without seeing that he was protected in some way); *Redington* v. *New York, O. & W. R. Co.* (1895) 84 Hun, 231, 32 N. Y. Supp. 535 (no rules provided for the loading of cars in such a manner as to prevent unnecessary danger to servants coupling them)

In *Tuttle* v. *New York & T. S. S. Co.* (1906) 10 App. Div. 463, 42 N. Y. Supp. 29, the plaintiff, owing to there being no light between the decks of a ship, fell into an uncovered hatchway, and it was contended, in behalf of the defendant, that, as it had provided sufficient lamps for the use of employees, the want of light was attributable, not to its negligence, but to theirs. But the court said: "There is evidence tending to prove that, when a vessel arrives at the dock, men appearing about there are employed to take off the cargo and to reload it with freight, and that they may have had no experience in the work they are called upon to perform in that service. They, misadvised, may not know of the facilities which can be afforded them when circumstances render their use and application desirable for safety. Conditions like that which caused the failure of the plaintiff to avoid the danger which he encountered, it may be assumed, are liable to arise and be pro-

Apparently the same principle is accepted in England, though the specific authority on this point is somewhat less explicit than that with regard to the non-delegable quality of the duty of supplying safe instrumentalities. See § 567, *a, supra*.[3]

It has also been intimated that, if the servants whose acts caused the injury were "acting without any known rule or regulation, and simply following a dangerous practice sanctioned by time and custom, the result might be imputed to the neglect of the defendant in omitting to change the method of doing the work, and adopting a safer one."[4]

duced in like manner. It would, therefore, seem to be reasonably incumbent upon the defendant to have some system by way of rules or regulations. The availability of protective means and appliances to the workmen is not necessarily of any benefit to them unless they are advised of it. It may be that, if the defendant had provided rules which required those in charge of the work to advise the workmen of the precautionary means of protection which could be had, the plaintiff's misfortune might not have occurred. . . . It does not appear that the defendant had, by any rules or regulations whatever, required or directed the agents to advise workmen temporarily employed to work upon the steamships, in loading and unloading, of any precautionary means which it might, for their safety, be or become desirable to use. For this reason we think that the question whether the defendant was chargeable with negligence was for the jury."

In *Bushby* v. *New York, L. E. & W. R. Co.* (1887) 107 N. Y. 374, 14 N. E. 407, where the plaintiff was injured through the defective loading of a railroad car, the defendant relied upon its "system," which was to let the shipper load and stake, while, as to inspection, its evidence only tended to show that if, in the general performance of the duties of their employment, the station agent found anything out of the way, he should correct it, or if the conductor or brakeman saw a defect, he should report it to the station master. No special duty was imposed on either in regard to inspection, nor direction given as to its manner. The court said: "The . . . proposition of the defendant is that 'it is not necessary in this case to decide whether the stakes in question were or were not appliances or machinery within the meaning of the rule invoked by the supreme court at the general term.' . . . 'for the reason that the system under which they were furnished, inspected, and employed was perfectly well known to the plaintiff, and he took the risks of the consequences of that system.' There was no system as to this matter. If the evidence shows that such practices had obtained before, it merely shows that the defendant chose to delegate a duty to the shipper which the corporation should have performed. It is equally responsible for his negligence; his negligence is its negligence."

[3] In *Smith* v. *Baker* [1891] A. C. 325, 353, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, Lord Watson laid it down that the master is "no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself." This remark was made in a case tried after the passage of the employers' liability act. But the authorities cited were the statements made by Lord Chelmsford in *Bartonshill Coal Co.* v. *McGuire* (1858) 3 Macq. H. L. Cas. 310, 4 Jur. N. S. 773, and by Lord Wensleydale in *Wilkins* v. *Wathieson* (1861) 4 Macq. H. L. Cas. 226, both decided under common-law principles. The observations of Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, in which the master's liability for an unsafe system is recognized, are also pertinent in this connection.

[4] *Doing* v. *New York, O. & W. R. Co.* (1897) 151 N. Y. 579, 45 N. E. 1028.

This is the rationale of the decision in *Sword* v. *Cameron* (1839) 1 Sc. Sess. Cas. 2d series, 493, where the master was held to be liable to a quarryman who was injured by the firing of a blast before he had time to reach a place of shelter, the evidence being that the shot

A servant who, acting upon the authority conferred on him, has made a rule which is reasonably necessary for the protection of his subordinates, is, of course, a representative of the master in regard to the suspension or abrogation of that rule.[5]

575. Duty to bring rules and regulations to the knowledge of employees.—The duty of framing suitable rules being certainly non assignable, it would seem to be a necessary inference that the subsidiary duty of publication, without the performance of which the framing would be an idle formality, must also be nonassignable. The authorities upon the subject, however, are very meagre, and, such as they are, conflicting.

On the one hand it has been held that a section foreman, on whom is devolved the duty of informing his hands of the contents of a rule that extra trains may be expected at any time without notice, is *pro hac vice* the representative of the company.[1]

On the other hand the supreme court of West Virginia has quoted[2] with approval the following passage from a recent textbook: "It is not required that the master should see to it personally that notice comes to the knowledge of all those to be governed thereby. If there is due care and diligence in choosing competent servants to receive and transmit the necessary orders, the negligence by them in the performance of it is a risk of the employment that the coemployee takes when he enters the service."[3]

The learned author considers that, "after the person whose duty, on the part of the master, it is to promulgate rules, or to communicate them to those engaged in the service, has performed his duty, by communicating them to a servant, who in turn is to observe them, or communicate them to another, then the omission or neglect of such other is the omission or neglect of a fellow servant, to the same extent

was fired in accordance with the usual and inveterate practice of the quarry. This case was cited in *Bartonshill Coal Co.* v. *Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, in support of the proposition that the doctrine of common employment was unknown to the law of Scotland, but Lord Cranworth pointed out that the decision did not turn upon the negligence of the fellow workmen who fired the shot, and expressly stated that it was justifiable, on the ground that "the injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosions." A similar construction was put upon the case by Lord Chelmsford in *Bartonshill Coal Co.* v. *McGuire* (1858) 3 Macq. H. L. Cas. 310, 4 Jur. N. S. 773.

Richmond Granite Co. v. *Bailey* (1896) 92 Va. 554, 24 S. E. 232.

[1] *Olson* v. *St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117, 35 N. W. 866.

Compare the argument of the court in *Tully* v. *New York & T. S. S. Co.* (1896) 10 App. Div. 463, 42 N. Y. Supp. 29, as quoted under the preceding section, note 2.

[2] See *Oliver* v. *Ohio River R. Co.* (1896) 42 W. Va. 703, 26 S. E. 444.

[3] See Bailey, Master's Liability for Injuries to Servant, pp. 77, 85.

as his disobedience of an order or rule, after receipt or knowledge, . . . would be such an act." Yet, at the same time, he declares that, "as to those orders or rules relating to the appliances and ways, it being the absolute duty of the master to see that such appliances and ways are reasonably safe, the master should be held to a strict liability to see that they were actually received and known." With all deference it is submitted that the distinction here relied on is logically unsound, and wholly inconsistent with the theory which makes the duty of protecting the servant by suitable rules an independent obligation, co-ordinate with the obligations of seeing that the material substances which compose the instrumentalities themselves come up to the required standard. If the master is bound at all to prescribe a certain system for the guidance of his servants, it surely can make no difference whether the object aimed at is that the instrumentalities shall be of a certain quality or that they shall be used in a certain way. In either case the obligation is referable to the general principle that he must use proper care to secure the safety of his servants, and it seems impossible to argue, with any show of reason, that one obligation arising out of that principle can be less absolute than the other. The true doctrine, we take it, is that the duty of bringing the rules to the knowledge of the servants is equally nonassignable, whatever the subject-matter may be, and that the question whether it has been performed is to be determined, not by considering the rank or number of subordinates through whom they are transmitted to the persons concerned, but by considering whether the steps taken are such that the servants, if they exercise ordinary care, cannot fail to ascertain that the rules have been framed, and that obedience to them is expected.

It may be remarked, moreover, that if this duty be removed from the class of those which are non-delegable, there will be considerable difficulty, not to say impossibility, in avoiding the virtual nullification of another doctrine which regards the subject from the standpoint of the servant's obligation to observe the rules made for his benefit, *viz.*, that his failure to comply with a rule not brought to his notice is not contributory negligence. See §§ 365, 366, *ante*.

576. Duty to carry out regulations, how far absolute; generally.— In some cases it is laid down in quite general terms that the master is absolutely bound "to exercise such supervision as will make it reasonably certain that the business is being carried on pursuant to the rules," as framed.[1] But a more exact statement of principles would

[1] *McElligott v. Randolph* (1891) 61 Conn. 157, 22 Atl. 1094, Quoted in *Ger-*

seem to be this: The quality of the duty in question depends upon the essential objects of the regulations which the alleged representative of the master has failed to carry out. All regulations, it is manifest, may be divided into two categories. In one we have a statement of the method by which the employer proposes to discharge some non-delegable obligation. The other relates to matters of detail with which servants may legitimately be left to deal, except when the unusual complexity of the business organism creates a duty on the master's part to inform them in what manner they should perform their respective functions, to the end that they may avoid injuring themselves and their coworkers. The propriety of applying a different standard of responsibility to each of these categories is sufficiently obvious. It cannot be contended, with any show of logic, that the obligation of the master in respect to the supervision of mere details is rendered more extensive by the mere fact that, under the circumstances, he was bound to systematize the execution of those details by issuing general orders for the guidance of his servants. Such general orders do not alter the character of the acts to which they relate.[2]

The situation which supervenes upon the issuance of regulations

rish v. *New Haven Ice Co.* (1893) 63 Conn. 9, 16, 27 Atl. 235.

It has been laid down, *arguendo*, that a railroad company is not only bound to adopt proper rules for the running of its trains, but is bound to enforce them. *Nolan* v. *New York, N. H. & H. R. Co.* (1898) 70 Conn. 159, 43 L. R. A. 305, 39 Atl. 115. The question, however, was not actually involved here.

[2] This consideration seems to have been ignored in *Hasc* v. *Northern P. R. Co.* (1893) 57 Fed. 283, where the court took the broad ground that any servant to whom is delegated the duty of seeing that a rule is observed is a vice principal, and held that the duty assigned to a railroad employee by the rules of the company, not to leave a switch which has been opened until it is closed or he is relieved by another employee, is one of the non-delegable duties owed by the employer to its employees.

Another decision which appears to be of dubious correctness for the same reason is one to the effect that a railway company is not, as matter of law, free from liability, where a car repairer is injured by a car which a conductor negligently shunted onto the repair track without any brakeman upon it. *Murphy* v. *New York C. & H. R. R. Co.* (1890) 118 N. Y. 527, 23 N. E. 812. (The correctness of this case is doubted in *Potter* v. *New York C. & H. R. R. Co.* [1892] 136 N. Y. 77, 32 N. E. 703).

Other questionable rulings are those cited at the end of the next section.

Some of the language used by the court in *Gerrish* v. *New Haven Ice Co.* (1893) 63 Conn. 9, 27 Atl. 235, might also seem to lay the court open to the same imputation as the cases just noticed. The point decided was that an ice company was guilty of negligence rendering it liable to an employee injured by the starting up of the machinery in a slide, while he was at work therein, under orders from the superintendent and general manager, where the evidence showed that the latter went away from his post at a bell cord intended to notify the engineer when to start, and failed to conform to a rule of the company requiring the engineer to be notified when any person was in the slide, so that the engine would not be started at a signal from the bell without such orders, and that the injury was caused by the falling of a piece of material which, being thrown by such employee from the slide, struck the bell cord, rang the bell, and caused the engineer to start the machinery. But the case was, it would seem, really decided

expressive of the methods by which the master thinks fit to perform a personal duty is precisely the converse of this, and may reasonably be regarded as entailing entirely different consequences. There would be a palpable inconsistency in asserting that the obligation to perform the acts prescribed by such regulations is not as absolute as the obligation to afford the servants that particular kind of protection which they will receive if the duty to which the regulations have reference is adequately discharged. Hence the accepted doctrine is that, "whether the act is that of the master, or the duty to be performed is particularly his duty, the liability resting upon him for the proper performance of the act or duty is not shifted by the adoption of rules or regulations providing for the performance of the act or duty by the agent of the master."[3] Or, as the doctrine has also been put in another case, a master cannot relieve himself from liability for an injury to an employee, resulting from a failure on his part, through his agents, actually to use such care for the safety of employees as the law makes it necessary for him to use, by any regulations, however stringent and however completely enforced, which do not actually result in the use of such care by his agents.[4] A master, therefore, is liable for the negligence of an employee to whom is deputed the performance of the one special act without which a rule prescribed with a view to making the place of work safe would be wholly ineffacious.[5] The great extension which the master's responsibility for dangers of the transitory class receives as a result of conceding a right of action on such a ground is made especially manifest by the decisions adverted to in the following sections.

Attention may here be drawn to the fact that in any case where the delinquency complained of was that of an employee who, according to the view accepted in the jurisdiction where the accident occurred was a vice principal by virtue of his superior rank (see chapter XXX.

on the ground that the negligent act was done by the superintendent in his official capacity. See § 542, *ante*.

[3] *Hankins* v. *New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. R. A. 396, 37 N. E. 466.

[4] *Missouri P. R. Co.* v. *McElyea* (1888) 71 Tex. 386, 1 L. R. A. 411, 9 S. W. 313.

[5] See *Evansville & T. H. R. Co.* v. *Holcomb* (1894) 9 Ind. App. 198, 36 N. E. 39, where a railroad company was held liable for the injuries received by a car repairer in consequence of the negligence of a brakeman, who was directed to notify him, in accordance with a rule of the company, that an engine was about to enter upon the track where he was working.

Compare *Chicago & N. W. R. Co.* v. *Taylor* (1873) 69 Ill. 461, 18 Am. Rep. 626, where the servant recovered, where the injury was to a station agent and switchman at a way station, and was caused by the negligence of other servants of the company, whose duty it was, under the rules, to see that cars in passing trains should not go out upon the road without proper lights and proper brakes, the common master being held liable.

ante), the master's liability is referable indifferently, either to the theory that the enforcement of rules is a non-delegable obligation, or to the theory that negligence in carrying out rules is reckoned among the official acts of a vice principal."[6]

It should also be noted that by thus segregating regulations into two categories, determined by their subject matter, a fairly satisfactory ground is obtained on which to meet the point made by some courts,—that the "superior servant doctrine" is legitimately deducible from the doctrine that an employee who promulgates or carries out regulations is a vice principal.[7] The analogy thus emphasized exi

[6] Thus, if one of the rules of the railroad company furnished to a section foreman for his guidance, provides that "extra trains may pass over the road at any time, without previous notice, and the foreman [of a gang of trackmen] must be always prepared for them;" and another rule provides that "he must run the hand cars with great caution, and he must not permit them to be used unless he accompany them;" and another rule requires him "to compare his time each day with the clock at the nearest telegraph office, or with the conductor on the train,"—these rules, as well as the law, require him to use the opportunities thus duly afforded, or any other opportunities, to ascertain what trains are expected to run over his section of the track by previous arrangements, and when, so that he may be prepared for them as well as he can be, and thus diminish the risk of a collision between extra trains and the hand car. If he neglects this duty, and, without any fault of one of the laborers under him, his hand car comes into collision with an extra train, which, had he performed his duty, would not have occurred, and the laborer on the hand car is killed or injured, the railroad company will be liable for the damages so sustained. *Criswell* v. *Pittsburgh, C. & St. L. R. Co.* (1888) 30 W. Va. 798, 6 S. E. 31.

So, also, in *Moore* v. *Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588, where it was held that the servant of a railway company may rely on the vice principal's promise to protect him while at work on a side track, notwithstanding the existence of a rule of the company requiring servants to protect themselves by putting out flags while engaged in such work. The court said: "It being conceded, as it must be, that the company owed a duty to the men under the car to provide for their safety, can it be that the foreman had no authority in an emergency to use any other means than those adopted by the company? That the red flags, and nothing but the red flags, was the means he was to employ? If, for any reason, that would clearly, in a given case, have been insufficient as a warning, can it be possible that the foreman would be restricted to the use of the red flags? Or if, in such case, he had had the red flag set up, and one of the men was injured, in consequence of its insufficiency to give the warning, that the company would not be liable to the injured party? Has it discharged its duty by simply adopting a means of protection, ordinarily sufficient, when the person in charge of the work knows that, in the particular case, it is not a sufficient warning? If the foreman has authority in such an emergency, that authority results from his general authority to perform the duty of the company in protecting the employees under his control in the performance of a dangerous work for the company, and he was authorized to make the promise to the plaintiff for the company, and undertook to set out the red flags in his possession, or to adopt any other means necessary to secure the safety of the men, thereby absolving them from the duty of setting out the flag, or setting the watch."

[7] See § 522, *d, ante*. In *Cord* v. *Ebbs* (1893) Mo.) 24 S. W. 746, it was held that a section foreman in charge of a gang of laborers at work along a railway is not a fellow servant with a locomotive fireman, while the latter is delivering a message from the road master, by throwing it, while tied to a lump of coal, from a passing train, as, in so delivering the message, he represents the master. Replying to the argument of defendant's counsel, that the fireman, as

dently loses at least a part of its force, when we advert to the fact that the quality of the master's obligations with respect to general directions for the conduct of the work varies according to circumstances.

577. Duty to carry out regulations with respect to the movements of trains.— The principles explained in the preceding section have been extensively discussed in that important class of cases which deal with the liability of railway companies for the negligence of employees concerned with the movements of trains. The cases referred to below show that, on the whole, the courts are agreed as to the propriety of making a distinction between the officials who are ordinarily known as train despatchers and the employees who communicate the directions of those train despatchers to the servants operating the trains. But it is often quite difficult to say whether the act which caused the injury should be treated as one incident to functions of control, or to the discharge of ministerial duties merely.

a. Doctrine that train despatchers are vice principals; generally.— It is a settled law in most jurisdictions in the United States that any employee who is invested with a discretionary power to regulate the running of the trains over an entire railway system, or one of its subdivisions, represents the railway company in respect to anything which he does in the exercise of that power, whether the despatch of trains is his sole function,[1] or that function is combined with the

to the act in question, was temporarily in the road department, and thus a fellow servant of the section foreman, the court said: "But this line of argument is intercepted by another proposition. It is the master's personal duty to give direction to the work in hand, and in the matter of communicating necessary directions for that work, by authority of the master, all employees represent the master. For a want of ordinary care in the transmission of such directions or orders the master is liable, if injury results. It has been expressly so held in this state, where the negligent act was performed by a train despatcher in transmitting an order for the movement of trains. *Smith* v. *Wabash, St. L. & P. R. Co.* (1887) 92 Mo. 359, 4 S. W. 129. The principle underlying that judgment is applicable to the facts now before us. There is positive proof here that for many years the practice had prevailed to deliver orders to the section foremen, while engaged at work along the road, by the intervention of employees on the trains to pass the points where the foremen were working. This practice was so general and long continued that it might fairly be found that the master was chargeable with knowledge of it. The proof, however, goes further than that, and positively shows that the practice was part of the method adopted by the road master himself for communicating orders to his subordinate foremen. Such being the case, it seems to us that in delivering such messages through the agency of the trainmen, the road master represented the defendants, and that the latter should be held answerable for negligence in the transmission of such orders, whereby the plaintiff suffered the injury which forms the basis of this action."

[1] *Felton* v. *Harbeson* (1900) 44 C. C. A. 188, 104 Fed. 737; *Oregon Short Line & U. N. R. Co.* v. *Frost* (1896) 21 C. C. A. 186, 44 U. S. App. 606, 74 Fed. 965; *Crew* v. *St. Louis, K. & N. W. R. Co.* (1884) 20 Fed. 87; *Clyde* v. *Richmond & D. R. Co.* (1895) 69 Fed. 673; *Little Rock & M. R. Co.* v. *Barry*

duties of some other office.[2] They are regarded as agents to whom is "delegated supreme authority in the special service,"[3] and to whom is given full control in the management of trains through the telegraph.[4] Their duty pertains to management and direction, while the duty of trainmen pertains to obedience.[5]

The plaintiffs in most of the cases in which the company's liability is affirmed were train hands, but the right of other employees,—such as track repairers,—to recover for negligence in directing the movements of a train is equally unquestionable.[6]

b. Train despatchers represent the company as to special orders suspending regular time-tables.—Most of the accidents due to the negligence of train despatchers are naturally the result of special orders, rendered necessary by the movements of extra trains not provided for in the regular time-tables, or by the failure of the trains specified in such time-tables to arrive at certain stations at the hours appointed. That such orders are issued by train despatchers as

(1893) 58 Ark. 198, 25 L. R. A. 386, 23 S. W. 1397; *Darrigan* v. *New York & N. E. R. Co.* (1885) 52 Conn. 285, 52 Am. Rep. 590 (Granger, J., dissenting); *Chicago, B. & Q. R. Co.* v. *Young* (1888) 26 Ill. App. 115; *Louisville, N. A. & C. R. Co.* v. *Heck* (1898) 151 Ind. 292, 50 N. E. 988 (Overruling *Robertson* v. *Terre Haute & I. R. Co.* (1881) 78 Ind. 77, in so far as it recognized no distinction between train despatchers and mere telegraph operators); *Hannibal & St. J. R. Co.* v. *Kanaley* (1888) 39 Kan. 1, 17 Pac. 324; *Louisville, C. & L. R. Co.* v. *Cavens* (1873) 9 Bush. 559; *McLeod* v. *Ginther* (1882) 80 Ky. 399; *Goodman* v. *Delaware & H. Canal Co.* (1895) 167 Pa. 332, 31 Atl. 670; *Madden* v. *Chesapeake & O. R. Co.* (1886) 28 W. Va. 610, 57 Am. Rep. 695; and the cases cited in the following notes.

A word sometimes used to designate train despatchers is train master. *Goodman* v. *Delaware & H. Canal Co.* (1895) 167 Pa. 332, 31 Atl. 670; *Crew* v. *St. Louis, K. & N. W. R. Co.* (1884) 20 Fed. 87.

[2] As that of superintendent. *Lasky* v. *Canadian P. R. Co.* (1891) 83 Me. 461, 22 Atl. 367; *O'Laughlin* v. *New York C. & H. R. R. Co.* (1887) 27 N. Y. Week. Dig. 109, 9 N. Y. S. R. 384; *Haynes* v. *East Tennessee, V. & G. R. Co.* (1866) 3 Coldw. 222; *Washburn* v. *Nashville & C. R. Co.* (1859) 3 Head, 638, 75 Am. Dec. 784; *Cincinnati, N. O. & T. P. R. Co.* v. *Clark* (1893) 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125.

Or of division superintendent. *North Pac. R. Co.* v. *Poirier* (1895) 15 C. C. A. 52, 29 U. S. App. 583, 67 Fed. 881; *Chicago, B. & Q. R. Co.* v. *McLallen* (1876) 84 Ill. 109; *Chicago, B. & Q. R. Co.* v. *Young* (1888) 26 Ill. App. 115; *Galveston, H. & S. A. R. Co.* v. *Cooper* (1893) 5 Tex. Civ. App. 611, 23 S. W. 928, Rehearing denied in 5 Tex. Civ. App. 617, 24 S. W. 33; *Chicago, B. & Q. R. Co.* v. *McLallen* (1876) 84 Ill. 109 (assistant superintendent held to be vice principal in respect to giving orders as to the running of a wild train).

Or of master mechanic. *Northern P. R. Co.* v. *Poirier* (1895) 15 C. C. A. 52, 29 U. S. App. 583, 67 Fed. 881; *Hoke* v. *California Southern R. Co.* (1885) 66 Cal. 302, 5 Pac. 482 (train sent out without a light).

[3] *Cincinnati, N. O. & T. P. R. Co.* v. *Clark* (1893) 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125.

[4] *Hunn* v. *Michigan C. R. Co.* (1889) 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502.

[5] *Smith* v. *Wabash, St. L. & P. R. Co.* (1887) 92 Mo. 359, 4 S. W. 129.

Compare *Darrigan* v. *New York & N. E. R. Co.* (1885) 52 Conn. 285, 52 Am. Rep. 590, which also dwells on the fact that, in emergencies, such an employee must promptly obey the orders of his superiors.

[6] *Haynes* v. *East Tennessee & C. R. Co.* (1866) 3 Coldw. 222 (plaintiff was a track repairer); *Galveston, H. & S. A. R. Co.* v. *Smith* (1890) 76 Tex. 611, 13

agents of the companies is recognized by all the courts which regard them as vice principals. In fact there would be little or no utility in holding them to be vice principals if the doctrine were taken to be inapplicable under such circumstances.[1] No trainman has any voice

S. W. 502 (plaintiff was a laborer traveling on a work train).

[1] In *Lewis* v. *Seifert* (1887) 116 Pa. 628, 11 Atl. 511, the court reasoned thus: "It is . . . clear that it was its [the company's] duty to frame and promulgate such rules and schedules for the moving of its trains, as would afford reasonable safety to the operatives who were engaged in moving them. This is a direct, positive duty, which the company owed its employees, and for the failure to perform which it could be responsible to any person injured as a consequence thereof, whether such person be a passenger or an employee. It would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably, or even probably, result in collisions and loss of life. This is a personal, positive duty; and, while a corporation is compelled to act through agents, yet the agents, in performing duties of this character, stand in the place of and represent the principal. In other words they are vice principals. If it be the duty to provide schedules for the moving of its trains which shall be reasonably safe, it follows logically that, when the schedules are departed from, when trains are sent out without a schedule, such orders should be issued by the company as will afford reasonable protection to the employees engaged in the running of such trains. I am not speaking now of collisions caused by a disobedience of orders on the part of conductors and engineers, but of collisions or other accidents the result of obeying such orders. At the time of the collision referred to, Wellington Bertolette was the general despatcher of the defendant company, and from his office in Philadelphia had the general power and authority of moving the trains. In this he was not interfered with by the company or anyone else. For the purpose of sending out the trains, he wielded all the power of the company. He could send a train out on schedule time, or he could hold it back. He could change the schedule time or make new schedules as the exigency of the case required. He could send a train out without schedule, and direct its movements from his office in Philadelphia. When he issued an order the train was bound to move as he directed. The engineer and conductor had but one duty, and that was obedience. . . . It is true the order in this case was sent by John J. Sellers. But Sellers was the assistant of Bertolette, and in his absence was clothed with all his powers. For the purposes of this case Sellers was Bertolette and Bartolette was the company. The distinction between a general despatcher—one who has the absolute control of all the trains upon the road and the conductor or engineer of a train is manifest. The latter have the duty of obedience. Their business is to run their trains under orders from the despatcher, and if an employee is injured, as the result of their negligence the company is not liable. They are in the same common employment, and are laboring together to the same end, under orders from superior authority. The argument for the plaintiff in error, if carried to its logical conclusion, would wholly obliterate all distinction between railroad employees from the president down; as they may all be said to be, in one sense, in the same common employment and paid by the same corporation."

The same view has been adopted in New York, where a railroad company has been held liable for the negligence of a train despatcher, the reasoning of the court being as follows: "In this case the evidence would seem to be quite conclusive that the defendant had fully discharged the duty which it owed its employees in the way of establishing and promulgating appropriate and sufficient rules and regulations for the government and operation of the various trains upon its road, and its furnishing general time-tables pertaining thereto. Whether the train despatcher violated one or all of such rules is not material in the view we take of the case, because the defendant had not performed its whole duty in promulgating rules; nor is a defense made out when it is shown that, if the train despatcher had obeyed the rules, the accident would not have occurred. If the defendant owed a duty, as master, to give correct orders to these

trains, or at least to take due and reasonable care to give them, the failure to perform that duty is the failure of the master in his character as such, although he intrusted the performance of the duty to the train despatcher. These trains were being run without regard to their ordinary time-tables; they were several hours late, proceeding in opposite directions, and each was approaching the other in entire ignorance of the other's whereabouts. Both were necessarily dependent upon the special orders they received from Hornellsville. As was said in *Slater* v. *Jewett* (1881) 85 N. Y. 62, 29 Am. Rep. 627, the master had the right to vary from the regular time schedules laid down for these trains. It was part of the details incident to the operation of the road; but when a variation, or, in other words, when a special time-table is made out for two trains, by which they are to run, it is the duty of the master, not alone to take reasonable care that the alteration shall be made known to the parties interested, but also to take reasonable care that the variation ordered, and by which the trains are run, shall not necessarily or probably lead to disaster when obediently carried out. Reasonable care in originating and formulating the order is necessary, and is the duty of the master. When the train despatcher originates and promulgates such orders as were given in this case, he is acting as the master, or, as it is said, his *alter ego*, and the master is liable for the negligence of the agent he has employed to do his, the master's, particular work." *Hankins* v. *New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. R. A. 396, 37 N. E. 486, Reversing (1889) 55 Hun, 51, 8 N. Y. Supp. 272.

Similarly it is held in Connecticut that, where one rule as to running trains by special orders provides that all orders shall be given by a superintendent, or by a despatcher under the direction of a superintendent, and another provides that superintendents are supreme in their own divisions, and responsible only to the management for such orders as they may give, the effect is to delegate to the train despatcher the whole power of the corporation in respect to moving the trains safely, and therefore to make him the representative of the company in that regard. *Darrigan* v. *New York & N. E. R. Co.* (1884) 52 Conn. 285, 52 Am. Rep. 590. The court said: "It is the duty of a railroad corporation to prepare a time table and adjust the running of its trains so as to avoid collisions. It must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. That cannot be done by general rules. Emergencies will arise which no system of rules can anticipate and provide for, in which the company must act, and act promptly and efficiently. In this case the scheme devised was to have these trains controlled by one who knew the position and movement of every train on the road liable to be affected by them,—a train despatcher acting in the name and by the authority of the superintendent. Is there not a wide and manifest difference between the duty of such an agent and the duty of a locomotive engineer?"

In *Galveston, H. & S. A. R. Co.* v. *Smith* (1890) 75 Tex. 611, 13 S. W. 562, the court said: "Upon the hypothesis that the company is bound to inform its servants and warn them of what is necessary to avoid collisions with trains, and that it cannot shift its own duty to a servant, and then, in case of injury, claim that it was the result of negligence of a fellow servant, the foregoing cases will stand upon the same principle. A failure to perform this duty increases the risk of employees on and operating trains, and exposes them to risk not embraced in their implied contract. The company ought to know where its trains are, and if the operators do not know, it is the duty of the company to inform them and give such orders as are reasonably necessary to avoid increased peril."

See also the following cases to the same general effect: *Missouri, K. & T. R. Co.* v. *Elliott* (1900) 42 C. C. A. 188, 102 Fed. 96; *Nolan* v. *New York, N. H. & H. R. Co.* (1898) 70 Conn. 159, 43 L. R. A. 305, 39 Atl. 115; *Cincinnati, I. St. L. & C. R. Co.* v. *Lane* (1889) 118 Ind. 579, 21 N. E. 317 (company bound to see that a section hand sent by a special order on a hand car along the track is not exposed to the danger of a collision with a wild train); *Missouri, K. & T. R. Co.* v. *Elliott* (1899) 2 Ind. Terr. 407, 51 S. W. 1067; *McLeod* v. *Ginther* (1882) 80 Ky. 399 (telegram worded so as to mislead the conductors of two trains); *Haas* v. *Michigan C. R. Co.* (1889) 78 Mich. 513, 7 L. R. A. 590, 44 N. W. 502 (instruction to engineer to wait for another train at a certain point); *Smith* v. *Wa-*

in running a train by special order, but is simply charged with the duty of carrying out the orders that come to him from the train despatcher's office.[8]

The mere fact that the orders given by the train despatcher were verbal instead of written, where the rules call for the latter, makes no difference, so far as the company's liability is concerned.[9] But the right to rely implicitly upon the propriety of a special order from a train despatcher cannot be extended to cases in which the circumstances are such that a prudent man would feel bound to seek some further information as to the reason why the regular routine of the business has been, in the given instance, departed from.[10]

One form of special order consists in the substitution of a temporary, for the regular, time-table. The promulgation of the former, no less than the latter, is deemed to be an act done in pursuance of the company's absolute duty.[11]

The company is, of course, no less liable where the train despatcher

lash, St. L. & P. R. Co. (1887) 92 Mo. 359, 4 S. W. 129; *Sheehan* v. *New York C. & H. R. R. Co.* (1883) 91 N. Y. 332; *Wetherbee* v. *Panama R. Co.* (1892) 49 N. Y. S. R. 148, 21 N. Y. Supp. 207 (irregular train so run as to cause accident); *Goodman* v. *Delaware & H. Canal Co.* (1895) 167 Pa. 332, 31 Atl. 670 (wild train sent out, collided with another); *Washburn* v. *Nashville & C. R. Co.* (1859) 3 Head, 638, 75 Am. Dec. 784 (superintendent started a train out of time, without any precaution to avoid a collision with a train coming in the opposite direction); *Hogan* v. *Missouri, K. & T. R. Co.* (1895) 88 Tex. 579, 32 S. W. 1035; *Galveston, H. & S. A. R. Co.* v. *Arispe* (1893) 5 Tex. Civ. App. 611, 23 S. W. 928, Rehearing denied in (1893) 5 Tex. Civ. App. 617, 24 S. W. 33 (conflicting orders caused collision); *Houston & T. C. R. Co.* v. *Stuart* (1898; Tex. Civ. App.) 48 S. W. 599. Reversed on other grounds in (1899) 92 Tex. 540, 50 S. W. 333; *Phillips* v. *Chicago, M. & St. P. R. Co.* (1885) 64 Wis. 475, 25 N. W. 544.

By some rules it is expressly stated that they may be suspended by the special order of some particular agent of the employers. See *Pittsburgh, C. & St. L. R. Co.* v. *Henderson* (1882) 37 Ohio St. 519, where the rule under discussion, which regulated the movements of freight trains, provided for its suspension by the company's superintendent and for the precautions to be observed during such suspension.

[8] *Hankins* v. *New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. R. A. 396, 37 N. E. 466. Compare also, as to this consideration, the language used in the Pennsylvania and Connecticut cases cited in the last note.

[9] *Smith* v. *Wabash, St. L. & P. R. Co.* (1887) 92 Mo. 359, 4 S. W. 129.

[10] In *Westcott* v. *New York & N. E. R. Co.* (1891) 153 Mass. 460, 27 N. E. 10, the conductor of a train was held to be negligent in starting a train, when he knew that, under the rules, he had no right to do so until the arrival of a certain train, without inquiring of the despatcher on that section of the road whether he had received any special information which would make it safe to leave the station. The court said that even supposing that it was ordinarily his duty to obey the orders of the despatcher, even if they were in violation of the rules of the road, this particular order was so obviously wrong, and was likely to involve such dreadful consequences, that it was manifestly negligent to act upon it without inquiring the reason for it.

[11] *Frost* v. *Oregon Short Line & U. N. R. Co.* (1895) 69 Fed. 936, where it was held that a telegraph operator, in giving notice to an engineer of a temporary change in the running time of his train, was performing a duty of the company. The distinction taken in *Baltimore & O. R. Co.* v. *Camp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952 (see *infra*), was disapproved.

has failed altogether to issue the orders required by the emergency,[12] or to give obligatory information as to the movements of trains,[13] than it is for his negligence in sending improper orders.

The single prerequisite of liability under the above doctrine is that the delinquent should have been an employee intrusted with such discretionary powers to regulate the movements of the trains as might seem most conducive to the interests of the company.[14] Hence, a train despatcher who is clothed with the powers of a general train despatcher in the latter's absence is no less a vice principal than the official whose place he takes.[15] Nor is the company allowed to escape responsibility simply because the party who sends the orders respecting the trains issues them in the name of some superior official, such as a division superintendent,[16] or an assistant superintendent.[17] Still less is such a circumstance a bar to the action where the ordinary routine of a railway office, acquiesced in by the general superintendent and other officials, is that the despatches are sent in such superintend

[12] *Chicago, B. & Q. R. Co.* v. *McLallen* (1876) 84 Ill. 109; *Sutherland* v. *Troy & B. R. Co.* (1889) 28 N. Y. S. R. 201, 8 N. Y. Supp. 83 (despatcher should have sent orders to have a train stopped by signal at a certain station); *McChesney* v. *Panama R. Co.* (1892) 49 N. Y. S. R. 148, 21 N. Y. Supp. 207; (1893) 74 Hun, 150, 26 N. Y. Supp. 245 (injury partly caused by the instructions actually issued, and partly by the lack of full instructions); *Louisville, C. & L. R. Co.* v. *Carens* (1873) 9 Bush, 559 (despatcher failed to stop a train following another which had been "stalled" on a gradient).

[13] *Louisville, N. A. & C. R. Co.* v. *Heck* (1898) 151 Ind. 292, 50 N. E. 988 (holding that a train despatcher's disregard of a rule prescribing that an extra train despatched after a work train has already gone out on the road shall be notified to protect itself against such work train is such negligence as will render the company liable for injuries caused by a collision between the two trains); *Clyde* v. *Richmond & D. R. Co.* (1895) 69 Fed. 673 (engineer injured owing to the fact that a station master was not notified as to the coming of an extra freight train); *Galveston, H. & S. A. R. Co.* v. *Smith* (1890) 76 Tex. 611, 13 S. W. 562.

See also *Northern P. R. Co.* v. *Charless* (1892) 2 C. C. A. 380, 7 U. S. App. 359, 51 Fed. 502, where it was laid down in general terms that it is the duty of a railroad company to keep the hands employed on a certain section informed as to the movement of trains over it, and that it is therefore liable for injuries resulting to one of them from the neglect of a telegraph operator to communicate such information. The question of the responsibilities generally of a telegraph operator was expressly waived, the case being decided on a demurrer to a complaint which alleged the existence of the above duty and its breach.

[14] This conception is emphasized in *McChesney* v. *Panama R. Co.* (1892) 49 N. Y. S. R. 148, 21 N. Y. Supp. 207. See also the extracts quoted in note 7, *supra*.

[15] *Lewis* v. *Seifert* (1887) 116 Pa. 628, 11 Atl. 514. Compare also the cases cited in the following notes.

[16] *Louisville, N. A. & C. R. Co.* v. *Heck* (1898) 151 Ind. 292, 50 N. E. 988.

[17] In *Chicago, B. & Q. R. Co.* v. *McLallen* (1876) 84 Ill. 109, the court reasoned thus: "As between the conductor and the company, the assistant superintendent, to whose orders the trains are all subject, is the representative of the corporation. His orders to the conductor of a train are essentially the orders of the employer. This rule applies as well to all orders issued by his assistants in his office and issued in his name. These orders were all signed in the name of Chappell, the assistant superintendent. If those intrusted by him with the management of the business of

ent's name, and the evidence is that he was absent when the despatch in question was sent.[18]

Another way of arriving at the same result is to say that, for the purpose of fastening liability on the company, any officer acting by the authority of the superintendent is put upon the same footing as the superintendent himself.[19]

c. Doctrine that train despatchers are not vice principals.—The decisions in which superintendents and train despatchers have been held to be mere coservants of trainmen are either rulings by courts in which the general doctrine of common employment was relied on, and the effect of the distinction between the master's assignable or non-assignable duties was not adverted to or discussed,[20] or are cases in which the negligence alleged had no relation to the operation of trains,[21] or which turned upon some special ground,—as, that the plaintiff did not offer evidence tending to show that no coservice existed.[22]

d. Liability of railway companies for the negligence of servants who transmit the orders or see that they are carried out.—In a case already cited it was laid down that a train despatcher, in devising a temporary time-table, which, in a sudden emergency, is to take the place of the regular time-table, and in issuing telegraphic orders for the operation of the trains under the new schedule, acts as a vice

the corporation by orders issued in his name neglect to issue a necessary order, that is his neglect and the negligence of the corporation."

[18] In *Lasky* v. *Canadian P. R. Co.* (1891) 83 Me. 461, 22 Atl. 367, the court said: "The defendants assail the plaintiff's case from another position, inasmuch as the despatch to the plaintiff was really sent in the superintendent's name by the train despatcher at Brownville, the superintendent not being there at the time and not cognizant of it, the plaintiff himself being fully aware of the facts, it is contended that the plaintiff cannot prevail in the action because he and the train despatcher were fellow servants in the same employment. We do not assent to this position. It appears that it was customary for the train despatcher thus to use the superintendent's name, and that the practice was acquiesced in by the superintendent and other officials connected with the road. An act done for the superintendent, by his authority, either general or special, is his act. The employee is not required nor permitted to investigate the question of authority. The superintendent's name conclusively imports authority, unless it be forged. The servant must obey, or be discharged from his employment. It would greatly demoralize the service if it were otherwise. Performance of duty to the road places all consequent liabilities upon the road."

[19] *O'I* [illegible] *v. New York C. & H. R. R. Co.* [illegible] N. Y. Week. Dig. 109, 9 N. Y. [illegible].

[20] *Robertson* v. *Terra Haute & I. R. Co.* (1881) 78 Ind. 77, 41 Am. Rep. 552 (overruled, as noticed *supra*); *Willsaps* v. *Louisville, N. O. & T. R. Co.* (1891) 69 Miss. 423, 13 So. 696; *Wonder* v. *Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143.

[21] *Norfolk & W. R. Co.* v. *Hoover* (1894) 79 Md. 253, 25 L. R. A. 710, 29 Atl. 994.

[22] *Blessing* v. *St. Louis, K. & C. N. R. Co.* (1883) 77 [illegible] 410. It seems doubtful whether, [illegible] in Missouri itself, this case would now be followed. See *Smith* v. *Wabash, St. L. & P. R. Co.* (1887) 92 Mo. 359, 4 S. W. 129. But, at all events, it carries a useful warning to practitioners.

principal; but that a telegraph operator, who merely transmits to the trainmen the directions he receives from the train despatcher as to the movements of the trains, is a fellow servant of the engineer.[23] As already remarked, the line which separates the two breaches of duty here contrasted is sometimes rather thin, but it seems more than probable that the cases referred to in the subjoined note would not be approved in all jurisdictions.[24]

578. Duty to impart information as to permanent dangers normally incident to the work at the time it is entered upon.— (Contrast § 609,

[23] *Baltimore & O. R. Co.* v. *Camp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952. To the same effect, see *Cincinnati, N. O. & T. P. R. Co.* v. *Clark* (1893) 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125.

"When the proper servant is so informed and ordered, and he then neglects his duty or violates his orders, causing injury to another servant, the negligence would be his, and the doctrine of fellow servants would apply." *Galveston, H. & S. A. R. Co.* v. *Smith* (1890) 76 Tex. 618, 13 S. W. 562, where it was held that, if the delinquent road master had control of the trainmen operating a work train and its movements, and was guilty of negligence in moving the train from a certain station, without notification as to the approach of specials with which there was danger of collision, or if his neglect consisted in having the train stopped at another station for such a time as rendered the danger of collision with other trains imminent, the negligence would be his own, as a servant of the company, and not the negligence of the company.

[24] The omission of a telegraph operator at a way platform to see that a despatch was understood by the conductor of a train, by whose negligence the plaintiff, the engineer of another train, was injured, is an act for which the company is responsible. *Madden* v. *Chesapeake & O. R. Co.* (1886) 28 W. Va. 610, 57 Am. Rep. 695.

Neither the conductor of a train coming into collision with a car having section hands on board, standing upon the track at a station, because of such conductor's disregard of signals displayed at the station, nor a telegraph operator at such station who displays improper signals, can be regarded as a fellow servant of such section hands. *Haney* v. *Pittsburgh, C. C. & St. L. R. Co.* (1893) 38 W. Va. 570, 18 S. E. 748.

The telegraph operator in charge of a signal station, who controls, by signal orders, the running of trains over a block section of a railroad, is not the fellow servant of a brakeman injured on such section by the operator's negligent management of the running of trains. *Flannegan* v. *Chesapeake & O. R. Co.* (1895) 40 W. Va. 436, 21 S. E. 1028 (following the last-cited case). The court said: "In this case the defendant, seeking to discharge its personal duty, and provide a safe track and at the same time facilitate the rapid movement of trains, established the signal station and placed the operator in charge, with full authority, by means of a code of signal orders equally as effective as any other kind could possibly be, to control the running of all trains over this block; and all trainmen of every train were under absolute rule to watch for and obey her orders before they dare enter upon the block. If she had been attentive to her duties, she must have known the block was occupied and obstructed, and her knowledge was the knowledge of the master; yet, in the face of that fact, she negligently gives a peremptory signal for the train to proceed. In what way could she possibly be the fellow servant of the train men who are entirely at her command, and who can neither influence nor control her own independent actions? She is as much the master of her section block as the master is of the whole road."

A station agent charged with the duty to see that all cars were so placed on the side tracks as to be clear from trains passing on the main line is not a fellow servant of a section hand upon a work train passing such station. *St. Louis, A. & T. H. R. Co.* v. *Biggs* (1894) 53 Ill. App. 550.

Some other doubtful decisions are noted in the preceding section.

post.)—In any case in which, for one or other of the reasons explained in chapter XVI., *ante*, a master owes his servant the duty of explaining to him the nature of the dangers to which the work will regularly and normally expose him, and the most effectual means by which to avoid them, that duty is not discharged by delegating the performance of it to an agent. If he cannot perform the duty himself he must provide a competent person to give such necessary instruction; and whether the person selected for that purpose be a coemployee of the servant or not, the employer must see to it that he is a competent and trustworthy instructor; otherwise, he will be liable for the consequences of his incompetence or negligence. The person to whom the duty of giving the necessary instruction in such cases is delegated represents the employer, and *pro hac vice* occupies the position of vice principal.[1]

[1] In *Wheeler* v. *Wason Mfg. Co.* (1883) 135 Mass. 297, the question was presented, whether the master's duty of giving notice to his servant of risks and perils to which the latter will be exposed in the course of his employment, when such duty exists, is an absolute one, or whether it is merely the duty of taking reasonable and proper pains to inform the servant of them. This question arose in three forms: (1) In the refusal to instruct the jury that, if the defendant's foreman directed a coservant of the plaintiff to give proper instruction and caution to the plaintiff, the latter could not recover by reason of such coservant's failure to do so, if he was a competent person for that purpose; (2) in the instruction that, if there were dangers in the business known to the defendant, which by reason of the plaintiff's inexperience were unknown to him, and which by the exercise of ordinary care he could not have known, the defendant was bound at its peril to give him reasonable warning of them; and (3) in the exclusion of the evidence of what the foreman told the coservant to do, in instructing the plaintiff. The court said: "That question was somewhat considered in *Coombs* v. *New Bedford Cordage Co.* (1869) 102 Mass. 572, 596, 3 Am. Rep. 506. But the question here is the more general one, whether it is an affirmative, positive duty resting upon the master, for the nonperformance of which he will be liable, or whether it can be delegated to a proper substitute, and he be thereby relieved from responsibility. We are of opinion that the duty resting upon the master is not merely one of reasonable care and diligence to give proper notice; but that he is responsible in case the servant suffers through a want of receiving proper notice of the risks to which he is exposed. The servant does not assume, and is not to bear the risk of, unknown and undisclosed perils; but he is held to take those risks which he knows, or which, by the exercise of ordinary care, he ought to know, to be incident to the nature of the business in the place where and the manner in which it is carried on. The master's duty is to provide machinery which is reasonably safe and proper; and if the use of it is attended with special peril, such as his servants ought to know, and if there is, accordingly, under the circumstances of the particular case, a duty resting upon him in respect to giving notice to the servants of such special peril, that duty is not discharged by delegating the performance of it to a third person. The servants should not be held to assume and undertake to bear the risk of latent and concealed perils, merely because the master takes reasonable care and pains to give notice of them. It is more reasonable to hold that, where the danger is known to the master and unknown to the servant, the master should be held to see to it that the servant, when put upon work which exposes him to danger, should be informed of it. The master must not expose his servant to an unreasonable risk. Where the servant is as well acquainted as the master with the dangerous nature of the machinery or instrument used, or of the service in which he is engaged, he cannot recover.

It follows, therefore, that in cases where the injured employee is an infant or inexperienced, the rule as to fellow servants "only holds good when it appears that such employee has been properly instructed by his employer as to the dangers of his employment, or has acquired knowledge of such dangers from other sources,"[2] and that the mere fact that a defect in a machine is due to the fault of a coemployee will not absolve a master from the duty of instructing a servant, where the

But where the master employs a servant in the use of machinery which he knows, but the servant does not know, to be attended with peculiar danger, we are all of opinion that he must be held responsible for an injury which occurs in consequence of his failure to see to it that a proper notice is given."

In *Brennan* v. *Gordon* (1890) 118 N. Y. 489, 8 L. R. A. 818, 23 N. E. 810, it was held that there was error in a charge given at the request of defendant that "if the jury find, as matter of fact, that the plaintiff was put under instruction of a competent instructor, and that the instructor was as well acquainted as defendants with the nature and character of the service which he undertook to perform, he cannot recover." The court said: "The jury could not otherwise understand this instruction than to mean that the defendants' whole duty to the plaintiff was performed when they assigned as competent an instructor to plaintiff as the defendants were. This was erroneous in two respects. The degree of the instructor's competency was gauged by the competency of the defendants. The plaintiff was entitled to have, and the defendants were bound to provide him with, an instructor competent to teach the art of managing an elevator, regardless of the competency of the defendants in that respect, and of which there was no proof whatever in the case. But the defendants were not only bound to furnish plaintiff with an instructor absolutely competent to manage an elevator, but the defendants were also bound to provide such an instructor for a reasonable length of time to teach the plaintiff how to manage the elevator, and that the instructor should be guilly of no negligence to the injury of the plaintiff while he was being instructed. These relations spring from the fact that during this period the instructor is doing the work and standing in the place of the defendants, the masters."

To the same effect are the following cases: *Sullivan* v. *India Mfg. Co.* (1873) 113 Mass. 396; *Verdelli* v. *Gray's Harbor Commercial Co.* (1897) 115 Cal. 517, 47 Pac. 364; *Felice* v. *New York C. & H. R. R. Co.* (1897) 14 App. Div. 345, 43 N. Y. Supp. 922; *Enna Cotton Seed Oil Co.* v. *Hale* (1892) 56 Ark. 232, 19 S. W. 600; *Pullman Palace Car Co.* v. *Laack* (1892) 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285; *Keller* v. *Goskill* (1898) 20 Ind. App. 502, 50 N. E. 363; *Olson* v. *St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117, 35 N. W. 866; *Consolidated Coal Co.* v. *Wombacher* (1890) 134 Ill. 57, 24 N. E. 627; *Thomas* v. *Cincinnati, N. O. & T. P. R. Co.* (1899) 97 Fed. 245; *Addicks* v. *Christoph* (1899) 62 N. J. L. 786, 43 Atl. 196; *Lebbering* v. *Struthers* (1893) 157 Pa. 312, 27 Atl. 720; *Smith* v. *Hillside Coal & I. Co.* (1898) 186 Pa. 28, 40 Atl. 287; *Strauss* v. *Haberman Mfg. Co.* (1897) 23 App. Div. 1, 48 N. Y. Supp. 425; *Eastland* v. *Clarke* (1901) 165 N. Y. 420, 59 N. E. 202 Reversing (1898) 28 App. Div. 621, 51 N. Y. Supp. 1140. *Telford* v. *Los Angeles Electric Co.* (1901) 134 Cal. 76, 54 L. R. A. 85, 66 Pac. 76.

[2] *Jones* v. *Florence Min. Co.* (1886) 66 Wis. 268, 57 Am. Rep. 269, 28 N. W. 207 (minor); *Western U. Telg. Co.* v. *Burgess* (1901) 47 C. C. A. 168, 108 Fed. 26 (inexperienced servant not instructed as to the proper method of sawing off sections of poles which were being taken down); *Louisville & N. R. Co.* v. *Miller* (1900) 43 C. C. A. 436, 104 Fed. 124 (inexperienced servant not instructed as to new and dangerous duties); *Nuback* v. *Champagne Lumber Co.* (1901) 48 C. C. A. 632, 109 Fed. 732 (inexperienced servant not instructed as to method of operating a slab-cutting machine).

danger resulting from the defect is one which is not within his comprehension.[3]

Ordinarily the employee who was in control of the injured servant will be regarded as the person upon whom, as the master's agent, the duty of instruction devolved.[4]

As in the case of other absolute duties the control exercised by the employee upon whom devolved the function of giving instruction may be of such a character that he is a vice principal simply by virtue of his position of superiority. Wherever the delinquent is deemed to be a representative of the master on this ground, the liability of the master may, it is obvious, be referred either to the theory that the duty of instruction is non-delegable, or to the theory that the function of instruction is one of those which are official in the sense explained in chapter XXX., subtitle G.[5]

Indeed, a third basis of liability is predicable in such cases, since an order to do work for which the subordinate is unfitted by reason of his ignorance is itself a negligent act of a manifestly official character, and it is therefore not necessary to rely upon a specific duty of instruction.[6]

Under the general rule stated above, the superior employee will

[3] *Bjbjian* v. *Woonsocket Rubber Co.* (1895) 164 Mass. 214, 41 N. E. 265.

[4] It was doubtless this customary apportionment of functions which has influenced the choice of phraseology in the remark of the supreme court of Indiana that, "if the agent or servant upon whom the power to command is given exercises the power, and fails to discharge the obligation, to the hurt of the servant who is without fault, the failure is that of the master, and he must respond." *Atlas Engine Works* v. *Randall* (1885) 100 Ind. 296, 50 Am. Rep. 798.

[5] Thus, in a state where the doctrine of departmental control is applied, one that has power to employ and discharge laborers, and is the foreman in his department, has the duty of the master devolved on him to instruct employees as to the danger of the employment. *Ft. Smith Oil Co.* v. *Slover* (1893) 58 Ark. 168, 24 S. W. 106.

Similarly, in courts where vice principalship is inferred from the mere exercise of control, the master is deemed answerable for the failure of controlling employees to instruct the subordinates. *Norton* v. *Volzke* (1895) 158 Ill. 402; 24 N. E. 1085; *Alton Paving, Bldg. & Fire Brick Co.* v. *Hudson* (1897) 74 Ill. App. 612, Affirmed in (1898) 176 Ill. 270, 52 N. E. 256; *Consolidated Coal Co.* v. *Wombacher* (1890) 134 Ill. 57, 24 N. E. 627.

In another state where the effect of vesting a superior servant with the power of employing and discharging his subordinates is to make him the master's *alter ego* as to them, it has been held that the superior servant is none the less a vice principal in respect to the duty of instruction because the employing and discharging are subject to the consent and approval of the superintendent. *International & G. N. R. Co.* v. *Hinzie* (1891) 82 Tex. 623, 18 S. W. 681, where the plaintiff was ordered to paint cars without being instructed as to a rule requiring men working on side tracks to set out signal flags.

[6] See, for example, *Missouri P. R. Co.* v. *Peregoy* (1887) 36 Kan. 424, 14 Pac. 7, where the court, while adverting to the duty to instruct an inexperienced boy, seems also to consider the defendant liable on the ground that the foreman was negligent in directing the boy to obey an unskilled mechanic in the performance of work which demanded expert knowledge.

necessarily be treated as the representative of the master in respect to the duty of instruction, even though he may be, for other purposes, a mere servant in the jurisdiction where the cause of action arises.[7]

The failure of an agent to instruct a fellow servant as to his duties naturally results in putting an incompetent employee in a position in which his want of skill will be dangerous to his colaborers. Under such circumstances it is clear that the liability of the master may be referred to his breach of either one of two non-delegable obligations.[8]

As there is no duty to instruct a servant as to the special dangers of work which is outside the scope of his original employment and to which his superior has no authority to assign him, the negligence of the superior in ordering him to perform such work is that of a fellow servant merely. In such a case the immunity of the master is obviously the result of a consideration which renders it wholly unnecessary to advert to, and impossible to rely upon, the non-delegable quality of the duty of instruction.[9] One conjunction of circumstances in which this principle operates in the master's favor is presented in those cases where an uninstructed servant undertakes a duty which he was not authorized to undertake.[10]

[7] "The master having subjected the servant to the command of another, without information or caution with respect to all such obligations as the master owes, the other stands in the master's place, and this is so notwithstanding the two servants are, as regards the common employment, fellow servants." *Atlas Engine Works* v. *Randall* (1885) 100 Ind. 293, 50 Am. Rep. 798.

See also *Olson* v. *St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117, 35 N. W. 866 (foreman of gang shoveling snow,—vice principal in regard to the duty of notifying his subordinates of rules); *Bibjian* v. *Woonsocket Rubber Co.* (1895) 164 Mass. 214, 41 N. E. 265 (man in charge of machine like that which plaintiff was handling, held to be vice principal, when deputed by the foreman to instruct the plaintiff); *Wallace* v. *Standard Oil Co.* (1895) 66 Fed. 260; *Klochinski* v. *Shores Lumber Co.* (1896) 93 Wis. 417, 67 N. W. 934; *Camp* v. *Hall* (1897) 39 Fla. 535, 22 So. 792; *Voilon* v. *Marinette & M. Paper Co.* (1899) 75 Wis. 579, 44 N. W. 772 (foreman); *Strauss* v. *Haberman Mfg. Co.* (1897) 23 App. Div. 1, 48 N. Y. Supp. 425 (foreman); *O'Connor* v. *Barker* (1898) 25 App. Div. 121, 49 N. Y. Supp. 211 (floor foreman in factory).

"The doctrine which exempts the master from liability arising out of the negligence of fellow servants is based upon the assumption by the servant of the ordinary risks of his employment, but has no application to risks which are not contemplated by him in entering upon the service." *Burke* v. *Anderson* (1895) 16 C. C. A. 442, 34 U. S. App. 132, 69 Fed. 814 (where the explosion of a stick of dynamite under a blow from the pick of a common laborer, who had been set to work after a blast, without any warning as to the possibility of peril from unexploded shots, was held to be an extraordinary risk).

[8] Such was the situation in *Sullivan* v. *Metropolitan Street R. Co.* (1900) 53 App. Div. 89, 65 N. Y. Supp. 842.

[9] See *Crown* v. *Orr* (1893) 140 N. Y. 450, 35 N. E. 648. Contrast with this case *Union P. R. Co.* v. *Port* (1873) 17 Wall. 553, 21 L. ed. 739 where the authority of the foreman in the premises was taken for granted. Compare also § 457, *ante*.

[10] Plaintiff, a street car driver, in crossing an excavation, was obliged to unhitch his team, and leave the car, under the control of the conductor, to come down the grade of its own weight, past the excavation. In getting the team around the excavation, plaintiff stumbled and fell across the track, and

579. Duty to impart information as to permanent dangers superadded to the environment after the work has begun.—Some courts have deferred to the force of the consideration that there is apparently no logical ground upon which it is possible to ascribe a non-delegable quality to the duty discussed in the preceding section, and at the same time to refuse to predicate such a quality to the duty of imparting to a servant such information as is proper under the circumstances with regard to new dangers, which are of such a nature that his safety will be continuously imperiled until the normal conditions of his environment have been restored. A master, it is held, cannot, by delegating to a servant the duty of notifying another servant of increased danger, absolve himself from liability for the non-transmission of the requisite information.[1] The rule is the same whether the increase of danger arises from some extrinsic alteration in the character of the environment itself,[2] or from the fact that the

the conductor, who had just been hired, and had received no instructions as to the use of the brake, turned it the wrong way, whereby the car ran over plaintiff and injured him. It was shown on the trial that the contractor making the excavation provided men to protect cars going up grade past the excavation. Held, that this fact did not tend to show that it was not the duty of the conductor to take charge of the car while coming down grade. *Sullivan* v. *Metropolitan Street R. Co.* (1900) 53 App. Div. 89, 65 N. Y. Supp. 842.

[1] *Pullman Palace Car Co.* v. *Laack* (1892) 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285 (negligence of persons who, under a license from the master, put in new burners in a brick kiln for the purpose of testing their advantages).

[2] See the case last cited, and also *Cerrillos Coal R. Co.* v. *Deserant* (1897) 9 N. M. 49, 49 Pac. 307 (a fire boss in a mine is a vice principal as to the performance of the duty of informing miners where they may work without being endangered by accumulation of gas); *Elledge* v. *National City & O. R. Co.* (1893) 100 Cal. 282, 34 Pac. 720 (foreman supervising work of excavation held to be a vice principal in regard to warning laborers as to any special danger of a subsidence).

A railroad company is liable to any one of its employees operating its road, for the negligence of either one of its officers or employees whose duty it is to keep the road in a reasonably safe condition, and who culpably fails to perform such duty or to give notice or warning of a sudden change in the condition of the company's premises, which introduces insecurity into a place which, from his previous acquaintance therewith, an employee has reason to believe to be free from danger. *Kansas City, Ft. S. & G. R. Co.* v. *Kier* (1889) 41 Kan. 661, 671, 21 Pac. 770 (brakeman injured by stumbling in the dark upon a pile of cinders deposited beside the track since he had passed the spot a few hours before).

The testimony of the foreman of a factory that a trap door in a passageway was used, on an average, about three times a week, and from five to ten minutes at a time, justifies an inference that it was expected to be used, and that the act of a servant in opening it was not unauthorized in such a sense as to prevent recovery from the employer by a fellow servant injured by falling through the trap door, upon the ground of the employer's negligence in maintaining the door in the passageway and failing to notify him thereof. *Johnson* v. *Field-Thurber Co.* (1898) 171 Mass. 481, 51 N. E. 18.

In *Smith* v. *Oxford Iron Co.* (1880) 42 N. J. L. 467, 36 Am. Rep. 535, it appeared that one Scranton, the president of the defendant company, to whose care was committed the superintendence of the business of the corporation, introduced the use of giant powder. It was clearly shown that it was a highly dangerous explosive, and that the proper manner of using it was not made known

servant has been transferred to a new place of work, where he will be exposed to some abnormal risk of the kind now under discussion."

to the plaintiff, although printed instructions were in the possession of the company. The court said: "Before allowing this new compound to be introduced, it was a duty which the company owed to the plaintiff to ascertain and make known its properties and the mode of using it, either to the plaintiff himself or those under whose direction he worked. The obligation to do so rested upon Scranton, as the head officer of the company, and his neglect in that respect was the neglect of the company itself. It was gross negligence in the company to furnish such an article for a laborer's use without giving him the requisite information. Whether the company was aware of its dangerous quality, or furnished it for use without having taken steps to obtain such knowledge, it is equally liable. It was a duty which the company, through Scranton, was bound to perform, to see that such reasonable care as the exigency of the case demanded, was taken, and to impart to the subord[illegible]s full information as to the manner o[illegible] applying the new compound, before placing it in the hands of an ignorant laborer. This obligation resting on the company itself, the president could not shift its liability by referring the matter to one of his subordinates."

See *Bolter* v. *Ross Lumber Co.* (1899) 103 Wis. 324, 79 N. W. 263.

It would seem that, if there were any object in doing so, all the cases in which the master has been held liable for the failure of a servant to discover defects in an instrumentality which he has to supervise might be brought under this principle.

[3] In *McMahon* v. *Ida Min. Co.* (1897) 95 Wis. 308, 70 N. W. 478, it was held that a master was "not to set a man at work among latent and extraordinary dangers, of which the employee knows nothing and which he cannot ascertain by experience or observation," and that, "in taking the plaintiff from one part of the mine in which he had been at work and setting him at work in a different place," and not warning him as to certain unexploded blasts, the shift boss was plainly and palpably acting in the capacity of the master.

This phase of the master's obligation to warn was recently considered at great length in *Carlson* v. *Northwestern Telephone Exchange Co.* (1896) 63 Minn. 428, 65 N. W. 914, where the court reasoned thus: "If the nature and magnitude of the master's work, whether it be that of construction or otherwise, and the number of men engaged in its execution are such that the exercise of ordinary care for the safety and protection of the workmen from unusual and unnecessary dangers requires that they be given reasonable orders, and that they be not ordered from one part of the work to another, without warning, into places of unusual danger and risks, which are not obvious to the senses and known to them, but which might be ascertained by the master by a proper inspection, the absolute duty rests upon the master to give such reasonable orders. Considerations of justice and a sound public policy impose this duty upon the master as such, which he cannot delegate, so as to relieve himself from the consequences of a negligent discharge of it. Where a large number of men are employed upon the same work, it is essential that reasonable orders, regulating their conduct, and assigning to them proper places in which to work, should be given. It is the duty and the right of the master to give orders and direct the places where his servants shall work. Their duty is instant and absolute obedience, unless it be obvious to them that such obedience will expose them to unusual dangers. Dispatch, discipline, and the safety of person and property in the execution of work imperatively require that the master should order and the servant obey. It would be practically impossible to carry on a work of any magnitude on any other base. A workman, when ordered from one part of the work to another, cannot be allowed to stop, examine, and experiment for himself, in order to ascertain if the place assigned to him is a safe one; and therefore, in obeying the order, while he assumes obvious and ordinary risks, he has a right to rely upon a faithful discharge of the master's duty to use ordinary care to warn and protect him against unusual dangers. Any rule or doctrine which deprives the workman of this right and protection when the master delegates the power and duty of giving such orders to a subordinate, no matter how high or low his rank or grade, is unsupported by reason, violates all considerations of justice, and is not support-

In some instances it is difficult to say whether, from a purely logical standpoint, the liability of the master should be referred to this rule

ed by the weight of authority." The standpoint of the court will be made somewhat clearer by quoting the following passage from the concurring opinion of Mitchell, J.: "The principle which this court has always announced as the test is that it is not the mere rank or grade of the superior employee, but the nature of the duty or service which he was performing, which determines the question; that, whenever a master delegates to another the performance of a duty which he owes absolutely to his servants, or which would fall within the line of his duty, as master, if personally present, then, in the performance of such acts such other person would be, as to other servants, a vice principal, and not a fellow servant. Whether we have always correctly applied this test to the facts is another question. For example, in hiring and discharging workmen the foreman in the present case would represent the master, and his negligence in the premises would be chargeable to the master. So, also, in the matter of selecting or inspecting implements and other instrumentalities for the performance of the work, assuming that this duty had been delegated to him. And where, as in this case, he had been given entire control of the work, and of all the workmen engaged in it, with absolute and supreme authority to give them orders how to do the work and where to work, I think that, on exactly the same principle, in giving these orders, which the workmen were bound to obey, he represented the master, and was performing a duty which would have devolved on the master, if personally present."

In *Burke* v. *Anderson* (1895) 16 C. C. A. 442, 34 U. S. App. 132, 69 Fed. 814, where a superintendent of the work of excavating for a railway was held to be a vice principal as regards his negligence in failing to notify a laborer that a portion of the explosives has not been exploded, the court said: "The master provides the place for his servant to work, and if his acts create a special danger he is not alone chargeable with the positive duty to exercise the utmost care and every available precaution against possible injury to those who are to work there, but, if danger impends, notwithstanding the precautions taken, he is further obligated to give due information and timely warning to those in his service who are ignorant of it, to the extent, before calling upon them to incur the risk. In respect of the employment of the plaintiff and the directions for his work, it is unquestionable and conceded that the superintendent represented the master as vice principal. In the same relation he is chargeable with knowledge of the danger in using the explosives, and with the duty to protect employees and notify them of risk. If the plaintiff was not informed of the peril which compliance with the order involved, or if it was not clearly apparent, the risk thus created cannot be held to have been contemplated in the service in which he engaged, and therefore it was not one assumed by him in his employment. The instructions requested on behalf of the principal defendant, and the theory of the whole defense as well, rest upon the claim that the operation of blasting was common labor, and not the work of a superintendent or vice principal; that its performance by this superintendent was in the character of a fellow servant, and the master was not liable for any neglect therein beyond the exercise of ordinary care in selecting his servants. In the same connection it is argued that the use and care of the explosives were not a personal duty of the master. Whether these claims could be maintained by the master in any case in which he brings into his work the dangerous means which produce injury, and whether the rule of strict care does not impose a positive obligation which he cannot evade by delegating the performance, are questions of interest, but they do not require consideration here. It is sufficient that the risk was created by the master or for his purposes; that there is legitimate finding by the jury of negligence on the part of those engaged in the performance, causing the injury; and, finally, that the plaintiff was ignorant of the risk and had not assumed it. The doctrine which exempts the master from liability arising out of the negligence of fellow servants is based upon the assumption by the servant of the ordinary risks of his employment, in which the negligence of fellow servants is included, but it has no application to risks which are not contemplated by him in entering upon

or to that which requires him to answer for the negligence of persons deputed to carry out regulations. See §§ 576, 577, *supra*. The intimate association between the two conceptions is especially manifest in cases turning upon the master's obligation to control the movements of trains.[1]

The advantage which the servant receives from the doctrine explicated in this section is necessarily, however, greatly curtailed by the construction which has been put upon the doctrine as to detail of work (see especially § 611, *post*). A portion of the cases cited in this section would undoubtedly have been decided differently in some jurisdictions.

the service (*Northern P. R. Co.* v. *Hambly* [1894] 154 U. S. 349, 357, 38 L. ed. 1009, 1012, 14 Sup. Ct. Rep. 983), and certainly cannot govern for this extraordinary risk interposed by the master without warning."

See also *McMahon* v. *Ida Min. Co.* (1897) 95 Wis. 308, 70 N. W. 478 (miner sent without warning to work in a place where there were a number of unexploded blasts).

[1] *Moon* v. *Richmond & L. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401 (section foreman failed to signal train to stop at a place where track had become dangerous).

The same state of facts appeared also in *Torian* v. *Richmond & L. R. Co.* (1887) 84 Va. 192, 4 S. E. 339, where we find the court laying down the law thus: "It was the duty of the defendant company . . . to use all reasonable precautions, including necessary signals to moving trains, essential to the protection of the lives and limbs, not only of employees, but to the protection of all persons lawfully on its road. The defendant company, by and through the negligence of its agent, Herndon, in failing to signal the approaching train, and warn it of the danger in its path, was guilty of culpable negligence, which caused the accident that resulted in the death of the plaintiff's intestate, and for that negligence and that result the company is liable in damages. That negligence was the proximate cause of the death of plaintiff's intestate, who was not the coemployee of Herndon, by whose negligence the accident was caused, in the sense which relieves the employer from liability for injuries to one servant, by and through the negligent act or omission of his fellow servant."

In *Turner* v. *Norfolk & W. R. Co.* (1895) 40 W. Va. 675, 22 S. E. 83 it was held that though, in some respects the engineer and fireman of a special engine are fellow servants of a section hand, yet in giving him warning of the use of the track by a special train they discharge a nonassignable personal or positive duty of the railroad company in its corporate capacity. The court said: "It has been well said that it would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably, or even probably, result in collisions or loss of life. *Lewis* v. *Seifert* (1887) 116 Pa. 647, 11 Atl. 514. Having prepared and promulgated its schedule, it must adhere to it, and if it makes a change or violates such schedule, it is its positive duty to notify all who may be affected thereby of such change. When, in contravention of its schedule, it sends a 'wild engine' over its track unexpectedly, it is in duty bound to warn all its employees who are rightfully on and using the track about its business, whether in charge of engine, train, or hand car, of the change in the schedule, and if it intrusts this duty to others, by bell, whistle, or otherwise, it makes such others its vice principals to that extent, and if they fail to discharge this duty the company must answer for their negligence, unless it be shown that the injured person contributed thereto. For instance, if the company had failed to notify Foreman Alley, by bell, whistle, or otherwise, of the presence of a special train or obstruction on the track, and he had been injured thereby, he could recover unless the defendant showed that he was under express instructions to be on the lookout for such special trains, and, as a matter of precaution, to flag around curves and through cuts. In such case he would

580. Duty to warn as to dangers of the transitory class, occasionally supervening during the progress of the work.— In some instances the master's liability for the failure of one employee to warn another as to a peril of the merely transitory class may be predicated on the ground that the dereliction of duty was an official act of an agent who was a vice principal by virtue of his rank as a general or departmental manager.[1] But wherever there is no such superiority of rank, and the plaintiff must rely solely on the character of the negligent act itself, as a ground of recovery, it seems clear that, in the absence of some special consideration bringing the facts within the domain of some duty conceded to be non-delegable,[2] the master cannot be compelled to indemnify a servant for injuries caused by this kind

foil, not because of being a fellow servant with the engineer, but from contributing to his negligence. The company must protect its employees from all dangers created by itself or its authorized agents or agencies which such employees cannot themselves foresee, or, by the use of ordinary prudence, avoid. For it must furnish them a safe place to work. To send 'wild engines' and trains, without any manner of warning or precaution, over tracks already rightfully occupied by other employees, is negligence, in the highest degree criminal, in utter disregard of human life or limb, and worthy of the severest penalties the law can possibly inflict; and it is made less criminal by the degree of precaution taken to give the necessary warning, and only becomes excusable when the measures adopted are sufficient to protect such employees from threatened danger, provided they are free from fault themselves."

[1] The general principle applicable to such a case has been stated thus: "It is a wrong on the part of the agent having the right to order a servant to do certain specific work, to increase the peril of the service by his own negligence. The employee acting under the specific order has a right to assume, in the absence of warning or notice, that his superior who gave the order would not, by his own negligence, make the work unsafe." *Taylor* v. *Evansville & T. H. R. Co.* (1889) 121 Ind. 124, 6 L. R. A. 584, 22 N. E. 876.

See also § 542, *ante*.

[2] Such a case is presented where the real gravamen of the action is the failure to conduct the work upon a safe system. See *Grace & H. Co.* v. *Connolly* (1900) 40 C. C. A. 69, 99 Fed. 879, Affirmed in (1899) 92 Fed. 116, where a person employing men to work on tall timbers above a sidewalk, which are required to be supported by guys across the street, was held liable for his failure to furnish watchmen to warn drivers in charge of vehicles upon the street to avoid the guys, so as to be liable for the fall of a workman caused by a vehicle striking a guy, although fellow workmen, in moving the guy as the work progresses, are also negligent in placing it where it will be struck by passing wagons. In the lower court the rationale of the decision was that the "place was made unsafe by the lack of warning, with which the work in which the plaintiff was engaged had nothing to do," and it was observed that the duty of providing for the safety of the place of work rests as a non-delegable obligation upon the master, "except as it may be changed by the progress of the work itself." In the court of appeals the liability was predicated rather from the lack of a proper system, and it was laid down that the master cannot escape liability under the rule that the duty of the master to provide safe places does not apply where the place originally furnished is safe, and becomes unsafe in the progress of the work, or because of the manner in which the work is done, since it cannot be said that the place (the street) originally furnished was safe, unless it was protected by danger signals or watchmen.

Under the theory that the master's

of negligence, without breaking in upon the principle that the master is, at all events, not liable for any dangers which are due to the manner in which the servants themselves deal with instrumentalities which are intrinsically safe and suitable. So far as the writer knows, there is only one case in which the master has been held liable on the broad ground that he must answer for the negligence of a servant charged with the function of warning other employees that the instrumentalities are about to be used in a way which will render their environment unsafe for a brief period, of uncertain duration.[3] The doctrine applied in the larger number of the decisions is stated in § 601, *post*.

581. Duty to inspect instrumentalities; generally.—Since neither the duty of seeing that the instrumentalities of work, as originally supplied, satisfy the legal standard of safety, nor the duty of seeing that they continue, while in use, to satisfy that standard, can be

duty to enforce rules is non-delegable it is also possible to justify the decision of the Indiana court of appeals, which has also held that a railroad company is liable to a car repairer for personal injuries received by him while making repairs, where a brakeman to whom the company has intrusted the duty of notifying the workmen that a switch engine is about to enter upon the tracks fails to give such notice, if a rule of the company requires the notice to be given, and does not require the repairer to take any steps for his own protection. *Evansville & T. H. R. Co.* v. *Holcomb* (1894) 9 Ind. App. 198, 36 N. E. 39.

[3] In New Jersey it has been held that the failure of a quarry foreman to give warning of a blast, as it was his duty to do, in time to permit the workmen to get out of danger, is negligence which is imputable to the employer, and is not one of the risks assumed by the employee, the result being the same whether the negligence arose from a defective system with reference to warnings, or from the foreman's failure to properly observe such system. The theory of the defendant that the giving of the warning was only incidental to the foreman's work in preparing the blast and lighting the fuse was rejected by the court, which thus explained its position: "When we consider the general duty owed by an employer to his employees to exercise reasonable care that the place where he sets them to work shall be kept safe (*Van Steenburgh* v. *Thornton* [1895] 58 N. J. L. 160, 33 Atl. 380), the propriety of including therein the duty of giving warning in such circumstances as those now before us becomes at once apparent. The danger of blasting was one frequently recurring, and its occurrence could always be foreseen, not by the workmen scattered about the quarry, but by any person charged with the duty of watching for it. If the danger was not foreseen and the proper warning given the quarry became an unsafe place for the workmen; but it was made reasonably safe if such warning was given. It seems clearly to follow that on him whose duty it was to take care that the place was kept safe was cast the duty of giving timely warning. We conclude, therefore, that it was part of the defendant's duty to the plaintiff that proper care should be exercised in giving warning of an expected blast." *Mooney* v. *Belleville Stone Co.* (1897) 61 N. J. L. 253, 39 L. R. A. 834, 39 Atl. 764, Affirming (1897) 60 N. J. L. 323, 38 Atl. 835.

Considering the rigor with which the doctrine of common employment has usually been construed in New Jersey to the servant's disadvantage, the attitude of the court in this particular instance is somewhat surprising.

adequately performed without a proper examination of the subject-matter, it would seem that, in any case in which an absolute quality is ascribed to these duties, a like quality ought as a necessary logical consequence, to be ascribed to the duty of examination, both as respects the time when the instrumentalities are first furnished, and as regards the period during which they remain in use. But a comparison of the decisions cited in the following sections with those noted in § 568, *supra*, and in chapter XXXII., subtitle D, *post*, shows that the courts have not always deferred to the logical force of this consideration.

582. Duty to inspect instrumentalities at the time they are first brought into use.— So far as regards the original addition of such instrumentalities as are furnished, an entirely symmetrical doctrine prevails. If a master undertakes, or is legally bound, to supply certain instrumentalities to his servant, he must, at his peril, see that they are properly inspected before being brought into use. (See § 152, *ante*.) "Inspection to discover whether an appliance is defective is as much a part of the work of furnishing safe appliances as reparation after the defect is discovered."[1] So, also, if articles which are stored, after being purchased, and then brought into use as the necessities of the work may demand, are liable to deteriorate with the lapse of time, the person who has them under his charge is regarded as the master's representative in respect to the duty of seeing that none which have become unfit for use are turned over to the servants.[2]

The doctrine that a master is liable for a defect in one of the constituent parts of a machine, which is substituted for a discarded one, obviously involves, in the present connection, the corollary that the master is liable for the careless performance of the duty of inspecting the new materials thus introduced into the machine.[3]

On the other hand the effect of the decisions cited in §153, *ante*, is that, to the extent there shown, the master is not required to answer for the inadequacy of an inspection, where the person who made or ought to have made it was a manufacturer or dealer, on whose skill

[1] *Eaton* v. *New York C. & H. R. R. Co.* (1900) 163 N. Y. 391, 57 N. E. 609; *Lafayette Bridge Co.* v. *Olsen* (1901) 54 L. R. A. 33, 47 C. C. A. 367, 108 Fed. 335 (foreman negligent as regards inspection of plank furnished for falsework).

[2] *Nord Deutscher Lloyd S. S. Co.* v. *Ingebrigsten* (1894) 57 N. J. L. 402, 31 Atl. 619 (storekeeper delivered a rusty cable to a stevedore).

[3] *Toy* v. *United States Cartridge Co.* (1893) 159 Mass. 313, 34 N. E. 461. (See extract in § 570, *supra*); *Hoes* v. *Ocean S. S. Co.* (1900) 56 App. Div. 259, 67 N. Y. Supp. 782 (inspection of machinery a part of which had been renewed, for the purpose of seeing whether it is in good order, was distinguished from that inspection which is made in the ordinary routine of work).

and judgment he was entitled to rely. Compare also §§ 558, 559, *supra*.

583. Duty to inspect instrumentalities during the time they are kept in use.— Except in so far as the servant's rights of recovery may be limited by the application of the doctrine as to details of work (see next chapter, subtitle D), the duty of inspection is, by most courts, treated as non-delegable. It may be said that, as a general rule, the duty of inspection is absolute, in so far as it has relation to intrinsic defects, and delegable in so far as it has relation to defects which arise in the daily use of the instrumentalities, and which are of such a nature that the necessary remedy can, without difficulty, be applied by the servants themselves. A differentiation based upon a theory so extremely vague as this is naturally anything but satisfactory, and a comparison of the cases cited in the subjoined and following notes with those tabulated in §70, *ante*, shows that, between the two zones of facts, with respect to which the theory yields definite and logical results, there lies an extensive debatable ground, which forms the subject of decisions which reflect little more than the tendency of the various courts to favor either the master or the servant in the choice of the particular principle to which the rights of the parties shall be referred.[1]

[1] The following cases were decided on the broad ground that, in the language of the court, in *Bailey* v. *Rome, W. & O. R. Co.* (1893) 139 N. Y. 302, 34 N. E. 918, "proper inspection to discover defects is a part of the master's duty:" *Texas & P. R. Co.* v. *Barrett* (1895) 14 C. C. A. 373, 30 U. S. App. 196, 67 Fed. 214, Affirmed in (1897) 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707 (weakness of boiler which exploded might have been discovered by a proper test); *Atchison, T. & S. F. R. Co.* v. *Mulligan* (1895) 14 C. C. A. 547, 34 U. S. App. 1, 67 Fed. 569 (engineer, charged with duty of inspecting his engine, not a fellow servant of a hostler injured by a defective footboard); *Texas & P. R. Co.* v. *Thompson* (1895) 17 C. C. A. 524, 30 U. S. App. 549, 70 Fed. 944. Reiterating the doctrine of *Texas & P. R. Co.* v. *Barrett* (1895) 14 C. C. A. 373, 30 U. S. App. 196, 67 Fed. 214 (boiler exploded—Speer, D. J., dissented, but only on the ground that the theory of the defendant as to the cause of the accident had not been brought to the attention of the jury by proper instructions); *Gowen* v. *Bush* (1896) 22 C. C. A. 196, 40 U. S. App. 349, 76 Fed. 319 (employees charged with "the duty of going through a mine inspecting it and seeing whether it is free from explosive gas and discharging a personal duty of the master, and are not fellow servants of a miner in that respect"); *Western Coal & Min. Co.* v. *Ingraham* (1895) 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219 (owner of a mine cannot escape responsibility for neglect to make timely inspection of the timbers, walls, and roofs by the devolution of the duty on a competent mining boss or foreman; *McCauley* v. *Southern R. Co.* (1897) 10 App. D. C. 560; *Baltimore & P. R. Co.* v. *Elliott* (1896) 9 App. D. C. 341 (error to direct a verdict for the defendant, where there is evidence of negligence in inspection); *Wells* v. *Coe* (1886) 9 Colo. 159, 11 Pac. 50; *Chicago & E. I. R. Co.* v. *Knoirim* (1894) 152 Ill. 458, 39 N. E. 324; *Cleveland, C. C. & St. L. R. Co.* v. *Ward* (1897) 147 Ind. 256, 45 N. E. 325, 46 N. E. 462 (defective locomotive); *Blazenic* v. *Iowa & W. Coal Co.* (1897) 102 Iowa, 706, 72 N. W. 292 (employee appointed to inspect the roofs of tunnels in a mine); *Atchison, T. & S. F. R. Co.* v. *McKee* (1887) 37 Kan. 592,

The nature of the liability imputed to the master for negligence in regard to inspection is sometimes defined by saying that the em-

15 Pac. 484; *Anderson* v. *Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585; *Cole* v. *Warren Mfg. Co.* (1899) 63 N. J. L. 626, 44 Atl. 647 (employment of an expert mill architect and builder in the reconstruction of a mill, not a sufficient discharge of the master's duty); *Cerrillos Coal R. Co.* v. *Deserant* (1897) 9 N. M. 49, 49 Pac. 807 (fire boss in a mine, whose duty it is to inspect the working places and inform miners who work by contract as to the safety of their working places); *Egan* v. *Dry Dock, E. B. & B. R. Co.* (1896) 12 App. Div. 556, 42 N. Y. Supp. 188 (boiler exploded); *McKnight* v. *Brooklyn Heights R. Co.* (1898) 23 Misc. 527, 51 N. Y. Supp. 738 (inspectors of harness used by street car company not fellow servants of drivers); *McKnight* v. *Brooklyn Heights R. Co.* (1898) 23 Misc. 527, 51 N. Y. Supp. 738; *Chesson* v. *John L. Roper Lumber Co.* (1896) 118 N. C. 59, 23 S. E. 925 (carpenters employed to inspect and make any needed repairs in a platform upon which servants are required to work are vice principals); *Fisher* v. *Oregon Short Line & U. N. R. Co.* (1892) 22 Or. 533, 16 L. R. A. 519, 30 Pac. 425 (section foreman held to represent the master in not discovering a dangerous defect on a railway track); *Mullan* v. *Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2, Reversing (1872) 9 Phila. 16; *Gates* v. *Chicago, M. & St. P. R. Co.* (1892) 2 S. D. 422, 50 N. W. 907 (derrick, not being properly fastened, swung round so as to obstruct railway track); *Houston & T. C. R. Co.* v. *Marcelles* (1883) 59 Tex. 334; *Sabine & E. T. R. Co.* v. *Ewing* (1892) 1 Tex. Civ. App. 531, 21 S. W. 700 (defective locomotive); *Forduce* v. *Culver* (1893) 2 Tex. Civ. App. 569, 22 S. W. 237; *Missouri, K. & T. R. Co.* v. *Lorch* (1898) 18 Tex. Civ. App. 46, 44 S. W. 317; *Houston* v. *Brush* (1894) 66 Vt. 331, 29 Atl. 380 (defective tackle block pin not properly fastened); *Newton* v. *Vulcan Iron Works* (1901) 199 Pa. 646, 49 Atl. 339; *Baltimore & O. R. Co.* v. *Mc Kenzie* (1885) 81 Va. 71 (section master and night watchman failed to discover a rock which had fallen on a railway track); *Re California Nav. & Improv. Co.* (1901) 110 Fed. 670 (defect in steam drum on ship was not discovered, owing to want of proper inspection); *Tracy* v. *Western U. Teleg. Co.* (1901) 110 Fed. 103 (foreman intrusted with the duty of inspecting telegraph poles held to be a vice principal).

In a case where the plaintiff was injured by the fall of a pile of timber in a railway lumber yard, it was held that, if the charge of the foreman (here treated as a departmental manager) involved the duty of maintaining an inspection of the piles so as to prevent their becoming dangerous to the workmen, he was in the performance of such duty as superior. An instruction that the plaintiff could not recover unless the foreman's negligence had relation to the employment of other servants or the furnishing of improper materials was accordingly held too broad. *Baldwin* v. *St. Louis, K. & N. R. Co.* (1885) 68 Iowa, 37, 25 N. W. 918.

In the following cases car inspectors were held not to be fellow servants of trainmen or other employees exposed to danger from defective cars: *Union P. R. Co.* v. *Daniels* (1894) 152 U. S. 684, *sub nom. Union P. R. Co.* v. *Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 756, Affirming (1890) 6 Utah, 357, 23 Pac. 762; *Macy* v. *St. Paul & D. R. Co.* (1886) 35 Minn. 209, 28 N. W. 249; *Ohio & M. R. Co.* v. *Pearry* (1891) 128 Ind. 197, 27 N. E. 479; *Little Rock & M. R. Co.* v. *Moseley* (1893) 6 C. C. A. 225, 12 U. S. App. 514, 56 Fed. 1009; *Cincinnati, H. & D. R. Co.* v. *McMullen* (1889) 117 Ind. 439, 20 N. E. 287; *Missouri P. R. Co.* v. *Dwyer* (1886) 36 Kan. 58, 12 Pac. 352; *Carpenter* v. *Mexican Nat. R. Co.* (1889) 39 Fed. 315; *Cooper* v. *Pittsburgh, C. & St. L. R. Co.* (1884) 24 W. Va. 37; *Illinois C. R. Co.* v. *Hilliard* (1896) 99 Ky. 684, 37 S. W. 75; *Long* v. *Pacific R. Co.* (1877) 65 Mo. 225; *Condon* v. *Missouri P. R. Co.* (1883) 78 Mo. 567; *Illinois C. R. Co.* v. *Reardon* (1894) 56 Ill. App. 542; *Braun* v. *Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5; *St. Louis, A. & T. R. Co.* v. *Putnam* (1892) 1 Tex. Civ. App. 142, 20 S. W. 1002; *G. H. Hammond Co.* v. *Mason* (1895) 12 Ind. App. 469, 40 N. E. 642; *Atchison, T. & S. F. R. Co.* v. *Seeley* (1894) 54 Kan. 21, 37 Pac. 104 (here the duty was predicated on the manner in which the car was loaded); *Kentucky C. R. Co.* v. *Carr* (1897) 19 Ky.

ployment of a competent inspector of its appliances does not relieve the master from liability for injuries resulting from defects in the

L. Rep. 1172, 43 S. W. 193; *Eaton* v. *New York C. & H. R. R. Co.* (1900) 163 N. Y. 391, 57 N. E. 609, Reversing (1897) 14 App. Div. 20, 43 N. Y. Supp. 656 (see, as to this case, § 622, *post*); *Morton* v. *Detroit, B. C. & A. R. Co.* (1890) 81 Mich. 423, 46 N. W. 111; *McDonald* v. *Michigan C. R. Co.* (1895) 108 Mich. 7, 65 N. W. 597; *Coontz* v. *Missouri P. R. Co.* (1894) 121 Mo. 652, 26 S. W. 661 (duty here delegated to engineer); *Chicago, B. & Q. R. Co.* v. *Kellogg* (1898) 54 Neb. 127, 74 N. W. 454; *Bailey* v. *Rome, W. & O. R. Co.* (1893) 139 N. Y. 302, 34 N. E. 918 (defective brake); *Jennings* v. *New York, N. H. & H. R. Co.* (1895) 12 Misc. 408, 33 N. Y. Supp. 585; *Cameron* v. *Great Northern R. Co.* (1898) 8 N. D. 124, 77 N. W. 1016 (steps had been removed from a car); *Columbus & X. R. Co.* v. *Webb* (1861) 12 Ohio St. 475; *International & G. N. R. Co.* v. *Keenan* (1890) 78 Tex. 294, 9 L. R. A. 703, 14 S. W. 668; *Smith* v. *Chicago, M. & St. P. R. Co.* (1877) 42 Wis. 520; *King* v. *Ohio & M. R. Co.* (1882) 11 Biss. 362, 14 Fed. 277; *Galveston, H. & S. A. R. Co.* v. *Nass* (1900; Tex. Civ. App.) 57 S. W. 910; *Norfolk & W. R. Co.* v. *Ampey* (1896) 93 Va. 798, 25 S. E. 226 (here the duty of inspection was delegated to the conductor).

In *Tierney* v. *Minneapolis & St. L. R. Co.* (1885) 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. 229, it was held that where, by a regulation governing the employees in the transfer yard of a railway company, car inspectors were required to inspect incoming cars immediately upon their arrival, and, if out of repair, to mark them "in bad order," indicating that they were to be sent to the "repair track," negligence on the part of the inspectors in failing to properly discharge this duty, by reason of which plaintiff was injured while attempting to couple a damaged car, without notice of its condition, and without fault on his part, may be imputed to the company. The court said: "In respect to patent defects in the coupling apparatus, brakes, wheels, etc., we may assume that the defendants had undertaken the duty of inspection, and intrusted it to the proper agents. As a rule, also, there is a distinction between the special duties of such persons and the service of other employees who are engaged in handling cars and operating trains. It is not the same in kind as that of the switchman, brakeman, or other operative. *Wedgwood* v. *Chicago & N. W. R. Co.* (1878) 44 Wis. 44; *Schultz* v. *Chicago, M. & St. P. R. Co.* (1879) 48 Wis. 375, 4 N. W. 399. The service of the former class relates wholly to the matter of the care and repair of machinery, the use of which is attended with constant danger to other employees unless maintained in a safe condition; and they represent the master, not in the capacity of superior officers placed over other employees, but because performing the master's duty in respect to safe instrumentalities."

See also the cases in the following section as to foreign cars.

In an action by an employee to recover for injuries caused by the giving way of a grab iron of a ladder on the side of the car, an instruction which deals with the method of inspection adopted by the company is properly refused, where the issue is, not whether the system of inspection was the proper one, but whether the inspectors properly executed the system. *Thompson* v. *Great Northern R. Co.* (1900) 79 Minn. 291, 82 N. W. 637.

It is not error to refuse an instruction that the master was not liable if it furnished a sufficient number of arms for telegraph poles from which workmen could select; that, if the defect was visible, the workmen who selected the arm was negligent, and the master was not responsible; and that, if competent inspectors were employed, the master was not liable. *McDonald* v. *Postal Teleg. Co.* (1900) 22 R. I. 131, 46 Atl. 407.

Two cases, *Flood* v. *Western U. Teleg. Co.* (1892) 131 N. Y. 603, 30 N. E. 196, and *Melsnac* v. *Northampton Electric Lighting Co.* (1898) 172 Mass. 89, 51 N. E. 524, were distinguished on the ground that there had not been any breach originally of the duty of inspection. This circumstance is surely not a sufficient differentiating element, as it might conceivably have been the duty of the employer to have made a subsequent inspection. It will be seen, however, by referring to § 414 ¶ (4), *ante*, that the real rationale of the decisions referred to was that the servant was himself charged with the duty of inspection.

appliances, which would have been discovered by a reasonably careful inspection, but which were not in fact discovered.[2]

The master will not be allowed to escape on the theory that the person who actually made the negligent inspection was not the employee appointed by him to discharge the duty of inspection;[3] and if he chooses to devolve the duty of inspecting an instrumentality upon the employee whose function it is to use it for the purpose of his work, and provides no other method of inspection, he must respond in damages for the negligence of the employee in continuing to use the instrumentality after he has learned that it is dangerously defective, and has had an opportunity of discarding it or reporting its condition to the employee whose duty it is to make the needful repairs.[4]

A conclusion similar to that stated in the text is reached under the theory that inspectors are in a different department from the servants who use the instrumentalities inspected. Thus, in one case it was laid down that the negligence of the servants of a railroad company having charge of the inspection and repair of cars is, as regards a brakeman, the negligence of a superior in another department. *Chicago & N. W. R. Co.* v. *Jackson* (1870) 55 Ill. 492, 8 Am. Rep. 661. In another, the conductor of a freight train was denied to be a fellow servant of a car inspector by whose negligence in failing to inspect the ladder of one of the cars the former is injured. *Illinois C. R. Co.* v. *Hilliard* (1896) 99 Ky. 684, 37 S. W. 75 (servants said to be "acting in different spheres").

[2] *Cleveland, C. C. & St. L. R. Co.* v. *Ward* (1896) 147 Ind. 256, 45 N. E. 325, Rehearing Denied in 147 Ind. 265, 46 N. E. 462; Following *Durkin* v. *Sharp* (1882) 88 N. Y. 225, where it was held that the inspection of a railroad track was a duty of the master, and that, if it was carelessly and negligently performed, even by a [illegible] inspector, the master would [illegible] liable. To excuse him from [illegible] the track must have been carefully inspected by a competent inspector.

The sufficiency of the number of inspectors of railroad cars, and their competency, furnish no defense to an action for injuries caused by a defect which could have been detected by a proper inspection. *Union P. R. Co.* v. *Daniels* (1894) 152 U. S. 684, *sub nom. Union P. R. Co.* v. *Snyder* 38 L. ed. 597, 14 Sup. Ct. Rep. 756.

Where a servant of a railroad company is injured or killed in consequence of the giving way of a defective bridge, the company cannot escape liability from the fact that the bridge was reconstructed properly in the first place, and it employed skilful and competent subordinates to inspect and repair its bridges. *Toledo, P. & W. R. Co.* v. *Conroy* (1873) 68 Ill. 560.

For other examples of the same form of statement, see *Egan* v. *Dry Dock, E. B. & H. R. Co.* (1896) 12 App. Div. 556, 42 N. Y. Supp. 188; *Bushby* v. *New York, L. E. & W. R. Co.* (1887) 107 N. Y. 374, 14 N. E. 407; *Elmer* v. *Locke* (1883) 135 Mass. 575; *Ohio & M. R. Co.* v. *Ivarey* (1891) 128 Ind. 197, 27 N. E. 479; *Texas & P. R. Co.* v. *O'Fiel* (1890) 78 Tex. 486, 15 S. W. 33; *Indiana Iron Co.* v. *Croy* (1897) 19 Ind. App. 565, 48 N. E. 803 (facts indicated that a proper inspection would have disclosed the danger).

[3] *Sabine & E. T. R. Co.* v. *Ewing* (1892) 1 Tex. Civ. App. 531, 21 S. W. 700.

[4] In *McDonald* v. *Michigan C. R. Co.* (1895) 108 Mich. 7, 65 N. W. 597, a railway company was held liable to one of its brakemen for an injury received through the failure of the engine to respond promptly to the air brake, which defect was known to the engineer, who continued to use the engine after knowing of the defect. The court said: "The record shows that there was no provision for inspection other than inspection by the engineer operating the train. He was expected to inspect his engine at all practicable times, and to report defects. This was no more than common prudence dictates should be required of all operatives of railway trains, and it is to be considered as a part of their du-

The antithesis between inspection which concerns matters of detail and inspection which has relation to intrinsic defects (see § 619, *post*) is the basis of the decisions cited below.[5] In other cases the consideration upon which stress is laid is the analogous one that the

ties in and about the operation of their trains; and this is as true when the railroad company makes no other provision for inspection as when it has another regular inspector. Such inspection, in the ordinary operation of the road, is the act of a fellow servant, as between the engineer and brakeman, and, as between them, does not constitute the engineer a representative of the master. To say that an engineer who should err in attempting to make the next station, after his engine became broken, acted as the representative of his master, thus holding the latter liable to the fireman, who was injured, would be carrying the rule too far. An unreported injury of the brakes, known to the brakeman, would be another illustration. The duty that the master owes to his patrons requires vigilance and care upon the part of the crew, and the master should be permitted to require it without subjecting himself to all the consequences following negligence by an inspector proper. . . . But if the company makes no other provision for inspection, and chooses to rely upon the reports of its men, deferring repairs until breaks occur, or until the operators, in due course of business, report defects, we must either say that it has neglected the duty of inspection altogether, or that it has imposed one of its duties upon its operatives, and that it does not fall within the limits of fellow service; or that it may avoid the duty which the law imposes by invoking the rule of fellow servant. So long as operatives do report, and the master repairs promptly, the jury may properly say that there is no negligence on the part of the master; but if defects are not seasonably repaired, the master neglects a duty, and we should not split hairs to determine whether it was his personal carelessness, or that of the agent whom he appoints to apprise him of his impending duty to repair, although such agent be a fellow operative of one who is injured by reason of a want of seasonable repair."

The reasoning in this case seems to be sounder and more in conformity with general principles than that of the following passage in *Thcleman* v. *Moeller* (1887) 73 Iowa, 108, 34 N. E. 765, where the court said: "It is the rule of this court that an employee cannot, in an action against his employer, recover for the negligence of a coemployee engaged in the prosecution of a common business. But this rule does not extend to an employee who is charged with no other duty than to inspect the machinery, in the operation of which the injury occurs. *Brann* v. *Chicago, R. I. & P. R. Co.* (1880) 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5. But the engineer, it will be seen from the statement of the evidence just made, was not confined by his duty to the mere inspection of the machinery. He had it in charge, was required to see that it was in good condition, and to repair it when broken or defective. These duties were not separated from the operation of the machinery. The engineer and plaintiff together operated it. The engine furnished the motive power propelling the saw, which did the work of sawing, — the very purpose for which both engine and saw were used. The saw could not be operated without the engine. The engineer was engaged in operating the saw. He was therefore a coemployee of plaintiff in the common business of both." There is no reason why the engineer should not have been regarded as occupying the dual position of a vice principal and of a mere servant. See § 561, *supra*.

[5] *Mayer* v. *Liebmann* (1897) 16 App. Div. 54, 44 N. Y. Supp. 1067 (owners of a brewery held liable for an injury to an employee caused by the fall of a beer keg through a run in which the kegs were lowered into a cellar, resulting from the rivet holes in the rods and brackets of the run becoming enlarged by use and rust, where the defect could have been discovered by proper examination).

In *Foa* v. *Le Comte* (1896) 2 App. Div. 61, 37 N. Y. Supp. 316, the court remarked: "As to the defendant's negligence, it is undisputed that if the plunger moved without pressure on the treadle, the press was defective. It was alleged that, though this was the case, the defendant had no knowledge of the fact. It was not necessary that the de-

fendant should personally have such knowledge. The repair of the press was not a mere detail of the work, as in *Webber* v. *Piper* (1888) 109 N. Y. 496, 17 N. E. 216, but a part of the master's duty to use reasonable care to provide safe appliances for his servants. This duty was committed to the machinist, but, being the master's duty, the machinist in the discharge of it was not a coservant, but represented the master. For his neglect the master was liable."

The improper adjustment of a brake rod constitutes a "defective appliance," and not a mere "neglect or failure in the detail of the work," within the rule relating to the liability of the master for defects in appliances, where, according to the regular course of the business, it was the duty of inspectors to make the adjustment, and not the duty of the train employees. *Woods* v. *Long Island R. Co.* (1896) 11 App. Div. 16, 42 N. Y. Supp. 140.

In *Bushby* v. *New York, L. E. & W. R. Co.* (1885) 37 Hun. 104, it was argued by the defendant's counsel that, as car stakes are uniformly furnished by the shipper, the defendant was under no obligation in respect to them, except to inspect them, and that that duty was performed in the present case; but the court held that the defendant could not divest itself of the duty it owed to its employees by leaving that duty to be performed by the shipper, or by making an arrangement with him whereby he undertook to perform it. This view was adopted by the court of appeals in (1887) 107 N. Y. 374, 14 N. E. 407, Danforth, J., remarking that the defect complained of was not in the loading, but in the preparation of the car to receive the load,—that is, in the car as a "lumber car."

Compare also *McIntyre* v. *Boston & M. R. Co.* (1895) 163 Mass. 189, 39 N. E. 1012, where the defendant was held liable for defective side stakes, the court saying: "The case is not one where an implement designed for repeated use had been weakened and made unfit for further service by such use; it is rather the case of the furnishing of an implement never fit for use, and evidently unfit. Such a stake could not, without negligence, have been placed where stakes were kept to be used for the purpose to which this was put. We need not inquire whether, if it had been taken from a number of sound and suitable stakes provided for that purpose by a workman whose duty it was to equip the car, the careless taking of this stake would have been negligence of a fellow workman the risk of which the plaintiff must stand, or whether negligence in equipping the car with stakes is something for which the defendant is responsible, whether it intrusts the work to one person or another."

A master cannot escape liability to servants for the nonperformance of his duty to use reasonable care that overhead shaftings shall be supported and maintained so as not to endanger their safety, by delegating its performance to an engineer placed in charge of the machinery in the factory. *Rustis* v. *James A. Banister Co.* (1899) 63 N. J. L. 465, 43 Atl. 651. The court disposed as follows of the contention that the case fell within the distinction drawn in certain cases cited, *viz.*, that inspection or repair, incidental to use by a servant of machinery or implements, is the servant's, not the master's, duty: "Of negligence in the performance of such incidental duty, other servants, as in case of any negligence of their fellows, take the risk. To illustrate,—an engineer while running his locomotive must not only watch its steam-gauge and the working of its mechanism, but may also need to have resort to his repair kit. For neglect of such duties his master is not liable to other servants in common employment with him. Simple or complex, the use of any instrumentality of human action involves some inspection, and may involve repair because of that very use. It is with such inspection and such repair only that the law charges the servant to the relief of the master, and it is plain that the use must be direct. The engineer runs, and therefore must inspect, his engine, but not the shafting or machinery to which he transmits power. The turner runs, and therefore must inspect, his lathe, but not the shaft that brings him power. Inspection while in use and inspection incidental to use are not convertible expressions. There may be inspection of moving mechanism devolving on no servant, but on the master. If so, negligence in that inspection or failure to properly repair defects discovered will be chargeable on the master, although he may select as the agent to perform his duty a fellow servant of those to whom he owes such duty. The test is always whether or not the duty left unperformed was the master's duty. In the case in hand it was properly left to

defective appliance was permanent, and not one merely for temporary use.[6]

584. Duty to inspect instrumentalities belonging to another person, but temporarily used by the master.— As regards instrumentalities not belonging to the master, but temporarily placed under his control for the purpose of facilitating the transaction of business in which both he and the owner have a common interest, the only rational and logical doctrine seems to be that a servant, inasmuch as he has nothing to do with the arrangements which the master may make with a third party for their mutual convenience, should be entitled to hold the master responsible for the negligent inspection of the thing so transferred, in all cases in which he would have been able to recover if that thing had been owned by, or permanently in the possession of, the master. And this is the view adopted in several jurisdictions.[1] The

the jury to say whether reasonable care for the safety of the workmen in the defendant's factory required inspection and repair of the line of shafting that fell and injured the plaintiff. If so, that duty could not be discharged by delegation, except at the master's peril, although the agent chosen was a fellow servant of the plaintiff. Properly, this case should not be considered as one involving the operation of machinery, but as one involving a place of working. That the support of a suspended piece of iron was rendered precarious by its motion in connection with machinery is an immaterial circumstance. The question for the jury was whether or not the defendant used reasonable care that what it set up over the heads of its servants should not fall down upon them."

[6] *Dougherty* v. *Milliken* (1898) 26 App. Div. 386, 49 N. Y. Supp. 905 (duty of an employer to see that an eyebolt to which a guy holding a permanent derrick in position is fastened is a reasonably safe and proper appliance cannot be delegated to a servant).

When a spur track is constructed for permanent use, it is an instrument for the use of those who conduct and manage the trains, and the liability of the master is referred to the principle that he cannot escape responsibility where it is his duty to supply suitable structures, instrumentalities, or appliances, by proving that he delegated to a proper agent their construction, superintendence, or repairs, and not to the rule under which it is held, in regard to temporary stagings erected for the repair or completion of buildings, that if suitable workmen and materials are provided his obligation is discharged. *Elmer* v. *Locke* (1883) 135 Mass. 575.

[1] That a car inspector is a vice principal, whether the cars whose condition is in question are foreign or domestic, has been declared in *Terre Haute & I. R. Co.* v. *Mansberger* (1895) 12 C. C. A. 574, 24 U. S. App. 551, 65 Fed. 196, Rehearing Denied in (1895) 14 C. C. A. 306, 24 U. S. App. 687, 67 Fed. 67; *Hobson, T. & S. F. R. Co.* v. *Myers* (1894) 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 793, disapproving the Massachusetts doctrine (see § 618, note 1, *post*); *New Orleans & N. E. R. Co.* v. *Clements* (1900) 40 C. C. A. 465, 100 Fed. 415; *Fay* v. *Minneapolis & St. L. R. Co.* (1883) 30 Minn. 231, 15 N. W. 241; *Jones* v. *New York, N. H. & H. R. Co.* (1897) 20 R. I. 212, 37 Atl. 1033; *Felton* v. *Bullard* (1899) 137 C. C. A. 1, 94 Fed. 781 (declining to follow Massachusetts decisions); *Louisville, N. A. & C. R. Co.* v. *Bates* (1896) 146 Ind. 564, 45 N. E. 108; *Chicago & N. W. R. Co.* v. *Gillison* (1897) 72 Ill. App. 207; *Galveston, H. & S. A. R. Co.* v. *Templeton* (1894) 87 Tex. 42, 26 S. W. 1066; *St. Louis, A. & T. R. Co.* v. *Putnam* (1892) 1 Tex. Civ. App. 142, 20 S. W. 1002; *Galveston, H. & S. A. R. Co.* v. *Voss* (1900; Tex. Civ. App.) 57 S. W. 910.

See also *Baltimore & P. R. Co.* v. *Hackey* (1895) 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct. Rep. 491; *Texas & P. R. Co.* v. *Archibald* (1898) 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, where, although the precise point decided is merely that a railway com-

duty extends, of course, to defects inherent in the original construction of the appliance, as well as to defects which may have supervened while it was in use.[2]

In Massachusetts, while mere ownership is probably not regarded as being, of itself, a differentiating factor, the doctrine which will be explained at length in § 619, *post*, that a master is not liable for negligence in the inspection of instrumentalities in their ordinary use from day to day, involves the consequence that the employees deputed to examine foreign cars are merely fellow servants of the trainmen.[3] Under this theory it is conceded that the receiving company may be held responsible where it has omitted to provide for a proper system of inspection, and for its negligence in the selection of an inspector.[4] This represents the full extent of its liability.[5]

pany owes employees a duty to have foreign cars as well as its own inspected, the facts involved and the language used by the court show that the duty was regarded as one of the non-delegable class.

The Indiana case cited above overrules the suggestion to the opposite effect in *Cincinnati, H. & D. R. Co.* v. *McMullen* (1889) 117 Ind. 139, 20 N. E. 287, and explains *Neutz* v. *Jackson Hill Coal & Coke Co.* (1894) 139 Ind. 411, 38 N. E. 324, 39 N. E. 147 (see § 619, note 4, subd. (c), *post*), as a case in which the rule as to the liability of railway companies for the defective condition of foreign cars was not applicable, as the defective car was merely delivered to a coal company to be loaded with coal.

[2] Thus, a railway company is absolutely bound to use ordinary and reasonable care to see that a foreign car is constructed safely,—as, for example, that it is furnished with such appurtenances as handles, ladders, or other safeguards in common use. *Donner* v. *Delaware & H. Canal Co.* (1894) 164 Pa. 17, 30 Atl. 269.

[3] In *Mackin* v. *Boston & A. R. Co.* (1883) 135 Mass. 201, the court reasoned thus: "Although, perhaps, the mere ownership is not material, a car so received, while in transit to its destination, and until ready for such inspection as would be suitable and necessary in preparation for its return, would not come within the rule applicable to machinery and appliances furnished by the defendant. According to the course of business, well known to the plaintiff, and notorious, the defendant was in the habit of receiving many such cars daily, and drawing them over its road as a part of its freight trains. Even in the absence of any statute or special contract, regulating the terms of receiving and drawing such cars, the defendant was bound, as a common carrier, to receive and draw them. *Vermont & M. R. Co.* v. *Fitchburg R. Co.* (1867) 14 Allen, 462, 92 Am. Dec. 785. The obligation of drawing cars over its road would not extend to such as were in an unsafe condition: but, as to cars so received, the duty of the defendant is not that of furnishing proper instrumentalities for service, but of inspection; and this duty is performed by the employment of sufficient, competent, and suitable inspectors, who are to act under proper superintendence, rules, and instructions; and, however it may be as to other cars, the inspectors must be deemed to be engaged in a common employment with the brakeman as to such cars, while in transit, and until ready to be inspected for a new service." To the same effect, see *Keith* v. *New Haven & N. Co.* (1885) 140 Mass. 175, 3 N. E. 28; *Little Miami R. Co.* v. *Fitzpatrick* (1881) 42 Ohio St. 318; *St. Louis, I. M. & S. R. Co.* v. *Gaines* (1885) 46 Ark. 555.

[4] *Keith* v. *New Haven & N. Co.* (1885) 140 Mass. 175, 3 N. E. 28.

[5] *Thung* v. *Fitchburg R. Co.* (1892) 156 Mass. 13, 30 N. E. 769.

CHAPTER XXXII.

EXTENT OF AN EMPLOYER'S LIABILITY FOR NEGLIGENCE IN REGARD TO THE DETAILS OF THE WORK.

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A. Generally.

585. Difficulty of defining boundary line between the domains of liability and nonliability.—By dint of numerous decisions during the last thirty years with respect to the same or similar groups of facts, the boundary line between the respective domains of the doctrine of common employment and the doctrine of non-delegable duties may

now be traced with reasonable precision along a large part of its extraordinarily devious course. But its actual position is still so largely a matter of controversy in any jurisdiction in which the facts to be passed upon are not covered by a precedent so close as to be decisive, that the volume of litigation relating to this department of the law of employer's liability seems to be [illegible] ily growing. Nor, when we consider the extreme vagueness of the tests propounded for the purpose of distinguishing acts which are, from acts which are not, done by a servant as the master's representative, is there any ground for expecting that the further elucidation of principles in the future will be materially accelerated.[1]

[1] "The boundary line between the act of a master and the act of an employe is sometimes quite vague and shadowy." *Hankins* v. *New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 421, 25 L. R. A. 390, 37 N. E. 466; *Vitto* v. *Kroga* (1897) 15 App. Div. 329, 44 N. Y. Supp. 1.

In *Fraser* v. *Red River Lumber Co.* (1891) 45 Minn. 235, 47 N. W. 785, the court, after referring to the rule that the question whether the servant is a vice principal must be determined by the nature of the duties which he is performing, proceeded thus: "While we have no disposition to impinge upon the just and salutary rule that makes it the primary duty of the master to furnish to his servants safe instrumentalities and places for work, yet we are satisfied that, in many cases, the courts, by indulging in too much refined and artificial reasoning, have carried the rule altogether too far, and have often held the master liable in cases where the untutored minds of laymen, in the exercise merely of common sense, would unhesitatingly say that the master had not been derelict in the performance of any duty towards his servants. When it is considered that, where numerous employees are all engaged in prosecuting the same general object, there is hardly one of them whose duties do not, in part, at least, in some way relate to or affect the safety of the instrumentalities with which, or of the places in which, the others work, it is easy to see that the rule referred to may be, as it often has been, carried so far as to practically arrogate the whole doctrine of 'common employment.'"

The following passage from the dissenting opinion of Mitchell, J., in *Tierney* v. *Minneapolis & St. L. R. Co.* [illegible] 31 Minn. 311, 53 Am. Rep. 35 [illegible] W. 229, is worthy of notice as [illegible] one of the difficulties of ex[illegible] precision "the division [illegible] delegated duties and the [illegible] ... duties [illegible] understood as meaning [illegible] 's responsible to [illegible] servant for the negligence of every employee, however subordinate his station [illegible] is engaged in performing the [illegible] common executive duties in the matter of repairing, examining, or watching the instrumentalities intended for the use of other servants. I think this is a misapprehension of the rule, which has sometimes arisen from losing sight of the distinction between one who is clothed with the powers of the master in the control and supervision of some department of the business, and who is *pro hac vice* the representative or *alter ego* of the master, and one who simply performs what may be termed mere executive details. . . . The management of an extensive business, like that of operating a railroad, includes so many departments and so many grades of service that it may not always be an easy matter to draw the line between those who are to be deemed 'vice principals,' or representatives of the master, and those who are to be deemed 'fellow servants,' as to other employees; but the fact of such a distinction is everywhere recognized. To hold that the master is responsible to his servants for the negligence of every employee of the most subordinate rank who is engaged in the department of repairing, examining, watching, or guarding the instrumentalities used by other employees would virtually abrogate the whole doctrine of 'common employment.' There is hardly

It is sufficiently evident that, for the determination of the question what work may ordinarily be intrusted to servants without liability to their fellow servants for their negligence, the essence of the problem is to discover some rational basis upon which the theory that the master is under an absolute obligation to use due care in providing and maintaining a safe environment for his servants shall be adjusted to the practical situation which results from the fact that any delinquency of a servant which actually eventuates in injury to a fellow servant must, in the very nature of the case, operate so as to render the environment of the sufferer unsafe.[2] It is clear that the problem is not susceptible of the simple solution sometimes explicitly submitted by counsel, and still more frequently repudiated by judges in their opinions, that a delinquency may constitute a breach of the master's duty to furnish a safe place of work, merely because the place of work is thereby made unsafe for the time being.[3] All

an employee in the service of any railroad whose duties do not, in part, at least, relate to the matter of maintaining in safe condition the track or rolling stock. If the rule be that all these *pro hac vice* represent the master, and are performing his duty, the same rule must be applied to all masters alike. Such a rule, if applied to farmers, manufacturers, and others, would, I think, effect a radical change in what has been supposed to be the law. And yet this is, I think, the logical result to which the opinion in his case would seem to lead; for I can see no distinction in principle between these 'car inspectors' and switch tenders, station agents, guards, watchmen, and the like, in so far as their duties relate to maintaining in safe condition the machinery and other instrumentalities of the master, designed to be used by his employees."

[2] In a very recent case we find the New York court of appeals commenting upon the fact that "under the guise of an application of the rule requiring a master to furnish a reasonably safe place for his servants to work in, other attempts before this have been made to deprive a defendant of the benefit of another equally well-settled and just rule of the law of negligence, that a party shall not be held responsible to a servant for an injury occasioned by the neglect of a competent coemployee." *Perry* v. *Rogers* (1898) 157 N. Y. 251, 51 N. E. 1021.

[3] In *Hermann* v. *Port Blakely Mill Co.* (1896) 71 Fed. 853, the court said with regard to such a contention: "The word 'place,' in my judgment, means the premises where the work is being done, and does not comprehend the negligent acts of fellow servants, by reason of which the place is rendered unsafe or dangerous. The fact that the negligent act of a fellow servant renders a place of work unsafe is no sure and safe test of the master's duty and liability in this respect, for it may well be said that any negligence which results in damage to someone makes a particular spot or place dangerous or unsafe. To so hold would virtually be making the master responsible for any negligence of a fellow servant which renders a place of work unsafe or dangerous. It would be doing the very thing which it is the policy and object of the general rule not to do. It would create a liability which the master could not avoid by the exercise of any degree of foresight or care."

In *Stourbridge* v. *Brooklyn City R. Co.* (1896) 9 App. Div. 129, 41 N. Y. Supp. 128, the court, in discussing the contention of the plaintiff that the case fell within the principle that a master is bound to furnish a reasonably safe place for his servants to work, said: "If this rule is applicable to the present case, then it would follow that for the negligence of any servant to whom the master had committed the duty of providing a safe place the master himself would be liable. I think, however, that this is not the case of 'a place' within the meaning of the rule. As stated in *Butler* v. *Townsend* (1891) 126 N. Y.

the authorities are agreed as to the general proposition, that a master who has furnished a reasonably safe place to work in, and reasonably safe appliances to work with, cannot be held liable to a servant whose coservant has, by his negligence, rendered that place or those appliances unsafe, without the master's fault or knowledge.[4] But there are too many latent ambiguities in such a statement to admit of its being used as a serviceable differentiating test of liability or nonliability. Nor is the situation rendered at all clearer by laying down the rule that, if the negligent act or omission of a servant was in the discharge of the servant's duty, the master is not liable to coservants in the same employment for such negligent act or omission.[5] Equally

105, 26 N. E. 1017, doubtless in one sense of the term the employee must always be in some place, and doubtless, also, the place, in a certain sense, is not safe if an accident occurs there. But the rule that the master must provide a safe place for work only applies where the work and the place are not connected; where the work is not in the construction of the place."

"The negligent use by one employee of perfectly safe machinery will seldom be adjudged a breach of the master's duty of providing a safe place for other employees. Such a construction would make any negligent misplacement of a switch, any negligent collision of trains, even any negligent dropping of tools about a factory, a breach of the duty of providing a safe place." *Howard* v. *Denver & R. G. R. Co.* (1886) 26 Fed. 837.

"That it was the duty of appellant to use ordinary care in furnishing appellee a suitable track and other appliances upon and with which to do his work, there can be no question; but, if his fellow servants negligently encroached upon this track while he was at work, it must be regarded as their negligence, and not the negligence of the master. Were the rule different, every servant, properly engaged in operating cars upon the track, who receives injury through the negligence of another servant in improperly running thereon, would be entitled to recover against the master. In other words, in every case of collision of two trains, those employees receiving injury who were not in fault would be entitled to recover against the master, by reason of the negligence of those who were in fault, upon the theory that the duty of the master in reference to the track applies as well to the acts of fellow servants as to strangers. We incline to think, as an original proposition, that this would have been the proper rule for our courts to have adopted, but the adverse decisions are now too numerous to undertake to overturn them." *Texas & P. R. Co.* v. *Campbell* (1894; Tex. Civ. App.) 39 S. W. 1104.

Compare the language used in *Jarman* v. *Chicago & G. T. R. Co.* (1893) 98 Mich. 135, 57 N. W. 32; *Martin* v. *Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603; *Richmond Locomotive & Mach. Works* v. *Ford* (1897) 94 Va. 627, 27 S. E. 509; *Jenkins* v. *Richmond & D. R. Co.* (1893) 39 S. C. 507, 18 S. E. 182; and also the cases as to the adjustment of railway switches cited in § 610, note 1, subd. (d), *infra*.

[4] "When, however, it appears that the working place originally, and when the employee was sent to do the work there was reasonably safe, but became unsafe at the particular time of the accident by causes that could not have been anticipated, by exigencies created in carrying out the details of the work, or by the neglect of a fellow servant, a different rule is applicable." *Baird* v. *Reilly* (1899) 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884.

"If a master provide a safe place for work, it is the duty of a servant by attention to details of arrangement and execution, to guard it against insecurity; and if a servant be injured by neglect of such details, no matter by whom, the negligence is that of a fellow servant." *Geoghegan* v. *Atlas S. S. Co.* (1893) 3 Misc. 224, 22 N. Y. Supp. 749.

[5] *Sofield* v. *Guggenheim Smelting Co.* (1900) 64 N. J. L. 605, 50 L. R. A. 417, 46 Atl. 711.

indefinite is the doctrine that the negligence of a coservant which relieves a master from liability is the omission of such coservant to perform some act which it is his duty to perform.[6] In practical litigation therefore, the courts have been accustomed to rely rather upon certain subsidiary conceptions which, when it is analyzed from various points of view, the general principle underlying these and similar formularies is found to involve. The varieties of phraseology in which the results of this analysis find expression are quite numerous, but may all, it would seem, be grouped under one of the heads indicated in the following sections.

"One distinguishing feature which is often helpful in doubtful cases is that of stability; if the implement, appliance, or structure is permanent in its character the duty of exercising a reasonable degree of care in its selection and maintenance is one from which the master cannot escape. Whereas, if it be portable, its erection, location, and operation may be, and generally are, regarded as mere details of the work, which pertain to the employee."[7]

586. Supervision of details, not a master's duty.— The most general form in which the limits of a master's obligations are susceptible of being stated is that he is not bound to supervise the merely executive details of the work to be done by his servants.[1]

[6] *Gates* v. *Chicago, R. & St. P. R. Co.* (1892) 2 S. D. 422, 50 N. W. 907.

[7] *Vaw* v. *Whitmore* (1899) 46 App. Div. 425, 61 N. Y. Supp. 731.

One indicium of a "detail" is that the appliance was not permanent, but temporary and movable, to be altered as the work progressed, by the workmen themselves, as their needs required. *Maher* v. *McGrath* (1895) 58 N. J. L. 469, 33 Atl. 945.

A "temporary contrivance" was opposed to a "permanent attachment" in *Kiffin* v. *Woolf* (1899) 39 App. Div. 229, 57 N. Y. Supp. 109.

Permanent conditions and temporary changes are also contrasted in *Vaw Pittsburgh Coal & C. Co.* v. *Peterson* (1894) 136 Ind. 398, 35 N. E. 7.

[1] "It would be extending the liability of the master beyond any established rule, to require him to oversee and supervise the executive detail of mechanical work carried on under his employment, and there is no rule of law which authorizes it." *Hassey* v. *Cooper* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556.

The master is under no duty to make regulations as to matters of executive detail. *Reed* v. *New York C. & H. R. R. Co.* (1877) 70 N. Y. 171 (not culpable to omit to prescribe how many men should be sent with a train of cars on their way to the repair shop).

The master does not insure his employees against each other, nor is he bound to supervise and direct every detail of their labor. They must exercise their own senses in the selection of material out of the mass provided for them; they must use their own judgments as to the manner of handling it. No employer could bear the burden of legal responsibility for every blunder or neglect on the part of each and all of his employees. The fact that one employee is more skilful than another, or, has had greater experience, and is so deferred to by others, does not change his relation to his employer or to his fellows. Nor does a difference in rank or grade of service change the rule. When the character of the business requires it, the master is as much bound to provide his workmen with a reasonably competent foreman as to provide them with tools; but, in either case, his liability ceases when he has made a suitable selection. What remains to be

A detail of the work in this sense has been defined as anything so "connected with work being done as to be an essential part of its performance" and "necessary to insure its safe completion."[2] But this definition is not of much assistance except in so far as it is explained

done is that each workman, whatever his rank or skill or experience, shall, with reasonable diligence and intelligence, discharge his duty towards his employer and his fellows.

"We are not disposed to discuss the question, on which some courts have differed, how far down in the chain of delegated appointments the master is to be held as bound to personal supervision. The starting point—that he is only liable for his own neglect—is one from which we have no right to depart. And it is plain enough that, when he is held to any personal supervision which, from the nature of his business, is impracticable, the rule is violated, and there is no tangible distinction left between liability to servants and liability to strangers. We think some of the decisions have led very far towards destroying all means of discernment." *Michigan C. R. Co.* v. *Dolan* (1875) 32 Mich. 510.

"It would be absurd to say that the owners owed a duty to the seamen that too long a hawser should never be used, or that signals in a fog should be properly given by their own vessel." *The Queen* (1889) 40 Fed. 694.

A railway company is under "no positive duty to supervise the details of the operation of switching cars" in its yard. *Central R. Co.* v. *Keegan* (1895) 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269.

A railway company cannot be held liable for the negligence of the foreman of a gang of track repairers in failing to set a lookout, as prescribed by a rule of the company, upon the theory that some one else should have looked after him and seen that he did his duty. *Duthie* v. *Caledonian R. Co.* (1898) 24 Sc. Sess. Cas. 4th series, 934.

In *Ryan* v. *Cumberland Valley R. Co.* (1854) 23 Pa. 384, the court, in discussing an allegation of the plaintiff (a laborer on a construction train who was injured by the carelessness of the engineer), that the neglect of the engineer in failing to see that all the cars were safely coupled before starting his train was chargeable to the company, observed: "This alleged duty did not grow out of any contract between the plaintiff and the defendants, else the contract would have been charged as an essential and relevant bond of their relation, which has not been done. If it was a duty which the engineer owed to the plaintiff in any way, then the action ought to be against him for the breach of it. If he owed it to the defendants, then they alone can complain of its nonperformance. The duty must therefore be alleged as that of the defendants to the plaintiff. In what form shall we put it, or how shall we define it? Is it that, when persons are employed to work for others, the employers are bound to see that the instruments of their work are and shall continue in a condition to be used with safety? Then the coachman, the wagoner, and the carter, who ought to know more about the vehicles which they use than their employers do, have a practical warranty that they are in good order, though practically we know that many of them are nearly worn out; the wood chopper and the grubber are insured that their axe or mattock shall not injure them by flying off the handle; the engineer, the miller, the cotton spinner, and the wool carder have a guaranty for the accidents that may befall them in the use of the machinery which they profess to understand, and which they ought so to understand as to be able to inform their employers when it is out of order. If this be so, then the care and skill required of workmen is reduced very much below what is ordinarily expected of them. If there be any distinction between any of the cases put and the one in hand, it is too narrow to be made the foundation of a new rule, or to cancel the force of the analogy which they afford. Certainly such a duty has never been considered as belonging to these relations, and therefore it cannot be law."

Other illustrations of the same phraseology may be found in *Doncaster* v. *Baumann* (1899) 40 App. Div. 502, 58 N. Y. Supp. 110; *Hart* v. *New York Floating Dry Dock Co.* (1882) 16 Jones & S. 460; *Frazee* v. *Stott* (1899) 120 Mich. 624, 79 N. W. 896.

[2] *Golden* v. *Sieghardt* (1898) 33 App. Div. 161, 53 N. Y. Supp. 460.

by the more categorical statements of principles in the following sections.[3]

In nearly all the cases in which this rule as to details of work constitutes a protection to the master, the evidence shows actual negligence on the part of the fellow servants of the plaintiff. But it is a mistake to lay down without qualification that "the negligence in such a case is said to resolve itself into the negligence of a fellow servant."[4]

Sometimes the circumstances seem to be such that the master's immunity may be referred indifferently to any one of three conceptions, *viz.*, that the servant was himself a participant in the acts of negligence, that his fellow servants were negligent, or that the negligent act was an incidental detail of the work, as to which no duty on the master's part can be predicated.[5]

587. Merely transitory perils, master not bound to protect the servant against.—(See also § 601, *infra.*)—A form of expression which is often met with in recent cases, particularly in Massachusetts, is that there can be no recovery where "the danger to which the plaintiff was exposed was merely a transitory one, existing only on the single occasion when the injury was sustained, and due to no fault of plan or

[3] It may be remarked that by predicating the nonexistence of a duty on the part of an employee alleged to be a vice principal to supervise his subordinates in the performance of their work, the necessity of inquiring into the correctness of that allegation is sometimes dispensed with. A conductor, for instance, is bound to give orders as to the movement of the several parts of a freight train at a station, but he is not in duty required to follow up each brakeman, and see how each movement is executed. *Relyea* v. *Kansas City, Ft. S. & G. R. Co.* (1892) 112 Mo. 86, 18 L. R. A. 817, 20 S. W. 480, where it was held not to be negligence for the conductor to leave to the brakeman the work of seeing that the brakes were properly set on each of the cars which were left standing on a grade.

[4] *Jones* v. *St. Louis, A. & P. Packet Co.* (1891) 43 Mo. App. 398, citing *Bowen* v. *Chicago, B. & K. C. R. Co.* (1888) 95 Mo. 268, 277, 8 S. W. 230. Compare also the following passage from the opinion in *Kimmer* v. *Weber* (1897) 151 N. Y. 417, 45 N. E. 860.

"Assuming that his attention was so called to the matter, as testified to by this witness, was the foreman guilty of negligence attributable to the master, in permitting the workmen to go on with the work upon the platform that they had erected to suit themselves? If his judgment was wrong with respect to the sufficiency of the platform, so was that of the workmen. They knew as much with respect to the safety of the place where they stood as he did. None of the masons suggested to any one that the scaffold was unsafe. Whatever was said on that subject was by one of the plumbers when he saw the men using their scaffold. If, under these circumstances, the foreman had refused or declined to interfere with what had been done by the workmen, and he trusted to their judgment, it was not such negligence as to charge the defendants with the result of the accident. It was, at most, [an] error of judgment on the part of the foreman with respect to a detail of the work in which the masons were engaged. He concluded, as the workmen themselves did, that the place was safe, and in determining that question they were all coservants."

[5] In *Hogan* v. *Field* (1887) 44 Hun, 72, the action was held to be barred on the first of these grounds; but, upon the evidence, the other two would apparently have been available as valid defenses.

construction, or lack of repair, and to no permanent defect or want of safety in the defendant's works, or in the manner in which they had been ordinarily used."[1] Or, as the rule has also been enunciated, "the absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks which arise from short-lived causes."[2]

588. Dangers caused by the progress of the work, master not bound to protect servant against.— One special application of the general conception underlying the rule stated in the preceding section is that, where the work is of such a character that, as it progresses, the environment of the servant must necessarily undergo frequent changes, the master is not bound to protect the servants engaged in it against the dangers resulting from those changes.[1] The cases in which this

[1] *Meehan* v. *Speirs Mfg. Co.* (1899) 172 Mass. 375, 52 N. E. 518.

[2] *Whittaker* v. *Bent* (1897) 167 Mass. 588, 46 N. E. 121, per Holmes, J.

[1] Where the place as it stands when the work begins is perfectly safe, and the danger can only arise as the work progresses, and be caused by the work done, it is not the duty of the employer to stand by during the progress of the work, to see when a danger arises. It is sufficient if he provides against such dangers as may possibly or probably arise, and gives the workmen the means of protecting themselves. *Durst* v. *Carnegie Steel Co.* (1896) 173 Pa. 162, 33 Atl. 1102.

The duty of a master to provide his servants a safe place in which to work does not attach "where the place becomes dangerous in the progress of the work, either necessarily or from the manner in which the work is done." *Cleveland, C. C. & St. L. R. Co.* v. *Brown* (1896) 26 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970.

"The employer's obligation towards an employee does not oblige him to keep the working place in a safe condition at every moment of the work, so far as its safety depends upon the due performance of the work by fellow servants of the employee." *Baird* v. *Reilly* (1899) 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884.

"It makes a vast difference in the question of the liability of the master whether, when a servant meets with an accident from a defect in the previous work, occurring through the negligence of a servant engaged in its construction, the negligence is to be deemed as arising from a failure to provide a safe place, or as negligence in the general enterprise in the prosecution of which all the workmen are engaged. If the first, the master is liable, even though the negligence is that of a servant; because the duty is that of the master. If the second, it is the negligence of a co-servant, and the master is not liable for it." *Stourbridge* v. *Brooklyn City R. Co.* (1896) 9 App. Div. 129, 41 N. Y. Supp. 128.

The rule that a master is bound to furnish his servant a safe place in which to do his work does not apply "where the prosecution of the work itself makes the place and creates its dangers." *O'Connell* v. *Clark* (1897) 22 App. Div. 166, 48 N. Y. Supp. 74.

The rule that the duty of furnishing and maintaining a safe place and safe appliances is non-delegable "cannot apply to a condition of dangers brought about by the negligent acts of a servant or a fellow servant, for whose acts he is responsible, nor to the hazards and dangers arising from the employment and belonging to the peculiar occupation in which the servant is engaged, and which he assumed when he entered the master's service." *Anderson* v. *Daly Min. Co.* (1897) 16 Utah, 28, 50 Pac. 815.

In *Petaja* v. *Aurora Iron Min. Co.* (1896) 106 Mich. 463, 32 L. R. A. 435, 64 N. W. 335, 66 N. W. 951, the court commented upon the failure of counsel to cite any cases supporting the theory of the plaintiff "that a master is obliged to make safe the place which the servant makes and occupies as a means of doing his work, or which results as an

principle is most usually applied are those involving the various kinds of construction work.[2]

It should be observed that in some cases of this class the element of a fellow servant's negligence is not involved at all, and recovery is denied on the broad ground that there is no breach of duty on the master's part.[3]

589. Preparation or care of instrumentalities, master not responsible for, where these functions are a part of the work to be done.—(See also subtitle C, *infra*.)—The cases determined by the conception adverted to in the preceding section often involve facts which may also be discussed with relation to the principle that the master is not liable as for negligence in failing to provide or maintain safe instrumentalities in any case where the preparation or care of these instrumentalities constitutes a part of the work which the injured servant or his coemployees undertook to do.[1] Both aspects of the master's nonlia-

incident of the work, although it necessitates his presence in a place to a greater or less degree unsafe;" and asked: "In such cases, must the master stay with, or follow up, the servants, to be certain that they make the place safe, so that they or some of them be not injured?"

In another case a contrast is drawn between permanent conditions and conditions in the place of work created by the workmen themselves, as the work progresses, which are continually changing in the course of the work. *Foley* v. *Brooklyn Gaslight Co.* (1896) 9 App. Div. 91, 41 N. Y. Supp. 66.

Compare also § 585, note 7, *supra*.

[2] "The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building which they are employed in erecting in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows." *Armour* v. *Hahn* (1884) 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433.

"The duty of a master to furnish a safe place for the performance of work does not require it to keep that place safe under the constantly changing conditions which the performance of such a work as the construction of a sewer necessitates." *Minneapolis* v. *Lundin* (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525.

See also *Durst* v. *Carnegie Steel Co.* (1896) 173 Pa. 162, 33 Atl. 1102; *Donnelly* v. *Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 111, 37 Atl. 874, and the cases cited in subtitle C, *infra*.

[3] Thus it has been held that the danger to workmen walking on the keelson of a barge which they were engaged in unloading, owing to the rounding top thereof, is not one for which the master is responsible, as it is a condition which the workmen create as the work progresses and the keelson is exposed. *Foley* v. *Brooklyn Gaslight Co.* (1896) 9 App. Div. 91, 41 N. Y. Supp. 66.

So, a master is not liable as for a failure to furnish a safe place of work, where he ordered the injured servant to push a draft of bales, which, while it was being hoisted, had caught in the coamings of a hatch, and one of the bales fell on the servant. *O'Connell* v. *Clark* (1896) 6 App. Div. 33, 39 N. Y. Supp. 454 (1897) 22 App. Div. 466, 48 N. Y. Supp. 74.

[1] In *Robinson* v. *George F. Blake Mfg. Co.* (1887) 143 Mass. 528, 10 N. E. 314, the court thus criticised an instruction: "It is not a universal rule of law that an implied duty rests upon an employer to furnish suitable means, machines, implements, and instrumentalities for doing his work. This may depend on the nature of the employment and the circumstances of the case. The natural inference from these might be that the servant or person employed was to furnish his own tools and appliances. Or the nature of the work to be done might be such that it would be natural and

bility are sometimes associated closely together, as where a court speaks of a place in which conditions are constantly changing, and of which the furnishing and preparation was in itself part of the work the employees were required to perform.[2]

The consideration of this principle from a slightly different stand

reasonable to infer that both parties understood that the servant should procure whatever might prove to be needed, according to his own judgment, as a part of his employment. If a person is employed to do a piece of work himself, with the understanding that he shall procure such means, materials, or implements as he finds to be needed, and if he enters upon the execution of the work and procures insufficient or defective means, materials, or implements, it might be found that the master did not assume any responsibility to such servant for the sufficiency or quality, even though he was to pay for them. Nor is the case necessarily different if the person so employed is authorized to engage others to help him do the work, as well as to procure means and appliances. If, for example, the work to be done with the use of a simple fulcrum ing of a heavy article, which could be done with the use of a simple fulcrum and lever, and the employer's foreman, in charge of the work, should be left to provide them at the place where the work was to be done, and he should take a common stone for the fulcrum and a piece of scantling or a rail from a neighboring fence for the lever, and the stone should roll, or the lever break, and one of the men engaged in the work should be hurt thereby, a jury would naturally find that such selection of materials and appliances was a part of the work to be done, and not within the implied duty and undertaking of the employer."

"The rule that the master must provide a safe place for work only applies where the work and the place are not connected: where the work is not in the construction of the place." *Stourbridge* v. *Brooklyn City R. Co.* (1896) 9 App. Div. 129, 41 N. Y. Supp. 128.

"A distinction has, however, been made, so that where it appeared that as a part of or an incident to the work which the employee was to do, such employee was required to erect a scaffold or other appliance necessary to do the work, neglect in the erection of such scaffold was not a neglect to perform a duty that the employer owed to his employee." *Richards* v. *Hayes* (1897) 17 App. Div. 422, 45 N. Y. Supp. 234.

"The rule that a master must furnish suitable tools and appliances and a safe place to work is qualified by another,—that where the master furnishes suitable appliances, and the duty to adjust them properly to work of a temporary character is neglected by a workman whose business it is to attend to that detail, the master is not liable to a fellow workman injured by that neglect." *Dwyer* v. *Hall* (1897) 21 Misc. 452, 47 N. Y. Supp. 630.

"We shall not attempt to do what no court has yet been able to do, *viz.*, to formulate a statement of the rule that will furnish a test by which to determine every case; but we may suggest that, in our opinion, an important consideration, often overlooked, is whether the structure, appliance, or instrumentality is one which has been furnished for the work in which the servants are to be engaged, or whether the furnishing and preparation of it is itself part of the work which they are employed to perform. If it be the latter, then, as is well settled by our own decisions, the master is not liable." *Fraser* v. *Red River Lumber Co.* (1891) 45 Minn. 235, 47 N. W. 785.

The rule as to non-delegable duties does not apply to a case "where several persons are employed to do certain work, and by the contract of employment, either express or implied, the employees are to adjust the appliances by which the work is to be done." *Barnes* v. *Sennett* (1893) 99 Cal. 363, 33 Pac. 916.

To the same effect see the following cases: *Beesley* v. *F. W. Wheeler & Co.* (1894) 103 Mich. 196, 27 L. R. A. 266, 61 N. W. 658; *Retaja* v. *Aurora Iron Min. Co.* (1896) 106 Mich. 469, 32 L. R. A. 438, 66 N. W. 951, Affirming on rehearing 106 Mich. 463, 32 L. R. A. 435, 64 N. W. 335; *Sims* v. *American Steel Barge Co.* (1894) 56 Minn. 68, 57 N. W. 322; *Marsh* v. *Herman* (1894) 47 Minn. 537, 50 N. W. 611; *Callan* v. *Bull* (1896) 113 Cal. 593, 45 Pac. 1017; and the cases cited in subtitle C, *post*.

[2] *Coal & Min. Co.* v. *Clay* (1894) 51 Ohio St. 542, *sub nom. Consolidated*

point yields the rule that it is always a condition precedent to the exemption of the master from liability that the operations which were the immediate cause of the injury were a part of the regular duties of the servant themselves.[3]

590. Negligent use of safe appliances by fellow servant, master not responsible for.—(See also subtitle B, *infra*.)—Another ground of distinction adverted to by the courts is based upon the theory that the master, while responsible for intrinsic defects in the instrumentalities, which would not have existed if the servants intrusted with the functions of supplying or maintaining them had exercised proper care, cannot be held liable for injuries caused by the manner in which the servants use those instrumentalities for the performance of their work.[1] That is to say, the master is deemed to have performed his whole duty, where he has supplied an instrumentality which is reasonably safe if it is carefully used by the fellow servants of the injured

Coal & Min. Co. v. *Floyd*, 25 L. R. A. 848, 38 N. E. 610.

[3] *McGinty* v. *Athol Reservoir Co.* (1892) 155 Mass. 183, 29 N. E. 510.

[1] The duty of the master "does not extend so far as to require of him that he should be responsible for the negligence of his servants, if of competent skill and experience, in using or managing the means and appliances placed in their hands in the course of their employment, if they are neither defective nor insufficient." *Snow* v. *Housatonic R. Co.* (1864) 8 Allen, 441, 85 Am. Dec. 720.

"For the management of his machinery and the conduct of his servants a master is not responsible to their fellow servants." *Gilman* v. *Eastern R. Co.* (1866) 13 Allen, 433, 90 Am. Dec. 210.

"The master has done his whole duty when he supplies the proper appliances, the care and use of which must be necessarily intrusted to his servants. *Jones* v. *Granite Mills* (1878) 126 Mass. 84, 30 Am. Rep. 661.

A master is not liable for acts "incidental to the management and use of the appliances furnished." *McKinnon* v. *Norcross* (1889) 148 Mass. 533, 3 L. R. A. 320, 20 N. E. 183.

"One line of distinction between vice principals and coemployees is in the duty, in one instance, to supply or maintain instrumentalities of the service, and, in the other, of using the instrumentalities supplied." *Vents* v. *Jackson Hill Coal & C. Co.* (1894) 139 Ind. 411, 38 N. E. 324, 39 N. E. 147.

A master is not liable for the "negligence of those engaged with the plaintiff in making use of a place admittedly safe." *Baron* v. *Detroit & C. Steam Nav. Co.* (1892) 91 Mich. 585, 52 N. W. 22.

"It is no part of the duty of the master to direct workmen in the use of the tools with which they perform their work." *Hussey* v. *Coger* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556.

"The line of demarcation here between the absolute duty of the master and the duty of the servants is the line that separates the work of construction, preparation, and preservation from the work of operation. Is the act in question work required to construct, to prepare, to place in a safe location, or to keep in repair the machinery furnished by the employer? If so, it is his personal duty to exercise ordinary care to perform it. Is the act in question required to properly and safely operate the machinery furnished, or to prevent the safe place in which it was furnished from becoming dangerous through its negligent operation? If so, it is the duty of the servants to perform that act, and they, and not the master, assume the risk of negligence in its performance." *St. Louis, I. M. & S. R. Co.* v. *Needham* (1894) 25 L. R. A. 833, 11 C. C. A. 56, 27 U. S. App. 227, 63 Fed. 107.

After rejecting the theory that the negligent use of materials can be, in the majority of cases, a breach of the master's duty, the court said: "The true idea is that the place and the instruments must in themselves be safe,

person.[2] Or, in other words, where an appliance is reasonably safe to operate, and its operation necessarily rests upon the care, intelligence, and fidelity of the fellow servants of the person injured, the master will not be held responsible for an accident the nature of which indicates that it must have been due to the manner in which the appliance was operated by one of those workmen.[3]

The cases decided on this theory may sometimes involve facts which show the master to be free from culpability for the reason that the instrumentality in question was applied to the purpose of the work without his authority. Compare § 567, *ad finem, ante*.

Negligence as regards the use of instrumentalities may, it is clear, be committed in one of the following ways. It is often difficult to say precisely under which of the categories the delinquency in question should be classed, but in practical litigation this is not a matter of any importance, since the result is the same, whatever may be the strictly logical designation of the negligent act.

(a) The delinquent coservant may have handled or placed a safe instrumentality so carelessly as to convert it, for the time being, into an injurious agency.[4]

(b) The delinquent may have created the abnormal danger by his negligence in selecting the defective instrumentality from the stock of materials supplied.[5]

for this is what the master's duty fairly compels; and not that the master must see that no negligent handling by an employee of the machinery shall create danger." *Howard* v. *Denver & R. G. R. Co.* (1886) 26 Fed. 837.

In *Hard* v. *Vermont & C. R. Co.* (1860) 32 Vt. 473, the court adverts to the difference between the master's obligation as to equipping and as to operating a railway.

See also *Smith* v. *Empire Transp. Co.* (1895) 89 Hun, 588, 35 N. Y. Supp. 534.

[2] *Fowler* v. *Chicago & N. W. R. Co.* (1884) 61 Wis. 159, 21 N. W. 40; *Hogan* v. *Smith* (1891) 125 N. Y. 774, 26 N. E. 742.

[3] *Dana* v. *Crown Point Iron Co.* (1893) 51 N. Y. S. R. 238, 22 N. Y. Supp. 455.

[4] See the cases cited above, and also the following: *Cleveland, C. C. & St. L. R. Co.* v. *Brown* (1896) 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970; *Peirce* v. *Kile* (1897) 26 C. C. A. 201, 53 U. S. App. 891, 80 Fed. 865; *The Queen* (1889) 40 Fed. 694; *McDermott* v. *Boston* (1882) 133 Mass. 349; *Treka* v. *Burlington, C. R. & N. R. Co.* (1896) 100 Iowa, 205, 69 N. W. 422; *Worhide* v. *Missouri Car & Foundry Co.* (1888) 32 Mo. App. 367; *McLaughlin* v. *Camden Iron Works* (1897) 60 N. J. L. 557, 38 Atl. 677.

"Any machine may be made dangerous if wrongfully or negligently used." *Calloway* v. *Allen* (1894) 12 C. C. A. 114, 24 U. S. App. 388, 64 Fed. 297.

[5] See especially the cases cited in § 605, *infra*, and the following: *Callan* v. *Bull* (1896) 113 Cal. 593, 45 Pac. 1017; *Daley* v. *Boston & A. R. Co.* (1888) 147 Mass. 101, 16 N. E. 690; *Young* v. *Boston & M. R. Co.* (1897) 168 Mass. 219, 46 N. E. 624; *Kennedy* v. *Spring* (1893) 160 Mass. 203, 35 N. E. 779; *McKinnon* v. *Vorcross* (1889) 148 Mass. 533, 3 L. R. A. 320, 20 N. E. 183; *Fraser* v. *Red River Lumber Co.* (1891) 45 Minn. 235, 47 N. W. 785; *McCone* v. *Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697; *Boaz* v. *McNeil* (1898) 35 App. Div. 323, 54 N. Y. Supp. 956; *Guggenheim Smelting Co.* v. *Flanigan* (1898) 62 N. J. L. 354, 41 Atl. 844, 42 Atl. 145; *Willis* v. *Ore-*

(c) The delinquent coservant may have failed to use the instrumentalities furnished, and so created the abnormal danger which caused the injury.[6]

(d) The delinquent may have been in control of the injured servant, and caused the injury by giving his fellow servants some direction as to the use of the appliances, or by sending the injured servant to work in a specially dangerous place without due warning, or with a positive assurance that he would not be put in peril by complying with the order.[7]

591. Rationale of doctrine exempting master from liability for negligence in carrying out the details of the work.— Viewed from the standpoint of the extent of a master's obligations to his servant, the doctrine that there can be no recovery for the negligence of a coservant in respect to the details of the work has been regarded as one deduced *ex necessitate rei*.[1] It seems difficult, however, to concede that

gon R. & Nav. Co. (1881) 11 Or. 257, 4 Pac. 121; *Ross* v. *Walker* (1891) 139 Pa. 42, 21 Atl. 157, 159.

"To provide these supplies (*i. e.*, new wicks) for use was the master's duty: to take them as they were needed for use was the servant's duty." *Simpson* v. *Central Vermont R. Co.* (1896) 5 App. Div. 614, 39 N. Y. Supp. 464.

[6] See, for example, *Griffiths* v. *Gidlow* (1858) 3 Hurlst. & N. 648, 27 L. J. Exch. N. S. 404; *Cleveland, C. C. & St. L. R. Co.* v. *Brown* (1896) 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970; *Keane* v. *Troy Steel & Iron Co.* (1893) 139 N. Y. 369, 34 N. E. 901; *Hulson* v. *Ocean S. S. Co.* (1888) 110 N. Y. 625, 17 N. E. 742; *Dicer* v. *Hall* (1897) 21 Misc. 452, 47 N. Y. Supp. 630, Reversing 20 Misc. 677, 46 N. Y. Supp. 533; *McAndrews* v. *Burns* (1876) 39 N. J. L. 117 (omission to deliver here); *Lapale* v. *Cook* (1899) 21 R. I. 158, 42 Atl. 519, and the cases cited in §§ 604–606, *infra*.

The duty of a foreman in using the means and appliances provided for safely and properly carrying on the work is that of a servant engaged in the same business with the plaintiff, even if he acted as the representative of the master in furnishing such means and appliances. *Floyd* v. *Snyden* (1883) 134 Mass. 563.

[7] See *Hodgkins* v. *Eastern R. Co.* (1876) 119 Mass. 419; *Harlan* v. *Chicago & A. R. Co.* (1895) 65 Fed. 37; *McBride* v. *Indianapolis Frog & Co.* (1892) 5 Ind. App. 482, 32 N. E. 579; *Tullo* v. *New York & T. S. S. Co.* (1896) 10 App. Div. 463, 42 N. Y. Supp. 29; *Craig* v. *Chicago & A. R. Co.* (1893) 54 Mo. App. 523; and the cases cited in §§ 596–600, *infra*. Compare also §§ 435, 448, *ante*.

[1] "Some of the details must necessarily rest upon the intelligence and care of the servants." *Sullivan* v. *New York, N. H. & H. R. Co.* (1892) 62 Conn. 209, 25 Atl. 711.

"That appellee did not owe to appellant, as its employee, under the circumstances, the legal duty to support the rims in question by the hands of some one of its agents or representatives in the manner as Huey was doing just previous to the accident, is certainly evident. If it could be said to be charged with that duty, then every corporation engaged in the same line of business as it was would, in legal contemplation, be required to be present at all times and places at its factory when lumber, timber, or iron or other heavy material of like character was being handled or moved by some of its employees, and by the hands of such agent or representatives prevent such iron, timber, or lumber, or other material connected therewith from slipping and falling upon said employees, and thereby injuring them." *Hodges* v. *Standard Wheel Co.* (1899) 152 Ind. 680, 686, 52 N. E. 391, 54 N. E. 383.

"When proper tools and appliances are provided upon the premises for the use of employees, no authority can be found for imposing upon the employer

such a consideration has any real weight, except in so far as it may be a step towards the conclusion that the servant assumes the consequent risks. See below. Taken by itself it may be said to be equally potent as a reason for insisting that the master should be chargeable with the negligence which, under the arrangements which he has chosen to make for carrying on his business, he knows to be occasionally inevitable. *Qui sentit commodum idem sentire debet et onus.* In whatever cloak of verbiage it may be wrapt up, a doctrine having no more solid foundation than the hypothesis that one of these inferences rather than the other should be drawn from the existence of the conditions adverted to is merely one formulated *ex cathedra*. Compare remarks at the end of § 475, *ante*.

A much more satisfactory reason for absolving the master from liability for negligence of this description is, that the servant is chargeable with an assumption of such risks because he knows them to be incident to the performance of the duties voluntarily undertaken by him. This is equivalent to saying that in cases in which the servant's right to recover is denied on account of the nature of the injurious act, this conclusion is, in the last analysis, referable to precisely the same elementary conception as that which underlies the doctrine of common employment itself. See § 472, *ante*.[2] In this point of

the further duty of seeing that the servant does not select from among a number of appliances the one not adapted to the work in which for the time he may be occupied. If such a responsibility is cast upon the master, it would be necessary in his protection to have an *alter ego* to attend constantly upon every workman in his service, to see that he did not use an implement unfitted for his work." *Guggenheim Smelting Co.* v. *Flanigan* (1898) 62 N. J. L. 354, 41 Atl. 844, 42 Atl. 145.

In a Delaware case the court speaks of a "duty ministerial in its character and of executive detail in the operation on the road which must, of necessity, be vested in [and trusted to] the faithfulness of the employee." *Wheatley* v. *Philadelphia, W. & B. R. Co.* (1894) 1 Marv. (Del.) 305, 30 Atl. 660.

See also to the same effect, *Kudik* v. *Lehigh Valley R. Co.* (1894) 78 Hun, 492, 29 N. Y. Supp. 533.

[2] "The master is not responsible for the negligent performance of some detail of the work intrusted to the servant, whatever may have been the grade of the servant who executes such detail. If it is the work of the servant, and he volunteers to perform it, and the master is not at fault in furnishing proper materials, there is no breach of duty on the part of the latter." "The scaffolding having been constructed by the workmen themselves, or under their direction, if appliances which they made use of for that purpose were in any respect defective or insufficient, they had, so far as appears, the same means of knowing that fact as the defendants." *Kimmer* v. *Weber* (1897) 151 N. Y. 417, 45 N. E. 860.

In another case the same court speaks of "a detail of the working or management of the business, the risks attending which have been assumed by the party taking employment." *Cullen* v. *Norton* (1891) 126 N. Y. 1, 26 N. E. 905.

In *Hatton* v. *Hilton Bridge Constr. Co.* (1899) 42 App. Div. 403, 59 N. Y. Supp. 272, the court, after citing several cases as to details of work, said: "Those authorities refer to accidents occurring during the progress of the work, where the servant is necessarily aware of the danger: where he knows, or ought to know, as much in regard to the safety of the place where he is called to work as the master; to cases where the master has performed his duty of furnishing and

view it will obviously be material in doubtful cases to inquire whether the operation which was the cause of the injury was ordinarily intrusted to the employees themselves.[3]

592. Pleading.—*a. Declaration.*—A declaration alleging facts which show that, if there was any negligence, it consisted in the omission of some duty characteristic of a mere servant, acting as such, is demurrable.[1] The operation of this rule cannot be prevented by the

maintaining a safe place for the servant to perform his work in, and safe and proper instrumentalities therefor. After that duty has been performed, they determine that if a servant is injured because of the manner of the performance of the work, the master is not liable."

In *Hogan* v. *Field* (1887) 44 Hun, 72, the plaintiff was held not entitled to recover for the reason that while the construction of the defective scaffold was no part of the business of the gang of workmen to which he belonged, they, without objection, undertook the erection of it, and had the control and management of the work.

In *McCone* v. *Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 694, the fact was emphasized that the servant's knowledge of the details and requirements of the temporary appliance which the servants were left to construct as a part of the work was as complete as that of the master.

In *Maher* v. *McGrath* (1896) 58 N. J. L. 469, 33 Atl. 945, the error in the construction of a scaffold was said to be one "committed by workmen with whom he [the plaintiff] was working in a common employment, subject to a common danger which all equally knew must result from a negligent construction."

In *Brothers* v. *Carter* (1873) 52 Mo. 372, 375, 14 Am. Rep. 724, the court said: "If a workman or servant is to work in conjunction with others, he must know that the carelessness of one of his fellow servants may be productive of injury to himself, and he must know that neither care nor diligence by the master can prevent the want of due care and caution on the part of his fellow servants. The servant, on entering upon the employment, is supposed to know and assume this risk." This statement was adopted in *Brown* v. *Winona & St. P. R. Co.* (1880) 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484.

"As between themselves, no one more than another in the ordinary work of navigation represents the owner, or performs an owner's duty; and therefore each takes the risk of the other's negligence." *The Queen* (1889) 40 Fed. 691.

See also *Armour* v. *Hahn* (1884) 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433, the effect of which is stated in § 612a, note 1, subd. (d), *supra*; *Minneapolis* v. *Landin* (1893) 7 C. C. A. 314, 19 U. S. App. 245, 58 Fed. 525; *Oregon Short-Line & U. N. R. Co.* v. *Frost* (1896) 21 C. C. A. 186, 44 U. S. App. 606, 74 Fed. 965; *Soutar* v. *Minneapolis International Electric Co.* (1897) 68 Minn. 18, 70 N. W. 796; *Slater* v. *Jewett* (1881) 85 N. Y. 61, 29 Am. Rep. 627; *Tully* v. *New York & T. S. S. Co.* (1896) 10 App. Div. 463, 42 N. Y. Supp. 29; *Donnelly* v. *Brown* (1887) 43 Hun, 470.

[3] This was the conception present to the mind of the court in a recent New York case when it used the phrase, "One of the details of the business that is generally left to the workmen themselves." *Kimmer* v. *Webber* (1897) 151 N. Y. 417, 45 N. E. 860. So, a Federal court speaks of acts which "may be all performed, and, for the most part, usually are directed and performed, by others than the master." *The Queen* (1889) 40 Fed. 694.

[1] *Dwyer* v. *American Exp. Co.* (1892) 82 Wis. 307, 52 N. W. 304; *Baxter* v. *Abernethen* (1893) 21 Sc. Sess. Cas. 4th Series, 159; *Carolan* v. *Southern P. Co.* (1897) 81 Fed. 81; *Davis* v. *Muscogee Mfg. Co.* (1898) 106 Ga. 126, 32 S. E. 30; *Kerr* v. *Crown Cotton Mills* (1898) 105 Ga. 510, 31 S. E. 166; *Kodil* v. *Lehigh Valley R. Co.* (1894) 78 Hun, 492, 29 N. Y. Supp. 533; *Frawley* v. *Sheldon* (1897) 20 R. I. 258, 38 Atl. 370; *Bourne* v. *King* (1900) 40 C. C. A. 545, 100 Fed. 561; *Baxter* v. *Abernethy* (1893) 21 Sc. Sess. Cas. 4th series, 159.

A complaint in an action to recover from a contractor for the mason work of a building for injuries caused by the fall of a wall is demurrable, when it alleges (1) that the mortar was badly mixed, but does not aver any want of due supervision; (2) that stones of an insufficient size were used for headers, but does not aver that the defendant

device of an averment ascribing the injury to the negligence of the master himself.[2] When the complaint positively alleges that the acts and omissions complained of were by the defendant, it cannot be presumed that they were those of a fellow employee of the deceased.[3]

b. Plea.—Where a complaint is demurrable because it shows that the plaintiff was injured by the negligence of a fellow servant, that fact need not be pleaded in an answer.[4] Upon a plea traversing negligence by the defendant, the defense that the injury complained of was caused by the negligence of a fellow servant is open.[5]

593. Instructions.— (See also § 611, note 1, subd. (b); § 615 *ad finem*, and § 617, note 2, *ad finem, infra.*)—Where upon the evidence, the injury may possibly have been due to an act of the kind for which the master is not responsible, it is error to refuse instructions embodying the rule appropriate to such a case.[1] It is also ground for reversal if such instructions are omitted where the state of the evidence is such that the jury may have been misled by such omissions.[2]

did not supply suitable stones; (3) that the contractor for the carpentry work drove "dooks" into the wall before the wall was properly set, but does not aver that the defendant knew of this being done and failed to take steps to prevent it. *Rae* v. *Milne* (1896) 24 Sc. Sess. Cas. 4th series, 165. See also the first of the Alabama cases cited in § 618, note 1, *infra*.

[2] From an allegation that the injury was caused by the negligence of the defendant in allowing a train to attain a dangerous rate of speed, it will be inferred that the injury was due to the negligence of the servants of the defendant. *Sherman* v. *Rochester & S. R. Co.* (1853) 15 Barb. 574. Affirmed in (1858) 17 N. Y. 153. A similar inference will be drawn where the averment is that the plaintiff was injured by the manner in which cars were loaded. *Indianapolis & St. L. R. Co.* v. *Johnson* (1885) 102 Ind. 352, 26 N. E. 200.

[3] *Bruce* v. *Central P. R. Co.* (1885) 68 Cal. 171, 8 Pac. 828.

[4] *Maan* v. *O'Sullivan* (1890) 126 Cal. 61, 58 Pac. 375.

[5] *M'Carthy* v. *Bristol Shipowners' Co.* (1883) Ir. L. R. 10 C. L. 384; *S. P. Byrne* v. *Fenaell* (1882) Ir. L. R. 10 C. L. 397.

[1] *Reichel* v. *New York C. & H. R. R. Co.* (1892) 130 N. Y. 682, 29 N. E. 763.

[2] In *St. Louis, I. M. & S. R. Co.* v. *Needham* (1894) 25 L. R. A. 833, 11 C. C. A. 56, 27 U. S. App. 227, 63 Fed. 107, it was argued that, if the court erred in its charge, that error did not prejudice the company, because there was uncontradicted testimony that there was no target on the switch which was left open, and the jury were charged that if the switch was not in proper order because it had no target upon it and for that reason the injury and death were caused, the company was liable. But the court said: "This position cannot be successfully maintained. The testimony was such that the jury might well have found that the injury was neither caused nor contributed to by the absence of the target, and that it resulted solely from the negligence of the conductor who left the switch open. The defendants in error charged two acts of negligence upon this company, the failure to provide the target, and the failure of the conductor to close the switch. Issues were raised and submitted to the jury to determine whether either of these acts caused or contributed to the injury. The verdict was general, and its generality prevents us from discovering upon which of these acts of negligence charged it was founded. A general verdict cannot be upheld where there are several issues tried, and upon any one of them error is committed in the admission or rejection of evidence, or in the charge of the court, because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related, and that they were controlled in

On the other hand, where the evidence clearly shows that the injury was caused by negligence in respect to a detail of the work, it is error to give an instruction to the effect that a master is bound to provide a safe place of work.[1]

594. Functions of court and jury in passing upon the evidence.—(See also § 195, *ante*, § 617, note 5, *ad finem*, *infra*.)—It is primarily for the jury to say whether the injury resulted from negligence in furnishing the materials, or in using them.[1] But where the evidence offered by the plaintiff is such that it is not reasonably susceptible of any other construction than that the injury was caused solely by an act belonging to the category of those deemed to be characteristic of mere servants, the case should be taken from the jury by a dismissal of the complaint,[2] or by a nonsuit,[3] or by directing a verdict for the

their finding by that ruling." *West Chester Coal Co.* v. *Johnson* (1893) 6 C. C. A. 118, 12 U. S. App. 190, 56 Fed. 810; *Maryland use of Barkley* v. *Baldwin* (1881) 112 U. S. 190, 28 L. ed. 822, 5 Sup. Ct. Rep. 278.

[1] *Lambert* v. *Massisquoi Pulp Co.* (1900) 72 Vt. 278, 47 Atl. 1085.

[1] *Thomas* v. *Ann Arbor R. Co.* (1897) 114 Mich. 59, 72 N. W. 40; *Bomby* v. *Norcross* (1900) 174 Mass. 112, 54 N. E. 374; *Donnelly* v. *Booth Bros. & H. L. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874; *Arkerson* v. *Dennison* (1875) 117 Mass. 407; *Banning* v. *Hogan* (1879) 78 N. Y. 615; *Fitzsimmons* v. *Taunton* (1883) 160 Mass. 223, 35 N. E. 549; *Taylor* v. *Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249.

The question whether a cross piece in a ladder broke under the weight of plaintiff servant because a nail that fastened its left end to the side piece was near such a knot in the side piece as was shown to have existed, is for the jury. *Haniora* v. *Guggenheim Smelting Co.* (1899) 63 N. J. L. 647, 44 Atl. 762.

Where, at the close of the plaintiff's case, it is apparent that the evidence thus far introduced is consistent with the theory that the injury was caused by the negligence of a fellow servant, it is error to rule that the doctrine of common employment is not applicable, and so exclude the defendant from offering any evidence to sustain a defense based on that doctrine. *Cooper* v. *Hamilton Mfg. Co.* (1867) 14 Allen, 193.

It is error to leave it entirely to the jury to determine what acts and duties the defendant was required to perform and discharge as principal. The proper course is to lay it down as a matter of law, that the duty of the defendant is to supply the servant with suitable and safe machinery and appliances, with competent and skilful coworkers, and to make and promulgate sufficient rules and regulations for the conduct of the business in its ordinary run and for any extraordinary occasions that may be reasonably anticipated" (*Slater* v. *Jewett* [1881] 85 N. Y. 61, 73, 29 Am. Rep. 627), and then ask the jury to find whether the defendant had failed in the performance of its duty in any of these respects. *Hart* v. *New York Floating Dry Dock Co.* (1882) 16 Jones & S. 100.

See also § 915, notes 2, 12, *infra*.

[2] *Dana* v. *Crown Point Iron Co.* (1893) 51 N. Y. S. R. 238, 22 N. Y. Supp. 155; *Doncaster* v. *Bannerman* (1899) 40 App. Div. 582, 58 N. Y. Supp. 110; *Byrne* v. *Eastmans Co.* (1898) 27 App. Div. 270, 50 N. Y. Supp. 157; *Hilson* v. *Hudson River Water Power & Paper Co.* (1893) 71 Hun, 292, 24 N. Y. Supp. 1072; *Sweeney* v. *Page* (1892) 64 Hun, 172, 18 N. Y. Supp. 891; *Collins* v. *St. Paul & S. C. R. Co.* (1892) 50 Minn. 31, 11 N. W. 60.

Upon appeal, where the complaint has been dismissed, the plaintiff is entitled to the most favorable inferences to be drawn from the evidence. *McCone* v. *Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697.

[3] *McCarthy* v. *Bristol Shipcarers' Co.* (1883) Ir. L. R. 10 C. L. 384; *Byrne* v. *Fennell* (1882) Ir. L. R. 16 C. L. 397; *Demarau* v. *Ferris* (1900) 128 Cal. 48, 60 Pac. 519; *Ryan* v. *McCully* (1894) 123 Mo. 636, 27 S. W. 533; *Judson* v.

defendant.[4] And if a verdict has been rendered for the plaintiff on such evidence, it should be set aside.[5]

Olcan (1889) 26 N. Y. S. R. 706, 22 N. E. 555; *Cole* v. *Rome, W. & O. R. Co.* (1893) 72 Hun, 467, 25 N. Y. Supp. 276; *Dwyer* v. *Hall* (1897) 21 Misc. 452, 47 N. Y. Supp. 630, Reversed in 20 Misc. 677, 16 N. Y. Supp. 533; *Leavy* v. *Lehigh Valley R. Co.* (1891) 76 Hun, 575, 28 N. Y. Supp. 187; *Mahoney* v. *Eaenum Oil Co.* (1894) 76 Hun, 579, 28 N. Y. Supp. 196; *Hoover* v. *Beech Creek R. Co.* (1893) 153 Pa. 362, 26 Atl. 315; *Fowler* v. *Chicago & N. W. R. Co.* (1881) 61 Wis. 159, 21 N. W. 10; *Cooper* v. *Milwaukee & P. du Ch. R. Co.* (1869) 23 Wis. 668; *Stutz* v. *Armour* (1893) 84 Wis. 623, 54 N. W. 1000.

[4] *Wigmore* v. *Jay* (1850) 5 Exch. 354, 19 L. J. Exch. N. S. 296, 14 Jur. 837; *Donovan* v. *Ferris* (1900) 128 Cal. 18, 60 Pac. 519; *Carroll* v. *Western U. Teleg. Co.* (1893) 160 Mass. 152, 35 N. E. 456; *Kelley* v. *Boston Lead Co.* (1880) 128 Mass. 456; *Kennedy* v. *Spring* (1893) 160 Mass. 203, 35 N. E. 779; *Young* v. *Boston & W. R. Co.* (1897) 168 Mass. 219, 46 N. E. 624; *Howard* v. *Hood* (1892) 155 Mass. 391, 29 N. E. 630; *Smith* v. *Lowell Mfg. Co.* (1878) 124 Mass. 111; *Conger* v. *Flint & P. M. R. Co.* (1891) 86 Mich. 76, 48 N. W. 695; *Ling* v. *St. Paul, M. & M. R. Co.* (1892) 50 Minn. 160, 52 N. W. 378; *Rowley* v. *Collian* (1892) 90 Mich. 31, 51 N. W. 350; *Baron* v. *Detroit & C. Steam Nav. Co.* (1892) 91 Mich. 585, 52 N. W. 22; *Kehoe* v. *Allen* (1892) 92 Mich. 664, 52 N. W. 740; *Marsh* v. *Herman* (1891) 47 Minn. 537, 50 N. W. 611; *Corcoran* v. *Delaware, L. & W. R. Co.* (1891) 126 N. Y. 673, 27 N. E. 1022; *Herrington* v. *Lake Shore & M. S. R. Co.* (1894) 83 Hun, 365, 31 N. Y. Supp. 910; *Hart* v. *New York Floating Dry Dock Co.* (1882) 16 Jones & S. 460; *Allegheny Heating Co.* v. *Rohan* (1888) 118 Pa. 223, 11 Atl. 789; *Crawford* v. *Stewart* (1887; Pa.) 6 Cent. Rep. 140, 8 Atl. 5; *Van den Heuvel* v. *National Furnace Co.* (1893) 84 Wis. 636, 54 N. W. 1016; *Adams* v. *Swan* (1900) 100 Wis. 152, 81 N. W. 983.

In an action by an employee against a manufacturing corporation for personal injuries received while endeavoring to escape from its mill which was on fire, it appeared that the fire was caused by the heating of a bearing on one of the machines used in the mill, and that it might have been readily extinguished when first discovered; that the defendant had a cistern with pipes leading to each story of the mill, to which were attached lines of hose, but at the time of the fire the water did not run when attempt was made to use it. Held, in the absence of evidence of any reason why the water did not run, that it must be attributed to the negligence of the fellow servants of the plaintiff in failing to keep the apparatus in order, or in failing to put it in operation; and that the defendant was not liable. *Jones* v. *Granite Mills* (1878) 126 Mass. 84, 30 Am. Rep. 661. The court remarked that it was not called on to decide whether an employer was bound to provide precautions for the prevention of fire, or means for facilitating the escape of employees from a fire which had started, and proceeded thus: "Even if we assume that such obligations rest upon the employer, no evidence was offered tending to show that the defendant failed to take proper precautions to prevent fire, or that the hose, tanks, and other appliances for extinguishing it were not all that under any circumstances would be required. The evidence offered was simply that the water did not run when the fellow servants of the plaintiff attempted to use it. This was not sufficient proof of negligence to charge the defendant. The defendant, in any aspect of the case, had done its whole duty when it supplied the proper appliances, the care and use of which must be necessarily intrusted to its servants. The failure of the water to run was therefore be attributed to the negligence of fellow servants either in failing to keep the apparatus in proper order, or in negligently putting it in operation."

Where the evidence merely shows that, whenever the hatchway through which the plaintiff fell was rightfully opened, it was by the order of the defendant or of a particular agent, and that in the latter case such agent always stood by it when it was open to guard against accidents, and that on the occasion in question it was opened without the knowledge or permission of such particular agent or of the defendant, and by the unauthorized act of a fellow servant of the deceased, the conclusion of law is that the plaintiff was injured, not by the

595. Explanation of the classification of the cases cited in the ensuing sections.— The decisions regarding acts of negligence which are not regarded as constituting breaches of the non-delegable duties seem to be, broadly speaking, susceptible of classification under the categories indicated by the headings of the next three subtitles. But in many instances it is obviously impossible to say positively that a case belongs to one category rather than another. The arrangement adopted, therefore, is merely to be regarded as a convenient method of showing the effect of the enormous mass of materials with which we have to deal.

B. Negligence of coservants involving merely the use of the instrumentalities, master not responsible for.

596. Orders respecting the use of the instrumentalities.— *a. Generally.*—The effect of the cases cited in chapter XXVIII., A, *ante*, and § 541, *ante*, is that an order is not deemed to be given in a representative capacity, unless the employee giving it is a vice principal by virtue of his rank. Other cases illustrating more directly the principle that a master is not liable merely for the reason that the negligence was committed in the giving of an order are cited in the following four sections.

b. Order accompanied by an assurance of safety.—(See also § 448, *ante*.)—In an early English case it was laid down broadly that a workman is entitled to rely on the representations of a fellow workman whose province it is to inform him whether he can or cannot safely work in a certain place.[1] As the negligent servant in this case was an underground manager in a mine, and such an employee was

neglect or default of his employer, but by that of his fellow servant. *Kurl* v. *Bullard* (1858) 3 Bosw. 591.

[1] *Donnelly* v. *San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559; *Lamblois* v. *Maine C. R. Co.* (1892) 84 Me. 161, 24 Atl. 804; *Jarman* v. *Chicago & G. T. R. Co.* (1893) 98 Mich. 135, 57 N. W. 32; *Reichel* v. *New York C. & H. R. R. Co.* (1892) 130 N. Y. 682, 29 N. E. 763; *Harley* v. *Buffalo Car Mfg. Co.* (1894) 142 N. Y. 31, 36 N. E. 813; *McDonald* v. *New York C. & H. R. R. Co.* (1892) 63 Hun, 587, 18 N. Y. Supp. 609; *McCampbell* v. *Cunard S. S. Co.* (1895) 144 N. Y. 552, 39 N. E. 637; *Peschel* v. *Chicago, M. & St. P. R. Co.* (1885) 62 Wis. 338, 21 N. W. 269.

Where, by agreement of the parties, the facts are left to a trial judge, in order that he, acting as a jury, may find what they were, it is not for a court of appeals to consider whether they would have found as he did, but whether his finding is so far wrong that they might to set it aside. *Charles* v. *Taylor* (1878) L. R. 3 C. P. Div. 492, 38 L. T. N. S. 773, 27 Week. Rep. 32, per Brett, L. J.

Where the nonliability is thus clear, as a matter of law, it is error to instruct the jury that it is for them to say whether any negligence is to be imputed to the master. *Hall* v. *United States Radiator Co.* (1900) 52 App. Div. 90, 64 N. Y. Supp. 1002.

[1] *Paterson* v. *Wallace* (1851) 1 Macq H. L. Cas. 748.

denied to be a vice principal in the more recent decision of *Wilson* v. *Merry*,[2] it would seem that such a ruling is in effect equivalent to a declaration that, as to the function in question, he is the master's agent. The precise grounds upon which the earlier decision proceeds are, however, quite obscure, and it is extremely doubtful whether, upon this particular point, it can be reconciled with the principles laid down in *Wilson* v. *Merry*.

Some American cases also seem to treat the assurances of any employee who is in the exercise of control as being binding on the master, although for other purposes he may be a mere servant.[3] But the opposite conception of the quality of an order accompanied by an assurance has also been adopted in several decisions.[4] In the opinion of

[2] (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30.

[3] *Poor* v. *Chicago, M. & St. P. R. Co.* (1882) 56 Wis. 227, 14 N. W. 46 (railway company bound by assurance of a servant in charge of a hand car to a detective in the company's employ that he might safely ride sitting upon the rear end of the car with his feet hanging over); *Bradley* v. *New York C. R. Co.* (1874) 3 Thomp. & C. 288 (track master as incident to his right to employ laborers, held to be authorized to give them an assurance that he will warn them as to the approach of trains); *Floettl* v. *Third Ave. R. Co.* (1896) 10 App. Div. 308, 41 N. Y. Supp. 792 (workman went under track in reliance on foreman's statement that no car would pass until a time much later than that at which the accident occurred); *Mullane* v. *Houston, W. Street & P. Ferry R. Co.* (1897) 21 Misc. 10, 46 N. Y. Supp. 957 (assurance by track master of a street railway company to a workman under his control, to induce the latter to enter a hole which was dangerous while the cable was in operation, that he would order the engineer not to start the cable, held to be a matter pertaining to the duty of a master to provide a safe place of work, and not a mere detail of work within the functions of a fellow servant).

The first of the decisions cited involves, it will be observed, the element of a difference of department, and may be justified on that ground alone. The second is contrary in principle to those collected in § 601, *infra*, and on the facts cannot be reconciled with the rulings of the Supreme and circuit courts of the United States, cited below.

As to the third and fourth, it is difficult to conceive of circumstances in which the injurious negligence could be more plainly that of a fellow servant than the acts of omission here in evidence. The places of work were perfectly safe except in so far as they were rendered insecure by the running of the car and the starting of the cable. If the foreman himself had operated the car or started the cable, the defendant would certainly not have been liable. (See *Crispin* v. *Babbitt* [1880] 81 N. Y. 516, 37 Am. Rep. 521); and it seems impossible to argue that the failure to prevent another servant from doing these acts can be negligence of an essentially different quality.

[4] The orders of a section foreman to a laborer who is with him on a hand car, that he shall not look back to watch for a train, and assurance that the foreman himself will watch and give warning of any danger, do not make the master liable for an injury to the laborer resulting from the negligence of the foreman in failing to watch for the train. *Martin* v. *Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603.

One of two foremen of construction work acts as a mere coservant of a subordinate in directing him to work at the base of an overhanging bank, and assuring him that he can work there in safety. *Balch* v. *Haas* (1896) 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. 974.

In Missouri it was held, at a time prior to the adoption of the superior servant doctrine, that a railway was not any more bound by the assurances of a conductor that a rope was safe than by those of a fellow laborer of the plaintiff. *Hetherton* v. *St. Louis & I. M. R. Co.* (1876) 61 Mo. 528.

the present writer these embody the correct doctrine, *viz.*, that an assurance of safety is not an act which constitutes the employee giving it a representative of the master *ad hunc vicem*, but merely an act which is official in the sense that an employee who is a vice principal by virtue of his rank is regarded as giving it in the capacity of an agent of the master, and not of a mere servant.[5]

597. Choice of particular methods of work.— (See also §§ 598, 599, 603, 610, *infra.*)—The general rule is that the master is not responsible for the errors which a servant of superior grade may commit in regard to the choice of methods for carrying out the work intrusted to his management.[1]

The last two of the New York decisions cited in note 1, *supra*, have been lately distinguished, not very successfully, in a case where it was held that the fact that, on plaintiff's objecting to descending into a trench, defendant's foreman assured him it was safe and that he would stand and watch, did not render defendant liable, since the foreman's assurance was merely as to the details of the work, given in his individual capacity, and not for the principal. *Schott* v. *Onondaga County Sav. Bank* (1900) 49 App. Div. 503, 63 N. Y. Supp. 631.

[5] In the following cases the assurance emanated from one who was a vice principal in the jurisdictions mentioned, but the question whether it was an official act was not discussed. *Goggin* v. *D. M. Osborne & Co.* (1896) 115 Cal. 437, 47 Pac. 248 (local manager); *Monahan* v. *Kansas City Clay & Coal Co.* (1894) 58 Mo. App. 68 (foreman of mine); *Atchison, T. & S. F. R. Co.* v. *McKee* (1887) 37 Kan. 592, 15 Pac. 484 (superintendent); *Jones* v. *St. Louis, V. & P. Packet Co.* (1891) 43 Mo. App. 398 (second mate of ship); *Nelson* v. *St. Paul Plow Works* (1894) 57 Minn. 43, 58 N. W. 868 (superintendent); *Helfenstein* v. *Medart* (1896) 136 Mo. 595, 36 S. W. 863, 37 S. W. 829, 38 S. W. 294 (superintendent); *Sopherstein* v. *Bertels* (1896) 178 Pa. 401, 35 Atl. 1000 (superintendent).

[1] The conductor of a freight train is a mere fellow servant with a brakeman on the train in determining not to apply for more brakemen, or set off cars from his train before proceeding down a steep grade, under a rule of the company committing to his judgment the question whether he shall make such application where there is nothing unusual about the train. *Wooden* v. *Western N. Y. & P. R. Co.* (1895) 147 N. Y. 508, 42 N. E. 199, Reversing (1891) 43 N. Y. S. R. 218, 16 N. Y. Supp. 840 (1892) 46 N. Y. S. R. 77, 18 N. Y. Supp. 768. The court said: "The duty of the company, as of any other master, to its servants, was performed if it furnished adequate machinery and suitable appliances for the work, and employed competent fellow servants, under proper rules duly promulgated and adapted to the end of meeting possible emergencies of an ordinary or extraordinary character, which might be foreseen to arise in the conduct of its operations. It is only when the duty to be performed is one which the master is supposed to do in person for his servant's safety in his place of work, that it cannot be delegated to another so as to free the master from responsibility for the consequences of some neglect. The duty here was not of that character. It related to the performance of a part of the servant's ordinary work, and was regulated by the rule and published notice."

A railway company is not liable for the decision of bridge carpenters to raise a heavy pile by tackle, rather than in some other way, to fasten that tackle in a certain way, and to omit to brace it while it was being raised. *Ulrich* v. *New York C. & H. R. R. Co.* (1898) 25 App. Div. 465, 51 N. Y. Supp. 5.

Where a large metal appliance called a dust collector was being hoisted, and suddenly fell, owing to its being imperfectly secured when the process of hoisting had to be suspended for a short time, it was held that the master was not liable for the negligence of his superintendent in bringing about the accident. *Small* v. *Allington & C. Mfg. Co.* (1901) 94 Me. 551, 48 Atl. 177.

The failure of a directing machinist who was holding a torch, to suggest the danger of striking a driving spring which

598. Disposition of the force of employees available for the work in hand.— One special application of the general principle embodied in the cases cited in the last section is observable in the rule that wherever the master has employed an adequate force of servants of a sufficient degree of skill and capacity, and furnished them with all the means which are essential for a proper discharge of their several duties, and the circumstances are such that the same number of men and the same degree of care are not always required, he is justified in leaving to them the exercise of their own discretion and judgment in the disposition and distribution of the force available.[1]

599. Assigning servants to work for which they are unfitted.—

was being placed in a locomotive, is not an omission of duty in the capacity of a vice principal. *Kerner* v. *Baltimore & O. S. W. R. Co.* (1897) 149 Ind. 21, 48 N. E. 364.

The mere fact that an employee held a stick of frozen dualin over a fire to thaw it will not support an action by a fellow employee against the master for injuries resulting from an explosion, upon the theory that the act itself showed that the employee was an unsuitable person for the master to have in his employment, where he was employed merely as a common laborer, and was acting at the time in pursuance of a direction for which the master was not responsible. *Hellanus* v. *Staples* (1898) 171 Mass. 150, 50 N. E. 537.

Directing a workman in a gang which is taking down a building, to chop a post at a particular conjuncture, is a mere detail of work. *Cleveland, C. C. & St. L. R. Co.* v. *Brown* (1896) 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970.

The acts of one who is superintending the putting up of an elevator in a building in process of construction, in determining when the measurements shall be taken in the upper floors, and how far the construction of the building shall progress before they are taken, are those of a fellow servant with a workman in the employ of such company, who is injured while taking a measurement under the direction of such superintendent. *Whallon* v. *Sprague Electric Elevator Co.* (1896) 1 App. Div. 264, 37 N. Y. Supp. 174.

Where a servant is injured by the falling of a staging which had been properly constructed, and was adequate for the purposes for which it was intended and had been used, but which fell by reason of the negligence of a fellow servant in taking it down, the master is not liable. *Leborge* v. *Berlin Mills Co.* (1895) 68 N. H. 373, 44 Atl. 533.

A servant cannot recover where he was injured through the act of a fellow servant taking down a trestle as a whole, instead of separating it and taking it down in sections. *Cogan* v. *Burnham* (1899) 175 Mass. 391, 56 N. E. 585.

No recovery can be had against an employer for an injury to an employee caused by the sudden fall of a frozen crust of ground on the employee while undermining the same, where the negligence, if any, which caused the crust to fall without warning, was not that of the superintendent, but of certain fellow servants who were driving wedges into the bank above. *Gorman* v. *Woodbury* (1899) 173 Mass. 180, 53 N. E. 373.

An employer is not liable for the negligence of a foreman in prematurely directing his subordinates to let go a telephone pole which was being taken down. *Morgridge* v. *Providence Teleph. Co.* (1898) 20 R. I. 386, 39 Atl. 328.

A laborer ordered to hold a bent fish plate in a certain position while the foreman endeavors to straighten it with a hammer cannot recover, if he is injured through his compliance with the order. *Lagrone* v. *Mobile & O. R. Co.* (1899) 67 Miss. 592, 7 So. 551.

A direction to put powder into a hole without waiting a sufficient time for the hole to cool after giant powder had been exploded there, is not deemed to have been given by the superior employee in the capacity of a vice principal. *Hast* v. *Kern* (1898) 34 Or. 217, 54 Pac. 950.

[1]No negligence can be imputed to a railway company for an omission to make regulations as to the number of brakemen to be sent on a train of detached cars when on its way to the repair track, and in what positions they should be placed. Hence, an accident

It has been held that there can be no recovery for negligence of this description, either in cases where the unfitness was the cause of injury to the unfit person himself,[1] or in cases where the negligence with which it is sought to charge the master consisted in allowing the unfit person whose acts were the direct cause of the injury to undertake duties which he was incapable of performing properly.[2] It is clear, however, that nonliability cannot, in cases of the latter class, be predicated, except where the change of functions was allowed without any authority, express or implied, from the master. The decisions cited in § 572, *ante*, with regard to such negligence, show that, if the change was made by an official who had the power to make it, the circumstances are controlled by the doctrine that the duty to employ competent servants is non-delegable.

600. Negligence in sending servants into abnormally dangerous places without warning.— (See, however, § 579, *ante*.)—Several decisions embody the principle that an employee who, in the exercise of superintendence, sends a subordinate to perform his duties in a place where he will be exposed to a specific peril due to conditions which have arisen in carrying out the executive details of the work, acts as

due to the fact that there were too few brakemen on a particular train, and none at the rear end, will be held to be attributable, not to the negligence of the company, but to that of one or other of the employees engaged in distributing the cars. *Besel* v. *New York C. & H. R. R. Co.* (1877) 70 N. Y. 171 (car repairer injured).

A railway company is not liable for the negligence of the foreman of a drill crew in sending a detached car along a track where other cars are being coupled, without stationing a brakeman upon it to control its movements. *Central R. Co.* v. *Keegan* (1895) 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269.

In *Hussey* v. *Coger* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556, where the plaintiff was injured through the negligence of some of his fellow servants, the court reasoned thus: "It was no part of the duty of the master to remove hatches or direct the particular mode of doing so, any more than to direct workmen in the use of the tools with which they performed their work. There were customary and established modes of performing such services, and each employee was expected to do his work in the manner and style to which he was accustomed, without special directions in respect thereto. It was entirely immaterial whether the superintendent undertook to perform the work of removing hatches, or ordered it to be done by others; he was, in either case, engaged in performing the duty of a workman. The master had furnished abundant help to do the work, and had done all that was required of him; and it was the fault of the servants that a sufficient number did not co-operate to perform it safely, or do it in the manner prescribed by custom."

[1] Where the act alleged to have directly resulted in injury was that of a fellow servant in requiring the plaintiff to lift beyond his strength, no breach of the master's duty to supply a safe place of work or safe instrumentalities is involved. The issue presented is merely one of the manner in which a servant employed a proper instrument of work. *Robertson* v. *Chicago & E. R. Co.* (1896) 146 Ind. 486, 45 N. E. 655.

[2] A railway company is not liable for an injury to a brakeman caused by the negligence of the engineer in placing his unskilled fireman temporarily in the performance of his duties in handling the engine. *South Florida R. Co.* v. *Price* (1893) 32 Fla. 46, 13 So. 638; *Parrish* v. *Pensacola & L. R. Co.* (1891) 28 Fla. 251, 9 So. 696; *Houston & T. C. R. Co.* v. *Myers* (1881) 55 Tex. 110.

a mere fellow servant of such subordinate in giving the order without warning him of the existence of the peril.[1]

[1] "The most important case on this point is *Cullen* v. *Norton* (1891) 126 N. Y. 1, 26 N. E. 905. There the plaintiff's decedent was employed by defendant as a laborer in his cement quarry, and was engaged in drilling rock for blasting purposes under the defendant's foreman. Prior to the accident, eleven holes had been drilled in a piece of rock, and charged and fired, but only ten of them exploded. The foreman examined the unexploded hole, and found the fuse unconsumed, but failed to remove it. The next morning he directed two of the workmen to drill holes in the rock, within 2 feet of the undischarged hole, and at the same time ordered the deceased to drill 20 or 30 feet below. The unexploded fuse shortly after in some way ignited the charge, which exploded and threw a mass of rock on the deceased. Upon these facts the trial judge dismissed the complaint. This judgment was reversed by the supreme court (1889; 52 Hun, 9, 4 N. Y. Supp. 774) on the ground that the foreman was the representative of the employer in regard to furnishing the plaintiff with a safe place of work. At the second trial the plaintiff had a verdict, and the judgment therein was affirmed by the supreme court (1890; 29 N. Y. S. R. 700, 9 N. Y. Supp. 174) on a theory of the evidence thus explained by Landon, J.: 'The rule requiring the master to protect his servant from the known and inherent dangers of the situation includes those reasonably to be apprehended. Because the carelessness of fellow servants in such a situation is not to be reasonably apprehended, the master may escape the consequences arising from that peril. But if it was reasonable to apprehend a premature explosion from some other cause, then the master's care and prudence should have protected the intestate from it. The foreman was his only representative to act for him, and the jury have found that he not only failed to exercise that care, but actually did with respect to the intestate what ordinary care should have restrained him from doing. *Leonard* v. *Collins* (1877) 70 N. Y. 90. It may be conceded that the distinction between the dangerous nature of the employment and the dangerous nature of the place of employment is not always clearly perceived. We . . . hazard the illustration: Suppose the place is a rock in a mine, and the work is the picking out of explosive powder from the hole of an undischarged blast in the rock. The place, aside from the nature of this particular work, is safe, but the work is unsafe and dangerous in the extreme. If an explosion results from the work and injures the servant, the injury is plainly attributable to the work, and not to the place. But suppose, while engaged in this dangerous work an overhanging rock, gradually becoming loosened, now falls upon the servant and kills him. His death is attributable to the place; and the inquiry would be pertinent whether his master was negligent in assigning him to such a place. Again, suppose the workman is extracting the powder from the blast, as in the first supposition, and the danger is incident only to the nature of his work, and the master, with knowledge of the situation, directs a second workman to drill a new hole in the same rock near to the one upon which the first workman is employed. Clearly, with respect to the second workman, the place is a dangerous one, wholly irrespective of his own employment. As is repeated in *Hussey* v. *Coger* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556, the master owes the duty to his servants to furnish a safe and proper place in which to prosecute his work, and to exercise care and prudence in the protection of his servants from the known and inherent dangers of the situation.'

"In the court of appeals (1891; 126 N. Y. 1, 26 N. E. 905), the judgment was reversed on the ground that the 'master furnished the mine as a place for labor, and it was solely on account of the manner in which the foreman, a fellow servant, performed the work or directed it that the accident happened, and happened in the course of the performance of the very kind and character of work which the plaintiff's intestate took the risk of by accepting employment.' The following extract from the opinion shows that the different conclusions arrived at by the two courts were not so much due to a doctrinal disagreement as to the circumstance that the effect of the evidence was considered by each of them from essentially different standpoints: 'If Doran acted as master, the defendant is liable; while if he acted in his capacity as an employee, and not

It is often quite difficult to decide whether cases of this type should be referred to the principle illustrated by the decisions just cited, or to the principle that the duty of instruction is non-delegable. A very

as a representative of the master, his negligence does not rest upon the master. The quarry was the place where the work was to go on, and the master was bound to make it a reasonably safe place for such work, considering its character and the necessarily dangerous nature of the work itself. For the manner in which the persons employed in the quarry should themselves perform their work the master was not liable. It is not claimed that the master did not furnish a proper place to work in the first instance; that is, when the deceased was employed, the quarry was as safe as any quarry is where frequent blasts are being fired off. But the manner of the performance of each of the various details of the work by which, as a whole, it was to be conducted, rested necessarily upon the intelligence and care and fidelity of the servants to whom these duties were intrusted. It can't be that every time a blast was exploded and the men came back, the manner of their distribution for work was a duty of the master, and that the order of a foreman, mistakenly or negligently given, must be regarded as the order of the master in fulfilling a duty to furnish a safe place to work in. It is, as it seems to me, a detail of the working or management of the business, the risks attending which have been assumed by the party taking employment."

A Federal circuit court of appeals has also rendered a similar decision, holding that a foreman of a gang of men engaged in constructing a sewer under the supervision of general superintendents is not a special vice principal so as to render the city liable to one of such men injured in consequence of the negligence of such foreman in directing such man to reload holes drilled for blasting, without telling him that the person who loaded them and was about to clean them out had said that the dynamite in one of them had not exploded. *Minneapolis* v. *Leadlin* (1893) 7 C. C. A. 341, 19 U. S. App. 245, 58 Fed. 525. The court reasoned thus: "The duty of the master to furnish a safe place for the performance of work does not require it to keep that place safe under the constantly changing conditions which the performance of such a work as the construction of a sewer necessitates. The city furnished a street in which it was safe to construct a sewer. The comparative safety of the place where each man worked was necessarily constantly varied by the progress of the work, and the duty of the master did not extend to keeping every place where each workman labored safe at every moment of its progress. It was the duty of each workman to use reasonable care to so render his service that the place in which he and his fellow servants were required to labor should continue to be reasonably safe. It was the duty of the foreman to so direct the work of excavating, of laying the pipe, and of filling the trench that it would continue to be reasonably safe for every man in his crew to render the service assigned to him. But these were personal duties imposed upon the workmen and the foreman by their employment in the common service, and not by the delegation to them of the performance of any absolute duty of the master. The street originally furnished by the city was safe. The trench in which the rock was to be blasted was originally safe for the blasting of rock. If the safe place originally furnished by the city became unsafe in the progress of the work, it was rendered so, not by any negligence of the city or its superintendent in furnishing it, but by the acts or negligence of the foreman and his workmen in discharging the duties imposed upon them by their common employment, and for these acts and this negligence the city was not responsible."

A master who provided a skilful foreman and competent fellow workman, with necessary and proper appliances and tools for the removal of fragments of stone after a blast, is not liable for injuries sustained by an employee, because the foreman omitted to give him notice to pry off the piece of rock that fell and hit him, instead of going to work directly under it. *Perry* v. *Rogers* (1898) 157 N. Y. 251, 51 N. E. 1021, Reversing (1895) 91 Hun, 243, 36 N. Y. Supp. 208.

The fact that a master personally directed a servant to go to work with a gang who cleared up at night the *debris* caused by blasting in the daytime will not make him liable for injuries to the servant occasioned by the fall of a rock

slight change in the standpoint from which the evidence is considered will suffice to throw the facts on one side or the other of the line.[2]

601. Failing to warn servants as to dangers arising from the execution of the details of the work.— The general principle that the ma-

loosened by such blasting, where competent workmen, a skilled foreman, and safe appliances were furnished. *Capasso* v. *Woolfolk* (1900) 163 N. Y. 472, 57 N. E. 760, Reversing (1898) 25 App Div. 234, 49 N. Y. Supp. 409. *Perry* v. *Rogers* (1898) 157 N. Y. 251, 51 N. E. 1021, *supra*, was followed.

In like manner, the negligence of a foreman in directing a common laborer employed to drill holes for blasting, to draw an unexploded charge, without warning him as to the kind of explosive used, or instructing him in the way of handling it, is that of a fellow servant merely. *Litto* v. *Farley* (1895) 15 Misc. 153, 36 N. Y. Supp. 1105. The decision was based on the ground that the direction related to a mere "detail of the work intrusted to the judgment and discretion of the foreman," and that the "method to be employed was left entirely to the foreman."

[2] In a very close case it was held by a divided court that an employer owning a coal dock, the structures and machinery upon which are undergoing repairs and rebuilding made necessary by a storm, is not guilty of negligence in failing to warn a new and inexperienced employee at work upon a chute, of the presence in such chute of the slack of a cable attached to the machinery of the dock, and of the danger of its suddenly lifting by the starting of the machinery, where the machinery is not in regular operation, and such lifting of the cable is not one of the incidents of such operation, regularly or occasionally occurring, but arises from the engineer's adjusting the cable upon the drums and leaving it for a time lying in the chute, and plaintiff's position is safe until the starting of the engine, and the employer has no notice of the presence of the cable in the chute, and cannot reasonably anticipate it,—especially where such employee is not ordered to take a position over the chute. *Porter* v. *Silver Creek & M. Coal Co.* (1893) 84 Wis. 418, 54 N. W. 1019. The majority of the court reasoned thus: "In the course of the engineer's work the cable was for a time lying in the chute. He started the engine and drew it up, and thus made the plaintiff's position over the chute dangerous, while a moment before it was entirely safe. The cable was never in the coal chute in the ordinary course of the business, but was always far above the chute. No official or superintending officer of the company knew of the fact that the cable was in the chute or was liable to be there, or ordered it put there. It was out of the usual course of business, and could not reasonably be anticipated. Nor was the plaintiff directed to take the position which he did over the chute. Certainly, the defendant could not be held to be obliged to warn the plaintiff of a danger which no one could reasonably anticipate."

Two judges dissented on the ground that the master was bound to know that the machinery might start at any moment and imperil the plaintiff. (Compare the reasoning of the supreme court in *Cullen* v. *Norton*, as quoted above.) On the whole, this seems to be the correct theory of the evidence. The rules as to details of work being based essentially on the hypothesis of an assumption of the risks involved in the given operations, it is manifestly a prerequisite to its application that those risks should have been understood by the injured servant. If it is a permissible inference from the evidence that, for some special reason, either *quoad personam* or *quoad res*, he did not understand those risks, and his want of comprehension was excusable, it is difficult to admit that the case is not one in which the jury should at least be called upon to say whether under the circumstances a duty of instruction should be predicated. The objection to the view of the majority of the judges is that the consideration mainly relied upon—*viz.*, that the event which caused the injury was not one which the master had reason to anticipate—was scarcely one which a court of review was, under the circumstances shown by the record, warranted in making the basis of a peremptory inference of fact. If there was no evidence, or insufficient evidence, on this point, the proper course, it is submitted, would have been to send back the case to the trial court for further investigation.

ter's duty to provide a safe place of work is not deemed to have been violated where the unsafety is caused solely by the acts of coservants in carrying out the details of the work clearly involves the corollary that the master is not chargeable with the failure of those servants to warn each other as to the existence of dangerous conditions which have already supervened.[1] Similarly, all the authorities, with the exception of the single New Jersey case cited in § 580, *ante*, seem to be agreed that a master is not liable for the negligence of a servant in failing to notify a coemployee of the approach of a transitory peril which, as the work progresses, will render the environment unsafe for a brief period, but which may easily be avoided if due warning is given. In some of the cases illustrating this principle, the breach of duty was committed by failing to notify the injured servant himself that his safety was imperiled by the particular peril in question.[2]

[1] A railroad company is not liable for injuries to a brakeman, caused by the neglect of a flagman in not giving due notice of rails torn up for repairs. *Cooper* v. *Milwaukee & P. du. Ch. R. Co.* (1869) 23 Wis. 668.

The road master of a railroad, directing the work of tearing down a bridge, is not the vice principal of the employer to the extent that his omission to give a particular warning of a detail thereof which portends danger would render the master liable for his omissions in that respect. *O'Neil* v. *Great Northern R. Co.* (1900) 80 Minn. 27, 51 L. R. A. 532, 82 N. W. 1086 (plaintiff caught by a bolt which had not been drawn from a stringer of a trestle which he was helping to remove).

An employer is not liable for the death of an employee, caused by the blowing off of a door of a blast stove while he was engaged in tightening a nut on it, where there was no danger in working at the door unless the blast was on, and of that fact he was ignorant, solely through the neglect of his coemployee under whose direction he was working. *Dahlke* v. *Illinois Steel Co.* (1898) 100 Wis. 431, 76 N. W. 362.

The negligence of a section foreman in failing to note an approaching train, and to give the proper warning so that a hand car may be taken from the track, is not the omission of a duty which the railroad company owes as master to one of the gang. *Martin* v. *Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603. "We do not perceive," said the court, "that the doctrine as to the duty of the master to furnish a safe place for the servant to work in has the slightest application to the facts of this case. There is no intimation in the evidence, nor is any claim made, that the hand car upon which the plaintiff was riding was not properly equipped and in good repair and in every way fit for the purpose for which it was used. It was a perfectly safe and proper means of transit, in and of itself, from the station at Albuquerque to the point where the plaintiff was going to work. . . . If the car were rendered unsafe, it was not by reason of any lack of diligence on the part of the defendant in providing a proper car, but the danger arose simply because a fellow servant of the plaintiff failed to discharge his own duty in watching for the approach of a train from the south."

A train master who orders cars to be taken out of a train without notice to a brakeman engaged in making a coupling acts as a fellow servant of such brakeman. *Martin* v. *Chicago & A. R. Co.* (1895) 65 Fed. 384.

The duty of warning servants that a blast is about to be fired in a quarry does not belong to the non-delegable class. *Donovan* v. *Ferris* (1900) 128 Cal. 48, 60 Pac. 519; *Gallagher* v. *McMullin* (1898) 25 App. Div. 571, 49 N. Y. Supp. 734 (warning not given in time).

There can be no recovery where an engineer without warning moved cars again after they had come to a stop, against another car to which a brakeman was about to couple them. *Long*

In other cases the delinquency consisted essentially in an omission to convey to the reservant whose act was the immediate cause of the in

v. *Coronado R. Co.* (1892) 96 Cal. 269, 31 Pac. 170.

The negligence of an employee intrusted with the duty of warning other employees of the starting of machinery is not imputed to the employer. *Portance* v. *Lehigh Valley Coal Co.* (1899) 101 Wis. 571, 77 N. W. 875; *Oak Bros.* v. *Wood* (1891) 11 Ind. App. 69, 36 N. E. 1071.

Compare the cases as to starting machinery without warning, in § 610, note 1, subd. (j), *infra*.

One under whose direction a carpenter is working upon a ladder in front of a car stable, who promises to remain at the foot of the ladder to give the workman notice whenever it is necessary to remove the ladder in order to permit the cars, or a cart to pass in or out of the stable, does not represent the master. *Byrnes* v. *Brooklyn Heights R. Co.* (1899) 36 App. Div. 355, 55 N. Y. Supp. 269.

Where a servant undertakes the work of putting damaged cars on a certain track in a yard, the receipt of insufficient notice as to the precise defect in some particular car which he has to handle is to be treated as the neglect of a fellow servant, and the risk must fall within the ordinary rule, inasmuch as it is an incident of the service which was entered upon. That broken cars might be put in the wrong place in the yard, and insufficient notice of the defects in them might be given. Such an omission of notice relates to matters of detail, and is one which cannot be given in advance. It is, therefore, not like an omission to give instructions to an inexperienced hand as to the general danger to which his work will expose him. *Yeaton* v. *Boston & L. R. Corp.* (1883) 135 Mass. 418.

Trainmen engaged in switching cars act as fellow servants in failing to give notice of their approach to a car repairer at work on one of the tracks. *Texas & P. R. Co.* v. *Campbell* (1894: Tex. Civ. App.) 30 S. W. 1104.

A railroad company which has provided watchmen to guard a car repairer from danger while at work is not liable to him for an injury resulting from their failure to warn him of an approaching train. *Luehke* v. *Chicago, M. & St. P. R. Co.* (1885) 63 Wis. 91, 53 Am. Rep. 266, 23 N. W. 136 (on the first appeal [1883; 59 Wis. 127, 17 N. W. 879] the judgment of the lower court had been reversed on the ground that it had not been shown that the company had performed its duty of furnishing a watchman). *Rex* v. *Pullman's Palace Car Co.* (1897) 2 Marv. (Del.) 337, 43 Atl. 216. In the latter case the court said in the course of an oral charge: "The giving of notice of the approach of danger, where it does not enter into the creation of or the maintenance of a safe place, is not necessarily a primary duty of the master but a secondary duty, so to speak, which may be delegated to competent fellow servants under proper rules. Notice is sometimes an incident to the safety of the place, a matter of executive detail, which ordinarily must of necessity, in operating large establishments, be intrusted to some independent human will other than that of the master, upon the faithfulness of which will in the performance of duty it is reasonable to rely."

The negligence of a motorman in disobeying a rule of the company requiring those in charge of its cars to give timely warning of their approach to a track crew is not chargeable to the company as a violation of its duty to use reasonable care to provide a safe place for the trackman to do his work. *Lundquist* v. *Duluth Street R. Co.* (1896) 65 Minn. 387, 67 N. W. 1006.

The failure of a hatch tender to discharge his duty of giving warning to the servants in the hold below that a lade is about to be thrown down is not negligence which is imputable to the ship owner. *Ocean S. S. Co.* v. *Cheney* (1890) 86 Ga. 278, 12 S. E. 351.

An employer is not answerable for the negligence of one reservant in failing to notify another that the operation of pulling down a pile is about to begin. *Geesen* v. *Saguin* (1901) 115 Iowa 7, 87 N. W. 745.

The failure of an employee to perform his duty of giving due warning that a piece of timber has been placed in the chute which conveys it to a ship is the negligence of a mere fellow servant of the workmen on board. *Hermann* v. *Port Blakely Mill Co.* (1896) 71 Fed. 853.

A contractor engaged in the business of altering and repairing vessels is not liable for the failure of his superintend-

jury such information as would have enabled him to avoid inflicting the injury.[3]

That the failure to warn servants as to transitory dangers is regarded as official negligence in an employee who is a vice principal by virtue of his rank, see § 512, *ante*.

602. Absence from the post of duty.—A master who employs a sufficient number of servants is not liable for an injury to an employee caused by the temporary absence of a coemployee from a post of duty without any fault on the part of the employer.[1]

603. Selecting an imperfect appliance from the stock available.—(Compare cases cited in § 597, *supra*.)—It is well settled that, where the master has provided an adequate and readily accessible stock of suitable appliances in good condition, from which to make a selection, and the imperfection of an instrumentality selected therefrom was, or ought to have been, apparent to the servant who selected it, the master cannot be held responsible for injuries which are sustained by the use of that instrumentality, whether the sufferer be the servant himself who made the selection, or a coemployee.[1]

ent to warn the men working in the hold that a hatch is about to be removed. *Hussey* v. *Coger* (1889) 112 N. Y. 614, 3 L. R. A. 559, 20 N. E. 556 (hatch escaped from the hands of the workmen).

The negligence of a superintendent in charge of work under a construction contract, in replying in the affirmative to the question whether it was clear below, by an employee who was throwing down blocks from a height to the workman below, resulting in an injury to such workman, is not chargeable to the master. *Donnelly* v. *San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559.

Where an employee was injured in attempting to preserve the property of his master from fire, and the injury resulted from the negligence of the foreman in failing to notify the servant of a peril which had developed during the fire, the negligence is considered to be that of a fellow servant. *Malthie* v. *Rehlen* (1901) 167 N. Y. 307, 51 L. R. A. 52, 60 N. E. 645. Reversing (1899) 45 App. Div. 381, 60 N. Y. Supp. 824.

In the absence of an express agreement, one employed to repair an elevator is not entitled to warning from the master when the elevator is about to start, where he relies upon a fellow servant whom he has requested to give such warning. *Mann* v. *O'Sullivan* (1899) 126 Cal. 61, 58 Pac. 375.

[3] The omission of a foreman of track repairers to set a lookout is not negligence which can be imputed to the company. *Duthie* v. *Caledonian R. Co.* (1898) 23 Sc. Sess. Cas. 4th series, 931.

A railway is not liable for the failure of a yard foreman to place a signal flag in front of the cars upon the repair track, so as to prevent any other train from coupling on to such cars while said signal was displayed, the result being that a car repairer was injured by the coupling of a train. *Peterson* v. *Chicago & N. W. R. Co.* (1887) 67 Mich. 102, 34 N. W. 260.

[1] *Reichel* v. *New York, C. & H. R. R. Co.* (1892) 130 N. Y. 682, 29 N. E. 763.

The absence of a brakeman upon cars shunted without an engine is the negligence of a coservant, and not of the railroad company, where the latter has employed sufficient and competent brakemen to do such work, and they are present in the yard at the time of the accident. *Potter* v. *New York C. & H. R. R. Co.* (1892) 136 N. Y. 77, 32 N. E. 603. The court distinguished *Flike* v. *Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545, where the missing brakeman did not present himself for duty at all, and intimated a doubt as to the correctness of *Murphy* v. *New York C. & H. R. R. Co.* (1890) 118 N. Y. 527, 23 N. E. 812.

[1] There can be no recovery where the theft superintendent of a natural gas

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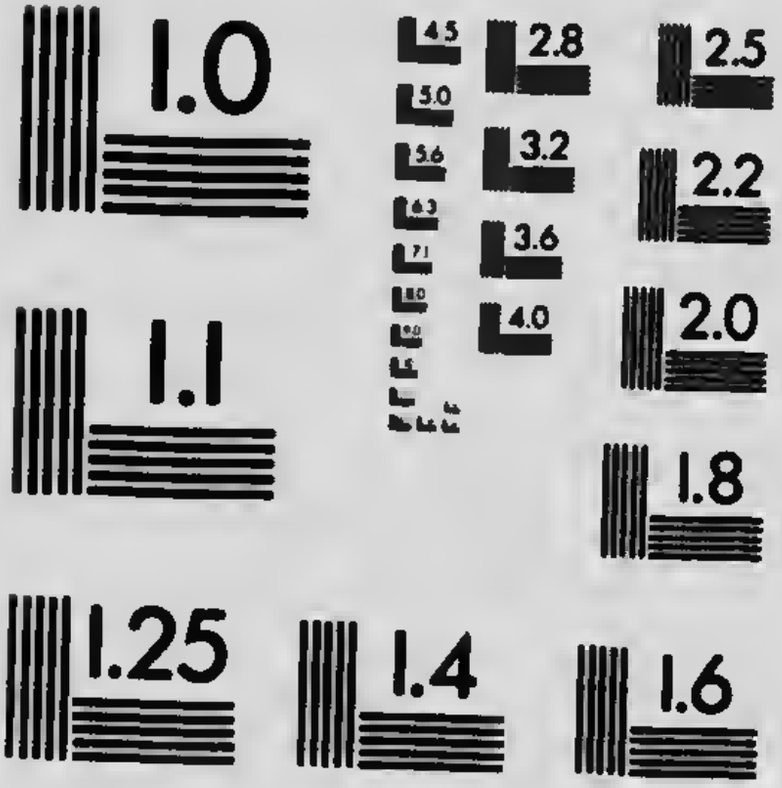
(ANSI and ISO TEST CHART No. 2)



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One common variety of negligent selection consists in the use of an instrumentality which is safe and adequate for the purpose which was contemplated by the master when he supplied it, but which is danger-

company, whose duty it was to shut in and test wells, was injured by an explosion due to his selection of a valve too weak to bear the pressure. *Toohey v. Equitable Gas Co.* (1897) 179 Pa. 437, 36 Atl. 314.

An employer is not liable for an injury to an employee caused by the breaking of a plank while putting a tank in position, where such plank was selected by the employee and his foreman while employed in the same service with him. *Mahoney v. Vacuum Oil Co.* (1894) 76 Hun, 579, 28 N. Y. Supp. 196.

A molder working by the day in a foundry, frequently called upon to assist in pouring heated metal into molds, is a fellow servant of an employee who made the molds, and cannot recover for injuries sustained by him by the escape of heated metal, due to the use of an imperfect flask in making the mold, where numerous flasks were provided, and the employee was not required to use an imperfect one. *Kehoe v. Allen* (1892) 92 Mich. 464, 52 N. W. 740.

The duty of selecting stakes, and placing them in position on a platform car to hold ties in place, is incident to the work of the servants operating the train and loading and unloading the ties; and the railroad company is not liable if an injury is caused by their carelessness in performing it. *Rounds v. Carter* (1901) 94 Me. 535, 48 Atl. 175.

In *Cregan v. Marston* (1891) 126 N. Y. 568, 27 N. E. 952, where the controversy was as to whose duty it was to observe and examine the condition of a rope, and change it when so worn that it became unsafe, the court explained its position as follows: "It is conceded that the defendants kept on hand and ready for use at any moment an adequate supply of these falls, and of the best and most approved character. . . . If one was wanted, word was sent to the office, and the new fall at once supplied for use at the dock. Usually the engineer or his assistant made the application, but anybody engaged in the work could give the notice and get the new fall. It does not appear that any such application coming from any of the workmen was ever unheeded or refused. The workmen, therefore, were left in a position of perfect safety as to the sufficiency of the falls against everything save their own negligence or error of judgment. The rope was swinging before their eyes, and would disclose its approaching weakness on the surface before it became rotten or pulpy within, and they were able to know how long it had been used, and so whether prudence required it to be changed. They were at liberty, and knew they were at liberty, to supplant one which exhibited marks of weakness with a other both new and sufficient, from the supply kept on hand. They were in the daily habit of observing its condition, and it was specially the custom of the engineer to do so. He had examined it a day or two before the accident, and deemed it safe." On this state of facts it was held that the negligence of the engineer, if it existed, was not that of the master.

In *Ling v. St. Paul, M. & M. R. Co.* (1892) 50 Minn. 160, 52 N. W. 378, the court thus explained its reasons for holding that a master is not responsible to a servant for the act of a fellow servant in negligently selecting from a number of those available an iron hook which was broken and unfit for use, to which to attach a pulley to raise a heavy weight in a boiler shop: "It is very apparent from the case that when, for this or like purposes, it became desirable or necessary for the boiler makers and their assistants to resort to the mechanical aid of a pulley, it was a part of their duty to consider where, under the circumstances relating to its use, they would fasten or anchor the pulley, and the means by which they would do it. To illustrate: It was not the legal duty of the defendant towards these mechanics, as their master, to direct them whether to make their pulley fast to the crown sheet over the fire box, or to use a timber for the purpose, or as to whether they should use a hook of one form or another, an eyebolt, or some other means of making it fast. It was not a part of the absolute duty of the master to provide the particular simple instrument or thing which should be used for such a purpose. That was a part of the very duty which the mechanics were to themselves perform. The defendant provided the means which might be necessary to en-

ons or inadequate when used for the work to which it was actually applied.[2] Compare § 342, *ante*.

The selection of an article from a supply of suitable material, to be taken away and used at a distance, has been held to be distinguishable from the selection of such an article from materials on hand at the place of work, and to be done as an incident of the performance of the non-delegable duty of furnishing appliances.[3]

604. Failing to use the instrumentalities furnished by the master.—

able the mechanics to do what was thus required of them. If there was not at hand such a thing as might be necessary to fasten the pulley in position for use, they could have it made by the blacksmith. But the evidence shows conclusively that there were enough hooks lying about the shop fit for this purpose, which might have been selected and used. The accident occurred from the fact that whoever procured this hook neglected to observe, as he might have done, that it was broken and unfit for use. It does not appear who did this. There is no reason to presume, even as a matter of fact, that the foreman did it, rather than the boiler maker, Brennan, or one of his helpers. But, while much attention is given to this matter in the argument of the appellant, we deem it to be of no consequence whether the boiler maker or the foreman was the person who negligently selected this particular hook and put it in position for use. In either case this was a part, a mere detail, of the work which these mechanics were employed to perform, and, whether done by the foreman, boiler maker, or a helper, whatever negligence there may have been in selecting the broken hook was the negligence of a fellow servant, and the plaintiff cannot recover from this defendant."

Recovery has been also denied where a fellow servant was negligent in selecting the following articles: A rope (*Prescott* v. *Ball Engine Co.* [1896] 176 Pa. 459, 35 Atl. 224); a buggy for conveying iron (*Bemisch* v. *Roberts* [1891] 143 Pa. 1, 21 Atl. 998); a coupling pin that was too short (*Thyng* v. *Fitchburg R. Co.* [1892] 156 Mass. 13, 30 N. E. 169); a defective link for coupling cars (*Young* v. *Boston & M. R. Co.* [1897] 168 Mass. 219, 46 N. E. 624); a defective hammer (*Rawley* v. *Collian* [1892] 90 Mich. 31, 51 N. W. 350); appliances for supporting and steadying a heavy iron structure which was being hoisted (*Ludlow* v. *Groton Bridge & Mfg. Co.* [1896] 11 App. Div. 452, 42 N. Y. Supp. 343, previous proceedings reported in [1895] 71 N. Y. S. R. 510, 36 N. Y. Supp. 452, new trial denied in [1896] 16 Misc. 222, 37 N. Y. Supp. 595); an imperfect plank upon which to walk from a car to a shed into which it is being unloaded (*Van den Heuvel* v. *National Furnace Co.* [1893] 84 Wis. 636, 54 N. W. 1016); portions of a derrick employed in stone-setting (*Harms* v. *Sullivan* [1878] 1 Ill. App. 251); a skid (*O'Connor* v. *Pennsylvania R. Co.* [1900] 48 App. Div. 244, 62 N. Y. Supp. 723); the door of a grain car, to be used as a platform for transferring a bale of wool (*Pennsylvania Co.* v. *Lynch* [1878] 90 Ill. 333); blocking for frogs (*Rojotte* v. *Canadian P. R. Co.* [1889] 5 Manitoba L. Rep. 365).

An employer cannot be held liable on the ground of failure to repair a defect in a gang plank, where it is shown that he kept an extra one which might have been substituted by the plaintiff for that which was defective. *O'Connor* v. *Pennsylvania R. Co.* (1900) 48 App. Div. 244, 62 N. Y. Supp. 723.

[2] *Carroll* v. *Western U. Teleg. Co.* (1893) 160 Mass. 152, 35 N. E. 456; *Meehan* v. *Spears Mfg. Co.* (1899) 172 Mass. 375, 52 N. E. 518; *Dargin* v. *Munson* (1864) 9 Allen, 396, 85 Am Dec. 770; *The Persian Monarch* (1893) 5 C. C. A. 117, 14 U. S. App. 158, 55 Fed. 333, Reversing (1892) 49 Fed. 669; *Maher* v. *Thropp* (1896) 59 N. J. L. 186, 35 Atl. 1057.

An employer who furnishes safe and suitable appliances to the employee with which to do the work on which he is engaged is not responsible for injuries from defects in appliances substituted by a fellow servant for those furnished by the employer. *Campbell* v. *New Jersey Dry Dock & Transp. Co.* (1898) 61 N. J. L. 382, 39 Atl. 658.

[3] *Thomas* v. *Ann Arbor R. Co.* (1897) 114 Mich. 59, 72 N. W. 40.

Another kind of dereliction of duty which is regarded as characteristic of a servant, and not of the master, is that which consists in the failure of a fellow servant to make use of suitable appliances furnished by the master for the work in hand.[1]

[1] A master who provides a proper apparatus to prevent a tub from falling back into a pit from which it is to be hoisted when full of earth is not liable for an injury caused by the failure of a fellow servant to use that apparatus. *Griffiths* v. *Gidlow* (1858) 3 Hurlst. & N. 648, 27 L. J. Exch. N. S. 404.

A brewer cannot be held culpable on the ground that he did not furnish proper appliances, where he sent his men to a customer's cellar with the usual apparatus for elevating barrels, and the men, finding the apparatus could not be used on account of the narrowness of the cellar, proceeded on their own responsibility to lift the barrels without it. *Ramsay* v. *Robin* (1889) 16 Sc. Sess. Cas. 4th series, 690.

A bridge builder is not liable where a foreman of a bridge gang injures a subordinate by his failure to use the braces furnished for enabling the workmen to move a heavy piece of the structure with greater safety. *Ludlow* v. *Groton Bridge & Mfg. Co.* (1896) 11 App. Div. 452, 42 N. Y. Supp. 343.

A servant cannot recover for personal injuries where the defect complained of is the want of a gang plank at the side door of a car into which he was helping to load a machine, when it is not shown that a suitable gang plank was not furnished. *Trimble* v. *Whitin Mach. Works* (1898) 172 Mass. 150, 51 N. E. 463.

A employer is not liable for an injury caused by the breaking of a derrick from the lack of guy ropes to prevent the swinging of the article hoisted, where there was rope on the premises which might have been used as guy ropes, but which the fellow servants of the injured employee neglected to use. *Clark* v. *Riter-Conley Co.* (1899) 39 App. Div. 598, 57 N. Y. Supp. 755.

Under the Pennsylvania statutes of 1877 and 1883, which merely require mine owners to furnish a sufficient number of props for the tunnels, a miner can recover if the evidence shows that a roof which fell and injured him would not have fallen if a single prop had been put in by the "boss." *Reese* v. *Biddle* (1886) 112 Pa. 72, 3 Atl. 813. Compare *Hall* v. *Johnson* (1865) 3 Hurlst. & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 189, 11 L. T. N. S. 779, 13 Week. Rep. 411, where a miner was held not to be entitled to recover for an injury due to the negligence of an underlooker in omitting to see that the roof of the mine was propped safely. Here, however, the point of view was not the same, as the essence of the decision was that the delinquent was not a vice principal by virtue of his rank.

An employer is not liable for an injury to a servant caused by the giving way of a belt fastener, due to the use of an insufficient number of fasteners in splicing the belt, where it keeps on hand a large quantity of such fasteners, and the failure to use a sufficient number is due to the negligence of his coemployees. *Harley* v. *Buffalo Car Mfg. Co.* (1894) 142 N. Y. 31, 36 N. E. 813.

An employer who acts as his own superintendent in the work of excavating a tunnel, and furnishes proper appliances for securing the safety of laborers who are to be lowered into it by a shaft leading into it, is not liable for an injury caused by the negligent omission of one of his subordinates to deliver those appliances at the mouth of the shaft. *McAndrews* v. *Burns* (1876) 39 N. J. L. 117. See, however, § 617, note 1, subd. (c), *infra*.

A shipowner which supplies and has on hand fenders and a gang plank, the use of which will render safe the unloading of the ship, is not liable for an injury to an employee caused by the failure of the stevedore who superintends the unloading to use the same. *Flynn* v. *Maine S. S. Co.* (1895) 14 Misc. 446, 35 N. Y. Supp. 1031.

A railroad employee cannot recover against the company for injuries caused by the neglect of an engineer or fireman in failing to have sand in the dome of the engine, on the ground of the company's failure to provide safe ways and appliances. *Illinois C. R. Co.* v. *Jones* (1894; Miss.) 16 So. 300.

The failure to provide a headlight renders a railway company liable to an employee who suffers injury through such failure; but it is not liable to the person injured for the failure of the men on the engine to light the one pro-

605. Negligence in failure to discard a defective for a suitable instrumentality.—In some cases of the class reviewed in the two preceding sections, the evidence indicates a breach of the duty to discard a defective appliance and replace it by a sound one, as well as a breach of the duty to use the appliances furnished. The effect of considering the master's responsibility from this standpoint is discussed in a later section (621).

606. Using instrumentalities in a manner not contemplated or authorized by the master.—A master who has furnished sufficient and suitable instrumentalities is not liable for the injuries which one servant may receive from the negligence of another in selecting for the performance of the work a particular instrumentality which, though sufficient in itself, is not adapted to the purpose for which it is used.[1] To this head may be referred those cases in which it has been held that a servant who is responsible for a fellow workman's use of a temporary makeshift contrivance during the progress of the work does not represent the master as regards the furnishing of that contrivance.[2] The position of the injured servant is not improved by the

vided. *Collins* v. *St. Paul & S. C. R. Co.* (1882) 30 Minn. 31, 14 N. W. 60.

Negligence cannot be imputed to an employer on account of the absence of lights from the place of work, where torches are furnished which may be used by the employees if they so desire. *Keare* v. *Troy Steel & I. Co.* (1893) 139 N. Y. 369, 34 N. E. 901.

[1] In holding a telegraph company not to be liable for the fall of a pole upon an employee engaged in raising it, due to the slipping of the pole upon a shovel with pointed end, directed by the foreman to be used instead of a crutch, which has broken, the court said: "We assume that the shovel was not a proper tool for the purpose, but it was not furnished for the purpose by the defendant. The plaintiff, as we understand, contends that his party was reduced to using it by the breaking of the deadman and the absence of other tools, coupled with the fact that the pole was to be raised at that time, and thus that the defendant was responsible for the situation. The short answer is that there is no evidence that the defendant did not furnish a sufficiency of proper tools at the depot from which those which were used were taken, or within convenient reach, and that, when proper appliances of this sort are furnished by the employer within convenient reach in a case like the present, he has done his whole duty, and is not bound to see that every gang of workmen take as many tools as the event may show to have been desirable." *Carroll* v. *Western U. Teleg. Co.* (1893) 160 Mass. 152, 35 N. E. 456.

A steamship is not liable for injuries to an experienced stevedore by the giving way of the guy rope of a derrick improperly used by such stevedore and his coemployees in hauling a vessel alongside, where the derrick was not intended for that purpose. *The Persian Monarch* (1895) 5 C. C. A. 117, 14 U. S. App. 158, 55 Fed. 333, Reversing (1892) 49 Fed. 669.

An employer is not liable for injuries to a painter in his employ caused by the breaking of a defective plank which his foreman placed in position and directed such painter to pass over for the purpose of removing a scaffold, where the plank was not furnished by the employer for such use. *Butterworth* v. *Clarkson* (1893) 3 Misc. 338, 22 N. Y. Supp. 714.

[2] A foreman knowing of the existence of a ladder placed upon a roof as a temporary contrivance for a special purpose is a fellow servant with an employee whom he directs to assist in going upon the roof to adjust a collar to a recently erected smokestack. *Kiffin* v. *Wendt* (1899) 39 App. Div. 229, 57 N. Y. Supp. 109.

An employer who furnishes a supply of ladders from which employees are to

fact that he had reason to believe that the defective appliance was one of those furnished by the master.[3]

The evidence in this class of cases is also susceptible of being sometimes viewed from the standpoint of the plaintiff's contributory negligence, and the master's exemption from liability is sometimes predicated on this ground.[4]

607. Giving of signals.—Frequent attempts have been made to bring the negligence of servants deputed to give signals within the scope of the principle that the duty to maintain a safe place of work is non-delegable. But this contention has always been rejected.[1]

select ladders to be used in painting is not liable for injury to an employee caused by the breaking of the lower of two ladders spliced together by the employees in such a manner that the foot of the ladder had to be placed some distance from the building,—especially where it does not appear that the ladder which broke would have been insufficient if used alone. *McKay* v. *Hand* (1897) 168 Mass. 270, 47 N. E. 104.

An employer who furnished a good ladder is not liable for an injury to an employee caused by falling from a defective ladder manufactured by and used at the suggestion of another employee, without the knowledge or direction of the employer. *Bolton* v. *Georgia P. R. Co.* (1889) 83 Ga. 659, 10 S. E. 352.

Where a tree used as a tackle post by workmen engaged in loading a pile driver hammer on a wagon was not an appliance furnished by the defendant, but a mere temporary instrumentality provided by the servants themselves during the progress of the work, defendant is not liable for the injury. *Bell* v. *Lang* (1901) 83 Minn. 228, 86 N. W. 95.

[3] *Guggenheim Smelting Co.* v. *Flanigan* (1898) 62 N. J. L. 354, 41 Atl. 844, 42 Atl. 145. It will be observed that the facts presented by these cases bring us very close to that which is the subject considered in subtitle C, *infra*.

[4] *Moran* v. *Brown* (1887) 27 Mo. App. 487. See also the extract from the opinion in *Durgin* v. *Munson* (1864) 9 Allen, 396, 85 Am. Dec. 770, as quoted in § 608, note 2, *infra;* and the case cited in § 342, *ante*.

[1] An employer is not liable where trainmen cause injury to one of their number by failing to give proper signals to a following train. *Hoover* v. *Beech Creek R. Co.* (1893) 154 Pa. 362, 26 Atl. 315; *Jenkins* v. *Richmond & D. R. Co.* (1893) 39 S. C. 507, 18 S. E. 182 (first train had broken in two); *Wheatley* v. *Philadelphia, W. & B. R. Co.* (1894) 1 Marv. Del. 305, 30 Atl. 660. Nor where a fireman omitted to sound a bell or whistle for the purpose of notifying the injured employee of the approach of a moving engine. *Greenwald* v. *Marquette, H. & O. R. Co.* (1882) 49 Mich. 197, 13 N. W. 513. Nor where one brakeman causes injury to another by giving a signal which causes a sudden reversal of the engine. *Cole* v. *Rome, W. & O. R. Co.* (1893) 72 Hun, 467, 25 N. Y. Supp. 276. Nor where the result of the manner in which a signal was given to a yard hand by his foreman was that he did not understand that the car he was ordered to couple was to be sent to the repair track, and accordingly acted less cautiously than he would have done if he had realized the danger. *Fraker* v. *St. Paul, M. & M. R. Co.* (1884) 32 Minn. 54, 19 N. W. 349. Nor where a conductor or other official in control of a train injures a brakeman by his negligence in signaling to back up cars. *Jackson* v. *Norfolk & W. R. Co.* (1897) 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258; *McCosker* v. *Long Island R. Co.* (1881) 84 N. Y. 77, Reversing (1880) 21 Hun, 500. In the last case the court said: "The yard master, through whose negligence the injury occurred, must be deemed to have been a fellow servant of the deceased as to all acts done within the range of the common employment, except such as were done in the performance of some duty which the master owed to his servants. The act, in the present case, was very plainly not of that character. The yard master was charged with the duty of making up the trains and distributing the cars in and about the yard and the repair shops of the defendant, and the deceased was employed by him to assist in that service.

608. Negligence in carrying out the express orders or regulations of the master.— In any case in which the master has issued directions for the guidance of his servants, respecting the manner in which the work is to be done, whether those directions take the shape of general rules or of specific orders *ad hunc vicem*, any delinquencies of which employees may be guilty in regard to the mere details of the work to which those orders or rules relate are deemed to be committed by them as mere servants.

In many instances it is easy to deduce inability to recover from the conception that a fellow servant's disobedience to orders is not one of those events which a master is bound to anticipate as likely to make the place of work unsafe.[1] Evidence that the master's directions were not followed will, under such circumstances, be viewed as simply negativing the existence of negligence on his part. But a comparison of the cases cited below with those reviewed in the preceding sections shows that all the various

As a necessary consequence, broken and disabled cars had to be handled and moved to the repair shops, and whatever of risk was inseparable from their damaged condition and the inconvenience, and even danger, of getting them to the shops, was an open and palpable risk of his employment, which the deceased assumed. It is, of course, no ground of liability of the company that the bumpers of this car were broken, and it could not be coupled in the ordinary way. The deceased was employed to handle and move to the repair shops damaged and disabled cars, and took the risk of his employment in that respect. While engaged in attaching the broken car to the one in front, with the aid of a chain and by direction of the yard master, the latter negligently and at the wrong moment signaled to the engineer to back his train, and as a consequence the deceased was crushed between the cars. The negligence which caused the injury was in no sense that of the master. In moving this train the yard master was acting, not as the agent of the master in the performance of the master's duties, for it was not the latter's duty to effect the coupling of these cars and their movement to the repair shop. What the yard master was doing was the work of a servant in the department of labor and duty assigned to him as such. No duty which the master owed to his servants was being done by the yard master from the negligent performance of which the injury resulted."

Liability has also been denied where a servant detailed to give warning to the men on board as to the movement of articles which are being hoisted on board a ship omits to perform that duty. *Hermann* v. *Port Blakely Mill Co.* (1896) 71 Fed. 853. And where the plaintiff was injured while assisting in laying iron pipe in a trench, by the pipe swinging against him as it was lowered, in consequence of the negligence of one of his fellow servants in giving the signal to lower the pipe. *Kennedy* v. *Allentown Foundry & Mach. Works* (1900) 49 App. Div. 78, 63 N. Y. Supp. 195. And where the proper signals were omitted in navigating ships. *The City of Norwalk* (1893) 55 Fed. 98; *The Queen* (1889) 40 Fed. 694. Where brake chains were so defective that a brakeman was frequently compelled to go under the car, and while he was there the conductor signaled for the train to start, and so injured him, the conductor's negligence, and not the broken chains, was regarded as the proximate cause of the injury. *Pease* v. *Chicago & N. R. Co.* (1884) 61 Wis. 163, 20 N. W. 908.

A conductor of a train when signaling to the engineer to go forward is a fellow servant of the engineer, and also of the fireman, who was injured by the negligent acts of the conductor in making the signal and the engineer in obeying it. *Grattis* v. *Kansas City, P. & G. R. Co.* (1900) 153 Mo. 380, 48 L. R. A. 399, 55 S. W. 108.

[1] *Healey* v. *New York, N. H. & H. R. Co.* (1897) 20 R. I. 136, 37 Atl. 676.

groups of facts as to which nonliability has been vindicated on this ground have been of such a character that the servant would have been unable to recover, quite irrespective of the circumstance that the negligence committed constituted an infraction of the master's orders. Indeed, it is clear, both upon principle and authority, that, so far as the availability of the defense of common employment is concerned, the extent of the master's liability is measured by the same standard whether the act which caused the injury was or was not expressly forbidden by him.[2]

[2] Where the evidence is equally consistent with the theory that the injury was caused by negligence in supervising the operation of trains, and with the theory that it was caused by the fault of a coservant, the plaintiff cannot recover. *Rose* v. *Boston & A. R. Co.* (1874) 58 N. Y. 217. The court said: "In the case before us it appeared in proof that the train on which the plaintiff's intestate was a brakeman went out within three or four minutes after another train, and was itself followed by a third train at about the same distance of time. The injury which resulted in the death of the plaintiff's intestate was the consequence, as the jury have found, and as they might rightfully find from the evidence, of those trains being sent out so near together. By what direction they started so nearly at the same time does not appear. All the proof that relates to the point is contained in the single phrase of one of the witnesses, who, speaking, not of the time of the accident, but of the time of his testifying, says: 'The head conductor who has charge of sending out trains is Mr. Rockefeller.' What charge Rockefeller has [illegible] not shown, nor whether he, in [illegible]ded the trains in question. [illegible]ppear whether he was in[illegible]ary discretion upon the [illegible]arting trains, or whether [illegible]as on the subject, either by [illegible]ed time-table or otherwise, had been made by the company. But it is obvious that the company may have prescribed proper and safe rules in respect to the starting of these trains, and that those rules may have been disregarded by the persons who actually started these trains so near each other. It may be conceded that it is the duty of a railroad corporation to prescribe, either by means of time-tables or by other suitable modes, regulations for running their trains with a view to their safety; but it is obvious that obedience to these regulations must be intrusted to the employees having charge of the trains. Such obedience is a matter of executive detail which, in the nature of things, no corporation or any general agent of a corporation can personally oversee, and as to which employees must be relied upon. . . . Nothing appears in the evidence indicating that any distinction exists between the duty of the company in starting trains and in subsequently running them. In the absence, therefore, of any such proof, and of any proof showing negligence in this respect on the part of the defendants, the case must be determined by ascertaining on which party the burden of proof rests."

The principle that the carrying out of rules is a "matter of detail" was also relied upon in *Bryant* v. *New York C. & H. R. R. Co.* (1894) 81 Hun, 164, 30 N. Y. Supp. 737.

When the master has furnished—to be observed by those having the management of his business—such rules as may be reasonably essential to the safety of his employees in any emergency or condition which may be apprehended in the service, he has discharged his duty to them in that respect, and they assume the hazard of the observance of the regulations by those with whom the duty rests to execute them. *Tully* v. *New York & T. S. S. Co.* (1896) 10 App. Div. 463, 42 N. Y. Supp. 29.

See also *Drake* v. *New York C. & H. R. R. Co.* (1894) 80 Hun, 490, 30 N. Y. Supp. 671.

In *International & G. N. R. Co.* v. *Hall* (1890) 78 Tex. 657, 15 S. W. 108, the following charge was approved: "If defendant had established or provided such reasonable rules, regulations, etc., plaintiff cannot recover, though he may have been hurt through failure of one or more of his fellow servants to do what was required of him or them under the rules of that business.

609. Failure to give instruction.—Where a servant has notice of the general risks and dangers of his employment, the master is not guilty of negligence in failing to notify him of each particular defect, as

In other words, if defendant's established methods of management of that branch of its business were reasonably sufficient, had its employees observed and followed them, to have afforded plaintiff reasonable protection against the danger he incurred when working on the repair truck, defendant would not be liable whether its other employees did their duty or not."

In *Durgin* v. *Munson* (1864) 9 Allen, 396, 85 Am. Dec. 770, the defect in the engine, which the plaintiff alleged as the cause of his injury, was the insufficiency of the brake to prevent the engine from running off while it was turned on the turntable. The defendant proposed to show that the person who had charge for him of all the engines on the road had given instructions, before the accident, to the engineers to have the wheels of their engines "chocked" while turning on the turntable, and that this accident occurred by failure of some servant of the defendant to obey such instructions. It was held that the exclusion of this evidence was error, as it was not shown that the instruction was given or known to the plaintiff. The court said: "Proof that the accident which caused the injury to the plaintiff was caused by the neglect of a fellow servant would have been a defense to the action; and the offer went to that extent. The defects of the engine in the abstract were not the gist of the plaintiff's complaint, but its defects at the time and for the service in which the defendant allowed it to be used when it ran on to the plaintiff. If it were fit and sufficient for use in the manner in which the defendant then allowed it to be used, its insufficiency for other service, at other times, would not concern the plaintiff. Now, it is plain that a machine may be safe and fit for one use, when it is not for another. To put an extreme case, by way of illustration: Suppose the defendant had a worn-out engine, unfit for any service, and he had given orders that it should not be run at all; yet some workman had, without his knowledge, undertaken to run it. Could the master be held responsible to the fellow servant? Suppose a car that was not fit to run with steam power was kept for use only when drawn by horses; or an engine which had not the proper appliances for a locomotive was employed solely as a stationary engine. Would an unauthorized change of the use make the master liable? If this engine, when 'chocked' upon the turntable, was absolutely safe against the possibility of running off, so that it needed no brake at all in that position, and it was not permitted to be turned until the blocking was applied to the wheels, it would be a question for the jury whether the want of a brake was the cause of the injury. There is no absolute requirement of law that the injurious action of a locomotive engine shall be prevented by the specific expedient of a brake. If other sufficient means of safety, equivalent in effect were supplied, that is all that is necessary; and the jury were to judge of their sufficiency. The fact that the orders to the engineers were not known to the plaintiff would not be decisive, because the question on that part of the case was whether the engineers were careless, and by their failure to obey instructions the accident occurred. The evidence which was rejected should therefore have been received, as having a direct tendency to show whether the defendant used such precautions and gave such rules for the use of the engine in the condition in which it was at the time of the accident as made it then a proper instrument for the service to which it was to be applied."

Where all the testimony shows that a special order to an engineer to run his train "two hours late" was to be read in connection with the general rule of the company, and was so understood by all the employees concerned, and that such order meant that the train was to run with reference to the schedule of all passenger trains, and never to encroach upon the time of the train which it followed, the company cannot be held liable for injuries which a brakeman on the train in front received through the negligence of the engineer of the following train in running it too fast. *Kennelly* v. *Baltimore & O. R. Co.* (1895) 166 Pa. 60, 30 Atl. 1014.

Where a railroad company has employed a sufficient number of competent servants to shift its cars in a yard, and has promulgated proper rules for the management of the business, it is not

liable for the consequences of a brakeman's failing to take his proper position on the top of moving cars. *Potter* v. *New York C. & H. R. R. Co.* (1892) 136 N. Y. 77, 32 N. E. 603, Distinguishing *Flike* v. *Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545.

In *Wright* v. *New York C. R. Co.* (1862) 25 N. Y. 568, it was sought to support the judgment on the ground of the improper arrangement of the time-tables at the point where the collision took place. The court, however, held that the time-tables were not in fault, but that the collision grew out of the carelessness of the employees in running the train not in conformity with the time-tables, and that the fault was therefore to be regarded as that of a fellow servant, and that the defendants were not responsible.

An employer is not liable for the death of an employee killed by the fall of a cornice which he was engaged in putting up without anchors, where he voluntarily assumed the risk, and the foreman in charge of the work had no authority to go on with it except in accordance with the plans and specifications, which provided for the use of anchors. *Homersky* v. *Winkle Terra Cotta Co.* (1899) 178 Ill. 562, 53 N. E. 346, Affirming (1898) 77 Ill. App. 42.

The duty of a railroad company to provide its employees a reasonably safe place to work does not render it liable for injuries received by a brakeman in a collision between his train and an engine, resulting from the negligent disregard by the engineer of such engine of his orders to proceed on a track other than that on which the train was running. *Healey* v. *New York, N. H. & H. R. Co.* (1897) 20 R. I. 136, 37 Atl. 675.

Even if it be assumed that rules for signals at crossings and as to speed are available to an employee, the negligence of the conductor and engineer of a train in failing to make such signals, and in running at excessive speed, is that of fellow servants as regards a section hand. *Wright* v. *Southern R. Co.* (1897) 80 Fed. 260.

The defendant is not entitled to a nonsuit where the evidence leaves it uncertain whether the injury was caused by the misconduct of the plaintiff's co-servants in violating a duly promulgated rule, or whether at the time the injury was received they were acting without any regulations and simply following a dangerous practice sanctioned by time and custom. *Doing* v. *New York, O. & W. R. Co.* (1897) 151 N. Y. 579, 45 N. E. 1028.

A railroad company is not liable for the death of a brakeman in a collision, on the ground that the train despatcher should have warned the conductor of the following train of the preceding one, where a despatch had been forwarded to the side-tracking station in ample time to afford an opportunity to side-track the first train but for its delay in reaching the station, and the conductor had been warned to guard against the following train, and knew of the increased danger, and took no precautions to guard against it. *Herrington* v. *Lake Shore & M. S. R. Co.* (1894) 83 Hun, 365, 31 N. Y. Supp. 910.

In one case it was held that the neglect of the duty of a telegraph operator to put out a proper signal for passing trains, so as to prevent a train passing a station within ten minutes of another, in accordance with the rules of a railroad company, was negligence of a fellow servant of a brakeman upon one of such trains, and not a failure to perform a duty of the master, and was not a cause of recovery for the death of such brakeman in consequence thereof. *Cincinnati, N. O. & T. P. R. Co.* v. *Clark* (1893) 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125. The court declined to enter into the question whether the telegraphic service constituted a department distinct from that of trainmen, and decided the case on the special and very narrow ground that the display of the signal was an act which did not pertain to the duties of the operator *qua* operator. The ruling in *McKaig* v. *Northern P. R. Co.* (1889) 42 Fed. 288, however, seems to have been approved of. *Northern P. R. Co.* v. *Charless* (1892) 2 C. C. A. 380, 7 U. S. App. 359, 51 Fed. 567, was distinguished on the ground that it was a ruling on demurrer, the court assuming that, under the allegations of the petition, the negligence of the operator was the same as that of a despatcher.

The plaintiff's action was also held not to be maintainable on similar grounds in the following cases: *Pittsburgh, C. & St. L. R. Co.* v. *Vondersen* (1882) 37 Ohio St. 549 (trainmen injured through collision resulting from the negligence of an employee sent to flag an approaching train); *Niles* v. *New York C. & H. R. R. Co.* (1897) 14 App. Div. 58, 43 N. Y. Supp. 751 (engineer ran his train past a block signal so that it came into collision with an

other standing on the track); *Evansville & T. H. R. Co.* v. *Tohill* (1895) 143 Ind. 49, 41 N. E. 709; Rehearing Denied in 143 Ind. 60, 42 N. E. 352 (collision caused by conductor's running train past station, instead of side tracking, as required by the regulations); *Simpson* v. *Central Vermont R. Co.* (1896) 5 App. Div. 614, 39 N. Y. Supp. 461 (same species of accident); *Northern P. R. Co.* v. *Poirier* (1897) 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741 (collision caused by conductor's disregard of rule as to running a train closely behind another); *Ford* v. *Lake Shore & M. S. R. Co.* (1889) 117 N. Y. 638, 22 N. E. 916 (disregard by employees of rules regulating the loading of cars); *Byrnes* v. *New York, L. E. & W. R. Co.* (1889) 113 N. Y. 251, 4 L. R. A. 151, 21 N. E. 50 (railroad company not liable for the negligence of its employees in making inspection of loaded cars which is imposed on them by its rules); *Rutledge* v. *Missouri P. R. Co.* (1894) 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327 (brakeman thrown off car by a sudden check in its movements consequent upon a fellow servant's giving a signal to the engineer in breach of the custom in use); *Denver & R. G. R. Co.* v. *Sipes* (1896) 23 Colo. 226, 47 Pac. 287 (railroad company not liable for the consequences of a conductor's negligence in failing to observe a rule of the company with respect to the closing of switches); *Davis* v. *Staten Island Rapid Transit R. Co.* (1896) 1 App. Div. 178, 37 N. Y. Supp. 157 (switch left open by conductor; brakeman injured); *Moeller* v. *Delaware, L. & W. R. Co.* (1897) 13 App. Div. 467, 43 N. Y. Supp. 603 (car repairer injured by fellow servant's failure to put out a signal flag); *Enright* v. *Toledo, A. A. & N. M. R. Co.* (1892) 93 Mich. 409, 53 N. W. 536 (engineer disregarded rule requiring freight trains to approach stations under full control); *Peterson* v. *Chicago & N. W. R. Co.* (1887) 67 Mich. 102, 34 N. W. 260 (no signal flag placed, as required by rules, to protect car repairer); *Re Fro* v. *Chicago, R. I. & P. R. Co.* (1885) 86 Mo. 302 (breach of rules made for the protection of car repairers); *Duthie* v. *Caledonian R. Co.* (1898) 24 Sc. Sess. Cas. 4th series, 934, 35 Sc. L. Rep. 720 (breach of rule requiring foremen of track-repairing gangs to set a lookout); *Whalen* v. *Michigan C. R. Co.* (1897) 114 Mich. 512, 72 N. W. 323 (brakeman or conductor failed to pull automatic cord when brakes were whistled for); *Lanquist* v. *Duluth Street R. Co.* (1896) 65 Minn. 387, 67 N. W. 1006 (warning signal not given, as prescribed by rules); *McDonald* v. *New York C. & H. R. R. Co.* (1892) 63 Hun, 587, 18 N. Y. Supp. 520 (engineer's breach of rule requiring him to examine engine); *Henry* v. *Lake Shore & M. S. R. Co.* (1882) 49 Mich. 495, 13 N. W. 832 (rules requiring engineer to obey certain signals were violated by an engineer); *Terre Haute & I. R. Co.* v. *Lerper* (1895) 60 Ill. App. 194 (signals at switch disregarded); *Miller* v. *Southern P. Co.* (1891) 20 Or. 285, 26 Pac. 70 (breach of rule as to adjustment of switches); *Cooper* v. *New York, O. & W. R. Co.* (1898) 25 App. Div. 383, 49 N. Y. Supp. 481 (freight cars left on a siding without setting brake). A railway company is not liable for an injury due to the neglect of orders, properly communicated by the employer's representative, as to the running of trains. *Galveston, H. & S. A. R. Co.* v. *Smith* (1890) 76 Tex. 611, 13 S. W. 562; *Chicago, St. L. & N. O. R. Co.* v. *Doyle* (1883) 60 Miss. 977, (conductor went on past a station without getting instructions, as the train despatcher had directed, with regard to the future movements of the train).

A railway company is not liable for injuries due to the negligence of an engineer who, against orders, moved a train out of a siding, and thus caused it to collide with another owing to its being provided with a defective headlight. *New York, C. & St. L. R. Co.* v. *Perriguey* (1894) 138 Ind. 414, 34 N. E. 233, 37 N. E. 976.

A railway company is not liable where an injury is received by a trainman, as a result of the road superintendent's taking a train across a defective bridge, in contravention of the manager's express orders. *Carney* v. *Canada P. R. Co.* (1890) 29 N. B. 425.

No action is maintainable where the [illegible] of the accident was the sudden [illegible]ng of a trap door in a passage, [illegible] below, by a coservant of the plain[illegible]n disobedience to express orders [illegible] foreman, the result being that the [illegible] fell through the opening. [illegible] (1887) 105 N. Y. 564.

[illegible] of a brakeman on a train [illegible]man when he sees a fellow [illegible] a railroad bridge in what [illegible] dangerous position if the train [illegible] by reason of which such fellow [illegible]nt is injured, will not render

such duty, if required, is one necessarily devolving on fellow servants, for whose particular acts of negligence the master is not responsible.

Evidence that an employer referred a servant to an experienced fellow employee for information as to the proper manner of dealing with certain dangerous conditions, and that, in consequence of following the instruction given, the servant was killed, is insufficient to support a charge of negligence on the employer's part.[2]

610. Manipulation of the instrumentalities during the progress of the work.—In the subjoined note are tabulated under headings calculated to facilitate comparison with § 567 and § 568, *ante*, a number of cases illustrating the nonliability of the master for negligence in handling the instrumentalities, under various circumstances, during the actual progress of the work. The cases cited under §§ 601, 602, *supra* should also be compared.[1]

the company liable, although he is directed by the superintendent to move the train across the bridge. *Austin & N. W. R. Co.* v. *Beatty* (1894) 6 Tex. Civ. App. 656, 24 S. W. 934.

An employer's order to lower a beam during the construction of a bridge does not render him liable for the act of an employee charged with the execution of the order, in lowering the beam so carelessly as to inflict an injury on a fellow servant. *Ryan* v. *McCully* (1894) 123 Mo. 636, 27 S. W. 533.

In *Grassel* v. *Weber* (1898) 76 Mo. App. 677, a demurrer to the evidence was sustained, as plaintiff's own evidence showed that his injury was caused by a fellow servant's disobedience to the orders of the foreman.

[1] *Chesapeake & O. R. Co.* v. *Hennessey* (1899) 38 C. C. A. 507, 96 Fed. 713 (servant knew that many of the cars which he had to handle as switchman were defective.

[2] *Welch* v. *Grace* (1897) 167 Mass. 590, 46 N. E. 387 (misspent charge of dynamite).

[1](a) *Handling railway cars and locomotives.*—A railroad company may, subject to its duty to provide proper rules, commit the handling of its trains and cars upon its road and in its yards to its employees, so as to avoid liability to employees from negligence in the handling of the same. *Sumner* v. *Atchison, T. & S. F. R. Co.* (1897) 17 Tex. Civ. App. 337, 43 S. W. 533.

Such a company, therefore, cannot be held liable for an injury to a laborer on a construction train, where the plaintiff seeks to recover on the theory of a special duty incumbent on the engineer in charge to see that the cars were safely coupled before starting. *Ryan* v. *Cumberland Valley R. Co.* (1851) 23 Pa. 384.

A trainhand cannot recover for injuries caused by the act of the ordinary servants of the company in making up a train of cars with platforms of unequal height, under the direction of the station master. *Hodgkins* v. *Eastern R. Co.* (1876) 119 Mass. 419. Negligence in making up a train was treated as a breach of a non-delegable duty, in *Norfolk & W. R. Co.* v. *Nuckols* (1895) 91 Va. 195, 21 S. E. 342, explaining on this theory *Moon* v. *Richmond & J. R. Co.* (1881) 78 Va. 745, 49 Am. Rep. 401.

No action can be maintained by a brakeman for injuries caused by a co-servant's neglect to observe the usual custom of chaining up a dead-wood head on a car. *Arnold* v. *Delaware & H. Canal Co.* (1890) 125 N. Y. 15, 25 N. E. 1064.

No action can be maintained where a collision is caused by the recklessness of the engineer. *Wright* v. *New York C. R. Co.* (1862) 25 N. Y. 562. Nor where a train is run at excessive speed and so derailed. *Slather* v. *Chicago & N. W. R. Co.* (1879) 46 Wis. 197, 1 N. W. 112; *Sherman* v. *Rochester & S. R. Co.* (1853) 15 Barb. 574. Nor where an engineer runs his engine against a brakeman. *Fowler* v. *Chicago & N. W. R. Co.* (1884) 61 Wis. 157, 21 N. W. 40. Nor where a conductor of a work train runs it without a light, and injures a trackman. *Coon*

611. Negligence . . . le transmission of the master's orders to . . er servants.—(Compare cases as to signals in § 607, *supra*.) In transmitting the master's orders to other servants, an em-

. *Syracuse & U. R. Co.* (1851) 5 N. Y. 492. Nor where an engineer disregards the signals at a switch, and so runs his train on to a sidiag. *Terre Haute & I. R. Co.* v. *Lee* (1895) 60 Ill. App. 191. Nor where an engi . caused the death of a fireman . . . failure to notice a red light at a switch. *Peoria C. R. Co.* v. *Hosler* (1892) 45 Ill. App. 205.

In *Howard* v. *Denver & R. G. R. Co.* (1886) 26 Fed. 837, the court rejected the contention that, because the locomotive operated by the delinquent was in the wrong and collided with decedent's train while the track was not clear, and the . . . the master had failed in his . . . providing a safe place for the em . . . e to work in and upon. See § 580, note 3, *supra*.

A general charge in favor of defendant in an action by a brakeman against a railroad company for personal injuries alleged to have been caused by a defective appliance for controlling the motion of the engine should be given where the only defect was in the brake of the engine, and the shock causing the injury was caused by putting the engine in motion, and there is no evidence that the defective brake contributed to causing the injuries. *Highland Ave. & B. R. Co.* v. *Miller* . . 398) 120 Ala. 535, 24 So. 955.

A brakeman on a train ordered to run ahead of another train, under circumstances requiring the employees in control to look out for such train and keep out of its way, cannot recover for a collision caused by the failure of the conductor and engineer of his train to side track the other train. *Hoover* v. *Beech Creek R. Co.* (1893) 151 Pa. 362, 26 Atl. 315.

Leaving cars standing on side tracks on each side of the main track in a switch yard, in such close proximity as to obstruct the view of a wagon road crossing the tracks at right angles, in consequence of which a foreman of a gang of men in the yard, whose business it was to locate the stored cars and see that the wagon way was left open, was killed by a collision between an engine on which he was riding and a loaded wagon, is negligence,—either his own contributory negligence or the negligence of his fellow-servants. *Hebert* v. *Delaware & H. Canal Co.* (1891) 41 N. Y. S. R. 86, 16 N. Y. Supp. 661.

An engineer cannot recover where he is injured by running his train against some box cars left standing on the main track owing to the negligence of the station agent. *Brown* v. *Minneapolis & St. L. R. Co.* (1884) 31 Minn. 553, 18 N. W. 834.

Though an engineer may be charged with the duty of instructing an engine wiper when the latter's foreman is absent, the former does not stand in the relation of vice principal to the latter in regard to his work of shifting and making up trains. *South Florida R. Co.* v. *Weese* (1893) 32 Fla. 212, 13 So. 136.

A railway company is not liable for the death of a brakeman who, after a train had separated owing to a defect in the couplings of one of the rear cars, had undertaken to repair the defect, and was killed by the negligence of the engineer in backing up the cars in the forward part of the train. *Course* v. *New York, L. E. & W. R. Co.* (1888) 17 N. Y. S. R. 715, 2 N. Y. Supp. 312, Affirmed (1889) 117 N. Y. 652, 22 N. E. 1133.

The retention of a car of another road in the yards of a railroad company after it has been ordered to be returned as defective, by the yard master or crews in the yard, is the act of a fellow servant of a switchman injured while attempting to couple such car to another for the purpose of removing it from the yard. *Atchison, T. & S. F. R. Co.* v. *Meyers* (1896) 22 C. C. A. 268, 46 U. S. App. 226, 76 Fed. 413 (previous appeal [1894] 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 793).

The court said: "The only vice principal or representative of the railroad company in the occurrences of the day was the inspector, and he represented the company only in the inspection of the car, and in the giving of notice of defects. The company owed to the defendant in error no duty in respect to the time or manner of return. If the car had been retained in the Santa . . yards by the order or authority of . . general superintendent or other general officer of the company, and the plaintiff, being required to work about it, had suffered injury by reason of its defective condition, he would doubtless have

ployee is regarded as being in the performance of a merely ministerial duty. No damages, therefore, can be recovered for injuries caused by negligence in the discharge of that duty, whatever may be the

had cause for complaint; but the crews engaged in the yards at Streator, including yard master, foreman, and engineers, were all his fellow servants, and for what they did with the car after the inspection and after notice that it was to be returned to the other road, the plaintiff in error is not amenable."

A street-railway employee injured in a collision with an empty car which ran down an incline because the brake was not properly set by a fellow servant cannot recover therefor. *Hoover* v. *Carbon County Electric R. Co.* (1899) 191 Pa. 146, 43 Atl. 74.

(b) *Operating hand cars.*—The negligent operation of a hand car by a section foreman is not a delinquency imputable to the company. *Martin* v. *Atchison, T. & S. F. R. Co.* (1897) 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603 (see as to this case, § 601, *supra*); *Northern P. R. Co.* v. *Charless* (1896) 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848 (excessive speed); *Olson* v. *St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117, 35 N. W. 866 (foreman took no precaution to secure his hand car against a collision); *Justice* v. *Pennsylvania Co.* (1892) 130 Ind. 321, 30 N. E. 303 (workman struck by lever of hand car).

(c) *Improperly placing the loads on railway cars and other vehicles.*—(Compare § 619, note 4, subd. (f), *infra*.)—That a railway company is not liable for injuries due to the improper manner in which railway cars are loaded has been held in *Conger* v. *Flint & P. M. R. Co.* (1891) 86 Mich. 76, 48 N. W. 695 (carelessly placed side stake allowed log to fall so that train was derailed); *Lellis* v. *Michigan C. R. Co.* (1900) 124 Mich. 37, 82 N. W. 828; *Indianapolis & St. L. R. Co.* v. *Johnson* (1885) 102 Ind. 352, 26 N. E. 200; *Fitzgerald* v. *Boston & A. R. Co.* (1892) 156 Mass. 293, 31 N. E. 7 (bales of hay carelessly stowed); *Sweeney* v. *Page* (1892) 64 Hun, 172, 18 N. Y. Supp. 890 (car jolted, throwing a heavy stone forward, the result being that the plaintiff was pushed off); *Boiley* v. *Delaware & H. Canal Co.* (1898) 27 App. Div. 305, 50 N. Y. Supp. 87 (loaded car, as a whole, not an appliance, as the trial judge laid down in his charge; projecting timber). In the last-cited case the court said: "It is the clear duty of the master to, at all times, furnish the servant safe material with which to do the work required, so far as the exercise of reasonable care in selection and inspection can make them so. But the use of such material is necessarily the work of the servant. Whoever accepts service under the master does so with the knowledge that it is the servant, and not the master, who will cause any injury that may result from a careless use of the material so furnished. And so far as protection against such careless use is concerned, he can, in reason, expect no more from the master than that competent coservants be employed, and a judicious system be adopted for carrying out the work. The car is furnished for the express purpose of being loaded and run over the road, and the brakeman is one of the employees; and the man who loads and inspects the loading is another whose duty it is to carry out that purpose. Each uses, within his own sphere, the car furnished by the master, and both are engaged in carrying out the purpose for which it is furnished. Surely the loading of the car was not an act pertaining to the duty the master owes to his servants, any more than running it over the road was such an act; and hence, within long settled rules, the master is not liable for negligence in loading it."

The failure to ballast a snow plow sufficiently is the negligence of a fellow servant. *Pudsey* v. *Dominion A. R. Co.* (1895) 27 Nov. Sc. 498.

In *Atchison, T. & S. F. R. Co.* v. *Seeley* (1894) 54 Kan. 21, 37 Pac. 104, the court declined to follow *Deacy* v. *Detroit, G. & H. M. R. Co.* (1893) 97 Mich. 329, 22 L. R. A. 292, 56 N. W. 756, and held the company liable for improper loading. See § 568, note 1, subd. (k), *ante*.

A similar principle is applicable with regard to the loading of other kinds of vehicles. Thus, it is held that the supervision of the loading of an elevator is a mere detail of the work. *Denenfeld* v. *Baumann* (1899) 40 App. Div. 502, 58 N. Y. Supp. 110.

So, a proprietor of iron works is not liable for an injury to an employee, caused by the negligent manner in which coemployees loaded iron upon an iron

agency employed for bringing the orders to the knowledge of those whose actions will be affected by them.

Most of the cases illustrating this principle relate to the position of

wagon or buggy. *Benisch* v. *Roberts* (1891) 143 Pa. 1, 21 Atl. 998.

So, an employer is not liable for injuries to an employee through the capsizing of a car having a superstructure for handling timbers, not dangerous if properly used, due to the overloading of such car by coemployees. *Callaway* v. *Allen* (1894) 12 C. C. A. 114, 24 U. S. App. 388, 64 Fed. 297. The court said: "The primary cause of the accident was the careless and negligent use of the car by Anderson and the men under him. The weight of evidence is clear that the car, with the added superstructure, was not ordinarily or necessarily dangerous, if carefully handled and not overloaded. . . . The evidence shows clearly that the car was overloaded. The timbers were too heavy for the counterbalancing weight, and that was the fault of coemployees, and was the primary and controlling cause of the accident."

Cases involving injuries from the improper loading of cars often turn upon the question whether the servant assumed the risk as one of those ordinarily incident to the service. With these we are not concerned in this note. In other cases the liability of a railroad company for injuries caused by foreign cars so loaded that the freight upon them projects over the ends has been referred to the consideration whether it is negligence to receive into a train cars loaded in this manner. In one case the ground has been taken that its acceptance is merely a fact bearing upon the question of the company's negligence. *Louisville & N. R. Co.* v *Gower* (1887) 85 Tenn. 473, 3 S. W. 824. In others it has been held that the court may pronounce the company, as a matter of law, not to be guilty of negligence in exposing a servant to a risk of this character. *Northern C. R. Co.* v. *Husson* (1882) 101 Pa. 1, 47 Am. Rep. 690; *Day* v. *Toledo, C. S. & D. R. Co.* (1880) 42 Mich. 523, 4 N. W. 203.

But this theory of the circumstances involved in cases of this class suggests a standpoint different from that occupied in the cases in which the responsibility of the master has been discussed with special reference to the existence of a duty to ascertain the condition of the cars which the servants are required to handle, and the right to maintain an action is tested by an examination of the question whether that duty is assignable or absolute. This question can only be material when it has been determined that there has been a breach of duty. See §§ 581–584, *ante*.

In a later section it will be shown that the negligence of an employee in inspecting a railway car with a view to ascertaining whether it is properly loaded is that of a mere coservant of the trainmen. See § 619, note 4, subd. (f), *infra*.

A master is not liable where his foreman, in helping to unload lumber from a wagon, allowed a roller to fall off upon a servant. *Lundberg* v. *Sherlin-Carpenter Co.* (1897) 68 Minn. 135, 70 N. W. 1078.

(d) *Manipulating switches.*—The duty of opening and closing a switch in the ordinary operation of a railroad is not one of the personal duties of the master, but a duty of operation. *St. Louis, I. M. & S. R. Co.* v. *Needham* (1894) 25 L. R. A. 833, 11 C. C. R. 56, 27 U. S. App. 227, 63 Fed. 107. The court said: "The roadbed, ties, tracks, stations, rolling stock, and all the appurtenances of a well-equipped railroad, together constitute a great machine for transportation. It is the duty of the railroad company to use ordinary care to furnish a sound and reasonably safe machine, to use due diligence to keep it in proper repair, and to use ordinary care to employ reasonably competent servants to operate it; but, when this duty is performed, the duty rests upon the servants to operate it carefully. In the case before us there is no evidence that the conductor who negligently left the switch open was not selected with reasonable care. There is no claim that there was any defect in the switch that hindered or prevented the conductor from closing it. The company furnished a switch sufficient to move the rails, and used due care in selecting the servant to operate it. Before this servant commenced to operate it, the switch was closed, so that the passenger train on which the decedent was killed might have passed in safety. It became the duty of the conductor, in the operation of the railroad, to open this switch and to run his train through it upon the

the telegraph operators of railway companies. In so far as these employees are not exercising any discretionary powers in regulating the movements of the trains (§577, *a, b, ante*), they are by all the courts

spur track. He did so. It then became his duty to take his train off the spur track, and to close the switch. He took his train off, and proceeded south, but carelessly left the switch open. His negligence was not in the construction, preparation, or repair of the railroad, but in its operation. The railroad was safe before he made it unsafe by his negligence in operating it, and he was discharging none of the personal duties of the master, but one of the duties of the servant, when he became guilty of the fatal negligence. Any other holding would annihilate the now settled rule of liability for the negligence of fellow servants. It will not do to say that the timely movement and fastening of a switch in the ordinary operation of a railroad is requisite to provide a safe place for the next train to be operated in, and hence is one of the personal duties of the master. Under such a rule, it would become the absolute duty of the master to so operate all switches, all turntables, the levers of all engines, all brakes, all cars, and every appurtenance of the railroad that every place upon it should at all times be safe, and no negligence of any employee could ever cause an injury to another servant for which the master might not be held liable. At the instant of the injury, every place in which an injury is inflicted is unsafe. The test of liability is not the safety of the place nor of the machinery at the instant of injury, but the character of the duty, the negligent performance of which caused the injury. Was it a duty of construction, preparation, or repair, or was it a duty of operation of the machine?"

To the same effect see *Pleasants* v. *Raleigh & A. Air-Line R. Co.* (1897) 121 N. C. 492, 28 S. E. 267; *Dares* v. *Southern P. Co.* (1893) 98 Cal. 19, 32 Pac. 708 (train ran through the switch on to the siding, and killed a track repairer); *Corcoran* v. *Delaware, L. & W. R. Co.* (1891) 126 N. Y. 673, 27 N. E. 1022 (car allowed to run on to repair track); *Denver & R. G. R. Co.* v. *Sipes* (1896) 23 Colo. 226, 47 Pac. 287.

In *Miller* v. *Southern P. Co.* (1891) 20 Or. 285, 26 Pac. 70, the special contention was put forward that the effect of a general rule of the company providing that conductors would be held personally responsible for the proper adjustment of switches used by their trains was to create the conductor whose negligence caused the injury vice principal as regards the plaintiff. The court rejected this contention, reasoning thus: "The argument for the plaintiff proceeds upon the assumption that the switch was broken and disarranged when the Lebanon locomotive used it, and that Huston [the conductor] had devolved upon him the duty of seeing that the switch was properly adjusted, which being a personal duty the company owed to Miller, that the negligence of Huston in failing to discover that the switch was out of order was the negligence of the company, and rendered it liable for the injurious consequences which ensued. The rule was a proper and needful regulation, and obedience to it was well calculated to insure safety, but it was not designed to create any new or distinct liability other than the law established. As a rule, it did not operate to change the rule of law which governed the relation of the parties and fixed their liabilities. The conductors were not expected to perform the duties of switchmen; someone under them, usually a brakeman, discharged this duty, by their direction; and the object of the rule in making them responsible was to secure the best possible performance of the duty of a switchman to insure safety in operating trains. It added no new or other element to the legal relation of the parties concerned than already existed. The whole duty combined and to be performed in this regard by conductor and switchman in operating the switch only constituted the proper discharge of the duty of a switchman. It is not the duty of a master, 'as with a personal sight and touch,' to operate the switches on the road. . . . If we take the character of the act performed by such servant to determine whether he is an agent or representative of the company or a fellow servant, what is there in the act of operating a switch so as to properly adjust the rails for the passage of trains which may be considered in any sense to impose or delegate the duty to such employee to furnish, construct, keep, or maintain in repair such switch? How-

ever liberally we may construe the rule as to coservants, it is difficult to perceive, if the rule itself is to remain, that a servant engaged in the operation of a switch is a representative of the master, or other than a fellow servant engaged in a common employment for the successful management of the train. The act he performs involves no duty of construction or repair or other duty in regard to the switches of the road if out of repair or unfit for use, whether by wear and tear or by the criminal interference of strangers, than to promptly notify the company of its condition so that it may be repaired or its place supplied." The facts and decision in *Guthrie* v. *Southern P. R. Co.* (1891; Or.) 26 Pac. 76, were the same as in this case.

(e) *Failing to prevent the movement of heavy pieces of machinery.*—The negligence of a servant in failing to secure railway cars on an incline so far as to prevent their moving is not chargeable to the company. *Kudik* v. *Lehigh Valley R. Co.* (1894) 78 Hun. 492, 29 N. Y. Supp. 533.

A train hand cannot recover for the negligence of a coservant in failing to block the wheel of a railway car so as to prevent its moving. *Dodge* v. *Boston & A. R. Co.* (1892) 155 Mass. 448, 29 N. E. 1086.

An averment which shows that the proximate cause of the injury was the moving of a traveling crane shows that it was due to the act of a fellow servant, and no recovery can be had on the theory that another crane was defective. *Baxter* v. *Abernethy* (1893) 21 Sc. Sess. Cas. 4th series, 159.

A servant who was injured while working in the elevator of a mine which he had been ordered to clean cannot recover where the cause of the injury was the starting of the engine which operates the hoisting machinery, and the accident might have been prevented if the foreman had, as it was his duty to do, detached the endless chains used in running the elevator, and thus disconnected it from the machinery. *New Pittsburgh Coal & Coke Co.* v. *Peterson* (1894) 136 Ind. 398, 35 N. E. 7; S. C. (1896) 14 Ind. App. 634, 43 N. E. 270.

(f) *Operation of hoisting machinery.*—An employer is not liable for injuries to a workman handling the crank of a crane hoisting a heavy weight, caused by the slipping of the shaft from slow gear into fast gear, requiring much greater power, due to fellow workmen stationing themselves upon the side of the crank opposite to the fast gear, and the pressure caused by their position. *Barlow* v. *Standard Steel Casting Co.* (1893) 154 Pa. 130, 26 Atl. 12.

An employer is not liable for the negligence of fellow servants in overloading a derrick, so that it toppled over. *Rosa* v. *Volkening* (1901) 64 App. Div. 426, 72 N. Y. Supp. 236.

The absence of a clutch to a machine does not render an employer liable for an injury to an employee while entangled in a rope, where the injury would have been prevented if the employee had held the rope tightly, or if a fellow employee at the machine had done the same thing, and there is no reason to believe that he would have been more likely to use the clutch if there had been one. *American Glucose Co.* v. *Lavin* (1898) 81 Ill. App. 482.

The death of an employee caused by the failure, either of himself or a coemployee, to take the twist out of a chain on a windlass used in operating machinery, will not render the employer liable. *Delaney* v. *Heartt* (1890) 32 N. Y. S. R. 499, 10 N. Y. Supp. 595.

Plaintiff's intestate was employed by defendants, at the time of his death, at the bottom of a mine shaft; his duty being to fill the ore bucket, which was hoisted by a horse led by a boy. The employee at the top of the shaft, whose duty it was to dump the ore bucket and let it down to deceased, dropped it without looking to see whether the boy had hooked the rope to the horse, as was the custom, in order to let the bucket down steadily, which he had not done; and the bucket struck deceased and killed him. Held, that though the boy was incompetent to manage the horse, such incompetency was not the cause of the accident, but that it was caused by the negligence of deceased's fellow servant at the top of the shaft; and hence there was no error in directing a verdict for defendants. *Adams* v. *Snow* (1900) 106 Wis. 152, 81 N. W. 983.

An employer is not liable for the negligent operation of an elevator which is safe if carefully used. *White* v. *Eidlitz* (1897) 19 App. Div. 256, 46 N. Y. Supp. 184; *Trewatha* v. *Buchanan Gold Min. & Mill Co.* (1892) 96 Cal. 494, 28 Pac. 571, 31 Pac. 561.

The servant's action is not maintainable where upon the evidence the cause of the injury must have been the negligence of one fellow servant in leaving an

elevator suspended at the floor from which it fell when another fellow servant got on it, or in leaving the rope out of gear, or in descending on it while the rope was out of gear. *Kelley* v. *Boston Lead Co.* (1880) 128 Mass. 456.

The mate of a vessel is a fellow servant of a boatswain in managing the chain in lowering the topmast, which the boatswain has gone up to unfasten. *The Miami* (1898) 87 Fed. 737.

An employer is not liable for injury to an employee in the hold of a vessel by the overturning of a loaded bucket which hit the combings of the hatch, where, on reaching the combings, it was pulled sidewise by another employee, to be dumped on the dock, and there is no other showing of negligence. *McDonough* v. *Walsh* (1892) 49 N. Y. S. R. 361, 21 N. Y. Supp. 303.

A foreman of a stevedore gang acts as a fellow servant of a stevedore at work in the hold of a vessel, in stopping a draft of loaded bags as it comes over the vessel's side to have them made tighter in the sling before being lowered into the hatch, and the ship is not liable for injuries caused by their being left unsecured, and falling and injuring the workman below. *The Kensington* (1898) 91 Fed. 681.

Recovery cannot be had for the death of an employee on a steamship, caused by the falling of a barrel from a sling while being lowered into the hold, where the negligence, if any, causing its fall, was that of a fellow servant. *Moy* v. *Ocean S. S. Co.* (1895) 12 Misc. 375, 33 N. Y. Supp. 563.

The captain of a lighter engaged in delivering boards upon a vessel cannot recover for injuries from the fall of boards, due to the insecure manner of fastening the rope holding them while they were being hoisted, where the fault was that of one of the workmen. *The Ravensdale* (1894) 63 Fed. 624.

A ship is not liable for injuries to a longshoreman engaged in the hold helping to unload iron, caused by the fall of iron from a skid through the corner of which a lanyard pulled out when the skid caught through the negligence of the guy-tender or engineer as it was coming up. *The Servia* (1891) 44 Fed. 943.

(g, h) *Operation of machinery in sawmills.*—Plaintiff was thrown on a trimming saw which he was operating in defendant's sawmill, and injured, having been struck by one end of a plank lying on rolls, the other end of which had been caught on the carriage of the main saw. It was the duty of a fellow servant to see that the plank was so placed on the rolls that it could not be caught by the carriage, and of another fellow servant not to run the carriage unless it was clear of the planks on the rolls. Held, that the injury was caused by the negligence of one or both of the fellow servants. *Demers* v. *Deering* (1899) 93 Me. 272, 44 Atl. 922.

(i) *Operating a fire hose.*—The failure of water to run from a hose will, in the absence of positive evidence, be attributed to the negligence of fellow servants in failing to keep the apparatus in proper order, or in negligently putting it in operation. *Jones* v. *Granite Mills* (1878) 126 Mass. 84, 30 Am. Rep. 661.

(j) *Starting machinery without warning.*—(Compare § 601, *supra*.) In several cases the principle is applied that there can be no recovery where the injury was caused by the negligence of a coservant in starting machinery, without warning or notice, at a time when the plaintiff was in such a position that he was safe as long as it was not in motion. *Bergstrom* v. *Staples* (1890) 82 Mich. 654, 46 N. W. 1035; *Dwyer* v. *Nixon* (1901) 47 C. C. A. 666, 108 Fed. 751; *Quigley* v. *Levering* (1901) 167 N. Y. 58, 54 L. R. A. 62, 60 N. E. 276, Affirming (1900) 50 App. Div. 354, 63 N. Y. Supp. 1059; *Fournier* v. *Columbian Mfg. Co.* (1899; N. H.) 44 Atl. 104; *O'Brien* v. *American Dredging Co.* (1891) 53 N. J. L. 291, 21 Atl. 324; *Henshaw* v. *Pond's Extract Co.* (1892) 50 N. Y. S. R. 263, 21 N. Y. Supp. 177 (oiler injured); *Whatley* v. *Block* (1894) 95 Ga. 15, 21 S. E. 985 (elevator); *Porter* v. *Silver Creek & M. Coal Co.* (1893) 84 Wis. 418, 54 N. W. 1019 (sudden starting of machinery tautened a slack cable); *Wilson* v. *Hudson River Water Power & Paper Co.* (1893) 71 Hun, 292, 24 N. Y. Supp. 1072 (water turned on to a power wheel); another case involving similar facts is *New Pittsburgh Coal & Coke Co.* v. *Peterson* (1893) 136 Ind. 398, 35 N. E. 7 (master held not liable for the negligence of a foreman in starting machinery while the plaintiff was working in an elevator which he had been ordered to clean); *Davis* v. *Muscogee Mfg. Co.* (1898) 106 Ga. 126, 32 S. E. 30; *Kerr* v. *Crown Cotton Mills* (1898) 105 Ga. 510, 31 S. E. 166 (petition alleging that steam was turned on from an engine so negligently by the engineer, or some other employee of the defendant, that the plaintiff, who was washing a window, was injured, shows no cause of action).

An operator of a spoke lathe who was injured while oiling it, by the foreman's negligence in starting it suddenly without warning, for the purpose of seeing whether it did the work properly, cannot recover. *Wellman* v. *National Wheel Co.* (1901) 128 Mich. 1, 87 N. W. 75. The court said the result might have been different if the foreman had been engaged in repairing the machine. For the purposes of this case the foreman was apparently regarded as not being a vice principal by reason of his official position. If he had been such an official, he would, according to the authorities, have represented the master as regards the act in question. See § 545, note 3, *ante*.

(k) *Moving heavy articles.*—(See also §§ 597, 603, 604, *supra*.) A conductor of a freight train in helping a brakeman to unload a car acts as a mere servant. *Louisville, N. A. & C. R. Co.* v. *Southwick* (1896) 16 Ind. App. 486, 44 N. E. 263.

A railway company is not liable where injury is received by a section hand owing to the way in which his colaborers lifted a rail. *Coyne* v. *Union P. R. Co.* (1890) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382.

An employer is not liable for the negligent manner in which a foreman conducts the operation of moving a heavy wheel. *Richmond Locomotive & Mach. Co.* v. *Ford* (1897) 94 Va. 627, 27 S. E. 509.

A lumber company is not liable for an injury to a lumberman, caused by the negligence of coemployees in failing to keep rollers at right angles with a piece of timber being moved thereon, in consequence of which it slewed around so that the end struck a lumber pile from which planks fell on his leg. *Wecklund* v. *Southern Oregon Co.* (1891) 20 Or. 591, 27 Pac. 260 (carelessness of workmen in using chute, not negligence in its construction, declared to be the proximate cause of the injury).

There can be no recovery for an accident caused by the slacking of guy ropes in the hands of the plaintiff's fellow servants, while a heavy piece of a bridge was being moved. *Ludlow* v. *Bridge & Mfg. Co.* (1896) 11 App. Div. 452, 42 N. Y. Supp. 343.

A servant has no cause of action against his master for an injury received while assisting to handle a heavy stone, through the neglect of his fellow workmen in letting the stone down too soon. *La Belle* v. *Montague* (1899) 174 Mass. 453, 54 N. E. 859.

(l) *Causing or allowing heavy objects to fall.*—An employer is not liable for injuries caused to a servant by the carelessness of another in pulling away a chocking guard in a pile driver, and thus allowing the hammer to fall. *McPhee* v. *Scully* (1895) 163 Mass. 216, 39 N. E. 1007.

A bridge foreman is a fellow servant of a carpenter in negligently and carelessly permitting a jackscrew to fall, which was set up by the two, and which the foreman agreed to watch. *Peirce* v. *Oliver* (1897) 18 Ind. App. 87, 47 N. E. 485.

A master is not liable for the death of a servant, caused by the fall of a sliding door in a store, where it fell owing to the careless manner in which it was opened by the men in charge of it. *Collyer* v. *Pennsylvania R. Co.* (1886) 49 N. J. L. 59, 6 Atl. 437.

A laborer cannot recover where he is struck by a plank left loose on a scaffold by his foreman, and thrown off by a tank which was being hoisted through a window by himself and his coservants. *Bagley* v. *Consolidated Gas Co.* (1896) 5 App. Div. 432, 39 N. Y. Supp. 302.

A superintendent in answering in the affirmative when a laborer was about to throw down a block of wood and asked if all was clear below acted as a mere servant. *Donnelly* v. *San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559.

The negligence of a foreman in dropping an implement and injuring an employee under his direction is that of a fellow servant, and not of a vice principal. *Frowley* v. *Sheldon* (1897) 20 R. I. 258, 38 Atl. 370.

A mining company is not liable where a miner is injured by the negligence of a blacksmith whose duty it is to sharpen the tools, in lowering them down a shaft. *Snyder* v. *Viola Min. & Smelting Co.* (1891) 2 Idaho, 771, 26 Pac. 127.

A foreman in a machine shop is deemed to be, with respect to his own negligence in the manner of bracing a section of a heavy condenser, a fellow servant of an employee who assisted him and who was injured by the section falling upon him. *Kliegel* v. *Weisel & P. Mfg. Co.* (1893) 84 Wis. 148, 53 N. W. 1119.

An injury caused by the fall of the door of a freight house, struck by a keg of nails which was being rolled out by the plaintiff's coservants, is regard

ed as being due to the negligence of the latter, and not to the negligence of the company, where the evidence shows that the door when rolled back left a space of about 8 feet for the unloading of freight, amply sufficient for the passage of the keg if it had been handled with reasonable care. *Chicago, R. I. & P. R. Co.* v. *Becker* (1899) 38 Ill. App. 523.

An employee engaged with other employees in hoisting ice to the top of a car by means of a large sawhorse placed on the tops of two cars standing side by side cannot recover for an injury caused by the horse tipping over because of his negligence or that of his fellow servants in pulling laterally, instead of perpendicularly, in hoisting the ice. *Tobin* v. *Friedman Mfg. Co.* (1896) 67 Ill. App. 149.

Where a master supplies machinery which, if duly oiled and cleaned, is safe, for the purpose of preventing a trolley from running off a traveler, he is not liable for injuries caused to an employee by failure of a fellow servant to oil and clean it properly, though there may be a standard article in use which would, if the master had procured it, have prevented the accident. *Quigley* v. *Levering* (1901) 167 N. Y. 58, 54 L. R. A. 62, 60 N. E. 276, Affirming (1900) 59 App. Div. 354, 63 N. Y. Supp. 1059.

Injuries sustained by a railway employee who, with other hands, was carrying a rail, caused by the hands at the other end dropping it, upon the section boss's order, before he and the other hands at his end were ready, are not due to the order, but either to his own disobedience of the order, or to the negligence of the other workmen. *Coffman* v. *Louisville & N. R. Co.* (1892) 13 Ky. L. Rep. 866, 18 S. W. 1012.

An employer is not liable for injuries sustained in removing pieces of lumber, the cause of the accident being the act of one left in charge of the work by the foreman while he was temporarily absent, in releasing his hold upon a pile of rims which he was supporting while the employee was removing the lumber. *Hodges* v. *Standard Wheel Co.* (1899) 152 Ind. 680, 52 N. E. 391, 54 N. E. 382.

An employer is not liable for the death of a workman caused by the fall of a large mass of caked lime, which was imbedded in a large pile of cinders which deceased and others were employed as laborers in removing, such fall having been caused solely by the method adopted of removing such mass of lime by digging out the cinders from beneath it. The fact that the mass had been partially undermined by the members of another gang, which had previously been at work was held to be immaterial. *Simone* v. *Kirk* (1901) 57 App. Div. 461, 67 N. Y. Supp. 1019.

The duty of a master to provide a safe place for the employees in which to do their work does not extend to conditions which the employees create in the performance and as a detail of their work,—as, where the employees in shoveling coal leave an overhanging frozen crust of coal which falls and injures one of them. *Miller* v. *Thomas* (1897) 15 App. Div. 105, 44 N. Y. Supp. 277.

Where a servant of a railway company is injured while putting a hose on an engine tender, by the falling of loose coal dislodged by another servant standing on the tender to receive the hose, the company is not liable, its negligence in overloading the coal not being the proximate cause of the accident. *Weisel* v. *Eastern R. Co.* (1900) 79 Minn. 245, 82 N. W. 576.

An employee of a railroad company cannot recover damages of the company for an injury received by the falling of a pile of lumber, caused by the negligence of himself and of his coemployees. *Langlois* v. *Maine C. R. Co.* (1892) 84 Me. 161, 24 Atl. 804.

A laborer injured by the fall of a steel ingot from a mass of such ingots carelessly piled by his fellow laborers in the same employment cannot recover of the employer. *Nash* v. *Nashua Iron & Steel Co.* (1882) 62 N. H. 406.

A laborer engaged in loading boxes on a railway car cannot recover for injuries due to the fact that they were unsafely piled, and fell when he climbed on them. Such a danger is one incident to the progress of the work. *Carolan* v. *Southern P. Co.* (1897) 84 Fed. 84.

An employer is not liable for the negligence of a servant in piling cloth so that a portion of the pile slips and falls on another servant. *Hale* v. *Wayside Knitting Co.* (1901) 59 App. Div. 395, 69 N. Y. Supp. 404.

A servant cannot recover for an injury caused by the fall of bags of cement, which were piled under the supervision of the employer's superintendent. *Page* v. *Naughton* (1901) 63 App. Div. 377, 71 N. Y. Supp. 503. In that case it was also held that, as the piling of bags on a floor is the act of a coservant,

evidence received on the question of the care with which the bags were piled, and going ...ow that the floor was out of level and shaky, would not support a judgment for plaintiff, on the theory that defendants failed to furnish a safe place to work in.

An employee is a fellow servant with a foreman by whose negligence in throwing a box upon a pile of iron posts the former is injured, where the latter was doing nothing which it was the master's duty to do. *Di Marcho* v. *Builders Iron Foundry* (1894) 18 R. I. 514, 28 Atl. 661.

A foreman acts as a fellow servant of his subordinates in moving loose stones which support a large rock, and thereby causing it to fall. *Ross* v. *Union Cement & Lime Co.* (1900) 25 Ind. App. 463, 58 N. E. 500.

Compare cases cited in § 612a, note 1, subd. (e), *infra*.

(m) *Failing to prevent explosions.*—A railroad company is not liable for the death of a fireman, caused by the explosion of the boiler of a locomotive engine, where such explosion was due to the fact that the water was permitted by the engineer to get too low while running at night, if the boiler was properly supplied with gauge cocks to test the height and adequacy of the water. *Leary* v. *Lehigh Valley R. Co.* (1894) 76 Hun, 575, 28 N. Y. Supp. 187.

An employee in a fruit-canning factory does not cease to be a fellow servant of another employee merely because he is directed by the superintendent to look after a barrel used for heating water with steam; and the employer is, therefore, not liable for his negligence in inserting or failing to remove a plug from the pipe through which the steam escapes, causing an explosion of the barrel. *Crowell* v. *Thomas* (1897) 18 App. Div. 526, 46 N. Y. Supp. 137.

(n) *Work of blasting.*—(See also §§ 597, 600, *supra*.) To place and set off blasts in a mine is the function of a mere servant, and the mine owner is not liable for its negligent performance. *Anderson* v. *Daly Min. Co.* (1897) 16 Utah, 28, 50 Pac. 815; *Wiskie* v. *Montello Granite Co.* (1901) 111 Wis. 443, 87 N. W. 461 (blast improperly prepared).

Where a servant of a person engaged in blasting rock was injured by the explosion of an open barrel of gunpowder under which a piece of lighted fuse had been thrown by a puff of wind, he cannot recover on the theory that the employer should have provided small flasks in which to carry the powder from the storehouse. The leaving of the barrel in a dangerous position is not a necessary incident of the system, but rather attributable to the negligence of the workman himself. *Mulligan* v. *M'Alpin* (1888) 15 Ct. of Sess. Cas. 4th series, 789.

(o) *Failing to keep footways secure.*—An employee was injured by falling upon a slippery floor, rendered so by grease left thereon by two other employees who had been directed by defendant's foreman to clean out a pit formerly occupied by the gearing of a machine. Held, that the injury was caused by a fellow servant, for whose carelessness the master was not liable. *Burke* v. *National India Rubber Co.* (1897) 21 R. I. 446, 44 Atl. 307.

No action can be maintained where carpenters had piled planks insecurely during the day, and plaintiff, a night watchman in defendant's mill, on his second passage over them at night, caught his foot and fell. *Bodwell* v. *Nashua Mfg. Co.* (1900) 70 N. H. 390, 47 Atl. 613.

(p) *Exposing the servant to excessive heat.*—An employer is not liable for the death of an employee engaged in cleaning an oven used for heating air to be blown into a blast furnace, by the unexplained opening of a cock letting on through such oven the blast of air heated to nearly 1,000 degrees. *Dana* v. *Crown Point Iron Co.* (1893) 51 N. Y. S. R. 238, 22 N. Y. Supp. 455.

(q) *Failing to keep place of work properly ventilated.*—An employer who furnishes a suitable place for a given machine and a particular kind of work, and instructs his foreman to ventilate the room by opening the windows when the machine is in use, is not liable for an accident to a workman, caused by the foreman's failure on a particular occasion to open the windows. *McGuerty* v. *Hale* (1894) 161 Mass. 51, 36 N. E. 682 (plaintiff became dizzy from the smell of benzine, and was injured by uncovered gearing while he was attempting to adjust the parts of a machine).

(r) *Failing to keep place of work properly lighted.*—Where, in an action by a servant against his master for an injury partially resulting from a dark molding room, it appears that the company furnished an adequate lighting plant, and that the gas could have been lighted by the servant, it is error to instruct that the question of the gas be-

ing lighted, and whether any negligence was to be imputed to the defendant, is for the jury, as the duty to light the gas was not on the defendant. *Hall* v. *United States Radiator Co.* (1900) 52 App. Div. 90, 64 N. Y. Supp. 1002.

There can be no recovery for injuries received by a stevedore or other employee on a ship, who falls through an open hatchway which is left insufficiently lighted through the negligence of a co-employee. *M'Carthy* v. *Bristol Shipowners' Co.* (1883) Ir. L. R. 10 C. L. 384; *Byrne* v. *Fennell* (1882) Ir. L. R. 10 C. L. 397; *Mellen* v. *Thomas Wilson Sons & Co.* (1893) 159 Mass. 88, 34 N. E. 96 (injuries received by falling down a dark hatchway usually lighted by electric lights, because they were not going at the time owing to an accident that might have been remedied by the engineer, and other lights available were not put in place owing to the negligence of another employee).

(s) *Exposing servant to peril from uncovered hatchways or other dangerous openings.*—(See also last subdivision.) *Kraeft* v. *Mayer* (1896) 92 Wis. 252, 65 N. W. 1032 (existence of negligence on owner's part denied, as the stevedore and his fellow servants had, under the customary procedure, full control of the physical conditions).

The owner of a ship is not liable to an employee for negligence of the master, mate, or other officer in failing to close the doors of the gangway at night. *Geoghegan* v. *Atlas S. S. Co.* (1895) 146 N. Y. 369, 40 N. E. 507

The failure to secure a removable section of a ship's railing is the negligence of a mere servant. *Quebec S. S. Co.* v. *Merchant* (1890) 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397. Compare the ruling in *Hedley* v. *Pinkney & Sons S. S. Co.* [1892] 1 Q. B. 58. Affirmed [1894] A. C. 222, that to leave a removable railing out of place while a ship is on a voyage (the consequence being that a seaman is thrown overboard by a lurch) is not a breach of the merchant shipping act of 1876, § 5, which imposes on the owner and master of a ship an obligation to put and keep her in a "seaworthy condition."

There can be no recovery for injuries caused by the failure of a fellow servant to replace the planking which is used to cover a pit when it is not in use. *Sofield* v. *Guggenheim Smelting Co.* (1900) 64 N. J. L. 605, 50 L. R. A. 417, 46 Atl. 711; *Filbert* v. *Delaware & H. Canal Co.* (1890) 121 N. Y. 207, 23 N. E. 1104.

There can be no recovery for injuries received from a fall through a scuttle, where the inference from the evidence is that the cause of the accident was a temporary misplacement of the cover, which permitted it to tilt under the plaintiff's weight, and that the cause of the misplacement was the hauling of trucks over the cover by the plaintiff's fellow workmen. *The Thorsina* (1887) 31 Fed. 90.

The leaving open of a hatchway by a squad of laborers is the act of a fellow servant, which will preclude recovery by a member of such squad for injuries from falling through such hatchway, where the duty of covering and uncovering it rested upon such squad. *The Louisiana* (1896) 21 C. C. A. 60, 41 U. S. App. 324, 74 Fed. 748.

A shipowner is not liable for an injury received by a member of the crew through the negligence of an officer or another member of such crew in leaving a hatchway open, the navigation of the ship during the voyage being a common undertaking, for which all the ship's company in their several stations are employed, and in respect of which they are regarded by the maritime law, as well as the common law, as fellow servants. *Olson* v. *Oregon Coal & Nav. Co.* (1900) 104 Fed. 574, 44 C. C. A. 51. Affirming (1899) 96 Fed. 109.

(Compare cases cited in § 520, note 1, subd. (p), *ante*).

Other illustrative decisions with regard to injuries of this sort are *Karl* v. *Maillard* (1858) 3 Besw. 591 (stress was laid on the fact that the hatchway was opened without authority); *Baron* v. *Detroit & C. Steam Nav. Co.* (1892) 91 Mich. 585, 52 N. W. 22.

(t) *Handling ship in docks.*—A foreman of a dock, who at the time the accident occurred was engaged in superintending the raising of a vessel, is not, as to such act, the *alter ego* of the dock company; and it cannot upon that ground be held liable for his negligence or for his errors of judgment in directing the work. *Hart* v. *New York Floating Dry Dock Co.* (1882) 16 Jones & S. 460 (vessel suddenly careened and fell on plaintiff).

(u) *Navigating ships.*—In *The Queen* (1889) 40 Fed. 694, it was sought to hold the ship liable for the negligence of the officers in hanging too long a hawser, in a dense fog, in a fair-way, and in not having any whistle or other signal to indicate her presence in a very

held to be fellow servants of trainmen.[1] But the principle itself is

dangerous place. The court said: "These faults arose in the details of navigation, —a work in which all the ship's company were alike employed in their several grades. As to such details the seamen as fellow servants took the risk of each other's negligence. . . . It would be absurd to say that the owners owed a duty to the seamen that too long a hawser should never be used, or that signals in a fog should be properly given by their own vessel. These details belong to the ordinary work of navigation, and to the men employed to conduct it. As to this work, the owners owe no duty to the officers or seamen to see it properly performed. The duty lies the other way, *viz.*, from the ship's company to the owners. None of such acts, moreover, belong to the master to do as the *alter ego* or special representative of the owner, as in *Chicago, M. & St. P. R. Co.* v. *Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184. They may be all performed, and for the most part usually are directed and performed, by others than the master. Though there are many acts in the care and management of the ship and of the voyage, in which the master acts as the representative of the owners, and performs the duties and functions of the owners, such as the maintenance of the ship and her apparel in a safe and seaworthy condition, procuring repairs and supplies, freighting the ship, arranging her voyages, her times and places of sailing and stopping, and the discharge of all the general duties and legal obligations of the ship to the seamen, for which acts, if negligently performed, the owners are responsible to the seamen injured, they are not responsible for negligence in the mere details of the ordinary work of navigation on board the ship; because these acts are not at all duties of the master as the *alter ego* or representative of the owner, nor are they acts as to which the owner owes any duty to the seamen. As to third persons, all the ship's company represent the owner in the work assigned them, and their negligence makes the owner liable. As between themselves, no one more than another, in the ordinary work of navigation, represents the owner or performs an owner's duty, and therefore each takes the risk of the other's negligence." The judgment accordingly provided that the seamen on board one of two vessels who had been injured in a collision caused by the negligence of both crews could only recover one half of the sums respectively assessed and allowed to them as damages.

A mate in managing a pilot boat acts as a mere servant. *Carlson* v. *United New York Sandy Hook Pilots' Assn.* (1899) 93 Fed. 468.

(c) *Driving horses.*—An employer is not liable for injuries received by one servant, owing to the negligent driving of another. *Dwyer* v. *American Exp. Co.* (1892) 82 Wis. 307, 52 N. W. 304.

[1] The whole duty of a railroad company is performed when it has promulgated rules which, if observed and followed by the subordinates who have to carry them out, will bring personal notice to everyone concerned of any special deviation from its time-table in regard to the running of its trains; and it is not liable for an injury caused to a fireman by the carelessness of operators and conductors in executing an order of the train despatcher to stop a train at a certain station. The servant's action cannot, under such circumstances, be maintained on the theory that the order so given was a change of the rules of the road. *Slater* v. *Jewett* (1881) 85 N. Y. 61, 39 Am. Rep. 627. The court said: "It cannot be contended that there was anything required of the conductor that raised him out of his relation to the intestate of a fellow servant. The act required of the conductor at the particular time was to receive an order from an authorized source of command, and in a prescribed mode to acknowledge the receipt of it, and then to follow the direction. This was service merely. . . . There is more plausibility in the position that the act that was to be done on this occasion was so essentially one for the master to do in his duty to his servants, that whatever subordinate was taken by him to do it came to be the master in doing it. It is urged, and with reason, that clearly arranging and promulgating the general time-table of a great railway is the duty and the act of the master of it; that when there is a variation from the general time-table for a special occasion and purpose, it is as much the duty and act of the master, and he is as much required to perform it; that it is the duty and act of the master to see and know that his general time-table is brought to the knowledge of his servants who are to square their actions to it; that the same is his duty and act as to a variation from it, which

is but a special time-table; and that, therefore, whoever he uses to bring those time-tables to the notice of his servants, he puts that person in his place to do an act in his stead hasmuch as the responsibility is upon him to see and know that it is done, and done effectually; and that if, instead of doing it in person, he chooses to do it through an agent, that agent, *pro hac vice*, is he, the master, and he, the master, is responsible for a negligent act therein of that agent, whereby a fellow servant of him is harmed. The rule has been laid down in repeated cases in this court, in terms so broad as to come close to this case. *Flike* v. *Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545; *Fuller* v. *Jewett* (1880) 80 N. Y. 46, 36 Am. Rep. 575; *Crispin* v. *Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521. Attentive consideration, however, will perceive a distinction between the cases. That the master has the right, as regards his servants, to vary from the time-table that he has set, cannot be doubted. It is at times a necessity so to do, and a necessity so frequent as to fall within the occurrences that a railway servant is bound to expect in the course of his employment. Even as regards the public and passengers, a railway manager has a right, when needs press, to vary from his general time-table. All that can then be required from him, by the public and passengers, is that when he makes the variation he acts under it with reasonable care and diligence. *Sears* v. *Eastern R. Co.* (1857) 14 Allen, 433, 92 Am. Dec. 780; *Gordon* v. *Manchester & L. R. Co.* (1873) 52 N. H. 596, 13 Am. Rep. 97. That is to say, due care and diligence in giving notice of the change, and in running the train upon the changed time. A servant cannot ask for or expect more than this. . . . We think that it is a misconception of the case to hold that the order of the train despatcher was a change of the rules of the road as established and promulgated by the superintendent. The train despatcher acted in exact accord with the general rules and regulations, which foresaw and with minuteness provided for such an occasion as this, — much and as fully, so far as we can see from the case, as for the ordinary running of trains on the general time-card. The order of the train despatcher was but a carrying out of those rules, and an application of certain provisions of them to a case for which they were made, and the arising of which had been foreseen as probable. In what other way could they be carried out in the detail of them, but through the service of the servants previously chosen and assigned to their parts? And can it with propriety be said that the parts of that detail are acts of the master, that he must do himself, or be liable for their negligent doing?" After laying down the principle that the master's liability depends on the character of the negligent act, the court proceeded thus: "The query, then, is in the case before us: Is it the duty of the master to give personal notice to every operative of a train of a special deviation from an established general time-table? or is his duty done when he has beforehand prescribed rules, minute, explicit, and efficient, and made them known to his servants, which, if observed and followed by all concerned, will bring such personal notice to every one entitled to it? We think that in the circumstances of this case the latter clause of the query propounds the true rule, and should be answered affirmatively. It is the duty of the master to provide rules and regulations for the running of the trains. He has done so here. One of them is that by telegraphic message sent at any time through operators at the ends of the wires, to the conductor and engineer of a train, that train may be stopped at a station, or hurried forward to another, or made to go out of general order. These rules, with that provision, are made known to all servants. If, when the intestate entered the employment of the defendant, these rules had been read to him, and his especial attention called to this one, and he had agreed to serve under it, would not he have taken the risk of the carelessness of the operators and conductor in carrying it out? Is this case any different in substance from that? Really, by entering the employment with these rules in force, he did in effect agree that special orders might be so sent. The bargain between him and the defendant was not only that special orders might be given interfering with the general time-table, but that they might be givin in this way. It is this feature of the case that distinguished it from some of those that we have cited."

One of the Federal circuit courts of appeals has also held that a local telegraph operator receiving and delivering the orders of a train despatcher to the person in charge of a train, in respect to a change in the schedule, is a fellow servant of the latter. *Oregon Short*

Line & F. N. R. Co. v. *Frost* (1896) 21 C. C. A. 186, 44 U. S. App. 606, 74 Fed. 965 (Dissenting, Hawley, J.). The court in discussing the correctness of the charge of the trial judge that it was the duty of the railroad company to give notice that it had changed the time of running the trains, and that if it intrusted that duty to the telegraph operator, his acts were the acts of the company, and that, if he was negligent in this matter, it was the negligence of the company, said: "The ordinary running of the train is established by a fixed schedule, of which all operatives have notice and by which their acts must be governed. When occasion arises to disturb the regular schedule, the duty rests upon the company to give timely notice to those that are to be affected thereby. This it is the office of the train despatcher to do. But when he has given that information to a local operator, is that duty discharged, or does there rest upon the company the further obligation to see that all of its servants through whose hands that message goes on its way to the [illegible] employees shall deliver it as given, and that in case of any failure in the line of communication, the company shall be liable for the resulting injury? In support of the latter view it is argued that, if the duty to notify the train operatives of a change in the time-table is personal to the company, and cannot be delegated to the servant so as to excuse the company from liability, it follows that such power, since it may not be delegated to one servant, may not be delegated by him to another, and that the reasons which lead to the conclusion that the train despatcher is a vice principal lead directly to the further conclusion that the local telegraph operator stands in the same attitude to the company, and that the duty the company owes of furnishing a safe place of operation to its employees cannot be discharged short of actual notice to those who are to be affected thereby, and whose personal safety is dependent thereupon. After a careful consideration of the question and of the strong reasons that may be urged in support of either view of this proposition, it is our conclusion that the better doctrine is that the local telegraph operator is the fellow servant of those who are in the control and management of the train. It is evident, and the court will take judicial notice of the fact, that a disturbance in the regular time schedule of trains is frequent and necessary in the operation of all railroads. [illegible] then becomes necessary to issue special orders for their direction. Conductors, engineers, and brakemen have knowledge of that fact, and they know when they enter into the employment of the railroad company that their notice of such orders must come through the local telegraph operator at the station, and that they incur the risk of accident through his negligence or mistake. The special orders issue in the first instance from the train despatcher. It is obviously impossible for him to give personal notice to all who are to be governed thereby. The orders must of necessity be conveyed to some one in behalf of the others. The local telegraph operator, the conductor, the engineer, and the brakeman are all engaged in a common employment,—that of moving the train. The operator, it is true, is subject, to no personal risk from [illegible] age in the time card, but that [illegible] not consisting one in depriving [illegible] are his fellow servants. The [illegible] be some point where the [illegible] ity of the company ceases. If [illegible] at the time when information [illegible] given to the operator, who [illegible] Could it be said [illegible] luctor [illegible] received from the [illegible] message from the train despatcher, yet who failed to guide his actions according thereto, stands in the relation of vice principal to the conductor, engineer, [illegible] brakeman of an other train who may be injured by his negligence? Or, that if the [illegible] should receive instructions [illegible] train despatcher to send out [illegible] to signal an approaching train [illegible] pany is responsible for the [illegible] such flagman in [illegible] such instructions. It seems [illegible] principle to hold that the company has discharged its [illegible] where [illegible] information to [illegible] of [illegible] is engaged in [illegible] common [illegible] of the others that are to [illegible] thereby, and has instructed [illegible] tify his coemployees; and [illegible] company has exercised due [illegible] lecting such local operator [illegible] instance, and has not been negligent in employing or retaining him [illegible] it has discharged its duty [illegible] that such operator stands in the attitude of a fellow servant to the trainman."

Very similar is the reasoning in a case decided in another circuit: "He and the engineer and the conductor work together, at the same time and place, for a common employer, with an

immediate common object, namely, the proper running of trains. It is essential, in the operating department of a railroad company, that there should be provision for communicating to those in charge of different trains the whereabouts of other trains, to avoid collision. This information is given by means of the general time table and general rules for the running of trains with reference to each other, which the employees in charge of each train are obliged implicitly to obey. But it often happens that the general time-table must be varied from, and these variations must be communicated to those in charge of trains. This is effected usually by telegraphic orders from the superintendent or the train despatcher, who has supreme control of the running of trains. The information is also communicated by means of flagmen, by means of torpedoes, by red lights and green lights upon trains, by the block signal system, and in other ways. The subordinate employees whose duty it is to transmit the orders of the officer in control, or to give information as to the presence of trains upon any part of the track, without special orders, are engaged at the same time and place with the persons operating the train, in a common employment, having an immediate common object,—namely, that of the running of trains,—and therefore are fellow servants. The man who makes the signal at the station to the engineer on the approaching train to stop is as much engaged in the running and operation of that train as the flagman sent out ahead to signal the condition of a switch. . . . There can be no separation of the signal department and the operating department, for the employees engaged upon the train, in the actual, manual operation of the train, are expected to be part of the signal department of the company. The man who puts out the green light at the back of the train, to indicate that a train is following, communicates to every station agent, every conductor, and every engineer who sees it, knowledge upon which they, each of them, must act; and yet it can hardly be said that the brakeman, in displaying this green light, is acting in a different department from the man who opens and closes the throttle valve of the engine." *Baltimore & O. R. Co.* v. *Camp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952.

See also *Illinois C. R. Co.* v. *Bentz* (1900) 40 C. C. A. 56, 99 Fed. 657 (railroad company is not liable for the death of an engineer in a collision, due to the negligence of an operator in failing to report the passing of a train at his station).

Where an engineer was killed through the negligence of a telegraph operator at one of the stations on the defendant's road, in failing to notify the conductor of the train of a fact telegraphed to him from the station ahead, which would require him to slacken speed and to cross over a switch onto another track at a given point, the consequence being that the engine driven by the intestate jumped the track and caused his death, the court held that the telegraph operator was a fellow servant with the engineer. *Derby* v. *Philadelphia & R. R. Co.* (1886; Pa.) 3 Cent. Rep. 112, 4 Atl. 170. In this case the court considered that the main duty of a telegraph operator is the receipt and delivery of messages regarding the running of trains upon the roadway, in which he is merely the automaton or communicator to give the information as to the condition of the track ahead of the moving train, and part of the general machinery by which the whole roadway was operated.

Recovery was also denied in the following cases: *McKaig* v. *Northern P. R. Co.* (1889) 42 Fed. 288; *Monaghan* v. *New York C. & H. R. R. Co.* (1887) 45 Hun, 113 (the correctness of this decision seems rather questionable, as the operator had the duty of controlling the movements of trains at a particular point under a temporary system organized by the company, in view of the fact that the progress of certain alterations in the track rendered it necessary to run all trains going in one direction on a single track); *Dana* v. *New York C. & H. R. R. Co.* (1881) 5 Hun, 473 (message misinterpreted; case was appealed, but merely on the question of the insufficiency of the company's rules).

See also *Cincinnati, N. O. & T. P. R. Co.* v. *Clark* (1893) 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125, where, however, the nonliability was predicated directly from the fact that the operator was at all events a fellow servant as to the negligent act which caused the injury,—*viz.*, in not putting out proper signals for passing trains,—and thus seeing that no train passed within less than ten minutes of another.

equally applicable where other methods of transmitting the master's commands are involved in the case.[4]

C. Negligence of coservants in respect to the preparation or structural modification of instrumentalities or their parts, when not imputed to the master.

As to cases in which the delinquency resolves itself into negligently selecting, or failing to use, the appliances to be adjusted, see also §§ 603, 604, *supra*.

612. Introductory.— Ordinarily, as has been shown above (§§ 566–568, *ante*), the duty of taking care that the servant is not exposed to danger from what may be called intrinsic defects in the instrumentalities is deemed to be non-delegable. But this principle is subject to some important qualifications. The precise extent of which is, as the authorities now stand, a matter of uncertainty.[1]

It may, perhaps, be taken as a proposition universally conceded, that the rights and liabilities of the master and servant are to be gauged with reference to the principle that, where the master furnishes the materials for securing the safety of the servant, as the work progresses, in a place the condition of which is constantly changing, the use and

[4] In *Card* v. *Eddy* (1894; Mo.) 28 S. W. 979, a section foreman was held not to be entitled to recover, where a fireman undertook to deliver to him a telegraphic despatch by tying it to a lump of coal, and, in throwing the lump off, inadvertently struck him. The court said: "The act the fireman was required to perform was the delivery from a running train of a message to the plaintiff. It cannot matter how important the message may have been, nor that it contained an order the receivers, through their road master, or other agent, were required to give. The injury did not result from the nature of the message, or from a failure to transmit it. The service required of the fireman was that of a servant, which any messenger could have performed, and the manner of its delivery did not pertain to the duty the receivers owed to plaintiff. They owed him the duty only of using reasonable care to select a competent and careful messenger. After the master has discharged the duty he owes his servants, such as proper care in the selection of those with whom they are required to work, providing suitable tools, and machinery, etc., yet the servants must look to each other for protection in the performance of their respective duties. The fireman can be regarded as the agent or vice principal of the receivers under no test which has ever been applied by the courts of this state, or elsewhere, so far as I have been able to discover. He was given no power to superintend, control, or direct the plaintiff,—which is the usual test; nor was he performing a duty the receivers owed to plaintiff, other than such as they owed to every other employee in their service."

[1] In one case it has been laid down that the master's liability may be tested by considering whether the injury was caused by a breach of the duty of construction, preparation, or repair, or by a breach of the duty to operate the appliance with proper care. *St. Louis, I. M. & S. R. Co.* v. *Needham* (1894) 25 L. R. A. 833, 11 C. C. A. 56, 27 U. S. App. 227, 63 Fed. 107 (see § 610, note 1, subd. (d), *supra*). But in view of the decisions cited in the present subtitle, this statement cannot be said to express correctly the doctrine accepted by many judges.

application of those materials according to the exigencies of the work is the function of the servants themselves, unless that function is specially assumed by the master.[2] But the practical construction of a rule so broadly expressed as this obviously affords scope for infinite differences of opinion.

The reports carry us, by gradations sometimes almost imperceptible, from cases involving groups of facts which may be, without difficulty, admitted to be such that recovery could not have been allowed consistently with any reasonable interpretation of the doctrine of common employment, to cases which virtually nullify in some very important respects the theory that the master must answer for the negligence of the employees who provide the place of work and other appliances. Judicial ingenuity has been taxed to the utmost for the purpose of discovering distinctions of sufficient importance to take the evidence out of the operation of this theory.[3] The desperate predicament in which the courts sometimes involve themselves in the attempt to deal with antagonistic principles at places where they overlap has assuredly never been more strikingly illustrated than by the recent remark of a New Jersey judge that "a duty may be ambiguous, or may have a double aspect, and be, in some sense, incumbent on the master and on the fellow servant," and that "such a problem may, perhaps, be solved by determining which duty is paramount over the other."[4] What more "lame and impotent conclusion" could be reached than the conception of a duty which may be regarded as the master's or the servant's according to the standpoint from which it is viewed, and the suggestion that the rights and liabilities of the parties should be settled by an unintelligible method of analysis? When such a confession of helplessness is forced from a judge, it seems to be high time for the legislature to play the part of a *deus ex machina*.

612a. Negligence which produces structural unsafety of a temporary character.— It seems to be well settled that, in the absence of evidence going to show that the conditions which caused the injury were, or ought to have been, known to the master or the employee whose special function it is to see that the instrumentality in question is reasonably safe for use (see chapter XLII., *post*), no action can be maintained for injuries caused by details of work which temporarily result in intro-

[2] *Floyd* v. *Sugden* (1883) 134 Mass. 563.

[3] In *Hamilton* v. *Rich Hill Coal Min. Co.* (1891) 108 Mo. 364, 18 S. W. 977, an eminent judge protested against "whittling away, by refined exceptions," the rule by which the master is required to provide suitable appliances, and no one who has had occasion to carry out any extensive researches among decisions of this class will say that this caution is unnecessary.

[4] *Flanigan* v. *Guggenheim Smelting Co.* (1899) 63 N. J. L. 647, 44 Atl. 762.

ducing some structural modification into the environment of the injured person.[1]

[1](a) *Defects in railway tracks.* — (Contrast cases in § 568, note 6, subd. (a), (b), *ante*.) Where the evidence is that, in the operation of a railroad at a certain point, it was frequently necessary to remove temporarily the planks covering a pit, for the purpose of making repairs thereon, and that the employees were repeatedly instructed to cover the pit when the repairs were finished, the efficient cause of an accident resulting from the pit being left uncovered is the carelessness of coservants, and not an imperfection of the road. *Filbert* v. *Delaware & H. Canal Co.* (1890) 121 N. Y. 207, 23 N. E. 1104.

A brakeman who knows of a lumber pile near the track, and is injured in jumping upon a train moving by the pile, cannot recover if the piling of the lumber was an act of a fellow servant. *Gaffney* v. *New York & N. E. R. Co.* (1887) 15 R. I. 456, 7 Atl. 284.

Where a deposit of sand alongside a railway track results in injury to a brakeman the injury is regarded as being due to the act of a mere fellow servant. *Robinson* v. *Houston & T. C. R. Co.* (1877) 46 Tex. 540.

A brakeman who, in coupling cars in a yard, slips on a pile of wet ashes, dropped from a locomotive fire-box and left between the rails, cannot recover. *Hughes* v. *Winona & St. P. R. Co.* (1880) 27 Minn. 137, 6 N. W. 553.

A railway company which has employed a competent workman to keep its track in order is not liable for injuries received by a train hand, owing to its defective condition, while he was engaged in coupling cars. *Wood* v. *Canadian P. R. Co.* (1899) 6 B. C. 561.

A railway company is not liable for the death of a brakeman who was brushed off the train by a car placed by fellow servants on a side track in dangerous proximity to the main track. *Schaub* v. *Hannibal & St. J. R. Co.* (1891) 106 Mo. 74, 16 S. W. 924.

(b) *Displacement of guards provided for dangerous machinery.*—The negligence of servants charged with the duty, necessarily involved in the ordinary use of machines, of oiling the same and changing the rolls operated in connection therewith, in failing to replace the guard over the gearing after oiling it, is not chargeable to the master, so as to render him liable for injuries to another workman employed to tend the machine, where the oiling of the machinery and the changing of the rolls required no special skill and might properly have been intrusted to the person injured. *Wosbigian* v. *Washburn & M. Mfg. Co.* (1896) 167 Mass. 20, 44 N. E. 1058. The court said: "The men who tended the machines were not accustomed to oil them and change the rolls, but two other men were regularly employed to do this. Were these men doing a part of the work that was within the department of the master, whose duty it was to furnish his servants with tools and machinery as suitable and safe as the exercise of reasonable care would secure, or were they doing the work of mere servants in making necessary changes of parts, incident to the management of the machines in the ordinary use of them? If these changes had regularly been made in the ordinary course of their business by the persons who tended the machines, there would have been no doubt that in making them they would have been mere servants, for whose negligence the master would not be liable, and to whom, if competent, he could trust the work without any other duty than to furnish them proper materials and appliances for carrying it on. The only ground for doubt arises from the fact that the work was done by machinists who were specially employed for that purpose. But it appears that there was work to be done in repairing the rolls which were taken out, and in fitting them for use again, which could not be done by ordinary persons who were only taught to tend the machines, and which called for the employment of machinists. So far as appears, the changing of the rolls and oiling of the machines was a simple kind of work, which the machine tenders might have done as well as others. We are of opinion that these changes were necessarily involved in the ordinary use of the machines, and could properly be left to competent servants as a part of their work of managing the machines, that called for no attention by the master if he kept the workmen properly supplied with suitable rolls and other necessary articles."

An employer cannot be held liable for the negligence of a coservant in displacing a plank which forms part of the

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fence by which dangerous machinery is protected, in accordance with the provision of a statute requiring such protection to be furnished. *Honor* v. *Albrighton* (1880) 93 Pa. 475.

(c) *Dangers supervening in excavation work.—trenches, mines, quarries, etc.*—(Contrast cases cited in § 568, note 6, *ante*.) A master is not liable where a foreman or other employee whose duty it is to see that the sides of a trench are properly shored and braced, either fails to use, or uses improperly or unskilfully, the materials provided for that purpose, and causes injury to other servants who are at work in the trench. *Floyd* v. *Sugden* (1883) 134 Mass. 563.

In *Zeigler* v. *Day* (1877) 123 Mass. 152, a case involving similar facts, the court said: "The work was committed to the supervision of a skilful and competent superintendent; it required, for the protection of the men, the frequent use of temporary structures, the location and erection of which, as the digging progressed, was a part of the work in which the superintendent and the men under him were alike employed, and for the preparation of which, as in the case of the scaffold of the mason or carpenter, the master is not liable, unless there is something to show that he assumed it as a duty, independent of the servant's employment."

To the same effect are the following cases: *Dube* v. *Lewiston* (1891) 83 Me. 211, 22 Atl. 112; *Durst* v. *Carnegie Steel Co.* (1896) 173 Pa. 162, 33 Atl. 1102 (plaintiff was himself excavating the trench); *Dwyer* v. *Hickler* (1891) 43 N. Y. S. R. 221, 16 N. Y. Supp. 814 (same facts); *Bergquist* v. *Minneapolis* (1890) 42 Minn. 471, 44 N. W. 530 (plaintiff was laying pipes); *Laporte* v. *Cook* (1901) 22 R. I. 554, 48 Atl. 798 (sides of trench inadequately shored).

It is error to refuse an instruction to the effect that the sheet-piling in a trench was a detail of the work, and that, if the failure of the foreman in charge to use such piling was the cause of the sides of the trench falling in, the plaintiff could not recover. *Golden* v. *Sieghardt* (1898) 33 App. Div. 161, 53 N. Y. Supp. 460.

The negligence of a foreman in charge of workmen engaged in excavating a trench, in continuing to drive curbing timbers into the ground in close proximity to a laborer, after discovering that they were throwing off splinters, is that of a fellow servant of the laborer, whatever may be his relation to him in other respects. *Friedrich* v. *St. Paul* (1897) 68 Minn. 402, 71 N. W. 387.

See however *Kranz* v. *Long Island R. Co.* (1890) 123 N. Y. 1, 25 N. E. 206, § 617, note 1, *infra*.

Since the danger that a bank which is being taken down in a gravel pit may fall at any moment is open and obvious, and the servants engaged in the work have ample facilities for discovering and removing such danger, the master may fairly be allowed to impose upon the servants themselves the duty of providing against such an occurrence. *Larsson* v. *McClure* (1897) 95 Wis. 533, 70 N. W. 662. The court said: "The present case does not seem to fall within the rule that the master must furnish the servant a reasonably safe place in which to work, inasmuch as the plaintiff and his fellow servants practically created the place and its attendant perils from hour to hour, in the prosecution of their labors; and the condition was constantly shifting by reason of their own acts, of which, as well as their probable consequences, they must be held to have had notice. The negligence, if any, in this view of the case, would be that of the plaintiff and his fellow servants, and the risk of it must be regarded as assumed by the plaintiff as incident to his employment; and, in any view that may be taken of the case, it must be regarded as a risk assumed by the plaintiff as incident to his employment."

A tunnel in a mine in course of excavation being a place in which conditions are constantly changing and of which the furnishing and preparation is in itself part of the work the employees are required to perform is not a place furnished by the master for employees within the spirit of those decisions which deny the right of the master to delegate to a servant the duty of providing a safe place for his employees. *Coal & Min. Co.* v. *Clay* (1894) 51 Ohio St. 542, *sub nom. Consolidated Coal & Min. Co.* v. *Floyd*, 25 L. R. A. 848, 38 N. E. 610.

As to the incidents or means of excavating ore, a mine owner has only the duty of furnishing competent men, and

iently referred to the principle that "the duty of the master to see to it that the machinery furnished for the use of his servants is reasonsuitable materials for the use of those engaged in the common employment. Hence, the negligence of a mine foreman in having too large a space mined before preparing to set the supports is that of a fellow servant of a miner. *Petaja* v. *Aurora Iron Min. Co.* (1895) 106 Mich. 469, 32 L. R. A. 438, 66 N. W. 951. Affirming on rehearing 106 Mich. 463, 32 L. R. A. 435, 64 N. W. 335. The court said: "It is apparent that if we are to adhere to the holding that miners and trammers are fellow servants, and that the shift boss, like the foreman of a section gang, is not an exception, there can be no theory upon which the plaintiff can recover, except that, immediately the room was in readiness for timbers, it was the duty of the master to see that they were properly set and maintained. And it is obvious that this claim must be, as it is, planted upon the rule that, in appropriate cases, requires the master to provide a safe place. The operation of mining, in this and similar mines, is to sink a shaft, and from the shaft start a drift, from which stopes or rooms are excavated across the vein, from the lower to the upper or hanging wall. It is accomplished by caving down and removing the ore. It is manifest that this cannot proceed unless the roof is supported behind the miners, and this is done by putting up timbers to support the roof until the ore shall be excavated beyond. It is said that, when the room has been excavated sufficiently large, it is the practice to cave the room down into the mining sets, and place more timbers on top of the first. Now, if this room can properly be said to be a place furnished to the servants in which to carry on the master's business, and which he must, at his peril, keep in reasonably safe condition, as a factory or warehouse, then the case should have gone to the jury; but, if it is not such a place, then it falls within that other rule, that the duty of the master is performed by using reasonable care in furnishing suitable material and employing capable and efficient men to do the work. . . . As we understand from the brief of counsel and the record,—and we do not discover a denial of it,—this stope or room starts from a drift at or near what is called the 'foot wall,' which is the bottom, as distinguished from the overlying stratum of the vein of ore. Both foot wall and top wall depart from the level, and dip sharply, so that, in running the stope on a level, it can go but a short distance until the top or overhanging wall is reached; and then the operation is repeated above the lagging, removing the lagging and caving down the roof, supporting the new roof thus formed by new sets placed upon the first. Thus, so far as the lagging is concerned, it has a temporary use merely to enable the miners to push the breast through to the overhanging wall, by supporting the roof. It is a part of the operation of mining, as much as a blast or a staging, and is not a part of the permanent structure."

A mine owner cannot be held liable for the negligence of his employees in failing to prop a passage securely. *Stewart* v. *Coltness Iron Co.* (1877) 4 Sc. Sess. Cas. 4th series, 952.

On the ground that "the doctrine that a master must supply a safe place for the servant to work does not apply where the place becomes unsafe during the progress of the work" it has been held that a mine owner is not liable for the negligence of a servant in taking down a pillar of coal which supported the roof of a room. *Oleson* v. *Maple Grove Coal & Min. Co.* (1901) 115 Iowa, 74, 87 N. W. 736.

The case is for the jury, where the evidence is conflicting as to whether the plaintiff, a miner, was making his own place of work. *Taylor* v. *Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249. As to respective provinces of courts and juries, see, generally, § 594, *supra*.

One employed by the manager of a mine to take down loose slate which is liable to fall, but not invested with any greater authority than any other laborer, is not a vice principal while so engaged, but is a fellow servant with the miners. *Fosburg* v. *Phillips Fuel Co.* (1894) 93 Iowa, 54, 61 N. W. 400.

A workman employed in a quarry in which, by reason of the constant removal of stone therefrom in the course of its operation by himself and his fellow servants, the conditions and surroundings are constantly changing, assumes the risk of the place becoming unsafe, and cannot recover for an injury due to the falling of a mass of stone

ably safe does not extend so far as to require him to attend to the proper regulation of those parts which necessarily have to be adjusted

loosened by succeeding blasts. *Mielke* v. *Chicago & N. W. R. Co.* (1899) 103 Wis. 1, 79 N. W. 22.

The removal of loose rocks from the edge of a cliff to which they have been thrown in the course of the work in a quarry is a mere detail of the work, and the employer is not liable to a workman who, while working underneath the cliff, is struck by a piece of that rock, owing to the negligence of the foreman. *Di Vito* v. *Crage* (1901) 165 N. Y. 378, 59 N. E. 141 Reversing (1898) 35 App. Div. 155, 55 N. Y. Supp. 64.

Compare also the cases cited in § 610, note 1, subd. (a), *supra*.

(d) *Dangers arising from the changing condition of buildings and other structures while in course of erection or repair.*—The fact that a master failed to comply with a request by an employee for material to make a new floor in one piece, to replace a section of floor which it had been necessary to frequently remove and replace, does not render him liable to a fellow servant of such employee for injuries due to the fact that such employee, in replacing the old floor without instructions to do so, failed to nail down the boards, where, had that been done, the floor would have been entirely safe. *Nemier* v. *Ritey* (1897) 179 Pa. 557, 36 Atl. 335.

The owner of a steam propeller is not liable for an accident to an employee engaged in painting the iron floor, caused by the fall of a section of a plank floor which had been safely placed on end, but which was rendered unsafe after the commencement of the work, owing to the fact that fellow servants removed other sections which helped to support it. *Smith* v. *Empire Transp. Co.* (1895) 89 Hun. 588, 35 N. Y. Supp. 531.

In *Armour* v. *Hahn* (1884) 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 455, the plaintiff, a man of full age, was, with one of his comrades, directed by their foreman to push a joist out on the sticks of timber projecting from a wall in course of erection. The usual course, as he himself testified, was to put the timber in, and leave it in that way temporarily, and afterwards build the wall up over it. The court said: "If it [the stick of timber] was, at the time, insecure, it was either by reason of the risks ordinarily incident to the state of things in the unfinished condition of the building, or else by reason of some negligence of one of the carpenters or bricklayers, all of whom were employed and paid by the same master, and were working in the course of their employment at the same place and time, with an immediate common object,—the erection of the building,—and therefore, within the strictest limits of the rule of law upon the subject, fellow servants."

The selection of sound beams out of a sufficient quantity of proper and suitable material furnished by an employer for the erection of a structure is the duty of the fellow servants of one employed on such structure, instead of the duty of the master. Hence, there can be no recovery where an employee is injured by the breaking of a cross-beam, upon which he was sitting while engaged in work, where such beam forms part of the structure on which he was at work. *Stourbridge* v. *Brooklyn City R. Co.* (1896) 9 App. Div. 129, 41 N. Y. Supp. 128. There the master procured the timber for a structure from a reputable dealer, and a "lot" or quantity of it was good, but some of the sticks were found defective, or with curls in them. It was therefore necessary to test the timber, so that knots or curls should be cut off or rejected. With respect to this test, the court said: "We think that the master discharged its duty when it supplied a sufficient quantity of proper and suitable material; that the choice of material, the selection of sound beams, the rejection of such beams or parts as were defective, work necessarily involved in the erection of structures of wood, were details of the work, and strictly the duty of the fellow servants. . . . It is here that the vital distinction occurs between the question of a place to work and that of a part of the work itself; a question of liability to employees who might use the structure when built and the liability to those engaged in building it. It may well be that, after the construction of the trolley carrier, the defendant would be liable to any lineman who might be injured from its defective condition; whether occasioned by the negligence of the employees who put up the structure or those who selected the materials. Such rule does not apply to the plaintiff." Discussing the contention of the plaintiff that the case fell within the principle

in the course of the use and with regard to the particular work to be done, and the adjustment of which is incident to the ordinary use of

that a master is bound to furnish a reasonably safe place for his servants to work, the court said: "If this rule is applicable to the present case, then it would follow that, for the negligence of any servants to whom the master had committed the duty of providing a safe place, the master himself would be liable. I think, however, that this is not the case of a 'place' within the meaning of the rule. As stated in *Butler* v. *Townsend* (1891) 126 N. Y. 105, 26 N. E. 1017, doubtless, in one sense of the term, the employee must always be in some place, and doubtless, also, the place, in a certain sense, is not safe if an accident occurs there. But the rule that the master must provide a safe place for work only applies where the work and the place are not connected; where the work is not in the construction of the place,—as in the case of a mill, a factory, mine, ship, well, etc. In the present case the cross-beam was not furnished for the purpose of providing the plaintiff a place to work, but as a part of the structure which he and the other workmen were engaged in erecting. The defendant might have provided a beam of such dimensions as to have been wholly unable to sustain the plaintiff's weight; yet, if good [illegible] ter and sufficient for the [illegible] ended, there could have been no lia[illegible]y on the part of the defendant for that reason alone. I do not mean to say that the defendant owed no duty to its workmen in the premises. If there was a latent danger of which it had knowledge, it should have apprised the workmen. But the distinction I seek to impress is that here the beam was a part of the structure, the common work upon which all the employees were employed, and the use of it by the deceased for support the mere incident. In the case of nearly all buildings or structures it is the common practice to use the part of the structure that may at the time be erected as a means to enable the workmen to obtain positions from which to prosecute the remaining work. It makes a vast difference in the question of the liability of the master whether, when a servant meets with an accident from a defect in the previous work, occurring through the negligence of a servant engaged in its construction, the negligence is to be deemed as arising from a failure to provide a safe place, or as negligence in the general enterprise, in the prosecution of which all the workmen are engaged. If the first, the master is liable even though the negligence is that of a servant, because the duty is that of the master; if the second, it is the negligence of a coservant and the master is not liable for it. If the workman who placed the beams on the flanges of the elevated railroad had been negligent, and improperly fastened them, and from this cause the accident to the plaintiff's intestate had occurred, and if the case is one of a safe place, the defendant would have been liable. Still, I think such a proposition would hardly be contended for. Would it not be clear that it was the negligence of a fellow workman? It is also clear from the same reasoning that the beam was not an appliance the furnishing of which was the master's duty."

To the same effect is *Callan* v. *Bull* (1896) 113 Cal. 593, 45 Pac. 1017, where a laborer was injured owing to the insufficient strength of one of the caps of a jetty in course of construction. It was contended by the plaintiff that, in neglecting to provide a cap of sufficient strength to support the mat upon which he was working at the time of his injury, the defendant failed to comply with the non-delegable duty to provide a safe place of work. After laying down the general principles already quoted (§ 614, note 1, *infra*), the court proceeded thus: "The work upon which the plaintiff was employed in the present case was to construct a jetty extending from the shore several thousand feet out into the waters of the bay. Manifestly, the place at which the work was to be done was not provided by the defendant; nor can it be said that different portions of the work in which the laborers might be engaged as it progressed was the 'place' furnished by their employer, within the meaning of the above rule, or that the bent or trestle, from which was suspended the mat on which the plaintiff was at work at the time of his injury, was one of the appliances to be furnished by the defendant. On the contrary, the making of this bent was a part of the work to be done by the laborers themselves in the construction of the jetty, and the bent was in fact made by them out of materials furnished by the defendant."

If the appliance is furnished by the

the machine."[1] It will be observed, however, that, as regards the facts stated, many of the cases cited below approach quite close to those which are reviewed in the two next sections, while others might, perhaps, with equal propriety be associated with the decisions which treat the duty of maintenance as delegable. See subtitle D., *infra*.[2]

master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall be reasonably safe for that purpose; but, if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation. The rule does not apply to a case where several persons are employed to do certain work, and by the contract of employment, either express or implied, the employees are to adjust the appliances by which the work is to be done.

The owner of a building upon which extensive repairs are being made is not liable for an injury to an employee, caused by stepping upon a roof board which is laid in place on the roof, but which has not been nailed down. *Richardson* v. *Anglo-American Provision Co.* (1897) 72 Ill. App. 77.

(c) *Dangers incident to the demolition of buildings.*—An employer of a gang of men engaged in taking down a building is not liable for an accident caused by the tipping up of a joist from which the support at one end had been removed. *Clark* v. *Liston* (1894) 54 Ill. App. 578. The court said: "In the destruction of a building there is not an attempt or obligation to make it or any part thereof secure: on the contrary, the work of removal is one in which, in turn, each part of the structure is rendered insecure; this, every workman understands."

[1] *Eicheler* v. *Hanggi* (1889) 40 Minn. 263, 41 N. W. 975.

[2] The negligence of a fellow servant on one occasion in failing to readjust the cylinders of a machine after oiling it cannot be imputed to the master, where he was competent when selected. *Bjhjian* v. *Woonsocket Rubber Co.* (1895) 164 Mass. 214, 41 N. E. 265. The ground of the decision was that "the oiling of the machine is one of the daily matters regularly incident to its ordinary use, which must be intrusted to servants." This case was followed in *Woshigian* v. *Washburn & M. Mfg. Co.* (1896) 167 Mass. 20, 44 N. E. 1058. See § 612a, note 1, subd. (b), *supra*.

The change of rollers in a feed mill for those that are sharper is a mere detail of work. *Frazee* v. *Stott* (1899) 120 Mich. 624, 79 N. W. 896.

A machine manufacturing company is not liable for injuries sustained by an employee by the falling upon him of a section of a heavy condenser, caused by the failure of himself and his coemployees to retain wooden braces between the various sections until the complete removal of a header, raised at the ends of the several sections on one side by a crane and tackle, and then coupled or bolted to each of the sections, although if a bolt which he was engaged in driving out had been put in in a different manner by the foreman the injury would not have ensued. *Kliegel* v. *Weisel & V. Mfg. Co.* (1893) 84 Wis. 148, 53 N. W. 1119.

A foreman in a mine whose duty it is to employ and discharge workmen, direct them in their work, look after the machinery, and direct when it shall run, is a fellow servant with a workman employed by him while the two are cleaning the sprocket wheels used in running an elevator in such department; and the employer is not liable for an injury to such workman by the negligence of the foreman, caused by the failure of the latter to detach endless chains used in running the elevator, as it was his duty to do. *New Pittsburg Coal & Coke Co.* v. *Peterson* (1896) 14 Ind. App. 634, 43 N. E. 270.

An employer is not liable for an injury resulting from a defective block and hook selected from a number available and arranged by a fellow servant as "a temporary incident of a particular job." *Harnois* v. *Cutting* (1899) 174 Mass. 398, 54 N. E. 842.

A servant cannot recover for an injury caused by the negligence of a fellow servant in setting him to work on a movable platform without securely fastening it. *Howard* v. *Hood* (1892) 155 Mass. 391, 29 N. E. 630.

Employees engaged in loading or unloading coal are coservants of each other as regards negligence in the splicing of pieces of rope upon buckets in which coal is hoisted, for the purpose of pull

614. Negligence in the preparation of temporary structures or other instrumentalities as a part of the work; general rule.—We now come to the decisions which cut most deeply into the doctrine of non-delegable duties, those, namely, in which the preparation of entire instrumentalities, and not merely their arrangement or the adjustment of their parts, is treated as the function of the servants themselves. The

ing the buckets toward the dumpers. *Ryan* v. *Smith* (1898) 29 C. C. A. 427, 56 U. S. App. 604, 85 Fed. 758.

The task of setting up or rigging appliances for stevedores and safely maintaining them is a part of the duty of the fellow employees of a stevedore who is injured thereby, where they are all under the charge of a foreman, who directs several of them to rig the vessel. *Burns* v. *Sennett* (1896; Cal.) 44 Pac. 1068, Reiterating Opinion on Former Appeal (1893) 99 Cal. 363, 33 Pac. 916.

"Properly to use pulleys, blocks, ropes, and other ordinary tools and appliances which have been furnished by a master to the workmen employed upon a derrick is a part of the duty of the workmen. It is incidental to the management and use of the derrick. working with a derrick the foreman and his assistants are fellow servants, and the master is not responsible to any one of them for the negligence of any other in the use of the materials and implements which the master has supplied." *McKinnon* v. *Norcross* (1889) 148 Mass. 533, 3 L. R. A. 320, 20 N. E. 183.

The work of putting together and setting up a movable derrick in such positions as may be required is a duty which may rightfully be committed to the servants themselves. *Kelly* v. *Jutte & F. Co.* (1900) 44 C. C. A. 274, 104 Fed. 955.

Where the moving, adjusting, and securing of a derrick is one of the regular duties of workmen, any negligence in the manner or place of putting down a post to which one of the guy ropes is fastened is their own negligence or that of the superintendent, and the latter is a mere fellow servant of the workmen in securing the post. *McGinty* v. *Athol Reservoir Co.* (1892) 155 Mass. 183, 29 N. E. 510.

The omission of workmen to fasten a guy rope of a properly constructed derrick which is in process of being moved is negligence which cannot be imputed to the master. *Marvin* v. *Muller* (1881) 25 Hun, 163.

An employer who furnishes with all the necessary appliances a derrick intended for use in different parts of a building in the process of its construction does not owe to his employees the duty of properly setting up and supporting it at each place where it may be required. *Kennedy* v. *Jackson & Agri. Iron Works* (1895) 12 Misc. 336, 33 N. Y. Supp. 630.

An employer is not liable for an injury resulting from the fall of a derrick occasioned by the absence of a check rope which a coservant in charge had forgotten to attach thereto. *Jenkinson* v. *Carlin* (1894) 10 Misc. 22, 30 N. Y. Supp. 530.

In one New York case it was held that the owner of a derrick was liable where a workman was injured by its defective rigging, the ropes having become stretched by rain the night before the accident, the starting being superintended by the foreman who had charge of it. *Courtney* v. *Cornell* (1883) 17 Jones & S. 286. Sedgwick, Ch. J., dissented on the ground that the plaintiff "accepted the risk that would be involved in arranging the derrick and its several attachments from occasion to occasion." This view seems more in harmony with the later cases.

An employee injured by the falling of a derrick on account of the neglect of a fellow servant to fasten a guy rope cannot recover of the master, who had cautioned the man never to let go a guy rope after it was untied until it had been tied again. *Neilson* v. *Gilbert* (1885) 69 Iowa, 691, 23 N. W. 666 (all the negligent acts antecedent to that of untying the guy rope and leaving it unsecured held to be remote causes of the accident).

In *Peschel* v. *Chicago, M. & St. P. R. Co.* (1885) 62 Wis. 338, 21 N. W. 269, the apparatus used for raising a part of the framework for a water tank consisted of a windlass crab, tackle blocks, ropes, the tank itself, and an anchor post set in the ground, the whole of these being placed in position and adjusted under the direction of the foreman. The plaintiff, a mason employed

general rule to which, for reasons to be explained in the following section, the courts have now committed themselves, may be stated thus: If the master supplies suitable material for the construction

with other masons, carpenters, and section men in the erection of the tank, was injured by the fall of the framework, owing to the fact that the anchor post was not set deep enough in the ground.

A verdict for the plaintiff was set aside for reasons explained as follows: The court said: "The stress of the argument is to bring the case within the rule which charges the master with the duty of supplying the servant with reasonably safe and suitable machinery and appliances to do his work. But, as I have said, I see no sufficient reason for saying the defendant was under obligation to furnish the men employed to erect the water tank and windmill with a machine or instrumentality for raising the bents in a complete condition ready for use. There is no claim that the materials and appliances provided were not suitable and sufficient for the purpose intended. They were in a detached condition, and necessarily had to be adjusted on the ground; but the defendant did not contract with the plaintiff that these various appliances should be adjusted and put in order, fit for use, before he went to work. On the contrary, it was what the foreman, Brooks, with his gang of men, including the plaintiff, was employed to do, to take the materials of stone and wood, and all other appliances, and build the piers, construct the tank, frame the bents, adjust the machinery, and hoist the bents to their proper position. All this labor was necessarily involved in what they undertook to do and were paid for doing. It is unsound reasoning to compare this hoisting apparatus to a steam engine, a railroad car, or to some machine which is all adjusted so that its sufficiency can be ascertained before the servant is called upon to use it. Here the materials had to be prepared and put together, frames made, and hoisting apparatus adjusted—which included the setting of the anchor post—by the men themselves; and, to use the forcible and pertinent language of defendant's attorneys on this point, if placing the post in the ground, in this particular case, was a duty which the master owed to the servant, then in doing work of this kind the rule as to nonliability for the negligent acts of fellow servants would be practically nullified. If, in the adjustment of this machinery, a pulley, although perfect in itself, had been improperly placed or secured; if the anchor rope, although proper and sufficient in itself, had been insecurely tied to the post and slipped therefrom; if one of the men, furnished with a proper crowbar, had negligently held it at the foot of the bent; if the framework made by the men themselves, in the shape of timbers underneath the bents and upon which they rested, had been improperly made,—the logic of the position of plaintiff's counsel would make the master liable in all the cases supposed for an injury caused by such negligence of a fellow servant. This is, indeed, extending the liability of the master further than the adjudications of this court have carried it, and further than the law will warrant."

Where a piece of iron used as a counter balance of a lathe flies off and strikes a servant, he cannot recover where the evidence shows that if there was any negligence it was that of the foreman of the lathe in not securing the weight, and that this weight was as safe as any other piece of iron if it had been properly secured. *Faber* v. *Carlisle Mfg. Co.* (1889) 126 Pa. 387, 17 Atl. 621.

An employee cannot recover for injuries which, upon the evidence, could have been occasioned only by the loosening of a button upon a carding machine, owing to the neglect of a fellow servant to tighten a screw. *Smith* v. *Lowell Mfg. Co.* (1878) 124 Mass. 114.

A foreman superintending the construction of a bridge acts as a mere servant in choosing the method of fastening the tackle employed. *Ulrich* v. *New York C. & H. R. Co.* (1898) 25 App. Div. 465, 51 N. Y. Supp. 5.

A master is not liable for the negligence of a fellow servant in so placing a suitable rope as to be cut and weakened unnecessarily. *Prescott* v. *Ball Engine Co.* (1896) 176 Pa. 459, 35 Atl. 224.

Putting a gangplank into position for the purpose of loading a heavy piece of machinery in a railway car is the function of a mere servant. *Trimble* v. *Whitin Mach. Works* (1898) 172 Mass. 150, 51 N. E. 463.

of an appliance which he is not obliged, and has not undertaken, to furnish in a completed state, and the workmen themselves construct it according to their own judgment, the master is not liable for the manner in which they used the materials thus supplied.[1]

A master, not being responsible for the arrangement of materials for temporary purposes, is not bound to indemnify a member of a shipping gang for defects in the construction of skids on which such gang is moving iron beams, where the materials have been selected and the skids built by such gang under general orders from the master, not limiting the materials or mode of construction. *Cunningham* v. *Ft. Pitt Bridge Works* (1901) 197 Pa. 625, 47 Atl. 846.

An employee engaged in unloading a spar from a scow cannot recover for injuries due to the fact that a skid over which the spar was being hauled, and which had been placed by the workmen themselves, flew up and struck him. *Liermann* v. *Milwaukee Dry-Dock Co.* (1901) 110 Wis. 599, 86 N. W. 182.

Other cases which proceed upon the theory that an employer is not liable for injuries caused by the failure of a fellow servant to adjust or fasten properly a plank, or other similar appliance, which was being used as a temporary bridge for the passage of the workmen themselves, or for the purpose of transferring goods from one place to another, are the following: *The Islands* (1886) 28 Fed. 478 (here it was shown that the usual practice preferred by the workmen themselves was not to tie the skid); *Hudson* v. *Ocean S. S. Co.* (1888) 110 N. Y. 625, 17 N. E. 342; *McCampbell* v. *Cunard S. S. Co.* (1895) 144 N. Y. 552, 39 N. E. 637 (some stress was laid on the fact that the appliance —a skid— was of simple construction, but this factor is not material, as is shown by the authorities here referred to); *Dirrer* v. *Hall* (1897) 21 Misc. 452, 47 N. Y. Supp. 630, Reversing (1897) 20 Misc. 677, 46 N. Y. Supp. 533; *Conroy* v. *New York C. & H. R. R. Co.* (1895) 13 Misc. 53, 34 N. Y. Supp. 113, Reversing (1895) 11 Misc. 641, 32 N. Y. Supp. 921; *O'Connor* v. *Hall* (1900) 52 App. Div. 428, 65 N. Y. Supp. 136.

An employer of longshoremen is not liable for the death of one of them resulting from the failure to lay the usual planks about the platform or "stool" on which they stand in performing their work of lowering merchandise into the hold of the vessel, where it is customary for them to lay such plank, and is not the duty of the master. *Hogan* v. *Smith* (1891) 125 N. Y. 774, 26 N. E. 712.

An employer is not liable for defects in a "trussed plank," a temporary contrivance constructed out of materials selected by the workmen themselves while fitting a roof on a building. *Keystone Bridge Co.* v. *Newberry* (1881) 96 Pa. 246, 42 Am. Rep. 543 (plank gave way while a rafter was being carried across it).

No action can be maintained where a servant was injured by a casting which fell out of a truck, owing to the fact that the wheels of the truck pressed downward the end of a plank laid by himself and a fellow servant across a soft piece of ground. *Shanke* v. *United States Heater Co.* (1900) 125 Mich. 346, 84 N. W. 283.

A master is not liable where a coservant of the injured person caused the injury by improperly setting a ladder. *Treka* v. *Burlington, C. R. & N. R. Co.* (1896) 100 Iowa, 205, 69 N. W. 422. Or by insecurely fastening it. *Quinn* v. *Fish* (1893) 6 Misc. 105, 26 N. Y. Supp. 10; *Ballenq* v. *New York & C. Rail S. S. Co.* (1899) 28 Misc. 238, 58 N. Y. Supp. 1074; *Manning* v. *Manchester Mills* (1900) 70 N. H. 582, 49 Atl. 91.

The placing of planks across a coal chute under the direction of a foreman, for the purpose of furnishing a place for an employee to stand on while prising open the bottom of a gondola car, is merely a detail of the work. *Warszewski* v. *McWilliams* (1901) 64 App. Div. 63, 71 N. Y. Supp. 680.

An employee whose fingers were severed while operating a machine, molding the top of a piano, cannot recover therefor, where the defect complained of is that a guard upon the machine was too narrow, when it formed no part of the machine, but was attached by the workmen as a protection. *Gleason* v. *Smith* (1898) 172 Mass. 50, 51 N. E. 460.

[1] *Kimmer* v. *Weber* (1897) 151 N. Y. 417, 45 N. E. 860, Reversing (1894) 81 Hun, 592, 30 N. Y. Supp. 1103.

Persons engaged in the same general

615. Rationale and limits of a master's exemption from liability for the adjustment or preparation of instrumentalities.— The limits of a master's liability for an injury caused by a scaffold or other appliance

work are fellow servants i. respect to the negligence of one of them in constructing appliances with which they are to work, where their work includes the construction of such appliances. *Marsh* v. *Herman* (1891) 47 Minn. 537, 50 N. W. 611.

"The master is never liable for failing to supply a safe place for the servant to work, when the work consists in making safe the place the condition of which he complains." *Bedford Belt R. Co.* v. *Brown* (1895) 142 Ind. 659, 42 N. E. 359.

"The rule which requires the master to provide a safe place and safe appliances for the servant is applied when the place in which the work is to be done is furnished or prepared by the master, as in the case of a ship or a mill or a factory, or when the machinery or other appliances with which the servant is employed to work are furnished by the master; but it has no application when the place at which the work is to be done or the appliances for doing the same are to be prepared by the servant himself. If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall be reasonably safe for that purpose; but, if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation. The rule does not apply to a case where several persons are employed to do certain work, and, by the contract of employment, either express or implied, the employees are to adjust the appliances by which the work is to be done.'" *Callan* v. *Bull* (1896) 115 Cal. 593, 45 Pac. 1017.

"Where, however, the master does not undertake the duty of furnishing or adapting the appliances by which the work is to be performed, but this duty is intrusted to or assumed by the workmen themselves, within the scope of their employment, he is exempt from responsibility if suitable materials are furnished and suitable workmen are employed by him, even if they negligently do that which they thus undertake." *Kelley* v. *Norcross* (1877) 121 Mass. 508.

(a) *Application of the rule in the case of scaffolds, stagings, etc.* — The earliest reported case turning upon the liability of a master for a defective scaffold is *Wigmore* v. *Jay* (1850) 5 Exch. 354, 14 Jur. 837, 19 L. J. Exch. N. S. 369. There the plaintiff's husband was one of the bricklayers employed by defendant for the purpose. The scaffold was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by men in the employ of the defendant, who used an unsound ledger, in consequence of which the scaffold broke while the plaintiff's husband was at work upon it. The unsoundness of the pole had been previously pointed out to the foreman, but the deceased could not see its defect on account of some planks being laid across it. Recovery was denied on the grounds that the defendant had not personally superintended the erection of the structure, and that his foreman was a fellow servant of the plaintiff's intestate, and not shown to have been "a person deficient in skill, or an improper person to be employed for that purpose." The main contention of plaintiff's counsel was that *Priestley* v. *Fowler* (1837) 3 Mees & W. 1, Murph. & H. 305, 1 Jur. 987, had no application, for the reason that the persons erecting a scaffold are not fellow laborers of a man who is merely employed to work thereon, and the case followed was *Hutchinson* v. *York, N. & B. R. Co.* (1850) 5 Exch. 343, 19 L. J. Exch. N. S. 296, 14 Jur. 837 (where the plaintiff was traveling on a train, and the delinquents were the trainmen). The actual decision thus rendered is quite in harmony with the more recent authorities, but it will become clear as we proceed with the review of the cases cited in this and the next sections that the tests at present applied for the purpose of determining the right of the servant to maintain his action are in some important respects different from those referred to by the English judges.

The doctrine which is now regarded as defining the nature and extent of the master's responsibility under such circumstances as those involved in *Wigmore* v. *Jay*, *supra*, is that which is set forth in the following extracts from the opinions in various cases.

constructed or adjusted as a part of the work are determined upon the hypothesis that it is his duty, in the alternative, "to furnish either a

Where the servant is injured by defects in a temporary staging intended to be used only in finishing the building where it was constructed, "If the plaintiff's employers furnished sufficient quantities of suitable materials for staging, employed suitable workmen, and did not themselves undertake the duty of furnishing the staging as a structure, but only of supplying materials and labor by which it might be built and from time to time adapted to the work, and if the duty of furnishing or adapting the staging as an appliance for use in the work of finishing the room was intrusted to or assumed by the workmen themselves, within the scope of their employment, the employers are not answerable to the plaintiff for his injury. . . . On the other hand, if the staging was furnished by the employers as a completed structure, or if they themselves supervised and directed its construction, or if, relying upon its construction by their workmen for themselves, the employers negligently failed to provide suitable and sufficient materials, or negligently hired incompetent workmen, the employers might be answerable to the plaintiff." *Brady* v. *Norcross* (1899) 172 Mass. 331, 52 N. E. 528.

"It was not enough to prove that the scaffolding gave way under the circumstances resulting in an accident, or that it was in fact defective, unless it was made to appear that this was the proximate result of some omission of duty on the part of the defendants or their foreman. If they furnished suitable materials for the construction of a proper platform, and the workmen themselves constructed it according to their own judgment, the defendants were not liable for the manner in which they used the material so furnished." *Kimmer* v. *Weber* (1897) 151 N. Y. 417, 45 N. E. 860.

"Where an employer employs mechanics to do a certain amount of work, the doing of which requires the use of scaffolds which it is a part of the work of the mechanics so employed to construct, and the employer furnishes proper materials with which to construct the scaffolds, the negligent use of such materials either by improperly uniting them together or by selecting materials not proper for the particular use for which they are selected, whereby one of such mechanics is injured, as the accident was not the result of the neglect of a duty that a master owed to his employees the master is not liable; and that, to establish a cause of action for such an injury, the plaintiff must prove, in addition to the fact that there was negligence in the selection of the materials for the building of the scaffold, the additional fact that the master, or someone that stood in the relation of representative of the master, assumed to construct the scaffold, and then directed the employees to use it as a constructed scaffold." *McCone* v. *Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697.

"If this plaintiff and his coemployees had, without specific instruction from the master, or one acting for the master and under his authority in the performance of the duty which he owed to his employees, constructed this scaffold of improper material, it would undoubtedly be a case where the negligence was that of a fellow employee or coservant with the plaintiff, for which the master would not be liable." *Richards* v. *Hayes* (1897) 17 App. Div. 422, 45 N. Y. Supp. 231.

"Where the master employs competent workmen and provides suitable materials for the necessary staging to be used by them, and intrusts the duty of erecting it to them as a part of the work which they are engaged to perform, he is not liable to one of them for injuries resulting to him from the falling of the staging." *Jones* v. *St. Louis, N. & P. Packet Co.* (1891) 43 Mo. App. 398.

"For an injury received by one workman from the negligence of others in increasing the scaffold's height, the employer would be no more liable than he would be for the fall of a ladder furnished by him to his workmen, when the fall was the result of one of them negligently placing it insecurely." *Maher* v. *McGrath* (1896) 58 N. J. L. 469, 33 Atl. 945.

"With respect to the building of ordinary scaffoldings and other simple structures of that nature, which laborers and mechanics are in the habit of constructing for themselves, . . . the master is under no obligation to do more than to supply a sufficient quantity of material which is reasonably well adapted for the making of such struc-

suitable platform or scaffold for doing the work that the plaintiff and his coemployees were required to do, or proper and suitable material-

turns." *Kerr-Murray Mfg. Co.* v. *Hess* (1899) 38 C. C. A. 647, 98 Fed. 50.

"A staging built and used by employees engaged in erecting a building is not a place provided by the master for his servants to work in, but an instrumentality provided by the servants as a means of carrying on the work they have undertaken to do." *Garrow* v. *Miller* (1900) 72 Vt. 284, 47 Atl. 1087.

In *Hoppin* v. *Worcester* (1885) 140 Mass. 222, 2 N. E. 779, a city employed a master builder to furnish labor and tools required in the erection of a building by the city highway commissioner. The city furnished the materials necessary and paid the builder and his men. A directed it, one of his men, to erect a staglug, and the man used a defective bracket belonging to A, whereby one of A's workmen was injured. It was held that, the master builder not having had any authority from the city to furnish the bracket, except an implied permission to use it under his contract, the negligence was held to be that of servants in constructing unsafe staging, and not that of a master in not furnishing proper materials.

Other cases in which the principles thus set forth have been held to prevent the injured servant from recovering are the following: *Noyes* v. *Wood* (1894) 102 Cal. 389, 36 Pac. 766; *Perigo* v. *Indianapolis Brewing Co.* (1899) 21 Ind. App. 338, 52 N. E. 462 (injury was caused by the removal of the supports by a fellow servant, plaintiff having notice of what was going on); *Kennedy* v. *Spring* (1893) 160 Mass. 203, 35 N. E. 779 (mason's "tender" injured by negligence of mason in selecting improper materials or in improperly fastening them); *Oelschlegel* v. *Chicago G. W. R. Co.* (1898) 73 Minn. 327, 76 N. W. 56, 409 (negligent selection of plank for temporary scaffold); *Marsh* v. *Herman* (1891) 47 Minn. 537, 50 N. W. 611; *Beesley* v. *F. W. Wheeler & Co.* (1894) 103 Mich. 196, 27 L. R. A. 266, 61 N. W. 658 (riveter and carpenters under the same superintendent, engaged in ship building, held to be fellow servants, so as to preclude recovery by the riveter for injuries caused by negligence of the carpenters in constructing a scaffold on which he works); *Olson* v. *Nixon* (1898) 61 N. J. L. 671, 40 Atl. 694 (part of work; no undertaking to furnish; ship carpenter injured); *Judson* v. *Ocean* (1889) 110 N. Y. 655, 22 N. E. 555, Reversing (1886) 41 Hun, 637; *Bother* v. *Townsend* (1891) 120 N. Y. 105, 26 N. E. 1017, Reversing (1890) 32 N. Y. S. R. 1055, 10 N. Y. Supp. 899; *Hogan* v. *Smith* (1891) 125 N. Y. 774, 26 N. E. 742; *Donnelly* v. *Brown* (1887) 43 Hun, 470 (foot of ladder used for supporting a scaffold was insecurely placed); *Hogan* v. *Field* (1887) 44 Hun, 72; *McCormack* v. *Crawford* (1886) 4 N. Y. S. R. 835; *Thompson* v. *Libbey* (1892) 40 N. Y. S. R. 324, 19 N. Y. Supp. 680; *Swain* v. *Brooklyn Alcatraz Asphalt* (1901) 57 App. Div. 50, 68 N. Y. Supp. 50 (plaintiff was one of several carpenters engaged in taking down a building); *Pfeiffer* v. *Dialogue* (1900) 61 N. J. L. 707, 40 Atl. 772 (plaintiff was lading iron plates to a vessel, while he stood on a scaffold which was increased in height as the work progressed); *Ferguson* v. *Galt Public School Board* (1900) 27 Ont. App. Rep. 480 (plank in gangway constructed by a mason and hod carrier was insufficiently nailed, and gave way under the latter); *State* v. *Armour* (1893) 81 Wis. 623, 51 N. W. 1000 (foreman directed plaintiff to adjust a plank in a scaffold); *Cudden* v. *American Steel Barge Co.* (1894) 88 Wis. 409, 60 N. W. 800; *Peffer* v. *Cutler* (1892) 83 Wis. 281, 53 N. W. 508.

A mason cannot recover for injuries sustained by falling from a staging, due solely to the carelessness of a laborer employed to assist him, in placing one of the barrels supporting the staging so that it rested unevenly on some rubbish on the floor. *O'Connor* v. *Neal* (1891) 153 Mass. 281, 26 N. E. 857.

A master is not required to see that planks laid without fastening, in the usual manner, upon a scaffold erected by his direction, are at all times properly adjusted. Such duty falls upon the servant using the scaffold. *Jennings* v. *Iron Bay Co.* (1891) 47 Minn. 111, 49 N. W. 685.

An unqualified instruction that it was the duty of the employer to furnish a proper scaffold is erroneous where the evidence is that it was part of the employment of the injured person and co-workmen to erect the scaffolds upon which they worked. *Banzhaf* v. *Ludwig* (1898) 28 Misc. 496, 59 N. Y. Supp. 535, Reversing (1899) 27 Misc. 821, 57 N. Y. Supp. 828.

Where a workman was injured by the

fall of a scaffold erected under the supervision of his foreman, as the building progressed, an instruction that the employer is bound to furnish a safe place of work is erroneous. *Lambert* v. *Missisquoi Pulp Co.* (1900) 72 Vt. 278, 47 Atl. 1085 (stagings erected under supervision of foreman, as a building progressed).

Other cases applying the same doctrine in one or more of its various phases are cited in the next three sections.

Both on the ground relied upon in these cases and also on the ground of the unauthorized use of the appliance, a contractor who provides a sufficient scaffold for his work is not liable for the death of an employee from the giving way of an insufficient scaffold constructed for the use of another contractor's employees, and not adopted by him for the use of his workmen, upon which such workman goes in the performance of his work. *Maw* v. *Ferguson* (1892) 44 N. Y. S. R. 372, 17 N. Y. Supp. 349.

(b) *Application of the rule in the case of other instrumentalities.*—A railway contractor is not liable for defects in a trestle which is not a structure furnished for employees to work on, but is itself a part of the work which they are engaged to perform, and is a thing which they themselves make, and "as much a part of the construction of the road as was digging in the pit, loading cars, driving teams, or tamping dirt on the dump." *Kindall* v. *Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020. As to this case in the Federal courts, see § 616, note 1, *infra*.

The making of the projecting steps in a pile of lumber being a part of the work which the men in the yard are hired to perform, none of them, whether pilers, sorters, or measurers, can recover for injuries caused by the selection of a knotty plank for one of the steps. *Fraser* v. *Red River Lumber Co.* (1890) 42 Minn. 520, 44 N. W. 878 (1891) 45 Minn. 235, 47 N. W. 785.

A master is not liable for an injury to a servant, caused by the fall of a heavy pump, due to the giving way of an eyebolt insecurely fastened in the ceiling by a fellow servant for the purpose of raising such pump. *Watts* v. *Beard* (1897) 18 App. Div. 243, 45 N. Y. Supp. 873.

"There is no question," said the court, "about the competency of the plaintiff's coemployees, nor of the strength and sufficiency of the eyebolt. The difficulty arose from the failure to securely fasten it in the ceiling for the purpose designed. If this preparation for the work of hoisting the pump was within the duties of the defendants, then whoever did it represented them, and the negligence was theirs. This is the contention of the plaintiff's counsel, by whom it is insisted that they failed to use the care required of them to afford to the plaintiff a safe place for his work. When the men commenced the performance of the work of adjustment of the pump there was no want of safety in the situation, or in the existing conditions, at the place where this was to be done, nor was there any defect in the appliances employed in the work. The accident arose from the failure to make such use of them as to give safety to its performance. It is not important to inquire whether the failure of the eyebolt to retain its place in the ceiling was attributable to the use of a larger sized bit than should have been used, or to an unsubstantial condition at the place in the wooden ceiling where the hole was made for it. The eyebolt was not designed as a permanent attachment to the ceiling, or for subsequent use in the business of the defendants. It was adopted as a temporary expedient for the occasion—employed as a means to accomplish the purpose then in view, and the use made of it was within the details of the work which the workmen were proceeding to perform. In that view any negligence to which the plaintiff's injury may have been attributable was not that of the defendants, but was that of his coemployees."

A member of a bridge gang cannot recover for injuries caused by the fact that a wedge used in constructing a temporary track for the conveyance of materials slipped out of place. *Bedford . R. Co.* v. *Brown* (1895) 142 Ind. 659, 42 N. E. 359.

A triangle made from plank and used for scraping a mast is of such simple construction that it is not negligence on the part of the owners of a vessel not to have a completed triangle on board, if suitable materials are provided. *Kalleck* v. *Ewing* (1897) 169 Mass. 200, 47 N. E. 598, Former Appeal (1894) 161 Mass. 469, 37 N. E. 450.

The decisions cited in this note should be compared with those cited in § 613, *supra*.

for the construction of such a platform."[1] Under the general principle stated in § 594, *supra*, the question whether the one or the other of these duties was chargeable to the master is primarily one for the jury, under proper instructions.[2] So far as regards the control or review of the conclusions of a jury, the essential matter for the consideration of a court is the effect of the evidence, as indicating the relation which the servant responsible for the defects in the instrumentality bore to the plaintiff and the defendant, either in directing the work which resulted in the production of that instrumentality, or in providing the materials of which it was to be constructed.[3]

What that relation is, may, as an analysis of the cases shows, be determined by following either one of two lines of investigation, to each of which certain logical conceptions are peculiarly appropriate. For the sake of clearness, therefore, it will be well to differentiate between the alternative theories of the evidence which is customarily presented in cases of this class, though at the same time it should be remarked that the interval between them is so easily bridged that the courts quite commonly pass from one to the other in the course of the same opinion.

The starting point of one of these lines of investigation may be said to be the question whether the construction or adjustment of the defective instrumentality was a function which the master was justified in leaving to the servants themselves. Thus, to take the most numerous group of cases under this head for the purposes of illustration, the mere fact that a staging was not built under the immediate personal supervision of the master is manifestly not sufficient to justify a trial judge in ruling, as a matter of law, that the plaintiff cannot recover. The omission to exercise such supervision may itself have been negligent.[4] That the delegation of the function was

[1] *McCone* v. *Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697.

[2] *Donnelly* v. *Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874 (negligence here was in the erection and support of a run for large stones, and in the selection of the gear), Citing *Arkerson* v. *Dennison* (1875) 117 Mass. 407, where the general rule was laid down as follows: "When the preparation of the appliances is neither intrusted to nor assumed by them, the master may be held guilty of negligence if defective appliances are furnished, even though the workmen themselves are employed in the preparation of them. In such case, negligence appearing, it is a question of fact for the jury whether that negligence was in respect of what was done or undertaken by the fellow workmen, or was the negligence of the master."

[3] *Richards* v. *Hayes* (1897) 17 App. Div. 422, 45 N. Y. Supp. 234.

[4] *Arkerson* v. *Dennison* (1875) 117 Mass. 407. There the plaintiff, by direction of his employer, went onto a staging which, being either constructed of unsuitable materials, or insufficiently fastened together, was insecure, and which was built before the plaintiff began work by persons who were afterwards his fellow workmen, the defendant directing what lumber was to be used

not culpable is sometimes inferred from positive evidence, showing that such workmen as those in question generally construct their own scaffolds and adjust their own appliances.[5] But specific testimony of such a custom is not necessary to negative fault in this regard. The virtual effect of the authorities is that, whenever the defective scaffold or other appliance was essentially one of a temporary character, constructed or adjusted with a view to some particular piece of work, the master cannot be held negligent, merely for the reason that he left such construction or adjustment to the servants themselves.[6] Accordingly, whenever the instrumentality is one of this

therefor, and, although the staging was not built under his direct personal supervision, superintending the work generally. The court said: "Whether a particular structure or appliance is one for which the master is responsible to his servant may depend upon circumstances, including the nature and scope of the employment of those engaged in its preparation and use. It may depend upon the question whether the direction and charge of the work is confided to the workmen, or some of them, or retained by the employer, or left unprovided for. If the employer directs his workmen to do certain work, leaving it to them to provide the structures and appliances required for its prosecution, he may be responsible only for care in selection of the men and material assigned for it. But if he simply employs them to work under his direction, giving them no charge or responsibility in regard to the result to be accomplished or the appliances to be used, that responsibility remains with him. The negligence of fellow workmen for which the master is held to be exempt from responsibility is negligence in respect to that which the workmen undertook or were set to do. . . . It would have been competent for the jury to find that the defendant had not intrusted the preparation of the staging to anyone else, and therefore that he retained the charge and direction of it himself, and was bound to exercise some degree of care in regard to it, which he neglected to do."

"When the selection of materials or construction of the appliances to the business is such that it may properly be left to the workmen, in their capacity as workmen, and within the scope of their employment, and it is so left by the master, he is relieved from responsibility for their negligence." *Donnelly* v. *Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874.

"The liability of the master cannot be determined merely by showing that the place where the workmen were engaged in his service was a scaffold, but it must depend upon the nature of the scaffold and the purposes it is to subserve, whether it could be properly left to the workmen to determine and control the method of its construction, and whether they did in fact control its erection, or whether the master had charge thereof." *F. C. Austin Mfg. Co.* v. *Johnson* (1898) 32 C. C. A. 309, 60 U. S. App. 661, 89 Fed. 677.

See further, as to this case in § 617, *infra*.

Another case recognizing the criterion adverted to in the text is *O'Connor* v. *Rich* (1895) 164 Mass. 560, 42 N. E. 111.

[5] In *Kimmer* v. *Weber* (1897) 151 N. Y. 417, 45 N. E. 860, the court remarked that "when a gang of masons are engaged in plastering or pointing a room, the construction of proper platforms or places upon which to stand while doing the work is one of the details of the business that is generally left to the workmen themselves."

In *McCone* v. *Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697, one of the evidential factors enumerated was that it was "customary" for carpenters employed to do the particular kind of work in question to construct the necessary scaffold.

See also *Noyes* v. *Wood* (1894) 102 Cal. 389, 36 Pac. 766, where the same conception is adverted to.

[6] In a recent case it was observed that the courts draw a distinction between a scaffold which is a permanent platform furnished by the employer, on which he invites his workmen to stand in doing

character, the burden of proof lies on the servant to overcome the presumption of nonculpability by adducing some positive evidence from which an obligation on the master's part to furnish such instrumentality in a completed state is reasonably inferable.[7] On the other hand, it is also clear, both upon principle and authority, that the fact of an appliance being ordinarily prepared by the plaintiff's fellow servants is not necessarily a bar to the action. Since the duty to furnish safe appliances rests upon the master, he must discharge his duty in the premises. Negligence, however often repeated, will not ripen into an excuse for a neglect from which injury results.[8]

It will be observed that the theory upon which recovery is, from this standpoint, permitted or denied, is simply that, as there is no culpability on the master's part, the general principle is left to operate, that in selecting and using the materials the workmen act as each other's fellow servants.[9]

their work, and a temporary and movable platform to be increased in height as the work progresses by the workmen themselves as their needs require. *Maher* v. *McGrath* (1896) 58 N. J. L. 469, 33 Atl. 945. Contrasting *Mulchey* v. *Methodist Religious Soc.* (1878) 125 Mass. 487.

In *McCone* v. *Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697, it was considered that the cases containing the latest expressions of opinion of the court of appeals established this principle: "Where an employer employs mechanics to do a certain amount of work, the doing of which requires the use of scaffolds is a part of the work of the m employed to construct, and e furnishes proper materials w hich to construct the scaffolds, the negligent use of such materials, either by improperly uniting them together or by selecting materials not proper for the particular use for which they are selected, whereby one of such mechanics is injured, as the accident was not the result of the neglect of a duty that the master owed to his employees the master is not liable."

A servant cannot recover for injuries caused by the fall of a scaffold, where the evidence is merel a rope which should have secured a spar slipped or came untied. *Rickett* v. *Atlas S. S. Co.* (1884) 12 Daly, 441.

Compare also the rulings cited in the following notes.

[7] See *Kimmer* v. *Weber* (1897) 151 N. Y. 417, 45 N. E. 860, where one of the grounds on which it was held that the plaintiff failed to make out a case for the consideration of the jury was that he had not shown that it was the duty of the master, under the circumstances, to construct the platform on which the masons were to do the work; but that, on the contrary, the proof showed that this duty was assumed by the workmen as one of the details of the work.

[8] *Donnelly* v. *Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874.

[9] In *Ross* v. *Walker* (1891) 139 Pa. 42, 21 Atl. 157, 159, where the action was held not to be maintainable for an injury caused by a defective falsework, the court said: "It is not material to this inquiry to know whether 'Duffey had entire charge and control of the work' as a foreman or not; nor to know whether he selected from the mass furnished by the employer the materials to be used for any particular purpose or not; nor whether he hired and discharged men or not. The inquiry is, Was it the employer's duty, after having provided materials ample in quantity and quality, to supervise the selection of every stick out of the mass for every purpose? To state this question is to answer it. This was not his duty, and for that reason Duffey, if he did select the timber, which is more than doubtful under the testimony, did not represent Walker as a vice principal in such selection. He and his fellow workmen were to judge of the suitability of the pieces

The essential question to be determined, if we choose the alternative line of investigation, is whether the master, as a matter of fact, assumed to furnish the scaffold or other instrumentality in a completed form, or merely furnished the materials and left them to be used by the servants themselves.[10] Clearly, if such assumption is established, the master will be liable, as for negligence, even if the circumstances were otherwise such that he would have been justified in leaving the servants to prepare the defective instrumentality themselves.[11]

The case is for the jury where the evidence is conflicting, or reasonably consistent either with the hypothesis that the defective appliance was constructed by the fellow servants of the injured person out of materials furnished by the master, or with the hypothesis that it was

of timber they used for the uses to which they put them, and their error in judgment, or their careless discharge of this duty was their fault or failure, and not that of their employer. He had discharged his duty when he furnished an abundance of materials from which they could select what was needed. The actual selection out of this stock of the sticks needed from time to time was not his duty but that of the workmen themselves. If there was a visible defect in a stick, common prudence and common care on their part would have rejected it and supplied its place with another out of the stock at their command." It was held error to have refused to instruct the jury that, if they found the defendant put the work in charge of a competent foreman, and provided suitable materials for the scaffolding in sufficient quantity, then he was guilty of no negligence and the verdict must be in his favor.

See also the language used in *Keystone Bridge Co.* v. *Newberry* (1881) 96 Pa. 246, 42 Am. Rep. 543.

[10] In one of the cases already cited, it was laid down that, generally, "to establish a cause of action for such an injury plaintiff must prove, in addition to the fact that there was negligence in the selection of the materials for the building of the scaffold, the additional fact that the master, or someone that stood in the relation of representative of the master, assumed to construct the scaffold, and then directed the employees to use it as a constructed scaffold." *McCone* v. *Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697.

[11] *Kinnare* v. *Weber* (1897) 151 N. Y. 417, 45 N. E. 860 (where, however, the action was held not to be maintainable for the reason that there was no evidence that the defendants actually constructed or directed the construction of the platform which gave way); *Glasgen* v. *Gilbert* (1896) 165 Mass. 443, 43 N. E. 199; *Brady* v. *Norcross* (1899) 172 Mass. 331, 52 N. E. 528.

"Where an employer employs men to do particular work, furnishing them with a complete scaffold as an appliance with which to do the work, if that completed scaffold is an unsafe or an improper appliance for the purpose for which it was to be used, there is a violation of the duty imposed upon the employer to furnish his employees proper appliances with which to do the work." *McCone* v. *Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697.

In *Miller* v. *Missouri P. R. Co.* (1891) 109 Mo. 356, 19 S. W. 58, the court said: "Cases often arise where the master becomes liable by reason of the fact that he undertakes by himself, or through a representative, to do certain things which might have been left to the servant to perform. Thus, where the master provides suitable materials for a staging and intrusts the duty of erecting the structure to the workmen as a part of the work which they undertake to perform, he is not liable for injuries resulting to one of them from the falling of the staging; but, if the master undertakes to furnish the stage, he must use due care in its erection, and, if there is negligence on his part or on the part of one representing him in that regard, he is liable for injuries resulting to the servant using the structure."

constructed under the direction of the defendant or his representative.[12]

The proper instructions to be given for the guidance of the jury are elaborately discussed in the case cited below.[13]

[12] *Bryer* v. *Foerster* (1896) 9 App. Div. 542, 41 N. Y. Supp. 617.

[13] In *Colton* v. *Richards* (1878) 123 Mass. 484, the evidence tended to show that the staging was erected by fellow workmen of the plaintiff, out of material furnished by the defendant; that the staging was insecure by reason of a small piece of defective timber, called a putlog, on which the floor of the staging rested, and which had been in use by the defendant about two years; that the material for the staging was lying on the ground in piles near the building, and, from the mass, persons who were afterwards the fellow workmen of the plaintiff selected such material as they wanted, including the putlog in question; that some of the workmen were journeymen whose trade it was to learn to build safe and proper staging, and that they superintended the erection of this staging. The plaintiff asked the judge to instruct the jury as follows: "1. It is the duty of an employer to provide reasonably safe and proper material and implements for his workmen to work with and use, and his failure so to do is negligence. 2. If it was the duty of the defendant to provide for the plaintiff a completed staging as a structure, as an implement or appliance to carry on this work, then he was bound to see that the staging was a reasonably safe and strong one, and suitable to the work required of the plaintiff, and the fact that fellow workmen of the plaintiff used poor material furnished by the defendant, in the erection of such staging, is no defense. 3. If the putlog was a manufactured and completed implement or utensil, and was furnished by the defendant for the plaintiff's use, he is liable, even though it was put in use by the act of the plaintiff's fellow workmen." The judge refused to give these instructions, and instructed the jury that the plaintiff could not recover, unless they were satisfied that the defendant did not exercise ordinary care in the selection of men and materials to erect the staging, and that such want of ordinary care caused the accident; and that, if the defendant was to furnish a staging as a completed structure, he was to use such care in so doing as any person of ordinary prudence would use in providing such a structure, and that, if he was only to furnish material, he was to use ordinary care in the selection of material; that if he was to furnish this putlog as a manufacturer's utensil, he was to use ordinary care in so doing." In the substitution of these instructions for those requested, there was held to be no error, and that the jury must have found either that the defendant did not assume the alleged duty in any of the forms suggested, or that the duty, whatever it was, was faithfully performed.

There being evidence in the same case which the defendant contended showed that he did not superintend the erection of the staging, the judge also instructed the jury, at the defendant's request, as follows: "1. If the defendant employed competent men to take charge of the erection of this building and of the necessary staging, and furnished suitable material for building the staging, out of which material a fellow workman, not under the superintendence of the defendant or his agent, selected a defective putlog, which broke after the staging was erected, by which the plaintiff was injured, the defendant was not liable. 2. The defendant is not liable if he used ordinary care and prudence in the selection of competent workmen and materials, from which this staging was made." After these instructions had been given, the court, at the defendant's request, further ruled, in substance, that if the defendant employed competent men to take charge of the erection of this building and of the staging necessary, and furnished suitable material therefor, he would not be liable if a fellow workman, not under the superintendence of the defendant or his agent, selected a defective putlog, by the breaking of which the plaintiff was injured; and added that the defendant would not be liable if he used ordinary care and prudence in the selection of competent workmen and materials, from which the staging was made. It was objected by the plaintiff that this last and additional sentence does not state the full measure of the defendant's duty, when, as master, he takes

616. Special circumstances not affecting the extent of the master's liability.— (As to the effect of an express undertaking on the master's part to furnish an appliance the construction of which he might have left to the servants, see the preceding section.)

a. Superior rank of the delinquent employee.—It would seem that inferences unfavorable to the defendant will more readily be drawn, where the delinquent coservant was in a position of control which normally left him free to arrange the details of the work at his own discretion, without any interference on the master's part.[1] But it is

upon himself the business of furnishing a completed staging for the use of his workmen. The court said: "In such case, it may indeed be true that the exercise of due care in selecting men and materials will not always satisfy the obligation assumed. It may still be his duty, especially when he superintends the work himself, to see that the completed structure is in itself reasonably safe and fit for the uses to which it is devoted. But this last statement appears to have been only intended to apply to a case where the duty of the master did not include the building of the staging, but ended with the supply of materials. The judge has just told the jury that, if the defendant was to furnish a completed staging, he was bound to use such care as a person of ordinary prudence would use in providing such a structure. This was sufficiently definite in the absence of any request for more specific instructions. The plaintiff relied on the defendant's neglect of duty in several forms, as we have seen, and the instructions asked by the defendant, taken together, imply that they all refer only to that which related to the supply of suitable material for the work. They expressly refer in terms to the case where the plaintiff and his fellow workmen are employed to take charge not only of the erection of the building, but of the necessary staging also, and where the defective timber is selected by a fellow workman, not working under the superintendence of the defendant or his agent. As applied to such a case, all parts of the instructions given at the defendant's request are correct and consistent; and the plaintiff's objection is not well taken."

[1] In *Woods* v. *Lindvall* (1891) 1 C. C. A. 37, 4 U. S. App. 49, 48 Fed. 62, a contractor for railway construction was held liable for defects in a trestle erected for the purpose of the work by his superintendent. The court said, speaking of this official: "He had authority to direct all the men on that section, between thirty and forty in number, when to work, where to work, and how to work, and it was their duty to obey his orders. He superintended and supervised all the work on the section, and hired and discharged workmen at his discretion. In these respects he was invested with all the power and authority his principals possessed. He did not ordinarily do manual labor; his chief duty was to supervise personally the work, including the building of the trestle, and to give directions how all parts of the same should be done. He went back and forth between the places where the different crews were at work on the section, directing and instructing, and occasionally assisting, each of them in the work they were doing. Johnson, who framed the bents and put up the trestle, worked in obedience to his orders, as well as the other men. As the plaintiffs assumed, through Murdock, the superintendence and control of the construction of the trestle, they were bound to exercise ordinary care to make it reasonably safe and secure for those called to do work upon it. In the discharge of this duty Murdock occupied the place of the plaintiffs in error, and any failure on his part to exercise ordinary care in the discharge of this duty is imputable to them. Whether the trestle was one of those structures the building of which the master might have committed to ordinary fellow laborers, without any instructions or superintending care, by simply providing them with adequate materials and tools to do the work, need not be discussed. The plaintiffs in error did not attempt to build the trestle in any such way. They did not leave the mode and manner of its construction to the discretion or judgment of the laborers doing the work, but

clear from the decisions that, if the rest of the facts show that the work of construction was intrusted to the servants, as part of their duties, the mere fact that the delinquent employee was a foreman, exercising some control over the injured person, is not sufficient to show that the master assumed to furnish the servants with such a structure as was necessary to do the work.[2]

b. Similarity or dissimilarity of the work in which the delinquent and injured servants were engaged.— (Compare § 620, *infra.*) In many of the cases belonging to the category now under review the court has laid more or less stress upon the fact that the plaintiff himself was one of that particular set or group of servants to whom the construction of the defective instrumentality was intrusted.[3] It is

they constituted Murdock their representative, and imposed on him the duty, and conferred on him the authority, to supervise, direct, and control its construction, and required the laborers to obey his orders and directions in the premises. Under these relations Murdock did not sustain the relation of a fellow servant to the defendant in error in respect to this work. He stood in the shoes of his employers, and was their representative, and they are responsible for the results of his negligence in the work so committed to his direction, supervision, and control." A different conclusion with regard to the same facts was reached by the supreme court of Minnesota in *Lindvall* v. *Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020.

In *Blomquist* v. *Chicago, M. & St. P. R. Co.* (1895) 60 Minn. 426, 62 N. W. 818, a foreman of a crew of stone-masons, with power to hire and discharge the workmen, was held to be a vice principal in respect to a common laborer aiding the masons, who was injured by the negligent manner in which a derrick was constructed, when the foreman directed where and how it should be built. The case was distinguished from *Lindvall* v. *Woods* (1889) 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020 (see § 614, note 1, subd. [h], *supra*), on the ground that the place, the plan, and the manner of putting up the appliance had been especially and unconditionally delegated to the foreman. (Canty, J., dissented.)

[2] See *Kimmer* v. *Weber* (1897) 151 N. Y. 417, 45 N. E. 860; *McCone* v. *Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697; *Swain* v. *Brooklyn Aleatra; Asphalt Co.* (1901) 57 App. Div. 56, 68 N. Y. Supp. 50.

In *Kitlea* v. *Faxon* (1878) 125 Mass. 485, the defendant employed a carpenter to superintend the entire job of repairing a building, and directed him to erect a staging, which was solely for putting on the gutters. In doing so, he insecurely fastened the brackets to the building. On the next day the defendant ordered copper gutters of a coppersmith, and directed him to send a man to put them on. This man was sent accordingly, and was directed by the carpenter where to go on the staging, which fell and injured him. The court said: "There was no evidence which would justify the jury in finding that either of the defendants undertook to furnish a staging for the plaintiff, or to assume the risk of its safety. It was like the ordinary case where a man, in building or repairing a house, employs various servants in different departments of labor. Neither of the defendants retained any charge or direction of the work of putting up the staging, but intrusted it to Higgins. He and the plaintiff were fellow servants employed in the same service, and each took the risk of the negligence of the other. It is not contended that there was any evidence of negligence on the part of the defendants in the employment of Higgins, it appearing that he was a skilful and competent carpenter. It follows that the plaintiff has proved no negligence for which the defendants, or either of them, are responsible."

[3] *Colton* v. *Richards* (1878) 123 Mass. 484; *Kelley* v. *Norcross* (1877) 121 Mass. 508; *Adasken* v. *Gilbert* (1896) 165 Mass. 443, 43 N. E. 199; *Moore* v. *McNeil* (1898) 35 App. Div. 323, 54 N. Y. Supp. 356; *Whalton* v. *Sprague Electric Elevator Co.* (1896) 1 App. Div. 264, 37 N. Y. Supp. 174; *Voyes* v. *Wood*

undoubtedly under such circumstances that the rule operates least harshly, especially if the injured person was himself an expert as regards the construction of the appliance which proved defective.[4] In some states of the evidence such a situation may even render the defense of contributory negligence available to the master.[5]

But it may be now taken as settled law that the mere fact that the injured and negligent persons were not doing the same kind of work is not of itself a sufficient ground for predicating a right of recovery.[6]

(1891) 102 Cal. 389, 36 Pac. 766; *Mahon* v. *McGrath* (1893) 58 N. J. L. 439, 33 Atl. 945 (master not liable to a hod carrier for an injury from the negligent manner in which masons constructed a scaffolding); *Crawford* v. *Stewart* (1886; Pa.) 6 Cent. Rep. 110, 8 Atl. 5; *Stutz* v. *Armour* (1893) 84 Wis. 623, 54 N. W. 1000; *Callan* v. *Bull* (1896) 113 Cal. 593, 45 Pac. 1017; *Donnelly* v. *Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874; *Willis* v. *Oregon R. & Nav. Co.* (1884) 11 Or. 257, 4 Pac. 121.

"If this plaintiff and his coemployees, without specific instruction from the master, or one acting for the master and under his authority in the performance of the duty which he owed to his employees, constructed this scaffold of improper material, it would undoubtedly be a case where the negligence was that of a fellow employee or coservant with the plaintiff, for which the master would not be liable." *Richards* v. *Hayes* (1897) 17 App. Div. 422, 45 N. Y. Supp. 231.

[4] See, for example, *Hoppin* v. *Worcester* (1885) 140 Mass. 222, 2 N. E. 779; *Vincent* v. *Manderstock* (1898) 30 App. Div. 308, 51 N. Y. Supp. 494; *McCone* v. *Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697; *Griffiths* v. *New Jersey & N. Y. R. Co.* (1894) 8 Misc. 3, 28 N. Y. Supp. 75, Affirming (1893) 5 Misc. 320, 25 N. Y. Supp. 812; *Perigo* v. *Indianapolis Brewing Co.* (1899) 21 Ind. App. 338, 52 N. E. 462. In all these cases the plaintiffs and their fellow servants were carpenters and had themselves erected or modified the scaffold which fell.

[5] It has been laid down that, where the workmen of whom the plaintiff was one, although the construction of the appliance was no part of their business, undertook, without objection, to construct it, and did this so carelessly that it was insecure, the plaintiff was debarred from recovery on the ground that he, as well as his colaborers, was guilty of negligence. *Hogan* v. *Field* (1887) 44 Hun, 72.

[6] In *Beesley* v. *F. W. Wheeler & Co.* (1894) 103 Mich. 196, 27 L. R. A. 253, 61 N. W. 658, it was held that riveters working on a ship could not recover for the negligence of the carpenters in constructing a scaffold. The court reasoned thus: "Here the defendant was engaged in the enterprise of building a ship. Artisans of various kinds were employed to do their respective shares of the work. The building of stagings, the erection of derricks, and the raising of materials were parts of the necessary work, incident to, and simultaneous with, and in fact a part of, the building of the ship. Stagings were for temporary use, and indispensable. All was under the charge of one superintendent, who directed the different gangs through their respective foreman. There is nothing to indicate a contract to provide a safe scaffold to work upon, or an assumption of that duty by the master, and the case seems to be clearly within the rule of *Killea* v. *Faron* (1878) 125 Mass. 485, which it closely resembles, and of *Hoar* v. *Merritt* (1886) 62 Mich. 386, 29 N. W. 15 (see below). The duty was one which was left to those engaged in the construction of the ship. It is believed that this does no violence to the rule of safe place. The case is different from those where the master furnishes a permanent place to work, as in a ship or factory. A master's duty in such a case is to make and keep the place reasonably safe; but that rule would apply as to those working in, but not necessarily as to those constructing, the factory. Such employees would not be fellow servants with each other, for the enterprises would not be the same. The service of one would be the erection of the completed factory; that of the other its use for the purpose for which it was designed. But here the scaffold builder and the riveter are engaged in the com-

Nor is any larger measure of liability imposed on the master merely for the reason that the appliance which proved defective had been constructed by another set of servants for their own use, and afterwards incorporated with the appliance which the injured servant and his co-laborers constructed for their own purposes.[7] The fact that the delinquent and injured servants were engaged in different kinds of work may, however, be material as tending to show that the undertaking of the master was to furnish the instrumentality in a completed condition.[8]

c. Completion of appliance before plaintiff entered the employment.—The established doctrine is that, wherever the circumstances were otherwise such that the injured servant could not have recovered if he had entered the defendant's service before the defective appliance was completed, his position is not in any way improved by the mere fact that he began work after such structure was completed.[9]

mon service of building a ship. The work of both goes along together, and it seems to us that the case is clearly within the rule of *Priestley* v. *Fowler*, 1837) 3 Mees & W. 1, Murph. & H. 305, 1 Jur. 987, and kindred cases."

A lumber company is not liable where a knotty plank negligently selected by a servant piling lumber to serve as a step for persons having occasion to mount the pile gives way under a scaler and measurer. *Fraser* v. *Red River Lumber Co.* (1891) 45 Minn. 235, 47 N. W. 785.

See also *Killea* v. *Faxon* (1878) 125 Mass. 485, cited in subs. (*a*), *supra*.

[7] *Kimmer* v. *Weber* (1897) 151 N. Y. 417, 45 N. E. 860.

An action has been held not maintainable where a scaffold, carelessly constructed by carpenters for their own use from suitable materials furnished by the master, is subsequently used by painters working on the same building, and falls, injuring one of them. *Hoar* v. *Merritt* (1886) 62 Mich. 386, 29 N. W. 15.

[8] See § 614, *supra*, and also the cases cited in § 620, *infra*.

[9] In *Lambert* v. *Mississquoi Pulp Co.* (1900) 72 Vt. 282, 47 Atl. 1085, the court, in discussing the effect of evidence that the workman had come upon the job after a defective scaffold had been built, said: "It is true that the plaintiff sustained no relations to the defendants or their workmen while the staging was being built, and that as far as his service, considered individually, was concerned, he went to work upon it as a place prepared for his use. But the plaintiff's service involved no use of the staging that was independent of the work of construction, and it had been prepared, not by the master as something which he undertook to provide for the plaintiff, but by his workmen as a part of the general work which they had undertaken to do, and upon which plaintiff entered. We think that in associating himself with these workmen for the completion of the building by the use of the staging already erected, the plaintiff assumed the risks which attached to the workmen generally. The test of the master's liability is not whether the servant came before or after the staging was built, but the relation which the structure sustained to the relative duties of master and servant."

An employer "owes one who is about to enter his service no duty to inspect all the work which has been done by his servants previously, and which ordinarily may be intrusted to them without liability to their fellow servants for their negligence." *O'Connor* v. *Rich* (1895) 164 Mass. 560, 42 N. E. 111, where the servant was injured by the fall of a scaffold erected by his fellow workmen a few days before he entered the service, from suitable materials supplied by the master.

See also *Arkerson* v. *Dennison* (1875) 117 Mass. 407; *Olsen* v. *Nixon* (1898) 61 N. J. L. 671, 40 Atl. 694; *McCone* v. *Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697. In this last case the judges, while not differing in opinion as to the general principle, disagreed as

The only peremptory inference which can be drawn from such a circumstance, coupled with the servant's ignorance of the defective construction, is that the servant was not guilty of contributory negli-

to the propriety of applying it under the circumstances in evidence. The reasoning which led the majority to the conclusion that the servant could not recover was as follows: "Great stress is laid in this case upon the fact that the plaintiff was employed to do the carpenter work after the timbers or sleepers upon which the planks were to be put had been placed in position by the carpenters employed by the defendant to do this work; but it seems to me that that fact is not at all material. The question is not so much as to whether the particular neglect or negligence which selected this improper piece of timber and placed it in this position was the negligence of a fellow servant, as it is whether it was the duty of the master, as master, to furnish these carpenters, employed by him to do carpenter work, which work involved the placing of these timbers in the position in which they were placed, a completed structure or scaffold for the purpose of doing the work. . . . Suppose one of these planks which he used in this way had broken and the injury had resulted therefrom,—it is clear that the master would not have been liable. Upon what principle then can he be said to be liable because one of the timbers that the plaintiff used to rest the planks upon was insufficient for the purpose? Is it because the timbers had been placed in the position in which they were when the plaintiff used them by some men in the employ of the defendant who, when the accident happened, were the plaintiff's fellow workmen? It seems to me clear that no liability of the defendant could be predicated upon such a distinction. Upon what principle can it be said that this plaintiff was not as much bound to examine these particular timbers which had been placed in this position by others as he was bound to examine the planks upon which he stood, and which he shifted as the necessities of the work required? Both the planks and the timbers were materials furnished by the master for the use of his men. An examination of the timbers would have disclosed this knot which it is alleged was the cause of the plank's breaking. It was not the master's duty to examine each timber before it was put in place by the carpenters, nor did he assume that task. If the master furnished for his workmen proper timbers for the purpose—and it is conceded that these timbers were proper if they had been of ordinary strength and without knots—and employed competent men to put the timber in place, he had performed his duty to the men who used them. It seems to me that this is expressly within the principle established by the cases before cited."

The following passage from the dissenting opinion is well worth quoting as an extremely able exposition of the other possible theory of the evidence: "If, with the latter, he and his fellow servants, as a detail of their own work, had undertaken to construct the scaffold, and had selected improper, where they might have chosen proper materials, the defendant would not be liable for injuries resulting from such defective construction. Here, however, the scaffold was erected ten days before the accident and one week before the plaintiff went to work upon it; and the plaintiff was directed by the defendant's foreman to get on this scaffold to do the ceiling work. The scaffold was about 10 or 11 feet above the floor at the wall and about 7 feet above the floor in front, and, unless properly constructed, was necessarily a dangerous place for the plaintiff and the other carpenters to work. That the knot in the sleeper made it dangerous to use in the construction of the scaffold was fairly to be inferred; and it is undisputed that the plaintiff had no part in the selection of the defective sleeper. When he went to work he found the scaffold already erected; and, having been ordered by the foreman to go to work thereon, he was justified in assuming that the master had discharged the duty which rested upon him of supplying a safe scaffold. I do not think this inference is in any way weakened by the fact appearing that the scaffold was actually constructed by the other carpenters who had preceded the plaintiff upon the work. If the plaintiff had assisted in its construction, or had been present and working at the time it was erected, a different question would be presented. Where, however, as here, the plaintiff, under what must be regarded as the master's instructions, went to work upon the scaf-

gence.[10] Evidence of this character, however, like that adverted to in the last subsection, may tend to show the actual character of the master's undertaking in regard to the defective instrumentality.

617. When the delinquency is deemed not to be in respect to the details of the work.— The limits of the doctrines discussed in the preceding sections of this subtitle will be more clearly apprehended if we contrast the situations reviewed with those in which the servant has been held entitled to recover, *viz.*:

1. Where the instrumentality which caused the injury was furnished by the master himself.[1]

2. Where there was an implied undertaking on the master's part to supply that instrumentality in a completed condition. See also § 567, note 7, subd. (e), *ante*, and compare subds. 5, 6, *infra*.[2]

fold already erected, he had a right to assume that the master had discharged the duty of supplying a safe scaffold. If the accident, instead of occurring on this armory, had occurred subsequently on another building which the defendant was engaged in constructing, and to and upon which he had furnished for the use of the workmen this defective scaffold, I do not think, as against a workman who had no previous knowledge of how or by whom the scaffold was constructed, that the master could claim, as matter of law, that he was relieved from responsibility, because, as a matter of fact, at some previous time the scaffold had been constructed by workmen in his employ. I can see no distinction in principle between the position of the plaintiff, who came upon the building after the scaffold was erected, with no knowledge of its prior history or hand in its construction, as connected with this armory, and his position as affected by a defective scaffold furnished in another building."

[10] *Hogan* v. *Smith* (1891) 125 N. Y. 774, 26 N. E. 742.

[1] Where, in unloading a vessel in a ship yard, an iron hook was fastened by the owner of the yard to the wharf, to hold a rope and tackle used for the work, running from the ship to the wharf, the hook must be considered an appliance used in the business, for reasonable care in maintaining the security of which the owner of the yard, for whom the work was done, was responsible to his employees. *Olsen* v. *Starin* (1899) 43 App. Div. 422, 60 N. Y. Supp. 134.

See also *Colton* v. *Richards* (1878) 123 Mass. 484, where the effect of a personal superintendence by the master is adverted to.

[2] A scaffold which is in the nature of an appliance furnished to the workmen to enable them to put in place the steel superstructure of a bridge is not within the scope of the doctrine that the master is not liable for the unsafety of a structure the erection of which is part of the work to be done. *F. C. Austin Mfg. Co.* v. *Johnson* (1898) 32 C. C. A. 309, 60 U. S. App. 661, 89 Fed. 677. The court said: "On part of the company it is claimed that the scaffold was of such a character that it comes within the exception to the general rule, which relieves the master from liability for stagings or scaffoldings erected by laborers who are to work thereon, and wherein it is held that the master's duty is performed if suitable materials are furnished for the erection of the scaffold. This exception originated in cases wherein a servant, such as a bricklayer, mason, carpenter, or the like, undertakes the performance of some work, like the erection of a wall, shingling a roof, or painting a house, which of necessity requires the construction of a scaffold or staging upon which the workmen may stand when engaged at work, and wherein it is customary for the master to furnish the materials, and the mechanics to actually construct therefrom the staging necessary for the work. In this class of cases the workmen will know the extent of the burden to which the staging will be subjected, and they are at liberty make the same as strong as they deem necessary. The method of the construction of the scaffold is under

their control, and they have the necessary knowledge of the strain it will be subjected to when in use to enable them by the use of due care on their own part to safely construct the same; and, under such circumstances, if the scaffold proves to be insufficient, it will be due to the lack of proper care on part of the workmen, assuming that the master has exercised due care in furnishing safe materials for the construction of the staging. In such cases the master is relieved from responsibility, not because the place where the workmen are employed is a scaffold simply, but because the master did not in fact undertake to furnish the scaffold for the use of the workmen when in his employ. The liability of the master cannot be determined simply by showing that the place where the workmen were engaged in his service was a scaffold, but it must depend upon the nature of the scaffold, the purposes it is to subserve, whether it could be properly left to the workmen to determine and control the method of its erection, and whether they did in fact control its erection, or whether the master had charge thereof. In the case at bar the scaffold was intended, not only as a place whereon the workmen were to stand, but as a support upon which was to be placed the entire superstructure of the bridge during the course of its erection. If it should fall through faulty construction, it might cause the entire or partial destruction of the steel work furnished by the company, and the company would be compelled to make good all damages thus caused. It is clear that such workmen as the defendant in error could not be expected to know the strain that would be placed upon this scaffold in the erection of the steel superstructure. It is equally clear that it would not have been open to the defendant in error to exercise any control over the method in which the scaffold was erected or the material used in its construction. The purpose for which this scaffold was to be used renders inapplicable the reasons upon which the rule is based,—that ordinarily the master is not responsible for the safety of stagings which the workmen put up as aids in carrying out the particular work they are employed to perform. The use to which it was intended to subject this structure, in that there would be placed thereon not only the dead weight of the material composing the bridge, but also the strain, caused by placing the different parts in proper position, clearly shows that the erection of the staging was not a matter that could be safely left to the control of ordinary laborers, but required skilled control by persons who from experience would know what strain would be placed on the staging, and the evidence shows that in its erection the defendant in error exercised no control or judgment, but on the contrary it was erected solely under the direction of Charles Kniffer, who, as a skilled expert, had been sent out by the company to erect the bridge and settle for it with the county authorities. Furthermore, it clearly appears that the scaffold, as constructed, was in the nature of an appliance furnished to the workmen to enable them to put in place the steel superstructure. The floor beams, side braces, trusses, and other parts of the bridge proper were carried out on the scaffold, put in place, and bolted together."

The failure to brace the heads of a falsework erected to sustain a heavy "traveler" used in building a bridge results in a structural defect, for which the employer is responsible. *Beattie* v. *Edge Moor Bridge Works* (1901) 109 Fed. 233. To same effect, see *Parsley* v. *Edge Moor Bridge Works* (1901) 168 N. Y. 589, 60 N. E. 1119, Affirming (1900) 56 App. Div. 71, 67 N. Y. Supp. 719 (involving essentially the same facts with the additional feature that the piles of the falsework were too short).

A servant who is set to work in a chamber of a mine after it has already been timbered may recover for injuries caused by the fall of the roof, if the defective conditions could have been discovered by a timely inspection. *Western Coal & Min. Co.* v. *Ingraham* (1895) 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219.

In *Tomaselli* v. *John Griffiths Cycle Corp.* (1896) 9 App. Div. 127, 128, 41 N. Y. Supp. 51, plaintiff, after he had been in defendant's employ a day and a half, was called to assist about the raising of a heavy box, containing material manufactured by defendant, from the basement of the building to the sidewalk above. The elevator by which this material was usually hoisted was out of repair, and the shipping clerk, having the matter in charge, directed and assisted about providing a temporary hoisting apparatus for raising the box in the elevator shaft. This, when complete, consisted of a piece of iron laid across the space and resting upon the

combing of the elevator shaft on either side. The tackle to hoist was a block pulley, which was attached to the iron, and a chain run through the pulleys, which the men pulled upon in hoisting the box. Plaintiff had nothing to do with fixing this apparatus, although he saw the iron and knew generally what it was. While the box was being hoisted, the iron broke and plaintiff was precipitated into the cellar. The court said: "It is quite evident from this testimony that the construction of the tackle, by means of which the box was to be raised, was not a detail of the work which plaintiff was required or expected to perform, but was an appliance by means of which he performed the labor required of him. The obligation was, therefore, imposed upon the defendant to exercise reasonable care and prudence in the selection of this appliance, and to see that it was reasonably suitable and safe for the purpose to which it was applied. This duty was primary and could not be delegated to a servant, so as to shield the master from liability for damage occasioned through an omission of the servant to properly discharge it."

A servant ordered by the master to perform work as a machinist in underground trenches opened and prepared for him has a right to assume that the place has been made reasonably safe by the master, through other and competent servants employed by him, and does not assume the risk of neglect of the latter to brace or protect the sides of the trenches. *Kranz* v. *Long Island R. Co.* (1890) 123 N. Y. 1, 25 N. E. 206. Contrast cases cited in § 612a, note 1, subd. (c), *supra*.

Men comprising a crew of workmen exclusively engaged in putting up such staging and scaffolding as is needed for the use of workmen engaged in the general business of a shipbuilding company are not fellow servants with men engaged in the general work of the company. *Sims* v. *American Steel-Barge Co.* (1894) 56 Minn. 68, 57 N. W. 322 (distinguishing the cases in which the furnishing and preparation of a structure is part of the work which the employees are hired to perform).

A master is liable for defects in a ladder made at his carpenter's shop and issued for the use of the masons in his employ. *Flanigan* v. *Guggenheim Smelting Co.* (1899) 63 N. J. L. 647, 44 Atl. 762 (same distinction relied on).

In *McCone* v. *Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697, the court instanced the case of painters employed to paint the outside of a building, who are required to work upon a completed scaffold built for that purpose, which is lowered or raised as the work progresses, and said: "It is quite obvious that it is the duty of the master to furnish such an appliance; and where the men must rely upon the care of the master or those employed by him in putting together a proper structure necessary for the men to use in the performance of the work upon which they are employed, and where any negligence in the selection of the materials or the proper use of those materials, in constructing the completed scaffold, would expose the men to serious danger, neglect in the performance of that duty will render the master liable."

In *Corson* v. *Coal Hill Coal Co.* (1897) 101 Iowa, 224, 70 N. W. 185, in sustaining an instruction to the effect that the owner of a coal mine having a sloping entry, through which the coal is brought to the surface, owes to an employee riding in the cars through such entry the duty of exercising reasonable care to have the roof of the entry sufficiently propped so that rock will not fall on the track, the court said: "The rule of the instruction applies to a case where a place is furnished for the servant to do his work, and the keeping of the place in repair is not incidental to the work to be performed. . . . The undisputed facts of this case bring it within the latter rule, so far as concerns the duties of the parties. The duties of the plaintiff had no concern with the preparation or looking after the entry. It was the general passageway to and from the mine,—a completed work; a place in which work was to be done, in no way connected with its construction or preservation. It was a place for such work as the plaintiff was doing, and furnished by the employer. This holding is not against that in *Fosbury* v. *Phillips Fuel Co.* (1894) 93 Iowa, 54, 61 N. W. 400. That case was expressly determined on the rule as to the negligence of a fellow servant. As the work of riding the trip was disconnected from duties as to the roof of the entry in which plaintiff was riding, it was defendant's duty, through a competent person, to look after its safety. The case, as now presented, does not involve a question as to the negligence of a fellow servant."

Where a fireman, while working in

the boiler room of the defendant, fell into a hole that had been dug and left open in front of the boiler by the defendant's employees, who were making a foundation there for an "economizer," leaving the hole uncovered or the excavation in an unsafe condition, it was held to be the negligence of the master. *Frye* v. *Bath Gas & Electric Co.* (1900) 94 Me. 17, 46 Atl. 801 (operation of digging the holes said to be connected with and a part of the plant itself).

Where a permanent tunnel is under construction, as fast as completed the finished part becomes an "appliance or means furnished by the master by which the remaining work is to be prosecuted." *Hanley* v. *California Bridge & Constr. Co.* (1899) 127 Cal. 232, 47 L. R. A. 597, 59 Pac. 577, holding that, as there was evidence that a tunnel had been driven in about 18 feet, and that it was about 8 feet wide and from 9 to 10 feet high; that a rock which fell and injured a workman was about 10 feet from the mouth; that the tunnel had passed the place where the rock was three or four days, it would be assumed, on a motion for nonsuit, that the tunnel was shown to have been completed at the point in question, so that it was his employer's duty to see that it was reasonably safe, though there was some unexplained evidence that the side of the tunnel opposite this point had been blasted, which might possibly imply that it was not entirely completed there.

A finding by the jury that it was a part of the employer's duty to put up a timber to which was fastened a coal bucket used for conveying coal from a bin into a loading chute is sustained by evidence that in all other chutes belonging to the employer a permanent boom was used instead of such timber, that a person specially employed to do mechanical work was directed to put up the timber, and that such timber was not included in the appliances usually put up by the employees. *Jaruck* v. *Manitowoc Coal & Dock Co.* (1897) 97 Wis. 537, 73 N. W. 62.

In *Manning* v. *Hogan* (1879) 78 N. Y. 615, the evidence was that it was a particular branch of mechanical occupation to put up a scaffold like the one in question (*i. e.*, for doing the plaster work in a building): that the persons employed were not of that occupation; and that it was built of insufficient material, both in quality and quantity. It was held "that the question of negligence in building the scaffold was for the jury; that it was not sufficient that there was enough of suitable material provided to build the scaffold. It needed that there should be skill and judgment in the use thereof." But the case is not fully reported, and it may also be regarded as having turned upon the failure of the master to employ competent servants—the construction placed upon it in *Beesley* v. *P. W. Hoeber & Co.* (1894) 103 Mich. 196, 27 L. R. A. 266, 61 N. W. 658.

Another doubtful case is *Green* v. *Banta* (1882) 16 Jones & S. 156, which, while it asserted the existence of a duty of furnishing a safe scaffold, does not state whether such duty arose by express contract, by necessary implication from the peculiar facts, or upon the broad ground that a scaffold builder and a plasterer are, under no circumstances, fellow servants. But probably this decision is to be explained in the same way as the one last cited.

In *McMahon* v. *McHale* (1899) 174 Mass. 320, 54 N. E. 854, the master was held liable for defects in a derrick on the ground that it "was a piece of machinery, part of the fitting up of a stoneyard, . . . rather than an appliance to be put together and set up and moved from place to place by workmen who were using it."

"Where, however, there were furnished to the plaintiff and his coemployees materials with which to construct this scaffold, which were not proper for the purpose, and which made the scaffold, when constructed, an unsafe and improper appliance for the doing of the work, . . . if the master employed a person to act in his place to furnish such material, the negligence of such person so appointed to act for the master in the discharge of the duty which he owed to his employees was the negligence of the master, for which the master was responsible." *Richard* v. *Hayes* (1897) 17 App. Div. 422, 45 N. Y. Supp. 324.

Compare also the rule that the furnishing of side stakes for retaining the load of a railway car is not a part of the operation of loading, such stakes being a part of the equipment of the car. See § 567, note 7, *ante*.

Whether or not it is the duty of the master to construct an appliance to be used by the servant is in each particular case a mixed question of law and fact for the jury. *Donnelly* v. *Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874.

3. Where suitable material was not furnished for the preparation of that instrumentality.[3]

4. Where the servants were not left free as to the selection of the materials from which that instrumentality was prepared.

Some cases embodying the doctrine that the fact of an injury having been caused by negligence in respect to a detail of the work will not preclude recovery, if the master or his representative prescribed the manner in which the operation in question was to be performed, are collected in chapter XLII., subtitle C, *post*.

5. Where liability is imposed because of the permanent character of that instrumentality.[5]

Instructions assuming that the duty of furnishing suitable agencies for the performance of the work rests, as a matter of course, on the employer, are erroneous, where the facts are consistent with the hypothesis that the furnishing of such agencies was a matter left to be done in the execution of the work, and as a part of it. *Robinson* v. *Blake Mfg. Co.* (1887) 143 Mass. 529, 10 N. E. 314. The court said: "A person is employed to do a piece of work himself, with the understanding that he shall procure such means, materials, or implements as he finds to be needed, and if he enters upon the execution of the work and procures insufficient or defective means, materials, or implements, it might be found that the master did not assume any responsibility to such servant for their sufficiency or quality, even though he was to pay for them. Nor is the case necessarily different if the person so employed is authorized to engage others to help him do the work, as well as to procure means and appliances. If, for example, the work to be done should include the moving or raising of a heavy article, which could be done with the use of a simple fulcrum and lever, and the employer's foreman, in charge of the work, should be left to provide them at the place where the work was to be done, and he should take a common stone for the fulcrum and a piece of scantling or a rail from a neighboring fence for the lever, and the stone should roll, or the lever break, and one of the men engaged in the work should be hurt thereby, a jury would naturally find that such selection of materials and appliances was a part of the work to be done, and not within the implied duty and undertaking of the employer."

[3] A city is not, as matter of law, free from liability for personal injuries to a workman, caused by the caving in of a trench in which he was digging, although there were materials 2 miles away which the foreman had authority to use to shore up the sides and make the trench safe, since the jury might properly find that they were practically inaccessible on account of the distance, as in such case the negligence is that of the city, and not merely of a fellow servant in failing to use the materials at his command. *Fitzsimmons* v. *Taunton* (1893) 160 Mass. 223, 35 N. E. 549. "On this view of the facts," said the court, "the plaintiff's intestate [workman] was set to work in a place of danger without the precautions being taken for his safety which his employer was bound to see taken."

An employer who erects a wooden falsework for the purpose of supporting the materials and parts of a bridge during the process of its erection is bound to furnish timber of sufficient strength to bear the weight to which the falsework will be subjected. *Lafayette Bridge Co.* v. *Olsen* (1901) 54 L. R. A. 33, 47 C. C. A. 367, 108 Fed. 335.

[5] "If the implement, appliance, or structure is permanent in its character, the duty of exercising a reasonable degree of care in its selection and maintenance is one from which the master can not escape. Whereas, if it be portable, its erection, location, and operation may be, and generally are, regarded as mere details of the work, which pertain to the employee." *Yaw* v. *Whitmore* (1899) 16 App. Div. 422, 61 N. Y. Supp. 73. Affirmed in (1901) 60 N. E. 1123. There a derrick, consisting of a mast 10 inches square and 40 feet long, with a boom of same dimensions, was firmly attached to the ground by planks, in which a metal plate had been imbedded, and which were weighted down with heavy stones

6. Where liability was imposed on the ground that the operation was not one of the transitory class.[6]

D. Negligence of coservants whose duty it is to keep the instrumentalities in proper condition, when not imputed to the master.

618. Theory that a master is never liable for negligence in regard to inspection and repairs.— One view for which there is a considerable body of judicial authority is simply that a master is liable for the negligence of the agents by whom the instrumentalities were originally supplied, but not for the negligence of the agents to whom he has deputed the function of seeing that they continue to satisfy the legal standard of safety. Such a conception has the merit of simplicity,

The derrick remained in this place nearly five months, and until the completion of the work for which it was used. Held, that it was a permanent structure, within the rule that a master must use reasonable care in providing his servant with suitable appliances and in keeping them in repair.

In *Cunningham* v. *Sicilian Asphalt Paving Co.* (1900) 49 App. Div. 380, 63 N. Y. Supp. 357, the defendant was held liable for defects in a platform regularly used by laborers for standing on while they were unloading cars. The fact that the planks were loose and movable was denied to be material. The structure was said to be "permanent in its nature," and distinguished from an "ordinary 'appliance' relating to an isolated job or a transient undertaking."

Plaintiff was taken by defendant's foreman from outside the grain elevator, where he was accustomed to work, to a place within, comparatively dark, and, being instructed to step on a raised platform, walk to a bin, and ascertain if it was open, started to do so, when the platform collapsed, and one of his legs was crushed in a hopper beneath. The platform was constructed nearly nine years previously, and until a few weeks before, its sole use was to enable workmen, on removing the cover, to watch the movement of grain through the conductor. Since then, temporary bins were constructed on that floor, and, to open them, it was necessary to step on the hopper boxes. No inspection was ever made of the condition of the box, and the only evidence in that regard was that the foreman had stood thereon two minutes before the accident. Held, that defendant was guilty of negligence. *Berry* v. *Ithaca Storage Co.* (1900) 50 App. Div. 590, 64 N. Y. Supp. 292.

One of a number of chains furnished for use as required is regarded, when it is applied to the purpose for which it was designed, as a permanent instrumentality, and not one of those small things which go through a rapid course of wearing out and replacement, as to which the rule is that it may be left to the judgment of the workmen when one of them is to be discarded. The making of a link for such a chain, therefore, is not one of those merely transitory adjustments which the master is under no personal obligation to see carefully performed. *Haskell* v. *Cape Ann Anchor Works* (1901) 178 Mass. 485, 59 N. E. 1113.

"An employer is not, as matter of law, free from liability caused by the fall of shafting which had been attached to the ceiling by the carpenter the day before, on the theory that the putting up of such shafting belongs to the 'transitory class,' for which the employer is not responsible beyond furnishing a choice of proper materials or instrumentalities." *Copithorne* v. *Hardy* (1899) 173 Mass. 400, 53 N. E. 915.

The insertion of a new link in a chain is not a mere transitory adjustment of the instrumentality, and the master is answerable for the negligence of a servant in using old, instead of new, iron for the operation. *Haskell* v. *Cape Ann Anchor Works* (1901) 178 Mass. 485, 59 N. E. 1113.

but is regarded by the writer, for reasons already explained, to be wholly illogical. See § 531, *ante*.

The decisions which are either avowedly based on the distinction thus taken, or which can only be supported by assuming it to be impliedly adopted, are collected in the note below. It should be observed, however, that some of the American cases have been expressly overruled, while others have been greatly qualified by later rulings in the same jurisdiction, which reflect more or less strongly the influence of the theory that the duty of maintenance, no less than the duty of supply, is absolute. Whenever there has been a merely partial recognition of this theory, the situation is probably due to the fact that the courts have been unable to break away altogether from existing precedents, which date from a period at which the character of the negligent act had not yet assumed its present importance as a differentiating element.[1]

[1] *United Kingdom.* — A master has been held not liable for the negligence of an employee appointed to examine materials (*Ormond* v. *Holland* [1858] El. Bl. & El. 102); nor of a chief engineer who allowed defective tackle to be used (*Searle* v. *Lindsay* [1861] 11 C. B. N. S. 429, 8 Jur. N. S. 746, 31 L. J. C. P. N. S. 106, 10 Week. Rep. 89, 5 L. T. N. S. 427); nor of an "underlooker" in a mine, whose duty it was to keep the workings in safe condition (*Hall* v. *Johnson* [1865] 3 Hurlst. & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 13 Week. Rep. 411).

In *Webb* v. *Rennie* (1865) 4 Fost. & F. 608, Cockburn, Ch. J., charged the jury as follows: "In the case of a manufacturer employing machinery which might be attended with danger to the persons employed about it, a danger which might be greatly aggravated by the machinery not being in proper condition,—as, for instance, in the case of the boiler of a steam engine bursting, as it would be more likely to do if in an improper condition,—the master manufacturer might have no means of personally knowing its condition himself, and, the question being whether he had used reasonable care and diligence to ascertain it, all that could be reasonably expected of him would be that he should employ some competent person from time to time to examine it. The master must either ascertain the state of the machinery or apparatus himself, or employ some competent person to do so; and if he did employ such a person, and a workman was injured in consequence of that person's neglect of his duty in that respect, the master would not be liable to one of his servants for such negligence of a fellow servant in the particular matter."

In *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 39, it was held that a mine owner was not liable for injuries, due to an explosion of fire damp, which resulted from the faulty construction of a temporary scaffold by the manager of the pit. For a full review of this case see §§ 529, 531, *ante*. A similar ruling had previously been made in *Wright* v. *Roxburgh* (1864) 2 Sc. Sess. Cas. 3d series, 748.

Negligence in allowing structures to fall into a state of decay and to remain in that state was regarded as the act of mere employees, in *Ulen* v. *New Gas Co.* (1876) L. R. 1 Exch. Div. 251, 45 L. J. Exch. N. S. 668, 34 L. T. N. S. 541.

British colonies. — An injury caused by the failure of brakes to work properly, so that a train runs down two trackmen, is conclusively presumed to have been due to the negligence of one of the trainmen, where the evidence is that an examination at the last inspecting station had not disclosed any defects, that the defects which prevented the brakes from working were of the most obvious character, capable of being remedied merely by tightening a bolt and taking up a rod, and that shortly before the accident the train had been easily kept under control upon a gradi-

619. Theory that the liability of the master extends on the subject-matter of the inspection or repairs neglected.—(See also § 583, note 5,

ent as steep as the one where the injury was received. *Plant* v. *Grand Trunk R. Co.* (1867) 27 U. C. Q. B. 78.

A "running" foreman whose duty it is to look after the condition of locomotives is not a vice principal. *Brown* v. *Board of Works* (1882) 2 Vict. L. Rep. 414 (dissenting, Higginbotham, J.).

In the event of a master's not personally superintending the repairs of his machinery, the limit of his duty is to select competent persons for this purpose, and to furnish them with all adequate materials required for the work. *Baird* v. *Dunn* (1895) 33 N. B. 156.

Alabama.—In a very recent Alabama case it was laid down that the common-law duty resting upon an employer of maintaining ways and appliances reasonably safe for the employees' use may be delegated to competent agents; and that a complaint which avers negligence in respect of such maintenance to have been that of a person in the same common service, who is intrusted by the employer with the duty of maintenance, does not show a breach of such common-law duty, when there is no averment of negligence in the selection of such person. *Woodward Iron Co.* v. *Cook* (1899) 124 Ala. 349, 27 So. 455 (employee intrusted with the duty of seeing that a tram track in a mine is in proper condition held to be a fellow servant with an employee engaged in spragging the wheels of the tram cars, for the purpose of checking their speed on the track).

This rule said to have been established by *Mobile & O. R. Co.* v. *Thomas* (1868) 42 Ala. 672; *Mobile & M. R. Co.* v. *Smith* (1877) 59 Ala. 245; *Alabama G. S. R. Co.* v. *Carroll* (1893) 97 Ala. 126, 18 L. R. A. 433, 11 So. 803.

In *Smoot* v. *Mobile & M. R. Co.* (1880) 67 Ala. 13 (negligence in inspecting loading of cars) the court said: "When such appliances have been furnished,—when diligence has been observed in procuring them,—the use of them is necessarily intrusted to the servants of a railroad company, as is their care and inspection, and the repair of them, and determining when the use must be abandoned, until repairs are made. This duty may be intrusted to those operating the appliances, or confided to other servants having no other duty than that of inspection or of repair. However this may be, the several servants are in the same circle of employment—derive duty and compensation from the same source, and are laboring for a common purpose. They are fellow servants, and the master cannot be made answerable to the one, for the negligence of the other. . . . Knowledge of the defective condition of the car, a want of prudence in its use, is traceable only to fellow servants of the appellee, whose care and diligence he is presumed to have consented to risk; whatever of guards against the use of defective cars were reasonable, so far as the evidence shows, and to which it could justly be expected the appellant would resort, were adopted."

Indiana.—A master mechanic was denied to be a vice principal in *Columbus & I. C. R. Co.* v. *Arnold* (1869) 31 Ind. 174, 99 Am. Dec. 615, but this decision is no longer good law in Indiana. See later cases cited in § 568, *ante*, especially *Indiana Car Co.* v. *Parker* (1885) 100 Ind. 181.

Louisiana.—An engine-driver and an employee whose duty it was to keep locomotives in repair were held to be fellow servants in *Hubgh* v. *New Orleans & C. R. Co.* (1851) 6 La. Ann. 496, 54 Am. Dec. 565. This is one of the cases which antedate the formulation of the rule as to a general class of non-delegable duties, and which do not advert to it. The decision was a simple application of the doctrine of common employment.

Maine.—In *Beaulieu* v. *Portland Co.* (1860) 48 Me. 291, it was regarded as well settled that the responsibility of a master is restricted to the employment of competent servants and the provision of adequate appliances. But the doctrine of non-delegable duties has since been adopted. *Shanny* v. *Androscoggin Mills* (1876) 66 Me. 420.

Maryland.—A master mechanic of a railway was denied to be a vice principal in *Shauck* v. *Northern C. R. Co.* (1866) 25 Md. 462; *Cumberland & P. R. Co.* v. *State use of Moran* (1875) 44 Md. 283. The distinction between absolute and delegable duties was not discussed by the court, the nonliability being referred to the conception that the plaintiff, a train hand, and the delinquent, were in the same general service.

In *Wonder* v. *Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143, a railway company was held not to be lia-

ante.)—According to another theory, which is a compromise between the doctrine applied in the cases just cited and that which declares the duty of maintenance to be non-delegable (see § 568, *ante*), the question is whether the omission was the efficient cause of the accident and of the injury to the plaintiff. If it was, he might maintain this action."

In *Cooper* v. *Hamilton Mfg. Co.* (1867) 14 Allen, 193, it was laid down that, although a master was required to use proper care in order to see that his floors were of sufficient strength to support any machine which it was necessary to move over or upon them, "the nature of this care which they are bound to use was such that the defendants [they] might have performed their legal duty by employing suitable persons of competent skill and experience, whose business it was to keep the floors in such condition as to repairs that they were fit and safe for use for any of the purposes for which it might become necessary to appropriate them," and that "if they were diligent and careful to this extent, and any want of repair had not existed for so long a time as to show absolute negligence on the part of the defendants [master], then the accident would have been attributable to the negligence of an agent or servant in the service of a common employer with the plaintiff."

The fact that water failed to run from a hose during a fire is prima facie attributable to the negligence of the servants in not keeping it in proper order or in putting it in operation, and does not constitute evidence sufficient to justify holding defendant responsible for injuries caused by a fire. *Jones* v. *Granite Mills* (1878) 126 Mass. 84, 30 Am. Rep. 661.

In the next section we shall see how far these decisions have been qualified by the more recent ones. See also § 560, *ante*.

Mississippi.—In *New Orleans, J. & G. N. R. Co.* v. *Hughes* (1873) 49 Miss. 258, and *Hoard* v. *Mississippi C. R. Co.* (1874) 50 Miss. 178, it was held that servants engaged in repairing a railroad or its appurtenances are not, in order to hold the company responsible to an employee, representative of the company. In the latter case the reasoning of the court was as follows: "A railroad company is bound, in the original construction of its road and appurtenances, to make it reasonably secure for the safe transportation of trains upon it, and also to keep the track in repair. In

ble for injuries to a brakeman resulting from a defective brake, which it was the duty of fellow servants to keep in repair. The theory that the character of the act determines whether the negligence is that of a vice principal was not noticed. The case followed was *Searle* v. *Lindsay* (1861) 11 C. B. N. S. 429, 8 Jur. N. S. 746, 31 L. J. C. P. N. S. 106, 10 Week. Rep. 89, 5 L. T. N. S. 427 (see *supra*).

In *State use of Hamelin* v. *Malster* (1881) 57 Md. 287, the master was held to be liable only for the negligence of an employee to whom is intrusted the selection of subordinates and the procuring of instrumentalities.

That the duty of repair is delegable is also, in part at least, the foundation of the decision in *Yates* v. *McCullough Iron Co.* (1888) 69 Md. 370, 16 Atl. 280. See *note* to *O'Neil* v. *Great Northern R. Co.* (1900; Minn.) 51 L. R. A. 567.

Massachusetts.—In *King* v. *Boston & W. R. Corp.* (1851) 9 Cush. 112, it was held that keeping a railway in proper repair is "the work of servants or laborers, as much as any other part of the business of the corporation," and that the company was not liable for the negligence of the repairers.

In *Seaver* v. *Boston & M. R. Co.* (1860) 14 Gray, 466, a servant of a railroad company was held unable to recover for an injury caused solely by the breaking of an axle, where the failure to discover the flaw resulted from the negligence of the employee, whose duty it was to examine the cars and other running apparatus of the road and to keep them in proper repair. In this case the distinction between furnishing and maintenance is distinctly drawn, the instruction approved being that "the corporation, in conveying the plaintiff in their cars, acting through their agent, whose duty it was to provide and keep in use safe and suitable engines and tenders on the road, were bound to use due and reasonable care in providing and using on the road engines and tenders suitably constructed with all the appliances and safeguards necessary to render them safe; and if the omission to provide a safety beam to the tender at the time of the accident constituted a want of due and reasonable care, which rendered the tender unsafe, and such

lion whether an employee engaged in inspecting or repairing instrumentalities is a vice principal or a mere servant depends upon the na-

order to discharge the latter duty the corporation must employ suitable persons and supply them with needful material to make repairs; and should also, through its agent or agents, have a supervision over the road. In order to hold the company responsible to an employee (as, a conductor on its train) for injuries sustained because of the road or its appurtenances being out of repair, it must be shown that the company is in default in its duty, either by the selection of incompetent servants or an insufficient number to do the work, or failure to furnish proper material, or that the company had notice of the bad condition of the road, or is chargeable with negligence for not knowing." The corporation will have done all that could be reasonably required of it, when it has exercised circumspection and prudence in appointing employees, to observe the road and make the repairs, and when it has put at their disposal suitable material for the work, and caused suitable supervision to be had over these.

Missouri.—The ruling in *McDermott* v. *Pacific R. Co.* (1860) 30 Mo. 115, that the negligence of a superintendent in allowing a bridge to get into bad repair was not imputable to the employer, is no longer law in this state. See cases cited in § 568, *ante*.

New Jersey.—In *Essex County Electric Co.* v. *Kelly* (1894) 57 N. J. L. 100, 29 Atl. 427, it was said: "It is a matter of judicial disagreement whether a master can discharge the duty . . . [of examining and ascertaining whether appliances have become unfit or unsafe from wear and tear or otherwise], and the similar duty of keeping tools and appliances in repair, by selecting and employing competent persons to make inspections and repairs. In our courts it is held that the master's duty may be thus discharged." The court cited *Rogers Locomotive & Mach. Works* v. *Hand* (1888) 50 N. J. L. 464, 14 Atl. 766, and *Harrison* v. *Central R. Co.* (1865) 31 N. J. L. 293. In the latter of these cases, where the plaintiff was injured by the fall of a bridge, the court remarked: "From the relation between the company and their brakeman, the legal consequence seems to have been deduced by the pleader that the former, with regard to the latter, was bound to keep the bridge in a safe condition. This is not a true statement of the obligation of the company. It was not near so absolute; for if the bridge was insecure from a secret defect which the company was not able to discern by the exercise of reasonable diligence and skill, no responsibility would have fallen on the defendant on account of its defective state. If, as was stated on the argument, the company, in point of fact, directed its agents, who were possessed of competent skill, to examine at stated periods the bridge in question, and such agents reported to the company that the structure was in a secure condition, and no circumstances existed which were calculated to impair a reasonable confidence in such report, I think it is plain, upon the principles of law above propounded, that even if the agents making such report acted carelessly in the discharge of their duties, or even falsely reported their conclusions to the company, that under such a state of facts the plaintiff could not sustain this suit. To warrant a recovery in this case in favor of the employee who is here represented by the plaintiff, the fault which forms the basis of the action must be that of the company, and not simply the negligence of a fellow servant."

A master is not liable for injuries to a workman in a tunnel, caused by the negligence of a laborer whose duty it is to deliver on the surface at the shaft, or there use or keep in repair, the instrumentalities provided for the safe transportation of the workmen. *McAndrews* v. *Burns* (1876) 39 N. J. L. 117.

But see the later New Jersey cases cited in this note, *infra*.

New York.—In *Chapman* v. *Erie R. Co.* (1873) 1 Thomp. & C. 526, the opinion, after quoting the headnote in *Warner* v. *Erie R. Co.* (1868) 39 N. Y. 468, to the effect that the only ground of liability which the law recognizes is that which arises from the personal negligence of the master, proceeded to criticize the case as follows: "The rule as thus stated is obviously of small consequence as a protection to the servants or employees of a corporation, when it is considered that a corporation acts entirely through officers and agents, and there can be no other personal negli-

ture of the defects which were left undiscovered or unremedied owing to his remissness. It is admitted that the decisions in which it has

gence committed by or imputed to it, except the negligence of such officer or agent; and when it is held also that all the agents and employees of a corporation are fellow servants of a common master, it is difficult to see why, under such rules, corporations are not virtually absolved from all the common law liability of a master to take care of his servants, and protect them from unjust and unreasonable danger and injuries resulting from the negligence of others. But the recent case of *Laning* v. *New York C. R. Co.* (1872) 49 N. Y. 531, 10 Am. Rep. 417, shows that the present court of appeals is receding from this extreme ground. This case asserts a sounder and more reasonable rule. Judge Folger, who gives the opinion of the court, says: 'The duty of the master to his servants is to use reasonable care to provide and employ none but competent and skilful servants, and to discharge from his service, on notice thereof, any who fail to continue such.'" This criticism, however, appears to be based on a misapprehension of the true purport of the earlier case, which merely decides that, in the absence of testimony going to prove negligence in the construction of a bridge, or in the selection of the servants employed to supervise and test it, or in the performance of their duties by these servants, the injured servant must fail in his action unless he shows that the managing officers of the corporation had notice, actual or constructive, of the defective condition of the bridge. In other words, there are several states of facts upon which an employer may be charged with personal negligence, and if the evidence is inconsistent with the theory that he was negligent in certain specified ways, the servant must fall back upon some other theory. Under the circumstances in *Warner* v. *Erie R. Co.* (1868) 39 N. Y. 468, where the testimony showed that due care had been exercised by the directors themselves in seeing that sound structures and competent supervising agents had been provided, and that these agents themselves had not been guilty of negligence in the premises, there was no theory to fall back upon, except one based upon the hypothesis that the directors had knowledge of the decayed condition of the bridge through some other avenue of information than the supervising agents appointed by them; and with any such hypothesis the evidence was quite inconsistent. That the case really goes no further than this, so far as the actual decision is concerned, is quite apparent from the opinion. But it must be admitted that, by citing with approval the ruling in *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, the court showed a disposition to countenance that much more sweeping doctrine under which a master is not liable, even for the negligence of a servant to whom he deputes one or more of the duties which the law imposes on him for the benefit of all persons in his employment. The extent of the liability of a master for the negligent act of a competent servant is, however, a very different question from that raised in *Warner* v. *Erie R. Co.* (1868) 39 N. Y. 468, and the approval of the English case may, for this reason, be regarded as quite supererogatory. Except in so far as the broad principle of *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, may be supposed to have been adopted by the court in *Warner* v. *Erie R. Co.* (1868) 39 N. Y. 468, it cannot be said that, as was suggested in *Chapman* v. *Erie R. Co.* (1873) 1 Thomp. & C. 526, the court of appeals has changed its ground in *Laning* v. *New York C. R. Co.* (1872) 49 N. Y. 531, 10 Am. Rep. 417, for there the master was held liable for the reason that personal negligence was shown by the retention of an incompetent servant —a species of negligence which was negatived by the testimony in *Warner* v. *Erie R. Co.* (1868) 39 N. Y. 468.

In *Malone* v. *Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573 (Church, Ch. J., and Rapallo, J., dissenting), it was held that an employer is not liable for the negligence of a carpenter employed to examine and make repairs in the building in which his business is carried on. The majority of the court cited with approval *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30. It seems to be impossible to reconcile the ruling with the other decisions of the same court, referred to in § 568, *ante*.

Ohio.—In this state a car inspector is held to be a fellow servant of the trainmen. *Little Miami R. Co.* v. *Fitz*

patrick (1884) 42 Ohio St. 318; *Lake Shore & M. S. R. Co.* v. *Lamphere* (1894) 9 Ohio C. C. 263, both following *Columbus & X. R. Co.* v. *Webb* (1861) 12 Ohio St. 475, which was itself based upon *Ormond* v. *Holland* (1858) El. Bl. & El. 102, one of the rulings in which the decision of the House of Lords in *Wilson* v. *Merry* was anticipated. See *supra*.

Pennsylvania.—In *Remisch* v. *Roberts* (1891) 143 Pa. 1, 21 Atl. 998, the court approved of an instruction in which the jury were told, among other things, that the defendant was not liable for an accident caused by a defect of which he knew, or ought to have known, provided he had a person in his employ whose duty it was to keep the appliances in good condition. But there was no testimony showing that the employer, or any agent of his having control, had any knowledge of the defect, and the case was ultimately made to turn on the facts that the state of the appliance was as open to the observation of the plaintiff as of the defendant, and that the proximate cause of the accident was the negligence of the plaintiff's fellow servants in selecting an unsound appliance, when they had the opportunity of selecting one that was in good condition.

A car inspector was held to be a fellow servant of a brakeman in *Philadelphia & R. R. Co.* v. *Hughes* (1888) 119 Pa. 301, 13 Atl. 286, the court said: "If, however, the company employ competent and skilful persons for the purpose of inspection, and afford them reasonable opportunities and facilities for the work, under proper instructions, the company will not ordinarily be liable for the negligent performance of the work by their employees, to a fellow employee, unless the company knew, or by ordinary diligence ought to have known, of the defective manner in which the inspection was conducted. We are clearly of opinion, too, that a brakeman and a car inspector are in the same circle of appointment: they co-operate in the same business, and the former knows that the employment of the latter is one of the incidents of their common service. But while the performance of the duty of inspection must necessarily be committed in detail to the employees, the general regulation is in the hands of the company, and it is the duty of the company to provide suitable persons, in sufficient numbers at proper places, with reasonable opportunities to accomplish the work."

But see the decisions of this court cited in the next section.

Tennessee.—In *Nashville, C. & St. L. R. Co.* v. *Foster* (1882) 10 Lea, 351, the court followed *Mobile & O. R. Co.* v. *Thomas* (1868) 42 Ala. 672, to the point that a car inspector and brakeman were fellow servants. See *supra*.

A master has also been held not liable for a failure to retemper knives of nail machines after being heated for the purpose of sharpening them, if the omission was that of a fellow servant. *Knoxville Iron Co.* v. *Dobson* (1881) 7 Lea, 367 (discussing charge: no opinion expressed as to whether the act was that of a fellow servant. Turney, J., dissented, holding that a servant having such a duty to perform was not a fellow servant of a feeder of the machine).

Vermont.—In *Hard* v. *Vermont & C. R. Co.* (1860) 32 Vt. 473, a decision which, as may be surmised from the citations of counsel, was based upon the English decisions which preceded and anticipated the ruling in *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, it was held that an engineer injured through the negligence of a master mechanic, whose duty it is to see that the engines are kept in repair, could not recover damages from the common employer. The court argued thus: "It is insisted that there is 'an implied warranty on the part of the principal of the soundness of the machinery which he puts into the hands of his servants, so far as any unsoundness therein may be discovered by the exercise of proper care and diligence.' This rule is undoubtedly correct, as we have already seen, and as is shown by the authorities cited in support of it. But this is true only of the state and condition of the machinery at the time it is put into the hands of the servant. The principal does not warrant that the servants shall faithfully discharge their duty in keeping the machinery in its original safe condition. To establish this principle would be to abrogate the rule and make the principal the warrantor of the faithfulness of all the servants." But this decision is practically overruled by *Davis* v. *Central Vermont R. Co.* (1882) 55 Vt. 84, 45 Am. Rep. 590, holding that a railroad company is liable for injuries caused by a defective condition of its track, which would have been known to the company's bridge builder and road master if proper inspection had been exercised. In the latter case the court remarked that,

been attempted to give effect to this theory are incongruous and inconsistent.[1]

The fundamental principle upon which the courts rely is indicated by the statement that "one line of distinction between vice principals and employees is in the duty in one instance to supply or maintain instrumentalities of the service, and in the other of using the instrumentalities supplied."[2] This distinction is predicated to some ex-

when the previous decision was rendered, "the liability of the master was held to be dependent upon whether the servant whose negligence caused the injury and the servant injured were fellow servants in a common employment or work," and proceeded thus: "Making this the test for determining the master's liability, and the reasoning and conclusions of the late Chief Justice Pierpoint are unanswerable. But this test, while determinative in a great number of cases, as we have seen, has been abandoned both in England and in this country, and in lieu thereof the master's liability has been made to rest upon whether the negligence arose in the performance of a duty, for the careful discharge of which he became responsible when he assumed the relation of master to the injured servant. On the principles which we think furnish the true ground upon which the master's liability rests, and on the American application of them, the charge of the county court in the particulars to which exceptions were taken contains no error. The American doctrine holding the master liable for the negligence of his servant while discharging a duty which the master owes to a general workman is more consonant with reason and the general safety of the traveling public than the English doctrine announced in *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30."

[1] See the remarks of the court in *Nord Deutscher Lloyd S. S. Co.* v. *Ingebregsten* (1894) 57 N. J. L. 402, 31 Atl. 619.

Contrast the cases tabulated in note 4, subds. (a)–(f), *infra*, with those reviewed in §§ 568, 570, 581–584, *ante*.

[2] *Neutz* v. *Jackson Hill Coal & Coke Co.* (1894) 139 Ind. 411, 38 N. E. 324, 39 N. E. 147.

"On this topic a rational distinction would seem to be that when the employee's duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment, then he is not intrusted with the master's duty to his fellow servant, and the master is not responsible to his fellow servant for his fault; but that, if the master has cast a duty of inspection or repair upon an employee who is not engaged in using the apparatus in a common employment with his fellow servant, then that employee in that duty represents the master, and the master is chargeable with his default." *Nord Deutscher Lloyd S. S. Co.* v. *Ingebregsten* (1894) 57 N. J. L. 402, 31 Atl. 619. It was considered that the distinction was noticeable in *McCulloch* v. *Ross* (1876) 39 N. J. L. 117; *Smith* v. *Oxford Iron Co.* (1880) 42 N. J. L. 467, 36 Am. Rep. 535; *Collyer* v. *Pennsylvania R. Co.* (1886) 49 N. J. L. 59, 6 Atl. 437; *Ross* v. *Walker* (1891) 139 Pa. 42, 21 Atl. 157, 159; *Moynihan* v. *Hills Co.* (1888) 146 Mass. 586, 16 N. E. 574; *Daley* v. *Boston & A. R. Co.* (1888) 147 Mass. 101, 16 N. E. 690, and many other cases.

In *Moynihan* v. *Hills Co.* (1888) 146 Mass. 586, 16 N. E. 574, we find the following elaborate statement of the relations existing between servants repairing or inspecting, and servants using, instrumentalities. "It is obvious that difficult questions arise in cases of this kind in determining the implied obligations of the respective parties under peculiar circumstances. In many kinds of business the condition of a machine as to safety is constantly changing with the use of it, and it is safe or unsafe at a given moment according as it is properly or improperly used and managed by the servant who operates it. Moreover, certain kinds of repairs can be conveniently and properly made, under direction and supervision, by servants regularly employed in the business. In such cases both parties to the contract of service must be presumed to have contemplated that, to a certain extent, fellow servants would be employed by the master to do work in keeping the machinery safe. Work negligently done within that field, if an accident should happen from it, would seem at

teul upon the fact that a smaller amount of technical skill and knowledge is, in most cases, required for what are termed by the court or-

first to introduce a conflict between the obligation of the master to hold himself liable for want of due care in keeping his machinery safe, and the obligation of the servant not to claim damages resulting from negligence of a fellow servant. It becomes necessary, therefore, to consider the rights of the parties in such cases. The application in each particular case, of any general rules which may be laid down, will involve a consideration of two questions of fact: First, what is the nature and character of the business, and the usual and proper general method of conducting it? Secondly, in such a business, what is reasonably necessary to be done on the part of the master to secure for the use of the workmen machinery and appliances which will always be reasonably safe? First, there is that class of cases in which the condition of a machine as to safety is constantly changing with its use, so as to require from the persons tending it, as a part of the ordinary use of it, reconstruction or readjustment of parts, as they become worn out or displaced, from materials or new parts supplied by the master for that purpose. Such work is a part of the regular business of the servant in using the machine, and not of the master in maintaining it. Negligence in doing it is, as to all other employees, negligence of a fellow servant. So far as the condition of machinery depends upon this kind of attention, the master does his duty if he employs competent and suitable persons, and supplies them with everything needed for their work. A second class of cases includes those in which repair or reconstruction of a machine is necessary, of such a kind as is commonly done, or may properly be done, under the direction of the master, by servants engaged in the general business. Both parties to the contract must be presumed to have contemplated that such work would be done by fellow servants of the employee, and he must therefore be held to have assumed all risks from their negligence in doing it. But this, it must be remembered, is a part of that work, for the results of which, in the completed machine, the master agrees to hold himself responsible, so far as good results can be secured by his exercise of proper care. And so he is bound to bring to this department of the business, either in his own person or by an agent, such intelligence, skill, and experience as is reasonably to be required in one to whom, in an important particular, the safety of others is intrusted, and he is bound also to be reasonably diligent and careful in the use of his faculties. One who represents him in this field is not acting as a fellow servant with his other employees, within the meaning of the rule which we are considering, but is his agent or servant, for whose care and diligence he is accountable. There may be still a third class of cases, in which a machine is of such a kind, and the nature of the business in which it is used is such, that the parties could never reasonably have contemplated that any servants employed in the business would build or reconstruct it. A proprietor might buy such a machine, or send an agent or servant to buy it. In either case the purchase would be in the line of the master's duty, and he would be liable for the consequences of negligence in making it. He might hire privileges and men in a machine shop in a distant city and build it there. His servants in that work would not be fellow servants with an employee engaged in an entirely different business. And under the doctrine of *respondeat superior* he would be held liable for the consequences of their negligence. If he saw fit to construct or reconstruct it, in the same way, in or near the building in which it was to be used, the result would be the same. Upon our hypothesis it would be inconsistent with his implied contract to employ fellow servants of his employee in this work, and he therefore could not relieve himself from his general obligation as to the safety of his machinery by setting up that his servants in the construction or reconstruction were fellow servants with his employees in the business in which it was to be used."

Another passage relating to the first class of cases adverted to in the above extract occurs in the opinion in *Rice* v. *King Philip Mills* (1887) 144 Mass. 229, 59 Am. Rep. 80, 11 N. E. 101. "It is the duty of the master to exercise due care in employing competent servants, in providing suitable machines, and in keeping them in proper repair, and the master cannot wholly escape responsibility by delegating these duties to a

servant. If this could be done, a master might escape all responsibility by employing a competent superintendent to perform all these duties. But there are defects in machinery which are of such a character that the master has been held to perform his duty if he furnishes suitable materials, and employs competent servants, and instructs them to keep the machinery in repair, although the servants neglect to make the repairs, or make them in an improper manner. The master must exercise a reasonable supervision over the manner in which his business is done; but the repairs which machines properly constructed require to keep them in running order may be intrusted to competent servants. They are regarded as incidental to the use of the machines, because they are such as machines in substantially good repair must, from time to time, need."

In a somewhat earlier case it was laid down that servants intrusted with the making of such ordinary repairs as the use of a machine requires to keep it in order from day to day are not vice principals. *McGee* v. *Boston Cordage Co.* (1885) 139 Mass. 445, 1 N. E. 745.

In *Monmouth Min. & Mfg. Co.* v. *Erling* (1891) 148 Ill. 521, 36 N. E. 117, the rule laid in *Moynihan* v. *Hills Co. supra*, was approved.

The rule as formulated in a Pennsylvania case is that, where the conditions from which the servant's injury resulted were produced by the ordinary use of the appliance, and not by any defect in the substance, size, or adjustment of the part of the appliance which caused the injury, and the master maintains a thorough and adequate system of constant inspection, and the defect was not known to any of the persons engaged in that inspection, the master is not liable. *Wonsch* v. *Pennsylvania R. Co.* (1892) 150 Pa. 598, 17 L. R. A. 450, 25 Atl. 31.

In *Cregan* v. *Marston* (1891) 126 N. Y. 568, 27 N. E. 952, the court, in discussing the charge of the trial judge that it was the duty of the master to the servants to watch the use of the defective rope by them and its changes of condition, that the engineer was his agent and deputy for such purpose, and that the negligence of the engineer, if it existed, was that of the master, said: "The doctrine at once renders inexplainable all the line of cases in which some defect in a machine has occurred from its use, and the master has been held freed from responsibility if the machine furnished was originally safe, and he neither knew nor ought to have known of the existence of the defect, to it puts the duty of daily watch and discovery on him, and so requires no notice or complaint or lapse of time to put him in default. I think the doctrine asserted was an extension of the master's duty beyond its natural and proper limits. Probably the existing rule was founded upon the truth that certain things essential to the safety of the servants must necessarily, in the management of the business, emanate from the master and remain in his absolute control, and so the servants should not be responsible to one another for defects which they could not repair, for lack both of authority and means. The servants cannot furnish the machines. That is the master's right and duty. But the servant who uses them can and should keep them in order for their proper and safe daily use, when furnished with the necessary means of so doing and when perfectly capable of correcting the defect. It is undoubtedly true, as we have often said, that it is the duty of the master to keep a machine or appliance in order and that he cannot delegate the duty so as to escape responsibility. But that is a general rule and has its qualifications and limitations. One of those is that it is not the master's duty to repair defect arising in the daily use of the appliance, for which proper and suitable materials are supplied, and which may easily be remedied by the workmen, and are not of a permanent character, or requiring the help of skilled mechanics. . . . The cases cited and their doctrine appear to be founded upon what is determined to be the implied contract relation between the master and servant. Their mutual duties grow out of that relation, and change and vary as it is changed or varied by the facts which indicate and measure it. Where those facts show that in the understanding of both parties a class of ordinary repairs are to be made by the servants with materials furnished by the master for that express purpose; that they and he regard it as a detail of their own work; that it is something entirely within their capacity, and not dependent upon the skill of a special expert; and that the necessity springs from their daily use of the appliance, occurs at different and unknown periods in their service, and is open to their observation in the absence of the

dinary repairs that for those of a more permanent character.[3] This conception is possible the essential rationale of the doctrine laid down in Arkansas, that the boundary line between liability and nonliability is to be drawn with reference to the distinction between the higher officials exercising a general supervision over the instrumentalities, with a view to keeping them in proper condition, and the subordinate employees by whom incidental repairs are carried out. See note 1, subd. (b), *infra*. In the subjoined note are tabulated, under headings adapted to facilitate comparison and contrast with former sections of this chapter, a number of cases showing what repairs the courts regard as permanent or ordinary.[4]

master,—the inference is inevitable that the contract relation between the parties makes it a duty of the servants and a detail of their work to correct the defect, when it arises, with the materials furnished."

The master's duty is fully performed when he "supplies adequate machinery, with all the appliances necessary and desirable for adaptation to some particular purpose, even though the same becomes temporarily impaired by reason of constant use, when the impairment is of such a character as to be easily and readily remedied by the servant, a part of whose duty it is to attend to such matters." *Yore* v. *Whitmore* (1899) 40 App. Div. 422, 61 N. Y. Supp. 731.

The failure to make slight repairs in an instrumentality is the negligence of a mere servant, where proper materials have been furnished. *O'Connor* v. *Pennsylvania R. Co.* (1900) 48 App. Div. 244, 62 N. Y. Supp. 723 (metal strip at end of gang-plank wore loose, so that it projected above the surface of the plank).

[3] "In many kinds of service the care and keeping of tools and machinery in a condition of safety require merely the attention and repairs occasioned by ordinary use and wear, and are properly a part of the regular business of the servant engaged in the use of such tools and machinery. In such cases the duty of the employer is performed by furnishing safe tools and machinery and the means of making needed repairs, and the duty of making repairs may be intrusted to servants, and any neglect in the performance of this service is the negligence of a servant. *McGee* v. *Boston Cordage Co.* (1885) 139 Mass. 445, 1 N. E. 745. But in cases where skill and practical knowledge are required in keeping machinery in a reasonable condition as to safety, beyond what is needed in operating it, it is the duty of the employer to supply the necessary due diligence, skill, and experience in the care and inspection of the machinery to protect the servant from injury; and for any failure to exercise proper care and skill the employer is accountable." *Jaques* v. *Great Falls Mfg. Co.* (1891) 66 N. H. 482, 13 L. R. A. 824, 20 Atl. 552.

See also the quotations from *Cregan* v. *Marston* (1891) 126 N. Y. 568, 27 N. E. 952, note 2, *supra*, and from *Smith* v. *Potter* (1881) 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273, in note 4, subd. (c), *infra*.

[4] (a) *Inspection and repair of railway tracks.*—In *Michigan C. R. Co.* v. *Austin* (1879) 40 Mich. 247, a railway company was held not liable for the failure of trackmen in not removing ashes and cinders, the decision being afterwards said, in *Ballhoff* v. *Michigan C. R. Co.* (1895) 106 Mich. 606, 65 N. W. 592, to rest on the ground that the condition of unsafety was temporary, resulting from an omission, which pertained merely to the operation of the road, where trackmen were held to be vice principals as regards their failure to level the track. To the same effect is *Dickerson* v. *Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585, where it was said that the daily repair of tracks by section men is not a discharge of a non-delegable duty.

(b) *Inspection and repair of rolling stock.*—The virtual effect of a decision in the circuit court of appeals is to make an engineer a fellow servant of his fireman as regards the inspection of the engine between the regular inspecting stations. *Texas & P. R. Co.* v. *Patton* (1894) 9 C. C. A. 487, 23 U. S. App. 319, 61 Fed. 259. But it is not

620. Master liable where the delinquent servant was engaged in a different class of work.—One material limitation to which the doc

apparent how such a doctrine can be reconciled with the Federal decisions cited in § 581, *ante*, especially *Chesapeake, O. & S. W. R. Co.* v. *Wiseman* (1895) 11 C. C. A. 547, 31 U. S. App. 1, 67 Fed. 569.

Where plaintiff, a head end brakeman, while standing on a car in the performance of his duties, was thrown to the ground by reason of the breaking of a link connecting the engine with the car on which he stood, causing the train to stop with a jerk, it was held to be error to instruct that it was the duty of defendant "to keep them [the links] in such condition that they should be proper and sufficient for work to be done by them," and "to prevent the use of unsuitable and dangerous links," since defendant's whole duty was performed when it furnished a sufficient supply of suitable links. *Hiller* v. *New York, N. H. & H. R. Co.* (1900) 175 Mass. 303, 56 N. E. 282.

A railroad company is not liable for injuries to a conductor from the turning of a loose step upon the engine, where the engineer was furnished with proper tools for its repair, and the company had no knowledge, actual or constructive, of its condition. *Miller* v. *Chicago & G. T. R. Co.* (1892) 90 Mich. 230, 51 N. W. 370.

A railway company is not liable for the failure of a fellow servant to set apart for repairs a disabled car, as it was his duty to do. *Dodge* v. *Boston & A. R. Co.* (1892) 155 Mass. 448, 29 N. E. 1086.

In *McDonald* v. *Michigan C. R. Co.* (1895) 108 Mich. 7, 65 N. W. 597, it was held that a railroad company, which imposes on its engineers the duty of inspecting their engines, and provides no other method of inspection, to keep them in a reasonably safe condition, is liable to one of its brakemen for an injury received through the failure of the engine to respond promptly to the air brake, which defect was known to the engineer, who continued to use the engine after knowing of the defect, whether such conduct be considered as a complete neglect of the master's duty of inspection, or the illegal imposition of such duty upon a fellow servant. The court said: "Such inspection, in the ordinary operation of the road, is the act of a fellow servant, as between the engineer and brakeman, and, as between them, does not constitute the engineer a representative of the master. . . . But if the company makes no other provision for inspection, and chooses to rely upon the reports of its men, deferring repairs until breaks occur, or until the operators, in due course of business, report defects, we must either say that it has neglected the duty of inspection altogether, or that it has imposed one of its duties upon its operatives, and that it does not fall within the limits of fellow service; or that it may avoid the duty which the law imposes by invoking the rule of fellow servants."

It has been laid down that, although a car inspector may not be a fellow servant of a brakeman, yet an instruction which treats all "servants whose duty it is to examine the cars" as not fellow servants of the brakeman is erroneous. Such an instruction is broad enough to cover the negligence not only of the car inspectors at the various car shops, but also that of conductors and other trainmen who have a like duty to perform, while in charge of the train. *Chicago & A. R. Co.* v. *Bragonier* (1882) 11 Ill. App. 516. This case was reversed on appeal ([1886] 119 Ill. 51, 7 N. E. 655), but on the altogether different ground that the brakeman was guilty of contributory negligence in not making such an inspection as he should have done.

In *St. Louis, I. M. & S. R. Co.* v. *Rice* (1888) 51 Ark. 467, 4 L. R. A. 173, 11 S. W. 699, the court said: "While we recognize the liability of the railway company for the wilful or negligent default of its chief inspectors and those deputed to supervise the condemnation of unsuitable tools, rolling stock, etc., we cannot assent to the proposition that every yard inspector on the line of railroad is a vice principal." The function of the yard inspector was to inspect cars on their arrival, make trifling repairs, and mark them unfit for use whenever they were seriously damaged.

This case was followed in *St. Louis, I. M. & S. R. Co.* v. *Brown* (1890) 67 Ark. 295, 54 S. W. 865, where a fireman was injured by the negligence of a switchman in putting a defective link in a car.

In *St. Louis, I. M. & S. R. Co.* v. *Gaines* (1885) 46 Ark. 555, a car in-

trine thus laid down is subject is exemplified in the cases which proceed upon the theory that, where the duty of inspecting and repairing appliances is cast upon an employee not actually engaged in the work

spector was held to be a fellow servant of a brakeman on the ground that he was not in charge of a separate department, and that his duties did not require special mechanical skill.

In another case it was said that the rule as to the furnishing of appliances and maintaining them in repair is limited in its operation to the agents who are employed to look after and see that these things are done. "We do not mean," said the court, "to determine that this rule would extend to every subaltern who hammers on an engine in the course of repairs; but when the company appoints an agent for a particular purpose, his acts in the line of his specialty are the acts of the company." *St. Louis I. M. & S. R. Co.* v. *Harper* (1884) 44 Ark. 524.

It has also been laid down that where the relation sustained by a car inspector to car repairers is merely that of a foreman directing their labors, he is not a vice principal. *Fordyce* v. *Briney* (1893) 58 Ark. 206, 24 S. W. 250.

The negligence of an engineer in running an engine without a headlight, instead of obeying rules requiring him to examine the engine, and, in case of defects, to take it to the repair shop, the consequence being that a flagman at a crossing was killed, is that of a fellow servant. *McDonald* v. *New York C. & H. R. R. Co.* (1892) 63 Hun, 587, 18 N. Y. Supp. 609.

A mining company is not liable for the negligence of its foreman in failing to see that the bumpers of a car were in proper repair. *Voshefsken* v. *Hillside Coal & I. Co.* (1897) 21 App. Div. 168, 47 N. Y. Supp. 386. Here, however, the master's nonliability seems to be asserted in terms too broad, as the court speaks of the fact of the coservice of the injured and delinquent servants as sufficient to prevent recovery.

(c) *Inspection of rolling stock belonging to other companies.*—An inspector of foreign railway cars is a fellow servant of a brakeman engaged in operating them. *Mackin* v. *Boston & A. R. Co.* (1883) 135 Mass. 201, 46 Am. Rep. 456; *Smith* v. *Potter* (1881) 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273; *Mexican C. R. Co.* v. *Shean* (1891; Tex.) 18 S. W. 151, Following *ton, H. & S. A. R. Co.* v. *Fare* 73 Tex. 86, 11 S. W. 136; *Kelly* v. *Abbot* (1885) 63 Wis. 307, 309, 53 Am. Rep. 292, 23 N. W. 890.

The special consideration relied on by the court in the Massachusetts case above cited, that a system of inspection may be adequate, even though it does not provide for the examination of foreign cars at the points where they are taken into the trains of the employer, is not supported by any satisfactory reasons. The assertion that there is no duty in the premises, because the servant knows such a system to be in operation and therefore assumes the risks incident to it, is a mere *petitio principii*. The question still remains, whether the circumstances are appropriate for the application of the doctrine of assumed risks. The present writer is strongly of the opinion that this question should be answered in the negative. In the first place, the conclusion of the court that the risks of the system were, as a matter of law, assumed, seems to be justifiable only on the hypothesis—not by any means self-evident—that the servant's comprehension of those risks was a peremptory inference, either from the plaintiff's opportunities of informing himself with the manner in which his own employers carried on their business, or from the generality of the usage which prevails among railway companies to omit the inspection of foreign cars at receiving stations. The omission to advert to these special elements, and to determine their precise significance in relation to the evidence, is of itself a serious flaw in the reasoning of the court. But that reasoning is also deficient in a still more important respect,—that no attempt is made to determine how far the doctrine of assumption of risks ought to be allowed to qualify the operation of the theory of non delegable duties. As already remarked, that theory has been worked out in Massachusetts in a form somewhat different from that which it has taken in other states. But, under any form which it can take, it seems to be essentially incompatible with the acceptance of a doctrine which declares that the servant's knowledge of the general system adopted for the conduct of a department of the business disables him from maintaining damages [illegible] caused by some particular

defect in the instrumentalities, which is not discovered owing to that system. To hold that the servant assumes the risks of the various abnormal sporadic conditions which may possibly be superadded temporarily to his environment, owing to the known imperfections of the employer's arrangements, is a doctrine which it not only extremely harsh, but which would tend to nullify completely the theory of absolute duties in its relation to perils, in the face of which the servant is unusually helpless, and against which he is therefore, in fairness, entitled to the fullest measure of protection which the law can afford. Compare § 279, *ante*.

In *Smith* v. *Potter* (1881) 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273, the court argued thus: "The work done is to be done at all hours and at every place where there are railroad connections with other roads. It is not a duty of management or general supervision, but a task for which nothing is required but fidelity and mechanical knowledge of a comparatively limited kind. It is such work as would seldom be delegated to an officer of extensive responsibilities, who has other interests to look after. But whatever be its quality, it was in this case not claimed to have been placed in wrong hands. Nothing more could be asked of the employer." "There is no difference in the nature of the danger, or in the quality of the inspector's employment, between the case of shifting cars belonging to other roads and cars belonging to the same road. Defects in both lead to the same results, and the methods of examining both are identical. Where a car has been damaged by some injury which has escaped notice, it cannot fairly be said that employers ignorant of it, who have taken all the usual and reasonable precautions against it, are any more to blame in the one case than in the other." This decision was subsequently explained as having been based on the ground that the delinquent's duty was not one of management or general supervision, as in the case before the court. *Van Dusen* v. *Letellier* (1889) 78 Mich. 492, 44 N. W. 572 (deck in mill yard not repaired). For other criticisms, see subd. (f), *infra*.

In *Cincinnati, H. & D. R. Co.* v. *McMullen* (1889) 117 Ind. 439, 20 N. E. 287, the court inclined to the view that inspectors of foreign cars were fellow servants of the brakeman, the view being taken that "it is not the duty of the company to furnish appliances and instrumentalities, but to make proper inspection and give notice of defects if any are found, and that this duty is performed by the employment of a sufficient number of competent and skilful inspectors, who are subjected to proper rules and instructions." The defective car in this case belonged to the defendant, and the suggestion as to foreign cars was definitely determined not to embody the true rule in *Louisville, N. A. & C. R. Co.* v. *Bates* (1897) 146 Ind. 564, 45 N. E. 108.

In an intermediate case it was held that a mining company fulfils its duty to its servants as to inspection of cars furnished it for temporary use, by supplying competent and skilful inspectors subjected to proper instructions; and the negligence of noninspection in such case is not that of vice principals. *Neatz* v. *Jackson Hill Coal & Coke Co.* (1891) 139 Ind. 411, 38 N. E. 324, Rehearing Denied in (1894) 139 Ind. 418, 39 N. E. 147. The court said: "In the present case the inspectors and the appellant occupied a relation to the appellee, in all respects identical with that occupied by the inspectors and brakemen of railway companies handling cars of other companies in the course of the master's business. The cars came, not as instruments of the service supplied by the master, but as incidents of its business, and from the dependence of the master upon those not in any manner connected with such business or subject to the master's control. If the defects had been in the original construction of the cars, it could not be said that such defects were chargeable to the negligence of the appellee; nor can it be said with greater reason that the ill repair was from the fault of the appellee, or that a duty rested upon the appellee to make the repairs. The extent of the appellee's control over the cars was in the use of them for loading coal, and it was not responsible to the appellant, or anyone else, for their sufficiency as a means of transportation. The failure to inspect, to set brakes, or to block the wheels when the first car was removed was negligence in the use, and not in the supplying of instrumentalities. One line of distinction between vice principals and coemployees is in the duty, in one instance, to supply or maintain instrumentalities of the service, and in the other of using the instrumentalities supplied. Negligence in the first, though that of a servant, is the master's negli-

gence, while in the second the negligence is that of a fellow servant. This distinction keeps in view the proposition that where the master himself participates in the use, and the negligence is his own, he may not be said to be a fellow servant."

This decision was explained in *Louisville, N. A. & C. R. Co.* v. *Bates* (1897) 146 Ind. 561, 45 N. E. 808, as being based on the theory that as the defective car had been merely delivered to a coal company to be loaded with coal, the liability of the bailee was essentially different from that of railway companies which receive foreign cars to be forwarded.

(d) *Inspection and repair of other kinds of machinery.*—A servant cannot recover who is injured while cleaning a cordage machine by the pushing in of a movable board which was insecurely fastened, the nut which held the button not being tightened. *Smith* v. *Lowell Mfg. Co.* (1878) 124 Mass. 114.

A servant employed on a slubber machine in a cotton mill, whose duty it was to see that the machine was kept running, to take off the full bobbins and put on others, to notify the overseer if she knew that there was anything wrong about the machine, and to see that it was kept clean, and the person whose business it was to keep the machine in repair were fellow servants. *Rice* v. *King Philip Mills* (1887) 144 Mass. 229, 59 Am. Rep. 80, 11 N. E. 101.

The mending of a belt used in transmitting power to machinery and which is frequently broken is not the duty of the master. *Rozelle* v. *Rose* (1896) 5 App. Div. 132, 39 N. Y. Supp. 363.

An employer is not liable for the death of an employee caused by the breaking of a belt on a machine in charge of a fellow servant, to whom the employer delegated the duty of inspection, and to whom other belts were supplied, especially if the deceased knew that the belt in use was unsafe. *Hartley* v. *Cooper* (1893) 6 Misc. 263, 26 N. Y. Supp. 763.

Where the cover of a steam chest was loose because the nuts were not tightly screwed on the bolts, and steam thereby escaped, causing an accident to plaintiff, a bridgeman engaged in coupling the engine with a car, the engineer having all the tools necessary to tighten the bolts, plaintiff cannot recover. *Keegan* v. *New York C. & H. R. R. Co.* (1899) 45 App. Div. 629, 64 N. Y. Supp. 595.

A warehouseman is not liable for the death of a fireman in his employ, caused by the failure to test hydrostatically a tubular boiler after removing and replacing the caps, where it is part of the ordinary duty of the engineer to make such test. *Bell* v. *Consolidated Gas, Electric Light, H. & P. Co.* (1899) 36 App. Div. 242, 56 N. Y. Supp. 780. On the second appeal ([1901] 62 N. Y. Supp. 921), this ruling was indorsed, though with some intimation of a doubt as to its correctness.

In *Schulz* v. *Rohe* (1893) 119 N. Y. 132, 23 N. E. 420, it was held that, even if it should be assumed that the foreman in charge of a factory was the master's *alter ego* (a point which was not determined), there was no liability for an injury caused by the neglect of the machinist employed for such duties, to execute certain repairs in a machine at the time when he had promised to do so.

The fact that defendants had furnished an extra bucket to be used in case of an emergency did not render the employees negligent in using the defective bucket, since the buckets and their repair were committed to the care of the engineer, who acted in that capacity as a vice principal. *Horton* v. *Zwierzykonski* (1901) 192 Ill. 328, 61 N. E. 413. Affirming (1899) 91 Ill. App. 362.

(e) *Inspection incidental to the details of blasting work.*—The danger from "missed shots" being temporary and incident to the work of drilling in a mine, which plaintiff was employed to perform, it is not the duty of the employer to make inspections for "missed shots" after each explosion. *Browne* v. *King* (1900) 40 C. C. A. 545, 100 Fed. 561.

The failure of a foreman to inspect cartridge holes to ascertain whether any charges remained unexploded is that of a mere coservant. *Vanenso* v. *Cataract Constr. Co.* (1895) 87 Hun, 519, 34 N. Y. Supp. 273.

(f) *Inspection of loads on railway cars.*—(See also § 610, note 1, subd. (c), *supra*.) The inspection of a railway car by a station agent or other employee with a view to seeing that the load is properly arranged and adjusted is, as regards the trainmen, the act of a fellow servant merely.

In *Barnes* v. *New York, L. E. & W. R. Co.* (1889) 113 N. Y. 251, 4 L. R. A. 151, 21 N. E. 50, the court said: "We think the defendant had fulfilled its duty to the servants in its employ when it furnished a perfectly safe car and

appliances, and when it also provided a system of inspection of cars, and proper persons to inspect them after they were loaded and before they were to be taken away. The failure to inspect, or, if inspection were made, the failure to rectify the improper loading by which the brake was rendered useless, was not the failure of the master to fulfil his duty to his servant, but it was the negligence of a coservant in carrying out the orders of the master. The master is not an insurer that all his servants shall perform their duty, and he performs his duty to the servant in this regard in providing a system of inspection and intrusting its performance to competent hands. If, thereafter, such servants are guilty of negligence, the master is not responsible therefor to a coservant. We do not see that the question is in any way altered by the fact that the car was loaded by the servants of the owner of the lumber which was placed upon it. Whoever loaded it, the master had provided for an inspection of the car before it was to be taken away, and if the inspection were neglected, it was still the same neglect of a servant of the defendant to do that which he ought to have done, and such neglect was not that of the master in fulfilling any of the duties which he owed as master to his servants. It cannot, we think, be properly contended that the master fails to provide a car which is a safe and proper one, or that he fails to provide one with proper appliances, because, through the negligent manner in which the car is loaded, the appliance is, on that account only, made useless for the purpose for which it was intended." Ruger, Ch. J., and Andrews and Danforth, JJ., dissented, the latter on the ground that when the car was furnished to deceased it was loaded, not an empty, car, and at that moment the movement of the brake was obstructed, so that therefore the car was imperfect and unfit for use.

This case was followed in *Ford* v. *Lake Shore & M. S. R. Co.* (1889) 117 N. Y. 638, 22 N. E. 946, where the employees who had loaded cars were held to be fellow servants of a switchman who was injured by a piece of timber which fell from one of them, owing to the failure to secure the load with the side stakes furnished. Danforth, J., dissented on the ground that the evidence showed that there were no brackets provided for the reception of stakes, and that the defect was therefore structural. Ruger, Ch. J., and Andrews, J., concurred in this view.

On a subsequent appeal ([1891] 124 N. Y. 493, 12 L. R. A. 454, 26 N. E. 1101), the plaintiff was permitted to recover on the ground that the company had not established proper rules prescribing the manner in which cars should be loaded with lumber,—a theory not discussed at the first trial.

To the same effect, see *Bailey* v. *Delaware & H. Canal Co.* (1898) 27 App. Div. 305, 50 N. Y. Supp. 87; *Jarman* v. *Chicago & G. T. R. Co.* (1893) 98 Mich. 135, 57 N. W. 32 (fireman of another train injured by a projecting limb of a tree on a flat car); *Lellis* v. *Michigan C. R. Co.* (1900) 124 Mich. 37, 82 N. W. 828 (piece of timber fell off and injured a switchman); *Dewey* v. *Detroit, G. H. & M. R. Co.* (1893) 97 Mich. 329, 22 L. R. A. 292, 56 N. W. 756, Reversing on Rehearing (1893) 97 Mich. 343, 14 L. R. A. 342, 52 N. W. 942 (McGrath, J., dissenting). At the first hearing of the last-mentioned case the majority had taken the ground that the duty of inspection went to the extent contended for by the plaintiff, and that *Smith* v. *Potter* (1881) 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273 (subd. (c), *supra*, holding that a car inspector and a brakeman were fellow servants, had been overruled by *Irvine* v. *Flint & P. M. R. Co.* (1891) 89 Mich. 419, 50 N. W. 1008, where it was held that it is as much the duty of a railway company to see that the cars are so loaded that brakemen will have reasonably safe access to the brakes, as it is to see that proper appliances are provided. The further statement that an inspector provided in pursuance of the obligation would be a fellow servant was thought to be erroneous. Other cases relied upon by the majority of the judges were *Van Dusen* v. *Letellier* (1889) 78 Mich. 492, 11 N. W. 572, *supra*, and *Morton* v. *Detroit, B. C. & L. R. Co.* (1890) 81 Mich. 423, 16 N. W. 111, where the duty to inspect the parts of cars was held to be nonassignable. The minority drew a distinction between the duty of furnishing a safe place and safe machinery and the duty of seeing that the appliances are properly used, and considered that the duty of seeing that a car is properly loaded came under the latter head. "The injury," said Montgomery, J. (see p. 347 of the report), "resulted, not from any fault in the appliances used, but because, in making use of suitable cars and machinery, a fellow servant neglected his duty." The view of the minority prevailed upon the subsequent hearing of the case. The court said (see p. 333 of

the report): "The real point in controversy here is whether the duty of a master is to be extended so that he may be made liable for the neglect of a car inspector in not observing that a car is improperly loaded when it is to be put into the train for transportation. There is no complaint here about the car itself. It was proper in construction, and a safe car for use in that service. Upon the first argument of the case in this court the real point in controversy was not so fully pointed out and considered as upon the reargument, and the case was regarded as very similar in principle to *Smith* v. *Potter* (1881) 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273, which Mr. Justice McGrath considered as virtually overruled by the later cases cited above. There is, however, a broad distinction between *Smith* v. *Potter* and the present case. In the former case, the injury complained of was received by reason of a defect in the framework of the car itself, while here the accident is attributable to improper loading. In the later decisions the doctrine of *Smith* v. *Potter* has been doubted, and the rule broadly stated that the master must furnish to the servant a safe place to work, and safe appliances to work with. . . . But in regard to the proper loading of cars, quite a different rule must necessarily prevail. The master must undoubtedly exercise care in the selection of inspectors to see that cars are not improperly loaded or overburdened, so that they are dangerous to employees, but after this has been done, it cannot be claimed that the master is to be held responsible for the faithful performance of the inspectors' duty. Any other rule than this would make railroad companies insurers of the lives and limbs of employees. In the present case the projection of the lumber over the end of the car was as apparent to the brakeman, if he had taken the precaution to make observation, as to an inspector. It requires no special skill or training to ascertain the fact. The duties of a brakeman are known to be dangerous, and when one enters such service he must be held to have assumed the risks of the employment. He must exercise care himself in going between moving cars to make couplings."

The opinion at the first hearing, which was thus reversed, was written by McGrath, J., who also composed an elaborate dissenting opinion after the second hearing. Some extracts from the latter may, with advantage, be given to indicate the arguments adduced to support the view which was finally rejected. The learned judge said: "The duty of inspecting the car itself, and that of the inspection of its condition with its load upon it, have a common origin. Both spring from the duty of protection which the master owes to the servant. There is no ground for saying that one of these duties may be delegated so as to relieve the master from all liability, and that the other may not; nor is there reason in saying that the person who inspects the car itself, its appliances and instrumentalities, with reference to the safety of those engaged in its transportation, is not a fellow servant, while he who inspects the loaded car for a like purpose, and to see whether it affords proper facilities for the performance of the duties which must necessarily be performed in its transportation, is a fellow servant. In the present case both duties were delegated to the same person, both are performed with reference to the same end, and the person to whom delegated must be held, in the performance of each, to occupy the same relation to plaintiff and defendant. It certainly cannot be said that, with reference to stationed machinery, belting, shafting, and gearing, the master must, at his peril, provide the necessary guards and coverings, and arrange the surroundings so as to render the place reasonably safe, yet, as to a train of cars, between which a brakeman is required in the ordinary discharge of his duties to go while one section is being driven against a standing section or car, so loaded as to render the position of the brakeman one of greatly increased hazard to life or limb, the master may, in case of injury, escape liability. The employment is, at best, a dangerous one. It is as essential to the protection of the brakeman that these spaces be kept clear as that the spaces be provided. This danger can be guarded against. As is said by Mr. Justice Long, in *Palmer* v. *Michigan C. R. Co.* (1891) 87 Mich. 290, 49 N. W. 613: 'In all cases where the danger can be readily guarded against, the employer is in duty bound to protect the employee at his peril.'"

Where a hand car, as originally furnished, is in proper condition for use, an accident happening afterwards because of its defective condition must be due to the negligence of the workmen using the car, and these are the fellow

which the plaintiff is doing, such employee is a vice principal.[1] But this circumstance is not conclusive in the servant's favor under the circumstances involved in the cases discussed in subtitle C, *supra* (see § 616, note 6), and is possibly not one which is invariably of a differentiating quality as in the present instance.

621. Negligence in failing to replace an unsound by a sound appliance, when master not liable for.—The result of the general principles discussed in §§ 590, 603, *supra*, is that the master cannot be held liable, where the substitution of a sound for an unsound appliance is susceptible of being effected by merely selecting another instrumentality from a stock furnished by the master. In other words, the quality of the operation through which the substitution is carried out determines the quality of the whole transaction, as being the discharge of the functions of a mere servant.[1]

servants of their foreman. *Reynolds* v. *Kneeland* (1892) 63 Hun, 283, 17 N. Y. Supp. 895.

[1] *Nord Deutscher Lloyd S. S. Co.* v. *Ingebregsten* (1894) 57 N. J. L. 400, 31 Atl. 619; *Judson* v. *Olcan* (1889) 116 N. Y. 655, 22 N. E. 555.

In *Woods* v. *Long Island R. Co.* (1896) 11 App. Div. 16, 42 N. Y. Supp. 140, the court, after citing several cases, said: "Tested by these authorities, I think that the controlling consideration in the solution of the question before us must be the method in which the operation and business of the railroad was conducted. If it were part of the duty of the train hands to make the adjustment of the brake rods, then I should say that the car furnished in this case was not defective, and that the failure to properly adjust the rod was the negligence of a fellow servant in the conduct of the work. But if the duty of the train hands was only to operate the brakes, and the duty of adjusting them was imposed on another department, which repaired them and constructed or repaired the appliances of the road generally, then I should say that the car, as furnished, was a defective appliance. If it was the course of business that the car should be furnished with brakes in condition for use by the train hands, I cannot see why the improper adjustment of the parts would not make the appliance defective in the same sense and to the same extent as if some part of the appliance was defective in character, or was wanting. In the case before us the evidence as to the operation of the railroad in these respects is meager. But there was no evidence given on the trial, nor was there any claim made on the argument that the train hands had any duty with regard to the adjustment of the brake rods. The rules of the company would seem to negative such a claim, for the rules require the conductors to report at their trains and inspect the signals and brakes, to see that they are in proper order, but no duty is devolved upon them of remedying any defects. It further appears that it is the duty of the inspectors in the yards to inspect these appliances, and to see that they are repaired or put in proper order. We are therefore of the opinion that the character of the car, as an appliance, must be determined as of the time when it was furnished to the train hands, and that any failure on the part of mechanics or employees up to that time must be deemed neglect in the master's duty of furnishing a safe appliance, and not as that of a fellow servant in the conduct of the work."

The improper adjustment of a brake rod constitutes a defective appliance, and not a mere neglect or failure in detail, within the rule relating to the liability of the master for defects in appliances, where it was the duty of inspectors to make the adjustment, and not the duty of the train employees. *Woods* v. *Long Island R. Co.* (1896) 11 App. Div. 16, 42 N. Y. Supp. 140.

See also *Daley* v. *Boston & L. R. Co.* (1888) 147 Mass. 101, 16 N. E. 690 cited in § 570, *ante*.

[1] "A master employing a servant to keep tools in repair or replace them

622. All employees engaged in repairing regarded as coservants of each other.— In the cases so far reviewed, the injured servant him-

with others is not liable for injury to a coservant through using a tool after it had become dull on account of the neglect of the servant to replace it with another. *Webber* v. *Piper* (1888) 109 N. Y. 496, 17 N. E. 216. The court said: "The master's duty was performed when he furnished suitable saws and the means and conveniences for keeping them sharp and properly set. The saw, though dull, was not defective in any legal sense, and the negligence, if any, was that of Myers, whose duty in sharpening and setting the saws was that of a fellow servant. A contrary rule might carry us to the extent of saying that, where the master furnished sufficient and adequate machinery, . . . but its running became dangerous to the operative, unless well oiled, he was liable for the neglect or omission of that servant. There are many matters of detail in the management of safe and adequate machinery, which must be intrusted to the operatives, and as to which the master owes no duty except the employment of competent workmen, and we deem this a case of that character. The line of division between the duty of the master to furnish and maintain safe and adequate machinery and that of the operative to manage and handle it with prudence and care, is difficult to define by any general description, but it is quite obvious when each case, as it arises, comes under consideration. In the one before us the neglect, if any, was in a detail of the management of the machinery. A master builder might furnish proper tools to his workmen, but it would not be his duty to sharpen every chisel as it became dull, or set every saw when that need arose. The appellant relies upon the case of *Kain* v. *Smith* (1882) 89 N. Y. 375. If, in that case, the master had furnished another jigger, perfect in all respects, and safe and adequate for use, and the neglect had been that the foreman used the old one which had become unsafe, when he might have used the new one, a very different case would have been presented. Here the master supplied saws enough and the means of sharpening and resetting, and if the servants neglected to avail themselves of the means of safety provided, the master was not in fault, for the saw was not defective, but merely dull from use. Its ordinary efficiency was impaired, but it had not thereby become a defective or dangerous machine."

In *Cregan* v. *Marston* (1891) 126 N. Y. 568, 27 N. E. 952, Reversing (1890) 32 N. Y. S. R. 913, 10 N. Y. Supp. 681, it was held that a master was not liable for the failure of an engineer in charge of hoisting machinery, to replace old ropes with new ones out of a stock which was kept on hand.

An employer is not liable for an injury sustained by an employee while working near a derrick managed by a fellow servant, because of the breaking of a rope, where a new rope was there, ready for use if the workmen chose to use it, and also a tackle which could have been used instead of the single rope, if desired. *McKinnon* v. *Norcross* (1889) 148 Mass. 533, 3 L. R. A. 320, 20 N. E. 183. The court said: "Properly to use pulleys, blocks, ropes, and other ordinary tools and appliances which have been furnished by a master to the workmen employed upon a derrick is a part of the duty of the workmen. It is incidental to the management and use of the derrick."

To the same effect, see *Conway* v. *New York C. & H. R. R. Co.* (1895) 13 Misc. 53, 34 N. Y. Supp. 113, Reversing (1890) 11 Misc. 641, 32 N. Y. Supp. 921; *Daley* v. *Boston & A. R. Co.* (1888) 147 Mass. 101, 16 N. E. 690; *Johnson* v. *Boston Tow-Boat Co.* (1883) 135 Mass. 209, 46 Am. Rep. 458, in all of which a sufficient stock of rope was kept on hand by the master, and a new one might have been obtained at any time. In the last-mentioned of these cases Colt, J., thus undertakes to reconcile the decision with the doctrine laid down in *Ford* v. *Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598: "It was incidental to the use of the apparatus,—a part of its contemplated use,—that the rope should be occasionally renewed; and when the defendant had furnished the means for that renewal, and employed Moore to make the renewal whenever needed, it employed him as a servant, and not as an agent or deputy. When a master has furnished suitable structures, means, and appliances for the prosecution of a business, all persons employed by him in carrying on the business by use of the means furnished, including those who use the means directly in the

self had nothing to do with the work of repairing. Another principle equally fatal to an injured servant's right to maintain the action comes into play where both he and the delinquent coservant were engaged in the work of repairing. Under such circumstances it is held that, being engaged in the same kind of work, they assume the risks of one another's negligence.[1]

prosecution of the business, those who maintain them in a condition to be used, and those who adapt them to use by new appliances and adaptations incidental to their use, are fellow servants in the general employment and business. One employed in the care, supervision, and keeping in ordinary repair of the means and appliances used in a business is engaged in the common service."

An employer is not liable for an injury to an employee, as for failure to furnish safe tools and appliances, because the bar used when one of the employees was injured was more liable to turn than that generally used, where the accident was due to the use of it without blocks, which were available at any time. *Hathaway* v. *Illinois C. R. Co.* (1894) 92 Iowa, 337, 60 N. W. 651.

There can be no recovery where a fellow servant selected a defective wheel for the purpose of replacing one which formed part of an appliance for conveying loads along an overhead wire. *Byrne* v. *Eastmans Co.* (1898) 27 App. Div. 270, 50 N. Y. Supp. 457.

The failure of an engineer, who by the rules of the company is required to keep his engine, including the head lamp, in order, to replace a short wick by one of suitable length from a supply furnished by the company at a convenient place, is not negligence which is imputable to the master. *Simpson* v. *Central Vermont R. Co.* (1896) 5 App. Div. 614, 39 N. Y. Supp. 464.

[1] In *Murphy* v. *Boston & A. R. Co.* (1882) 88 N. Y. 146, 42 Am. Rep. 240, it was held that a railway company was not liable for the death of a mechanic in its repair shop, where the cause of the disaster was the explosion of a boiler, due to the negligent failure of his coemployees at the last stage of the repairs to discover and repair defects in the boiler which had been overlooked at a previous stage of the repairs by other employees. The court said: "We think this case is not within the principle which holds the master responsible for unsafe machinery furnished for the use of the servant. The case of *Fuller* v. *Jewett* (1880) 80 N. Y. 46, 36 Am. Rep. 575, is a distinct authority for the proposition that, if this locomotive had been sent out from the shop, and afterwards exploded while in use on the defendant's road, injuring the engineer or other servants of the defendant, the company would have been responsible. The negligence of the boiler makers in the case supposed would be regarded as the negligence of the master. The risk of the negligence of the repairers and machinists would not be considered one of the risks which a servant in whose hands the machine was subsequently placed for use had assumed. The placing of the locomotive on the road for use would be an assurance that it was fit and safe; and an engineer or other servant employed on the train could not be supposed to have known the condition of the locomotive, or whether the men employed to make repairs were competent, or the manner in which the work had been done. In this case Murphy was not, we think, a servant, in whose hands the locomotive was placed by the defendant for use, within the principle of *Fuller* v. *Jewett*, and like cases. The locomotive was sent to the repair shop in order that it might be made fit for use. The mechanics in the repair shop, including the intestate, were employed for the purpose of repairing defective locomotives. The intestate and his colaborers in the shop were engaged in the same department of service, worked under the same control, and in the case in question the boiler makers and the other mechanics were employed to effect the same object, *viz.*, the reparation of the 'Sacramento.' It is true that the work was done in successive stages, and different parts of the work were intrusted to different persons. The refitting of the valve and its adjustment to the required pressure were the last things to be done. This work was, however, as necessary in fitting the locomotive for use as the work of the boiler makers or machinists. The intestate had an opportunity to inform himself of the competency of his coservants in

This principle, however, is held not to be controlling in a case where a brakeman who is required by a rule to inspect the brakes of his train at every station where the train stops is injured by the negligence of one of the regular inspectors at a terminal point. For reasons explained in the note below, it is considered that, by reason of the difference between the duty of inspection resting on the trainmen, and that imposed on the car inspectors, the two classes are not fellow servants within the doctrine which exempts the master from liability.[2]

the shop. He doubtless supposed that the boiler makers had performed their duty; unfortunately, they had neglected it. But we think the risk of their negligence was one of the risks he assumed, as incident to his employment in the common service. It would be too close a construction to hold that the repairs were completed when his work commenced, and that the setting of the valve was an independent and disconnected service in respect to a machine put into his hands by the company for use. This claim of the plaintiff's counsel would make the master responsible to each successive employee engaged on the repairs for any negligence of a coemployee whose work was prior in point of time, although done in effecting the common purpose in which all were engaged. This would, we think, be extending the liability of the master further than is warranted by the adjudged cases."

To the same effect are the following cases:

A servant in a shop who has repaired a chain used in raising locomotive driving wheels, and another servant who, in so using the chain, is injured by its breaking at the link which had been repaired, are fellow servants. *Rogers Locomotive & Mach. Works* v. *Hand* (1888) 50 N. J. L. 464, 14 Atl. 766.

Plaintiff's intestate, a timekeeper at defendant's paper mill, was killed by the bursting of a tee in a steam pipe, occasioned by the action of the superintendent of the mill in opening a valve while testing some new steam pipes. The superintendent was a millwright and had general charge of defendant's machinery. Held, that the [illegible] the superintendent in opening [illegible] was, as matter of law, the act of a coservant, and not of the defendant. *Wait* v. *C. R. Remington & Son Co.* (1900) 53 App. Div. 592, 65 N. Y. Supp. 1116 (injuries inflicted while the work of inspection is in progress were distinguished from those due to conditions resulting from a faulty inspection).

The wife of a section man cannot recover from a railroad company for the death of her husband, who was swept from defendant's tracks into a river by a landslide, where the slide was caused by the failure of the crew, of which her husband was a member, to properly drain a bluff overhanging the track, where such duty was imposed on them by the rules of the company, as such failure is the negligence of fellow servants. *Shirens* v. *Northern P. R. Co.* (1899) 38 C. C. A. 151, 97 Fed. 255.

That all servants engaged in repairing a railroad track are in a common employment, see also *Wellman* v. *Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 530, 28 Pac. 625.

A foreman of a gang of car repairers in assisting in making repairs acts as their fellow servant. *Holtz* v. *Great Northern R. Co.* (1897) 69 Minn. 524, 72 N. W. 805.

See also *Atchison, T. & S. F. R. Co.* v. *Meyers* (1896) 22 C. C. A. 288, 46 U. S. App. 226, 76 Fed. 443, the effect of which is stated in § 610, note 1, subd. (a), *supra*.

A switchman employed to shift cars in a railroad yard according to directions upon a card furnished him by the yard despatcher, whose duty it was to order sent to the repair shop all cars marked as out of repair by the car inspector, is a fellow servant of such inspector. *Gibson* v. *Northern C. R. Co.* (1880) 22 Hun, 289.

An engineer engaged in repairing the machinery upon a coal dock is a fellow servant with a laborer at work repairing a chute connected with such dock. *Porter* v. *Silver Creek & M. Coal Co.* (1893) 84 Wis. 418, 54 N. W. 1019 (sudden starting of engine drew a cable taut, so that it caught plaintiff). Distinguishing *Luebke* v. *Chicago, M. & St. P. R. Co.* (1883) 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870.

See also § 498, note 1, subd. (m), *ante*.

[2] In *Eaton* v. *New York C. & H. R. R.*

Co. (1900) 163 N. Y. 391, 57 N. E. 609, Reversing 14 App. Div. 20, 43 N. Y. Supp. 556, the court argued thus: "We may concede that the question whether a faulty act or omission complained of is negligence in the discharge of the duty of the master, as such, or is in a detail of the work, may depend on the manner in which the work is carried on. We may also assume, for the argument, that it was within the power of the defendant to have so conducted its business as to have made its trainmen both brakemen and car inspectors; but the question remains whether it did so in this case, and whether such is the effect and object of the rule promulgated. The question is not without interest to the defendant in other cases than that before us. If the same servant is to discharge the duties of separate positions, he must have the necessary qualification for each, to be a competent fellow servant. If a brakeman is to act as car inspector, he must have the expert skill and knowledge which a jury might find was necessary to discharge the duties of the latter position, and the defendant might find itself very much circumscribed in its appointment of trainmen. We think it quite plain that the defendant never intended to blend, nor has blended, the two distinct positions of brakeman and inspector. It appears that, as a matter of fact, it has assumed to inspect cars at its terminus by servants especially designated for that purpose. The rule promulgated by the company must have a reasonable construction. It imposed on the trainman the obligation of examination of the appliances which their service compelled them to use, both for their own protection and the protection of the property of the master and the persons of their fellow servants. The examination, however, was not necessarily to be that of an expert inspector, but such as the ordinary knowledge of brakemen and the time allowed for the purpose, consistent with their other duties, would enable them to make."

CHAPTER XXXIII.

LIABILITY OF THE MASTER CONSIDERED WITH REFERENCE TO THE QUESTION WHETHER THE INJURED PERSON WAS A SERVANT IN RESPECT TO THE WORK IN HAND.

623. Introductory.

A. LIABILITY AS DEPENDENT UPON THE TEMPORARY SUSPENSION OR INTERMISSION OF THE RELATION OF MASTER AND SERVANT.

624. Servants carried on vehicles belonging to their employer.

a. Servants traveling in the performance of their contract assume known risks.

b. Negligence of coservants operating the vehicles; when deemed to be a risk assumed.

c. Rationale of these cases.

d. Assumption of the risk of the negligence of servants not operating trains.

e. When servants traveling on their employers' vehicles are deemed to be passengers.

f. Master's obligations inure to benefit of servant traveling in course of his employment.

625. Servants in various other situations.

625a. Temporary intermission of relation of master and servant, never produced by the servant's neglect of his duties.

B. LIABILITY AS DEPENDENT UPON THE QUESTION WHETHER THE ACT FROM WHICH THE INJURY RESULTED WAS OR WAS NOT AUTHORIZED.

626. Presence of servant at the place where the accident occurred.

a. Circumstances under which recovery has been allowed.

b. Circumstances under which recovery has been denied.

c. Right of recovery considered with reference to the culpable or nonculpable quality of the servant's conduct.

627. Servant's use of the given instrumentality.

628. Servant's use of the given instrumentality in a certain manner.

629. Servant's unauthorized performance of certain work; generally.

630. Right of action where the injured person was not in the service of the defendant for any purpose.

631. Volunteers subject to same burdens as servants.

632. Persons not deemed to be subject to the disabilities of volunteers.

633. Right of action where servants undertake new duties.

634. Same subject continued.

635. Performance of unauthorized duties, considered as being indicative of negligence.

636. Minority as an element.

The decisions by which the meaning of the phrase, "in the course

of his employment," as used in the English workmen's compensation act of 1897, is construed, may usefully be compared with those cited in this chapter. See § 768, *post*.

Other decisions bearing upon the same subject will be found in the sections in which the Wisconsin statutes are reviewed. See § 764, note 8, and § 765, *post*.

623. Introductory.—The extent of the defendant's liability often turns upon the answer to the question whether the injured person was acting, at the time when his injury was received, in the capacity of a servant, and was therefore entitled to the rights and subject to the disabilities which the law infers when the existence of a contract of employment is established. Unless this question is answered in the affirmative, it is manifest that, on the one hand, he cannot hold his master liable for the nonperformance of the various obligations which are treated as implied incidents of the contract, and that, on the other hand, the defense of assumption of risks, at all events in so far as it rests upon the theory of a hypothetical agreement, is not available to the master. The latter result involves the important corollary that, under the circumstances supposed, a plaintiff will be able to recover for the negligence of a fellow workman to whom he bears a relation which would have admittedly let in the defense of common employment if he had been injured while actively engaged in the performance of his duties.[1] See also cases cited in § 624 subsecs. *b, c, d*, and § 631, *infra*.

An analysis of the cases which deal with the question whether the injured person was a servant acting in the course of his employment shows that, broadly speaking, they may be divided into two classes. In one of these the controlling issue presented for determination is simply whether the relation of master and servant was or was not suspended or intermitted at the time when the injury was received. In the other the essential consideration upon which the right of action hinges is that the injured person was or was not authorized to be in that particular position which he was occupying at the time of the

[1] *Hutchinson* v. *York, N. & B. R. Co.* (1850) 5 Exch. 343, 19 L. J. Exch. N. S. 296, 14 Jur. 837. In order that this defense may be available, the accident must have "happened whilst the servant was employed about his master's business." Archibald, J., in *Lovell* v. *Howell* (1876) L. R. 1 C. P. Div. 161, 169, 45 L. J. C. P. N. S. 387, 34 L. T. N. S. 183, 24 Week. Rep. 672. "In whatever else they may differ, these cases all agree upon one principle, and that is, that if the plaintiff is not, at the time of the accident, engaged in the actual service of the company, or in some way connected with such service, the company is liable for the negligence of its employees." *State use of Abell* v. *Western Maryland R. Co.* (1884) 63 Md. 433,

accident, or to engage in that particular work which he was then doing. These two classes will be considered in separate subtitles.

It should be remarked with respect to the latter class, that it has been deemed advisable, for convenience' sake, to analyze in the present chapter certain cases involving facts which, in a strictly logical point of view, indicate that they should rather be reviewed in that part of the third volume of this treatise in which the general question of the existence of the relation of master and servant is dealt with: the cases, namely, in which the injured person was one who had, without authority, undertaken to do work for the benefit of a person to whom he was a stranger. See §§ 630, 631, *infra*. The inclusion of these cases in the present chapter is reasonably justified by the consideration that they illustrate the limits of an employer's liability in one particular direction, and that the rights of action possessed by persons injured under the circumstances adverted to have been discussed almost entirely with reference to the points of similarity or difference between their position and that of servants.

It would seem that, on the whole, the evidential conditions which must be established in order to enable the injured person to claim the privileges of a servant ought to be identical with those which, if they are shown to have existed, will prevent him from recovering where the proximate cause of the accident was the negligence of a coservant. In at least one case this theoretic identity has been recognized in the argument of the court.[2] But a collation of the cases cited in the following sections indicates that it has not always been borne in mind by the courts, and that the drift of judicial opinion has been rather in the direction of giving the evidence a construction unfavorable to the servant.

A. Liability as dependent upon the temporary suspension or intermission of the relation of master and servant.

624. Servants carried on vehicles belonging to their employer.—

[2] In *Ewald* v. *Chicago & N. W. R. Co.* (1888) 70 Wis. 427, 5 Am. St. Rep. 178, 36 N. W. 12, the court, in speaking of the pathway on which the servant received his injury, said: "There was, by virtue of the same contract, a corresponding duty of the company to keep that passageway open for the plaintiff, for he had a right to be there as an employee of the company working in the roundhouse. If the company violated that duty, to the plaintiff's injury, by its own act or primary negligence, its liability to respond in damages is absolute and unquestionable; but if the plaintiff has this benefit or advantage by reason of his relation to the company, as an employee, he must also suffer the disadvantage, if it be such, of being remediless against the company, if his injury in that relation was caused by the negligence of his coemployees or fellow servants."

a. Servants traveling in the performance of their contract assume known risks.—A servant who, at the time of the accident in suit, was being transported on a railway car or other vehicle furnished for the purpose of facilitating the performance of his work, is deemed to have been injured in the course of his employment, and therefore cannot recover if the injury was the result of a risk known to and appreciated by him. See, generally, chapter XXII., *ante*.[1]

b. Negligence of coservants operating the vehicles; when deemed to be a risk assumed.—The general principle stated in the preceding subsection has been exemplified in a large number of cases in which it has been held that the negligence of the servants operating the vehicle in which the injured servant was being transported was one of the risks assumed by him. Under such circumstances, he cannot recover on the theory that he was in the position of a stranger, as having ceased, for the time being, to be actively employed in his master's business.

Upon this ground it has been held that no action was maintainable in a case where a laundress was injured by the negligence of the driver of a carriage in which she was being carried to her place of work;[2] or in a case where a miner who, while on the lift by which he was lowered to and raised from the place of work below ground, was injured by the negligence of the engineer who operated the hoisting apparatus.[3] But most of the applications of the doctrine are fur

[1] In a case where a burning bridge gave way under a train, the possibility of such accident was held to have been accepted, as one of the ordinary risks of his employment, by a civil engineer who knew there was no watchman at the bridge, and who, at the time when the injury was received, was traveling on duty for the company, upon a pass exempting the company from liability for injuries to person or property. Under such circumstances, he occupied the position of an employee, and not that of a passenger upon the train upon which he was carried. *Texas & P. R. Co.* v. *Smith* (1895) 31 L. R. A. 321, 11 C. C. A. 509, 30 U. S. App. 176, 67 Fed. 524.

[2] *McGuirk* v. *Shattuck* (1893) 160 Mass. 45, 39 Am. St. Rep. 454, 35 N. E. 110.

[3] *Bartonshill Coal Co.* v. *McGuire* (1858) 3 Macq. H. L. Cas. 300, 4 Jur. N. S. 773. Lord Chelmsford, in the course of his opinion, said: "It appears to me that the deceased and Shearer were engaged in one common operation,—that of getting coals from the pit. The miners could not perform their part unless they were lowered to their work, nor could the end of their common labor be attained unless the coal which they got was raised to the pit's mouth; and, of course, at the close of their day's labor the workmen must be lifted out of the mine. Every person who engages in such an employment must have been perfectly aware that all this was incident to it, and that the service was necessarily accompanied with the danger that the person intrusted with the machinery might be occasionally negligent and fail in his duty. The lord advocate put the case of a master undertaking to convey his workmen to their place of work in the morning, and to bring them home in the evening, as being similar to the present one of lowering the workmen to their work, and taking them up when it is over. And he asked whether it could be doubted that if something were deducted out of the workmen's wages for their conveyance to and from their work, the master would be liable? My Lords, in the latter case supposed, it may be

nished by the decisions relating to railway servants who, being engaged in the construction or repair of the permanent way and its appurtenances, or in other duties along the line, were injured while traveling on a train operated by other servants of the defendant. The liability of such employees to recover has been affirmed, both where the accident occurred while they were journeying between two points at which work was to be done,[1] and where it occurred while they were being transported from the place where they resided to the place where they worked.[2] But the operation of the general rule is not

very probable that the master would be liable for damages to the workmen by the negligence of his servants in the course of the journey, because he has for that purpose converted himself into a carrier for hire. And so it may be, if the employer in Gibson's case had entered into an express contract with the miners to bring them into and raise them from the mine, he might have put on the master's relation of master for this duty, and undertaken that of a contractor. But we are here dealing with no such special and precise cases, but with an engagement in a service subject to all the necessary incidents to it, and, as essential to and forming a part of that service, subject to the very act through the negligent performance of which by one of the servants engaged in the common work the death has been occasioned."

[1] An employee engaged at two different gas works operated by a railway company for its own use, and traveling over the line in the ordinary course of his duty from one set of works to the other, without paying fare and receiving a special sum for his extra expenses, travels as a servant, not as a passenger. *Rhodes* v. *London, C. & D. R. Co.* (1871) Q. B. D.) cited in 2 Wood Ry. Law, p. 1212, and in a note to 2 B. 139.

See also the following cases: *Louisville & N. R. Co.* v. *Stetler* (1901) 51 C. C. A. 696, 48 C. C. A. 149, 108 Fed. 621, affirming (1900) 102 Fed. 421 (engineer supervising water supply on a division of a railway was held to be the coservant of the engineer of a detached engine on which, while engaged in his duties, he was traveling in accordance with the terms of a pass which allowed him to do so); *Bonnaffon* v. *Pennsylvania R. Co.* (1900) 197 Pa. 384, 47 Atl. 359 (track layer injured by collision between construction and freight trains); *St. Louis & S. F. R. Co.* v. *Lentz* (1874) 72 Ill. 256 (shoveler on gravel train injured by collision while being conveyed from place of loading to that of unloading); *Beem* v. *Chicago & N. W. R. Co.* (1883) 58 Wis. 525, 17 N. W. 420 (laborer hurt through sudden starting of train which was about to start for the place of unloading); *Copper* v. *Louisville, N. & St. L. R. Co.* (1885) 101 Ind. 305, 2 N. E. 719 (one employed to do work on the permanent way of a railroad, whether for the repair of tunnels, relaying of ties, ballasting the track, or construction of tunnels, held to be a coservant of the servants in charge of a train in which he was conveyed from one part of the line to another); *Knahtla* v. *Oregon Short Line & U. N. R. Co.* (1891) 21 Or. 136, 27 Pac. 91 (section hand under directions of road master, and traveling on conductor's train to make repairs wherever needed, is engaged in furthering the same general object as the conductor); *Knuble* v. *Junction R. Co.* (1877) 33 Ohio St. 150 (laborer on gravel train killed by negligence of engineer); *McFarlane* v. *Glover* (1881) 5 Ont. Rep. 302 (foreman of lumber yard, coservant of laborer who is injured while being conveyed on a car from one part of the yard to another).

[2] *Tracey* v. *Midland R. Co.* (1866) L. R. 1 C. P. 291, 12 Jur. N. S. 691 (plate layer injured while being conveyed, under the terms of his engagement, to the place where he lived, on a work train, the cause of the accident being a collision between that train and another); *Prather* v. *Richmond & D. R. Co.* (1888) 80 Ga. 427, 12 Am. St. Rep. 263, 9 S. E. 530; *Livingston* v. *Bowen Dean Lumber Co.* (1893) 93 Ga. 53, 19 S. E. 21 (track repairer here was employed by a lumber company); *Toledo, W. & W. R. Co.* v. *Durkin* (1875) 76 Ill. 395 (laborer on gravel train while being conveyed to his home was killed by a derailment); *Hand* v. *Terre Haute & I. R. Co.* (1884) 111 Ill. 202, 53 Am. Rep. 616 (head

confined to cases of the above type. The character of the train on which the servant was being transported is immaterial, provided it was being used as a means of conveyance to take him, in the course of the performance of his contract, to or from the place where his duties called him.[6]

blacksmith injured while traveling with wrecking crew); *Madison & I. R. Co.* v. *Bacon* (1855) 6 Ind. 205 (not stated in what capacity plaintiff's decedent was employed); *Ohio & N. R. Co.* v. *Tindall* (1859) 13 Ind. 366 (train derailed by running against an ox between the places of loading and discharging gravel); *Gilman* v. *Eastern R. Corp.* (1865) 10 Allen, 233, 87 Am. Dec. 635 (carpenter employed as car repairer held to be fellow servant of switchman); *Searer* v. *Boston & M. R. Co.* (1860) 14 Gray, 466 (carpenter employed at specified daily wages, with the privilege of being carried gratuitously to and from his place of work, is deemed to be a servant while he is upon the train); *Cassidy* v. *Maine C. R. Co.* (1884) 76 Me. 488 (laborer injured in obeying a negligent order by the conductor of a work train to jump from a moving train on to a station platform); *Sullivan* v. *Toledo, W. & W. R. Co.* (1877) 58 Ind. 26 (a demurrer sustained to a complaint alleging negligence in failing to notify the conductor of the other train of the approach of the gravel train, the court saying that there was nothing in the averments to take the case out of the general rule); *Gillshannon* v. *Stony Brook R. Corp.* (1852) 10 Cush. 228 (derailment through collision with hand car); *Ryan* v. *Cumberland Valley R. Co.* (1854) 23 Pa. 384 (dumping of one of the cars which had been left unhooked threw plaintiff out); *Wright* v. *Northampton & H. R. Co.* (1898) 122 N. C. 852, 29 S. E. 100 (section master injured while riding to his sleeping place); *Gulf, W. T. & P. R. Co.* v. *Ryan* (1888) 69 Tex. 665, 7 S. W. 83 (roadmaster injured); *Dallas* v. *Gulf, C. & S. F. R. Co.* (1881) 61 Tex. 196 (servant who was engaged in the duty of looking after the ties which were being used for the construction of a new track, and at various times had done other construction work, was injured by the derailment of a construction train while he was returning after the execution of an errand); *Galveston, H. & S. A. R. Co.* v. *Crispe* (1891) 81 Tex. 517, 17 S. W. 47 (instructions as to running the train violated); *Rowland* v. *Wilcau-kee, L. S. & W. R. Co.* (1882) 51 Wis. 226, 11 N. W. 529 (derailment caused by conductor's trying to clear away a snow bank by the momentum of the train alone, shoveler on a snow plow train injured); *Way* v. *Ontario & Q. R. Co.* (1885) 10 Ont. Rep. 70 (plaintiff was taking supplies to places where they were needed along the line); *Carney* v. *Caraquet R. Co.* (1890) 29 N. B. 425 (section hand injured by negligence of conductor in going on a bridge known to be unsafe); see also the cases cited in the next subsection.

In *McGill* v. *Southern P. Co.* (1893 Ariz.) 33 Pac. 821, it was held, on the authority of *Chicago, M. & St. P. R. Co.* v. *Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, that a conductor of a work train was not a fellow servant of a section foreman conveyed thereon to his place of work. On a rehearing this ruling was reversed (1896; 44 Pac. 302), the court holding that as the conductor did not have any control over the foreman, the principle of the *Ross Case* (§§ 532, *et seq.*, *ante*) had been wrongly applied, and that, as the relative positions of the servants showed that a constant association was contemplated, they were in a common employment.

In *Fitzpatrick* v. *New Albany & S. R. Co.* (1856) 7 Ind. 436, it was held that an agreement by which a laborer was to be regularly conveyed to and from his work involved an implied engagement to carry him as safely and securely as if he really had been a passenger in the ordinary sense of the term. The case relied upon was *Gillenwater* v. *Madison & I. R. Co.* (1854) 5 Ind. 339, 61 Am. Dec. 101. But the essence of this ruling was a difference of departments, not the fact that the servant was a passenger. Of course, where common employment is negatived by a difference of department, the question whether the servant was traveling as such becomes immaterial. These early Indiana decisions are virtually, if not explicitly, overruled by those by the same court cited above, as well as discredited by the great weight of authority.

[6] *Hutchinson* v. *York, N. & B. R. Co.*

The general principle established by the authorities already cited is, of course, equally applicable, whatever the nature of the vehicle may be which is used for the transportation of the railway servant.[7]

c. Rationale of these cases.—The decisions reviewed in the preceding subsection are referable to the conception that the master retains the right to control the servant while he is on the vehicle, and that this right, although ordinarily dormant during the period of transporta-

(1850) 5 Exch. 343, 19 L. J. Exch. N. S. 296, 14 Jur. 837, where it was held that the personal representative of a servant killed in a collision while he was traveling on a passenger train in the discharge of his duty could not recover.

See also *Unaville* v. *Cleveland & T. R. Co.* (1860) 11 Ohio St. 417 (passenger train); *Ross* v. *New York C. & H. R. R. Co.* (1875) 5 Hun, 188 (engineer supervising the laying of track, injured by the negligence of the conductor of a passenger train); *Ionmore* v. *New York, N. H. & H. R. Co.* (1899) 24 R. I. 152, 46 L. R. A. 730, 79 Am. St. Rep. 812, 44 Atl. 592 (employee, after his day's work was done, took gratuitous passage on a freight train to a point near his home).

A railway hand ordered to quit work before the usual hour, and to take a train to carry him to a point where he is to be paid, is in the service of the company at the time when he is boarding the train. *O'Brien* v. *Boston & A. R. Co.* (1885) 138 Mass. 387, 52 Am. Rep. 279.

See also *Vick* v. *New York C. & H. R. R. Co.* (1884) 95 N. Y. 267, 47 Am. Rep. 36 (next subsection).

If there is no direct proof in a case of this type, that the contract of hiring provided for the servant's transportation free of charge, an implied stipulation to that effect will usually be inferred. *Ross* v. *New York C. & H. R. R. Co.* (1875) 5 Hun, 188. Affirmed (1878) 74 N. Y. 617 (assistant surveyor killed while traveling from his home to the place of work). See also the comments on this case in *Vick* v. *New York C. & H. R. R. Co.* (1884) 95 N. Y. 267, 47 Am. Rep. 36.

Nor does it make any difference, for the purposes of the defense of common employment, whether the accident was occasioned by the negligence of the servants guiding the train in which the deceased was, or of those guiding the other train, or of both. *Hutchinson* v. *York, N. & B. R. Co.* (1850) 5 Exch. 343, 19 L. J. Exch. N. S. 296, 14 Jur. 837; *Sullivan* v. *Toledo, W. & W. R. Co.* (1877) 58 Ind. 26. That a road master and the engineer of a train other than that on which the road master is carried are co-servants was conceded in *Holland* v. *Southern P. Co.* (1893) 100 Cal. 240, 34 Pac. 666.

The fact that an employee was received and treated as such by the conductor will not give him the rights of a passenger. *Texas & P. R. Co.* v. *Scott* (1885) 64 Tex. 549 (held that jury should have been charged to this effect, and that the capacity in which the plaintiff traveled should have been submitted to them).

By § 2083 of the Georgia Code, all employees except those who may be able to control the men engaged in the running of trains are placed on the footing of passengers, as to injuries arising from the negligence of the latter class of employees. A track raiser is entitled to the benefit of this provision. *Atlanta & R. Air Line R. Co.* v. *Ayers* (1874) 53 Ga. 12.

[7] Injury to a member of a railroad gang while riding on a hand car, caused by neglect of a fellow servant, does not make the master liable to him, where there is no proof of any contract to carry him safely on such car, further than it can be inferred from the use of the car in going to and from the place of labor. *Northern P. R. Co.* v. *Peterson* (1896) 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

A bridge builder and repairer employed by a railroad company, and furnished with cars in which he and his assistants and tools are transported to places along the line of the road where his services are required, the usual custom being to attach his cars to some regular train, is a fellow servant with the employees in charge of such trains, not only while he is engaged in the work of building or repairing bridges, but also while being so moved in his cars from place to place in the discharge of his

lion, is susceptible of being at any moment called into active exercise.[8] Under such circumstances the servant is regarded as being in

regular duties. *Tomlinson* v. *Chicago, R. & Q. R. Co.* (1899) 38 C. C. A. 148, 97 Fed. 252.

[8] In two of the cases cited it was observed that the servants were transported, not as passengers, but in the course of the performance of their contract. *Tunney* v. *Midland R. Co.* (1866) L. R. 1 C. P. 291, 12 Jur. N. S. 691; *Gillshannon* v. *Stony Brook R. Corp.* (1852) 10 Cush. 228.

In *Manville* v. *Cleveland & T. R. Co.* (1860) 11 Ohio St. 417, the court, accepting the suggestion of counsel that the true test to determine whether the plaintiff was in the employ of the defendant at the time of the injury was the fact of its being his duty and part of his employment to be upon the train at the time the injury was received, held the plaintiff not to be a passenger, where the evidence was to the effect that he was employed by the month to render service generally on a railroad, in the capacity of baggage master or conductor of passenger trains and gravel trains, at such times and places along the road as directed; that he was ordered to go to F. and there take charge of a gravel train at that place on the following day; that he took passage on a passenger train for F., but passed by F. to T., and while returning the next day by the same train towards F., to take charge of the gravel train, was injured by the carelessness of the servants on the passenger train. There was held to be nothing in the record tending to show that even his passing on to T. was inconsistent with the relation the plaintiff sustained as employee. The privilege of necessary visits to his family or home, in the immediate vicinity, when not interfering with his duties to his employers, might or might not have been expressed in the contract; or it might have been implied, or conceded on the part of the company to its employees. And even if the plaintiff had passed on to T. in disobedience of orders and without the knowledge or consent of his employer, the duty was still incumbent on him as an employee to present himself at F. on the day appointed, and to that end take passage on the train in which he was injured.

Still more explicit is the language of the court in *Lick* v. *New York C. & H. R. R. Co.* (1884) 95 N. Y. 267, 47 Am. Rep. 36. In that case, by an arrangement made between the employees of whom the plaintiff's intestate was one, and the defendant company, they were to be taken from Rochester to Buffalo every Monday morning, and brought back every Saturday evening, after finishing the week's work. They traveled in a passenger car called a shop car, in which other persons who paid fares were permitted to ride. No fare was required of the men thus employed and transported, but by agreement a deduction was made from their wages, at an amount fixed per hour, being the same as when at work, for the time they were upon the train, their wages beginning when they reached the shops at Buffalo, and ending when they left them. It was held that no action could be maintained for the death of the plaintiff's intestate, caused by the collision of his own train with another. The court said: "The essence of the contract was that the deceased should work for the defendant as foreman of the tin shop, and in consideration thereof it should pay him a price fixed per hour, and should transport him from his residence to the place where the work was to be done, and back again, upon its railroad, without charge. At the time of the accident the deceased was in the shop car of the defendant, on his way to the place where he was to perform services. As his transportation was a part of the contract, he was there by virtue thereof as an employee. His services had then commenced under the contract; he paid no fare as an ordinary passenger would have done, but was being transported under the provisions of the contract. Under these circumstances the deceased was, at the time of the accident, in the car under the terms of the contract made for the rendition of his services, and not as a passenger. It was essential that he should be in the car at the time and place of the accident to enable him to discharge the duties of service for which he had entered. Further than this he would not have been required at the time, and his traveling on this occasion was in the capacity of an employee, and not as a passenger. If two separate contracts had been intended to have been made, one for the services of the deceased and the other for his transportation, it is fair to assume that the amount allowed for his wages would

the exercise of a mere permissive privilege connected with his contract."

have been increased sufficiently to pay his fare as a passenger. Clearly, such could not have been the intention, as the contract made was a single one, which related only to the services of the deceased and the compensation he was to receive for the same. It was part of this contract of service that he was to be carried to and from the place of his work every week on the defendant's railroad, and on a train which was usually provided for that purpose. The right to go and return being inseparable from the contract to do the work, it is not obvious that any valid ground exists for claiming that the deceased was a passenger and paid his own fare. . . . As to the position that, because his hours of labor had not commenced at the time of the accident, the deceased was to be regarded as a passenger, it is a complete answer to say that his conveyance to and from his work was incident to his employment, and was part of the contract of service under which he was engaged. This remark will also apply to the position of the respondent's counsel that traveling to the shop where work was to be done was not the beginning of service, but an act done to obtain the service. If it was a part of the contract, then obviously it cannot be said that the deceased gave a portion of his wages as the price of transportation, independent of his contract. He was as much under the control of the defendant when traveling as any other employee who was transported by virtue of a contract with the company for his services, which contract provided for the right to go and come upon the defendant's cars to and from the place where he was required to work. Although he had no particular duty to discharge while traveling, yet the traveling of the deceased was not as a passenger, but as an employee under the contract of service between him and the defendant. . . . If the master's negligence is a matter extraneous to his specific employment, or if the injury be received at a time when the servant is not engaged in his duties, then the servant occupies the position or status of a stranger. But this rule has no application when by the terms of the contract, expressed or implied, it appears that traveling on the cars constitutes a part and portion of the contract of service. In such a case, we think, the person injured must be regarded as a servant or employee, and the company, in whose employment he is at the time engaged, is not responsible for the injury."

" In *Gillshannon* v. *Stony Brook R. Corp.* (1852) 10 Cush. 228, it was urged that the plaintiff was not in the employment of the defendants at the time the injury was received, or that he might properly be considered as a passenger, and the defendants, as respects him, were carriers for hire. But the court said: "In no view of the case can this action be maintained. If the plaintiff was, by the contract of service, to be carried by the defendants to the place for his labor, then the injury was received while engaged in the service for which he was employed, and so falls within the ordinary cases of servants sustaining an injury from the negligence of other servants. If it be not properly inferable from the evidence that the contract between the parties actually embraced this transportation to the place of labor, it leaves the case to stand as a permissive privilege granted to the plaintiff, of which he availed himself, to facilitate his labors and service, and is equally connected with it and the relation of master and servant, and therefore furnishes no ground for maintaining this action."

Compare the ruling that, where an employee of a railroad company, after his day's work was done, took gratuitous passage on a freight train from the place of his work to a point near his home, and while riding on said train received injuries resulting in his death, the gratuitous carriage of such employee was a privilege incidental to his contract of service, and accorded to him merely by reason of that contract, and did not make him a passenger. *Iommone* v. *New York, N. H. & H. R. Co.* (1899) 21 R. I. 152, 46 L. R. A. 730, 79 Am. St. Rep. 812, 44 Atl. 592.

The conception of the transportation being a privilege conferred for the purpose of facilitating the work was also adopted in *Wright* v. *Northampton & H. R. Co.* (1898) 122 N. C. 852, 29 S. E. 100.

The theory of a permissive privilege incidental to the contract has received what is, to say the least, an extreme application in *Huggins* v. *Hannibal & St*

A simple and intelligible consideration upon which this theory of the situation may be justified is that, in most instances, the work would be seriously retarded, or even impossible of performance, unless the train was used as a means of transportation. The train becomes, from this standpoint, one of the instrumentalities furnished for the more efficient performance of his duties, and in using it he is carrying out his contract just as clearly as when he is using any other piece of machinery for the same purpose.[19]

R. R. Co. (1863) 36 Mo. 418, where recovery was denied in the case of a servant who had been off duty for some days, who was traveling on a private errand, and who was not immediately engaged in the business of the company. It was held that, when proof was furnished that he had previously been hired as a brakeman, was still on the pay roll, and had not been paid off at the time he was killed, these circumstances became quite immaterial. The court said: "The conductor, knowing him only as an employee, was not bound to inquire into his particular errand; and though informed by a casual conversation with him, in the baggage car, that he was looking for some temporary employment, so as not to lose time, he might still be justified in treating him as an employee who had the privilege of free passage on the trains as such. Under such circumstances, it was his business, if he claimed to be a passenger, to engage or take a seat in a passenger coach as such, or, at least, in some way to make it known to the conductor that he claimed to be traveling in the character of a passenger. . . . On the morning of the accident, he signaled the train to stop and take him up, as it passed where he was; he took his place in the baggage car among other employees; he appears to have treated himself as an employee; and he was received by the conductor as an employee who was passing from one point to another on the road, in the usual manner. He engaged no passage, took no seat in any passenger car, paid no fare, and evidently did not expect to pay any, and none was exacted from him. He did not claim to be a passenger, nor was he considered otherwise than as an employee by the conductor." This case is an especially strong one, as it was in evidence that the deceased, although hired by the month, was not paid for the days on which he did no work. On the whole, it seems to be of very dubious soundness, and certainly cannot be reconciled with the rulings cited in subsec. *c*, *infra*. The *Doyle Case* (1894) 162 Mass. 66, 25 L. R. A. 157, 44 Am. St. Rep. 335, 37 N. E. 770, there mentioned, may, we think, fairly be construed as qualifying the remarks on the *Gillshannon Case* (1852) 10 Cush. 228. The *Higgins Case* is also opposed to the ruling in *Baltimore & O. R. Co.* v. *State* (1870) 33 Md. 542 (8 625, note 2, *infra*), and in fact seems to have no support except such as it may be deemed to derive from *Kansas P. R. Co.* v. *Salmon* (1873) 11 Kan. 83, where, among the reasons why an engineer going back to his work was held not to be a passenger, the following were enumerated: "He bought no ticket, paid no fare, nor offered to buy any ticket or pay any fare. . . . He did not at any time claim to be a passenger, or act as such. He did not go into a passenger car, nor upon a passenger train, . . . but went into a caboose car attached to a freight train . . . where other servants and employees of the company rode, and from which passengers and all other persons except employees of the company, were [to his knowledge] excluded. . . . He was going from his home to the place of his employment, as was his custom for the purpose of performing the duties of his employment, and rode in the caboose car on a freight train, and paid no fare, according to custom, usage, understanding, and agreement of the parties." In that case, however, the ruling was expressly based on the theory that the plaintiff was traveling "for the purpose of performing the duties of his employment," and, however questionable an inference this may be, considering the evidence, the circumstance thus relied on manifestly differentiates the case from the one in Missouri, which lays no stress upon any such factor, and may be regarded as bringing it into the same category as the New York ruling above referred to.

[19] In *Ryan* v. *Cumberland Valley R.*

Apart from these general grounds for inferring that the master's control is not suspended while the servant is being conveyed, the special circumstances of the case may sometimes point to the same conclusion.[11]

d. Assumption of the risk of the negligence of servants not operating trains.—As the availability of the defense of common employment in cases of the type here under review depends simply upon the answer to the question whether there was any break in the continuity of the relationship of master and servant during the journey, it is obvious that an employee cannot recover, under the circumstances supposed, for an injury which was caused by the negligence of any

Co. (1854) 23 Pa. 384, we find the court reasoning thus: "The nature of the case requires the admission that it was the understanding of the parties that the hands were to ride on the gravel train to and from their work, and at their work, and the plaintiff is entitled to use this fact as a part of his case. He cannot, however, use it as presenting the whole of the relation between him and the defendants. He was not a mere passenger on the defendants' cars; because his travel upon them was really an incident of a different relation, that of a servant; and this is the character in which we must regard him here. He was no more a passenger than is the coachman, or wagoner, or carter, who is in the employment of another. He was simply a servant, with the privilege of riding, as part of his business, in the gravel train, which was one of the instruments of his work. He could not and does not sue on a contract as a passenger, for that was not his relation; but he does sue on his true relation, as a servant injured by the carelessness of his fellow servants."

[11] In *Russell* v. *Hudson River R. Co.* (1858) 17 N. Y. 134, Reversing (1855) 5 Duer. 39, where by an arrangement between the plaintiff and the defendants he was to be taken home to the city upon the gravel train at night, it was urged that his day's work was completed when the last load of gravel was deposited; that he was under no further obligation to do anything for the company; that carrying him home was a service to be performed by the company, in consideration of the labor previously done, and constituted a part of his wages; and that it was entirely optional with him to avail himself of this service or not. This contention did not prevail, the court saying: "It is not, I think, entirely clear, that the defendants would not have had a right, under their agreement with the plaintiff, to insist upon his returning to the city at night. The gravel train could not be properly managed by the engineer alone. Men were required to act as brakemen in case of accident. It appears that some of the same men who worked in the gravel pit also manned the brakes. A portion of the hands employed lived in the city, and the defendants may have relied upon them to work the brakes, in case of necessity, upon the return of the train, and may have taken this into consideration in agreeing to bring them home at night. But, conceding that the plaintiff was not bound to return even if the defendants insisted upon it, it does not follow that while actually returning to the city with the train he was not the servant of the company. If he was a mere passenger he was not bound to do anything to facilitate the return of the train. If an emergency arose requiring the use of the brakes, he might refuse to raise his hand. If an obstruction was met with upon the track, he might fold his arms until the company removed it; and what he might do in this respect, every other hand returning to the city under similar circumstances might also do. Such could not, I think, have been the true relation between the parties. The plaintiff was employed by the defendants as a day laborer. His was to be taken up at the city where he lived, in the morning, and set down there at night; and he should, I think, be regarded as having been, during the entire interval, the servant of the company, and bound as such to render aid, if necessary, in promoting the passage of the train both to and from the city. This is decisive of the case."

fellow employee, not a trainhand, for whose defaults the master would not have been responsible if the injured person had, at the time of the accident, been actively engaged in the performance of his duties.[12]

c. When servants traveling on their employers' vehicles are deemed to be passengers.—Both on principle and authority, it is clear that the defense of common employment is not available to the master where the injured person was traveling entirely for his own purposes, and the right of the master to exact the performance of services was not merely dormant, but wholly suspended.[31]

[12] In *Moss* v. *Johnson* (1859) 22 Ill. 633, it was held that no ground of action was shown by a complaint alleging that a carpenter, while being conveyed to his work on a construction train, was injured owing to the misjoinder of two rails. It should be observed, however, with regard to the facts in this case, that none of the qualifications of the doctrine of coservice arising out of the theory of nonassignable duties are noticed, or were, so far as can be seen, present to the mind of the court; and the ruling in the form in which it was made can scarcely be correct in view of the later decisions, and is certainly not in harmony with the present doctrine in Illinois itself. But, setting aside this point, the case is manifestly one which takes for granted the rule stated in the text.

[13] In *State use of Abell* v. *Western Maryland R. Co.* (1881) 63 Md. 433, a brakeman hired from day to day, and not paid for Sunday unless he actually worked, who was killed on Sunday, by the negligence of the trainmen, while traveling on a conductor's pass to visit his family, with the permission of the company, was held entitled to recover. He was declared not to be discharging any part of his contract, having been expressly released from the contract of service for the time being.

In *Washburn* v. *Nashville & C. R. Co.* (1859) 3 Head, 638, 75 Am. Dec. 784, an engineer absent from duty without leave, and traveling on another train with the permission of the conductor, was allowed to recover. See, however, *Higgins* v. *Hannibal & St. J. R. Co.* (1865) 36 Mo. 418, note 9, *supra*.

A railroad employee having a monthly ticket given him, which is good for more rides than are necessary in attending to his work, with the express privilege of using them for his own private interest or pleasure, is not, when passing over the road entirely for his own business or pleasure, "in the employment" of the company, within Mass. Pub. Stat. chap. 112, § 212, creating a liability for injury to a passenger. *Doyle* v. *Fitchburg R. Co.* (1891) 162 Mass. 66, 25 L. R. A. 157, 44 Am. St. Rep. 335, 37 N. E. 770 (collision occurred through the negligence of the engineer). The court pointed out that such a ticket is not mere gratuity, but furnishes part of the consideration by which he was induced to enter the company's service, and said: "A person may at one time be an employee when passing over a railroad, and at another time, in passing over the same road, be a passenger, though continuing all the while, in a popular sense, to be in the employment of the railroad company." "The defendant was not transporting him to or from the place of his daily labor pursuant to the arrangement which existed between them. It had no control or authority over him. He was not traveling on any service for it. His time was his own, and the defendant was not paying him for it, and he could use it as he saw fit, and he was passing over the road entirely for his own business or pleasure. So long as he was working from day to day for the defendant it might be said, in a popular sense, that he was in its employment. But we do not think that is the sense in which the words are used in the statute." On the second appeal, the court reiterated its opinions that the ticket was not a gratuity. It was conceded by counsel that the plaintiff was a passenger. (1896) 166 Mass. 492, 33 L. R. A. 844, 55 Am. St. Rep. 417, 44 N. E. 611. This decision was lately followed in *Dickson* v. *West End Street R. Co.* (1901) 177 Mass. 365, 52 L. R. A. 326, 59 N. E. 60, where an action was held

There is one Pennsylvania decision holding that a mechanic employed by a railway company to work upon the road at a distance from his home, who is, by agreement, carried to and fro in the trains of his employers without paying any fare, the understanding being that this transportation is a part of his wages, may recover if he suffers injury, while on the road, from the negligence of a fellow servant. The differentiating factors relied on by the court were that the deduction from his wages made him a paying passenger; that his duties had been completed before he boarded the train; and that he was not carried merely for the convenience of his employers and

to be maintainable by a motorman who, while going home to his dinner, was injured by the negligence of the motorman of the car on which he was traveling; such use of the car being permissible under a rule of the defendant company, which provided that employees might ride on the cars at any time free of charge. Discussing the position of the plaintiff, the court said: "At the time of the accident he did not stand in the relation of a servant to the defendant. His time was his own, and he owed the defendant no duties until the time arrived for resuming his work. It was no part of his duty to the defendant, as a servant, to take the car on which he was riding, and go to a particular place for his dinner. He might go where he pleased and when he pleased, during the interval before coming back to his work. This case is different in this particular from cases in which the plaintiff was riding in the line of his duty in the course of his employment. . . . His rights were the same as if, after finishing his day's service, he had taken a car in the evening to visit a friend, or to do any business of his own. The fact that he had been in the defendant's service during the day would not make him a fellow servant with the motorman while riding in the evening under the rule, any more than if he had been a policeman or a newsdealer."

It has been held that a railroad employee working upon a bridge is a passenger while riding on a railroad train to his home after his day's work is done, where his contract entitles him to free transportation, and he is not under any obligation to ride, or engaged in any service for the company while so riding. *McNulty* v. *Pennsylvania R. Co.* (1897) 182 Pa. 479, 38 L. R. A. 376, 61 Am. St Rep. 721, 38 Atl. 521.

Where a night watchman and ticket taker was being carried, according to custom, to his regular place of work without payment of fare, it was held that, as he was not on the train in the line of his duty, he was a passenger, and that, on proof of injuries received while he was being so carried, negligence would be inferred from the collision which occasioned them. *Chattanooga Rapid Transit Co.* v. *Lemmle* (1900) 105 Tenn. 460, 51 L. R. A. 886, 58 S. W. 861.

In Washington it has been decided, after an elaborate review of the authorities, that a man employed to lay track for a street car company, with transportation to and from work as part consideration, and who has no duties to perform in connection with the operation of the car on which he rides, and whose contract does not require him to ride on any particular car or on any car, is not a fellow servant of the employees operating the car at the time of an injury received by him while so riding. *Peterson* v. *Seattle Traction Co.* (1900) 23 Wash. 615, 53 L. R. A. 586, 63 Pac. 539 (1901) 23 Wash. 613, 53 L. R. A. 596, 65 Pac. 513. The rationale of this ruling was that such an employee ceases to be in the employ of the company after his day's work is concluded, and that he is neither under the control of the company's agents nor required to perform any services. On rehearing (1901) 23 Wash. 613, 53 L. R. A. 596, 65 Pac. 513, the court modified this judgment to the extent of holding that, as defendant alleged that plaintiff was not a passenger, but was riding on a free pass ticket, which contained a condition that plaintiff should assume all risk while using it, and also denied that the ticket was furnished plaintiff as a part of his compensation, the exclusion of testimony that the ticket contained such a condition and that plaintiff signed it was er-

without any contract of carriage.[14] This ruling embodies, as the present writer ventures to think, a doctrine which is more in harmony with the common-law conception of the effects of the existence or absence of a specific consideration for the transportation than a New York case in which substantially the same facts were presented, and in which the Pennsylvania doctrine was expressly disapproved.[15] The hypothesis that a servant who submits to a reduction of his wages in consideration of being carried acquires no additional rights, as compared with a servant whose right to be carried cannot be put higher than a mere "permissive privilege" (see subsec. *b*, *supra*), seems to be quite anomalous. Whether in any particular instance a special bargain has been made which exempts the servant from the operation of the doctrine of common employment must be determined with reference to the terms of the contract.[16]

The doctrine which declares that a railway company owes a higher degree of care to its passengers than to its employees inures to the benefit of a servant who is traveling on a train without any reference to the performance of his contract.[17]

Whether a servant who is shown by the evidence not to have been

roneous. It was laid down that, if a servant's transportation constitutes a portion of the consideration for his services, he becomes a passenger for hire, just the same as anybody else who parts with anything of value for transportation; while, if the consideration for his services is independent of his transportation, and his transportation is a mere gratuity bestowed upon him by his employer, he stands like anyone else traveling on a free pass so conditioned, notwithstanding his employer would not probably have bestowed the transportation if the recipient had not been in his employ.

In a case where deceased was a section foreman, but was injured after working hours while on a crossing, it was declared that the company's duty towards him was the same as towards a stranger, and that for this reason it could not avail itself of the rule that an employer is not liable for an injury received by an employee through the misconduct of a fellow servant. *Sullivan* v. *New York, N. H. & H. R. Co.* (1900) 73 Conn. 203, 47 Atl. 131 (no warning signal given when a train was approaching).

[14] *O'Donnell* v. *Allegheny Valley R. Co.* (1868) 59 Pa. 239, 98 Am. Dec. 336.

[15] *Vick* v. *New York C. & H. R. R. Co.* (1884) 95 N. Y. 267, 47 Am. Rep. 36 (see note 8, *supra*).

[16] A statement of claim showing that the plaintiff was injured while engaged in traveling on a train to take supplies to certain places is none the less insufficient because it avers that he was received on the train "to be safely carried on it." This does not necessarily mean that the company had made a special bargain with him which would give him the rights of an ordinary passenger. *Ray* v. *Ontario & Q. R. Co.* (1885) 10 Ont. Rep. 70 (servant's action held to be barred by the defense of common employment).

[17] A station agent riding to his home on a passenger train of his employer, by permission of the conductor, five hours after his labors of the day had ceased, was a passenger, and did not take the risks attending the operation of the train with the coach, instead of the engine, in front. *Louisville & N. R. Co.* v. *Scott* (1900) 22 Ky. L. Rep. 30, 56 L. R. A. 381, 56 S. W. 674. The court remarked that "his services were distinct from that of operating the train," and rejected the doctrine contended for that "where an employee in another department of the service is permitted to ride on the train of his employer from his home to the place of his employment, or

in the course of his employment when the injury was received, but who was traveling on an employee's pass which declared him to have waived his right of action for the negligence of the company's agents, is entitled to recover, will depend upon the doctrine held by the court as to the binding character of such stipulations.[18]

For other cases bearing upon the duty owed by employers to servants traveling as passengers, see § 626, notes 4, 5, *infra*.

f. Master's obligations inure to benefit of servant traveling in course of his employment.— In a few cases the doctrine that the obligations of a master to servants traveling in the line of their duty on vehicles owned by him are not different either in kind or degree from the obligations to which he is subject with regard to servants who are actively engaged in work has been asserted for the servant's advantage.[19] But in the great majority of instances, that doctrine is relied upon for the purpose of establishing the nonliability of the defendant, either on the ground that he was entitled to avail himself of the defense of a contractual assumption of the risks, or on the ground that he was not required to exercise for the protection of the injured person that high degree of care which a carrier is bound to exercise in conveying passengers. See the preceding subsections, and (as to the latter point) § 17, *ante*.

625. Servants in various other situations.—Some of the cases under

on his return from his employment to his home, the status of passenger does not exist, but he is regarded as being an employee, taking such risks as employees in charge of the train would take."

[18] See, generally, Shearm. & Redf. Neg. § 505.

In a recent case decided by one of the Federal courts of appeals the plaintiff, being in the employment of defendant, a railroad company, changed to a different employment, still with defendant, and, in connection with the change, stipulated for free transportation to Boston from the city where he was to be employed, not in connection with his work, but for his own convenience. On one of these trips, made for his own purposes, and while not at work or going to or from his work, he was injured by the derailing of the car in which he was riding. It was held that he was in the position of a passenger at the time when he was injured, having given for his passage a valuable consideration, and that, under the circumstances, public policy did not permit the enforcement of the stipulations indorsed on the pass, although he freely assented to them. *Whitney* v. *New York, N. H. & H. R. Co.* (1900) 50 L. R. A. 615, 43 C. C. A. 19, 102 Fed. 850.

See also *Peterson* v. *Seattle Traction Co.* (1900) 23 Wash. 615, 53 L. R. A. 586, 63 Pac. 539, on rehearing (1901) 23 Wash. 613, 53 L. R. A. 596, 65 Pac. 543, the effect of which is stated in note 13, *supra*.

[19] That the duty of the defendant company to furnish a reasonably safe plant inured to the benefit of a laborer who was injured while traveling on a street car from the place where his work was done to his home was taken for granted in *Pendergast* v. *Union R. Co.* (1896) 10 App. Div. 207, 41 N. Y. Supp. 927.

The mere fact that a railroad employee, under a mistake for which he is not responsible, leaves his place of work before the arrival of the last train of cars which it is his duty to unload, does not relieve the company from responsibility for his death while returning at the request of the conductor of a train which he is to unload, on the ground that he is not in the employ of the company. *Rombough* v. *Balch* (1900) 27 Ont. App. Rep. 32.

this head have turned upon the question whether the defendant was or was not subject to the obligations of a master with regard to the injured person. The cases do not, like those cited in the preceding section, embody any secondary principles which are of general application, but represent simply the conclusion of the courts that, under the evidence introduced, the relation of master and servant did or did not exist at the time when the injury was received.[1]

[1] (a) *Liability affirmed.* — Although asleep upon a side track, in a car provided for that purpose, the foreman of a bridge gang, who is liable to be called at any moment to go out with his gang upon the road, is on duty so far as to be at the time a fellow servant with the men operating a freight train, whose negligence causes his injury. *St. Louis, A. & T. R. Co.* v. *Welch* (1888) 72 Tex. 298, 2 L. R. A. 839, 10 S. W. 529.

A railroad employee working by the day in a bridge gang, and living in a car provided by the company, may recover for an injury which he sustained in a collision after his day's work was performed, and while he was in his car engaged with his own affairs, as in such case his employment does not terminate with his day's labor. *International & G. N. R. Co.* v. *Ryon* (1891) 82 Tex. 505, 18 S. W. 219, following the last cited case.

An employee upon a railroad construction train is not out of the line of his duty simply because he chooses to remain upon the car during the noon hour. *Evansville & R. R. Co.* v. *Maddux* (1893) 134 Ind. 571, 33 N. E. 345, Rehearing Denied in (1893) 134 Ind. 585, 34 N. E. 511 (demurrer properly sustained to an answer relying on the fact that the accident happened at that time).

Where a workman in a grain elevator stayed on the premises during the time allowed him for his dinner, and within that time was injured while executing an order to assist in opening a ventilator which was defective, it was held that his employer was liable. *Broderick* v. *Detroit Union R. Station & Depot Co.* (1885) 56 Mich. 261, 56 Am. Rep. 382, 22 N. W. 802. The court said: "It does not follow that, because plaintiff was given an intermission from work of an hour and a half for dinner, he ceased during that time to be the servant of defendant. If during that time he had in his care or custody any of his master's property requiring his attention and oversight, or if called upon to perform work by the master or by one having authority to command his service, the relation would still exist, arising in the one case from the duty to properly care for the property of the master, and in the other from the duty to perform the service."

The relation of master and servant between a railroad company and one of its section hands continues during a period of thirty minutes allowed to such employee in which to eat his dinner, where, under the circumstances attending the employment, that time is too short to allow him to leave the premises for that purpose. The eating of the meal is regarded as an incident of the service. *Cleveland, C. C. & St. L. R. Co.* v. *Martin* (1895) 13 Ind. App. 485, 41 N. E. 1051 (boiler exploded).

(The two last mentioned cases are referred to under another aspect in § 626, note 3, *post*.)

A boy who is sent by his master to warm himself at a stove does not cease to be in his service, and is as much entitled, under these circumstances, to hold the master liable for any injury which may result from his not having been instructed in regard to the dangers incident to the position as if he had been actually at work in the neighborhood of the stove. *Wallace* v. *Standard Oil Co.* (1895) 66 Fed. 260 (where the boy's clothes were saturated with inflammable oils and caught fire).

An employee who, while engaged outside a sugar factory, very early on a cold morning, receives permission to go inside to warm himself, and falls into a cistern of boiling water when attempting to enter one of the doors, is not, as a matter of law, out of the line of his employment. *Parkinson Sugar Co.* v. *Riley* (1893) 50 Kan. 401, 34 Am. St. Rep. 123, 31 Pac. 1090.

In *Powers* v. *Calcasieu Sugar Co.* (1896) 48 La. Ann. 483, 19 So. 455, recovery was allowed on the grounds explained in the following extract from the opinion: "We have given attention to the insistence that when the accident

occurred there was no contract relation between plaintiff and defendant. He was being shown the work to be done; hence it is argued he was entitled to no protection against the danger he encountered. He was in charge of defendant's manager at the time, to be shown the work he was to perform. It seems to us he was within the shelter of the responsibility of the master or proprietor to those lawfully on his premises in his service. If not actually in that service, the plaintiff, at the time of the accident was, on the invitation of the master, being conducted to that portion of the premises where it was proposed to employ him. The case is, we think, with the plaintiff on the issue of responsibility."

A master is not relieved from liability for injuries to a servant in the course of his employment, by the fact that he had directed such servant to quit work at a time before the accident happened. *McElhagott* v. *Randolph* (1891) 61 Conn. 157, 29 Am. St. Rep. 181, 22 Atl. 1094.

In a case where the plaintiff was injured by unfenced machinery, it was held that, although he had finished his day's work, and was changing his clothes, at the time of the accident, preparatory to going home, the relation of master and servant still existed between them. *Holmes* v. *Tholoway* (1900) 107 Wis. 246, 83 N. W. 351.

A servant whose duties are not so exacting as to prevent his leaving the premises occasionally without detriment to the employer, and who is permitted to absent himself in this manner, is deemed to be in the employment as long as he is actually on the premises, and is entitled to recover for any injury which he may there receive, although at the time of the accident he may have started on a journey to a neighboring town to attend to some private business of his own. *Peters* v. *Iron Cliffs Co.* (1889) 78 Mich. 271, 18 Am. St. Rep. 441, 44 N. W. 270 (run over by cars while crossing a track).

The responsibility of a mine owner for the safety of his workmen continues as long as they are in the mine. He is bound to bring them up safely, even though they may have quitted their work while down below; and their right of recovery is not affected by the fact that the jury have found that they had no lawful excuse or proper cause for abandoning the employment. *Bowden* v. *Stewart* (Sess. 2 Macq. H. L. Cas. 30).

(b) *Incidental acts.*—A direction by a section foreman to a section hand to notice the track closely any time he is going over the road, going or coming to or home, and to let him know if anything is wrong, is not an order to go on the track for such a purpose after the end of his day's work at laying rails, on his way home, so as to render the company liable for his death, which occurs at such time. *Baker* v. *Chicago, R. I. & P. R. Co.* (1895) 95 Iowa, 103, 63 N. W. 607 (struck by train).

A servant not working overtime, injured while alighting from his master's wagon by reason of a defect therein, where he has been driven for his own accommodation after hours by a fellow servant, to a point near his house has no claim against his master. *Wood* v. *Weber* (1891) 11 Ill. App. 336 (instruction based on theory that duty as of a master to a servant was owed to plaintiff held erroneous).

A track repairer engaged in repairing the tracks in a freight yard is not entitled to special protection which he might not be entitled to when engaged in other business about the yard, on the ground that his work is not completed until he returns his tools to the tool house, but he is entitled, in going to the tool house from the place where he has been repairing a track, only to the same protection and care on the part of the railroad company as he is entitled to when moving about the yard performing his ordinary daily business. Such an employee, therefore, assumes all the risks created by the frequent passage of trains. *Crowe* v. *New York C. & H. R. R. Co.* (1893) 70 Hun, 37, 23 N. Y. Supp. 1109.

Where, under the rules of the company, servants have no right to claim compensation when disabled by sickness or any other cause, and any allowance they make to them in such case is to be regarded "as a gratuity only," a conductor who, after having had his leg badly crushed in a collision, has been taken to a hotel and placed in charge of a physician, occupies the position of a stranger, not of an employee, and the company is not liable for the defaults of the physician who attends upon him during a subsequent journey which he makes along the line. *Baltimore & O. R. Co.* v. *State* (1874) 41 Md. 268.

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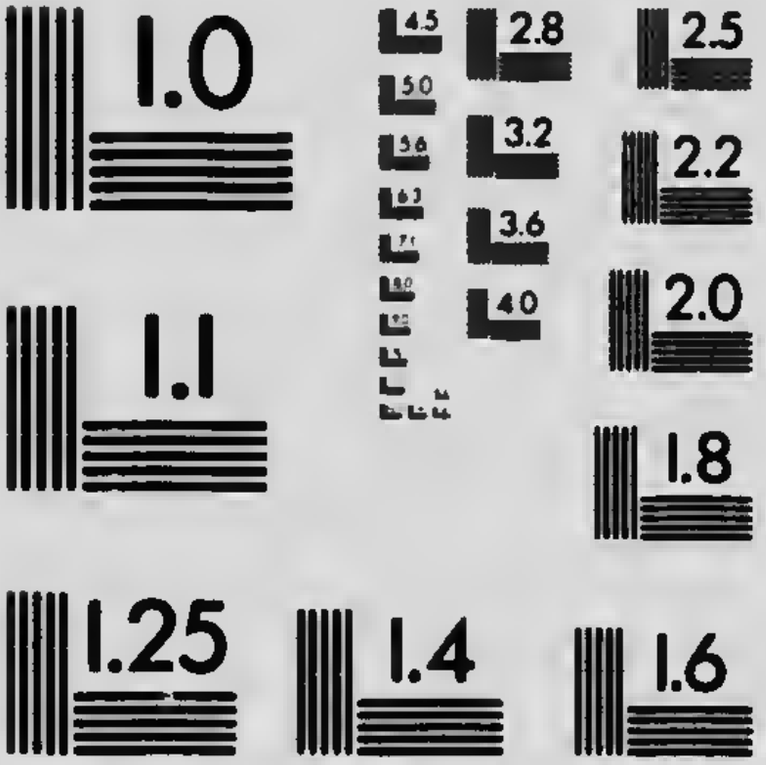

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In other cases the legal consequence of the conclusion drawn as to the existence or nonexistence of the relation was that the defense of common employment was or was not available to the master.[2]

[2](a) *Defense not available.*—A trackman who, after completing his day's work and laying aside his tools, walks to his place of residence along a section of track other than that which is under his own supervision, is not, during that walk, in the service of the company, and may recover if he is run down by a train through the negligence of the men operating it. *Baltimore & O. R. Co.* v. *State* (1870) 33 Md. 542.

A laborer in the carpenter shop of a railway company, while he is walking to or from his work over its tracks, is in its employment in such a sense as to be unable to recover damages for an injury caused by the negligent operation of an engine, except in states where the engineer is deemed to be in a different branch of the service. See *Ryan* v. *Chicago & N. W. R. Co.* (1871) 60 Ill. 171, 14 Am. Rep. 32.

Recovery may be had where the injured person had finished his day's work, and when he was injured by the negligent act of a coemployee was walking along a public street in the immediate vicinity of his master's premises. *Baird* v. *Pettit* (1872) 70 Pa. 477 (where a draftsman in a locomotive factory, who, after the day's work was over, left the building in the dark, and fell over a pile of dirt thrown on the public footwalk by a carpenter in his employer's service, was held to be in the position of a stranger so far as regarded his right of action.

In *Savannah, F. & W. R. Co.* v. *Flannagan* (1889) 82 Ga. 579, 14 Am. St. Rep. 183, 9 S. E. 471, a railway servant who, while walking home along a public thoroughfare close to the track, stepped on to it for a moment to avoid a wagon, and was struck by a train, was held to be in the position of a stranger as regards his rights of action. But the doctrine of common employment was not actually involved here, that defense having been abolished in Georgia as to railway servants. See chapter XXXIX., *post.*

In *Northwestern Union Packet Co.* v. *McCue* (1873) 17 Wall. 508, 21 L. ed. 705, a man standing on a wharf was hired by the mate of a steamer which it was desired to get under way as soon as possible, and which was short of hands, to assist in loading some goods which were near the wharf. He had not been in the service of the boat generally, though he had been occasionally employed in this sort of work. He assisted in loading the goods,—an employment which continued about two hours and a half. He was then told to go to "the office," which was on the boat, and get paid. He did so, and then set off to go ashore. While crossing the gang plank in going ashore, the boat hands pulled the plank recklessly in and from under his feet, and he was thrown against the dock, injured, and died from the injuries. In an action by his administratrix for the injuries done to him, the declaration alleging that he had been paid and discharged, and that after this, and when he was no longer in any way a servant of the owners of the boat, he was injured, the defense set up was that he had remained in the service of the boat till he got completely ashore, and that injuries having been done to him by his fellow servants, the owners of the boat (the common master of all the servants) were not liable. It was held not erroneous to leave it to the jury to say whether the relation of master and servant had or had not ceased at the time of the accident. Disenssing the contention that it was the province of the court, and not the jury, to determine the point of time at which the service was ended, the court said: "One of the theories on which the suit was prosecuted was that McCue's special employment had ceased when he was injured. This theory was resisted by the defense, and the court, not taking upon itself to determine as an absolute proposition when the employment terminated, left it to the jury to find how the fact was. This ruling, in our opinion, was correct. It was for the jury to say, from the nature of the employment, the manner of engaging the hands, the usual mode of transacting such a business, and the other circumstances of the case, whether the service had or had not ceased at the time of the accident. The point was submitted fairly to the jury, with no more comments than the evidence justified. It was argued by the plaintiff in error that the employment of necessity terminated on the land, because it was there McCue was engaged to do the work, and he had the right to be provided with the proper means of

625a. Temporary intermission of relation of master and servant never produced by the servant's neglect of his duties.—As a servant cannot take advantage of his own wrong, he cannot recover on the theory

reaching it from the boat. On the contrary, the defendant in error contended the special service ceased when McCue had finished his work and was paid off; that after this he was not subject to the control or direction of the officers of the boat, but at liberty to stay on the boat or go off as he pleased. The jury took this latter view of the relation of the parties, and we cannot say that they did not decide correctly. At any rate, their decision on a question of fact is not subject to review in this court. The defense at the best was a narrow one, and in our opinion more technical than just."

A person on the list of "spare men" who reports every morning at his employer's office, and is then at liberty to leave at once if there is no opening for him, is not a coservant of the regular employees during the time he remains on the premises on the chance of being set to work. *Conlon* v. *Glasgow* (1899) 1 Sc. Sess. Cas. 5th series, 869.

A man employed as a laborer by the day in a section gang is not in the employment of the company on any days except those on which he is actually at work. *Cincinnati, N. O. & T. P. R. Co.* v. *Conley* (1892) 14 Ky. L. Rep. 568, 20 S. W. 816 (run over by cars running on down grade without a light).

(b) *Defense available.*—Several cases proceed upon the theory that a railway servant, while he is walking along or across the tracks of his employers to reach or return from his place of work, is in the service of the company in such a sense as to be unable to recover for injuries received through the negligence of any fellow servants who would be held to be in common employment with him if he were actively engaged in his duties. This doctrine is put upon grounds quite analogous to those which are adduced to support the similar doctrine which has been discussed in the preceding section. The privilege of passage over the master's premises is said to be "an essential part and ingredient of the plaintiff's contract of employment, and incidental to it, as much as any means and facilities for his labor," furnished at the place of work itself. *Ewald* v. *Chicago & N. W. R. Co.* (1888) 70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 12. There an engine wiper who was on his way to his work, and while crossing the track on a path used by the employees of the company, was jammed between cars which had been left apart for the employees to pass between, was held to be, at the time of the injury, in the employ of defendant and a fellow servant of the trainmen in charge of the cars. The court said: "As to what may be the law when an employee of a railroad company is not actually employed, or at any intervals of actual labor, or going to or from his labor his own way and independently of the company, or under other circumstances, is immaterial to this case. The authorities may be in great conflict on that question; but we are not aware that they are in conflict on the question presented by the facts of this case. Here we have a private pathway over the grounds of the company, granted and allowed to the plaintiff and other employees of the company, who worked in the roundhouse, by usage, custom, and consent, for their ingress and egress to and from their work, kept open across the track of the road, and which had been worn and used by himself and others for long time prior to the injury; and that in order to reach the roundhouse it was necessary for him to go upon said pathway, and to cross the track of the company at that place. It was the means, and only means, of entrance and exit to and from their work, furnished by the company, and the plaintiff and others had a right to its free and uninterrupted use, as they always had; and it was because they were employees of the company in the roundhouse that the had such right and privilege. . . . Our present concern is, Was he, when injured, an employee of the company? The peculiar facts of this case which make him such appear to involve precisely the same principle as that class of cases where the plaintiff was being carried on his way from and to his place of labor by the railroad company, by consent, custom, or contract, and was injured by the negligence of other employees of the company."

In *Boldt* v. *New York C. R. Co.* (1858) 18 N. Y. 432 (trackman injured by trainmen), the court said: "He was in the defendant's employment and doing that which was essential to en-

that by reason of the fact that he was neglecting [illegible] duties, and was therefore not in the line of his employment at the [illegible] moment of the accident, he was not subject to the operation of the doctrine of common employment.[1]

B. Liability as dependent upon the question whether the act from which the injury resulted was or was not authorized.

626. Presence of servant at the place where the accident occurred.— *a. Circumstances under which recovery has been allowed.*— If at the time of the accident the injured servant was actively engaged in the performance of the functions assigned to him, the mere fact that he had no connection with the defective instrumentality which caused the insecurity of the place of work will, of course, not prevent him from maintaining an action.[1] Numerous cases in which this principle is taken for

abling him to discharge his particular duty, *viz.*, going to the spot where it was to be performed; and he was, moreover, going on the track where, except as the servant of the company, he had no right to be. He was there as the employee of the company, and because he was such an employee."

In *Olson* v. *Andrews* (1897) 168 Mass. 261, 47 N. E. 90, a servant using a bridge under repair, for the purpose of getting back to his work from his boarding house, was held to be a fellow servant with the engineer in charge of a derrick car used in the work of repairing.

A day laborer assumed the risks of the negligence of a fellow servant, although when called upon to do the work in which he was injured he had completed his day's stint, where there was no agreement excusing him from continuing work during the entire number of hours called for in his contract. *Kehoe* v. *Allen* (1892) 92 Mich. 464, 31 Am. St. Rep. 608, 52 N. W. 740.

The fact that a servant was working overtime will not exempt him from the operation of the doctrine of coservice, provided he was in the line of his employment. *Ibid.*

A servant cannot recover in a case where, although his duty did not call him to his master's premises at the time, he had been in the habit of going occasionally to see what he would have to do in the course of the ensuing night, and the evidence was that he was injured by the fellow servant's negligence while proceeding to the office in connection with a summons from the manager. *Lovell* v. *Howell* (1876) L. R. 1 C. P. Div. 161, 45 L. J. C. P. N. S. 387, 34 L. T. N. S. 183, 24 Week. Rep. 672.

[1] In *Evans* v. *Atlantic & P. R. Co.* (1876) 62 Mo. 49, it was contended that the plaintiff, who, as station agent, was especially entrusted with the duty of attending to freight trains, and of seeing that they were loaded and unloaded and properly secured on the side track or switches, was entitled, at the time when he was run over by a locomotive, to be regarded as a member of the general public, and to recover on the ground that the bell had not been rung, as required by statute. The court declared this proposition to be too monstrous a proposition to be conceded, and that the evidence showed that he was not merely the fellow servants of the train hands, but had entire control over them.

The general principle that one person cannot by his own wrongful act acquire a right of action against another is recognized, in another connection, in Baron Bramwell's argument in the *Dry Case* (1857) 1 Hurlst. & N. 773, 26 L. J. Exch. N. S. 171, 3 Jur. N. S. 595, as quoted in § 631, note 5, *infra*.

[1] *Egan* v. *Dry Dock, E. B. & B. R. Co.*

granted are cited in the first volume of this treatise. But it is not necessary to show, as a condition precedent to recovery, that he was on duty when the injury was received. In so far as his rights are dependent upon the position which he was occupying at the time of the event complained of, a good cause of action is made out as soon as it is proved that, although he may not have been actively engaged in the performance of any duty, the position in question was one which he was authorized to occupy.[2] This rule inures to the servant's

(1896) 12 App. Div. 556, 42 N. Y. Supp. 188 (boiler exploded and injured a man whose duty it was to hitch up and unhitch teams). The court said: "The boiler was neither an appliance furnished by the defendant for the plaintiff to use in his work, nor was it a tool in which he had any interest whatever. As to him, the obligation the law imposed upon the defendant with regard to this boiler arose out of its duty to furnish him a safe place in which to do his work. His employment kept him in the building in which the boiler was situated, and, while it did not call upon him to work at the boiler or do any work which was connected with it, he was still required to be so near the place where the boiler was that, if the boiler was not safe to use, it necessarily was dangerous for him to be in the place where his duty called him to be. As the defendant saw fit to keep the boiler so near the stables that an explosion caused by a defect in it was liable to injure the plaintiff, as well as any other person whose duty called him to be within the limits liable to be affected by such an explosion, it was clearly within the place where the plaintiff was called upon to work, and its presence there imposed upon the defendant the duty of taking care that it was in reasonably safe condition."

To a detective who, with the permission of the proper officials, is conveyed over the road on a hand car, the company owes the obligation of using reasonable care that the car is in a condition fit for the purposes of carriage, and also of seeing to it that the car is used with due care by those intrusted with its management. This obligation is owed, whether the relation between the company and the detective is that of master and servant, or carrier and passenger. *Pool* v. *Chicago, M. & St. P. R. Co.* (1881) 53 Wis. 657, 11 N. W. 15.

A verdict for the defendant should not be directed in any case where there is evidence which fairly tends to show that a servant was traveling as a passenger on a railway car, under a license given by an agent of the company who had sufficient authority in the premises. *Bryant* v. *Chicago, St. P. M. & O. R. Co.* (1895) 4 C. C. A. 146, 12 U. S. App. 115, 53 Fed. 997, Reversing *Davis* v. *Chicago, St. P. M. & O. R. Co.* (1891) 45 Fed. 543. (Bryant was the administrator of Davis, who died while the appeal was pending.) See further, as to this case, this note, subsec. *b, infra*.

Where a conductor allows a servant to remain on a freight train which is allowed to carry passengers, after discovering that he is on the train, he becomes entitled to the rights of a passenger, although he may, in the first instance, have boarded the train without leave. *Sherman* v. *Hannibal & St. J. R. Co.* (1880) 72 Mo. 62, 37 Am. Rep. 423, citing *Wilton* v. *Middlesex R. Co.* (1871) 107 Mass. 108, 9 Am. Rep. 11.

A railroad company is liable for the death of an employee killed while crossing a trestle which he was tacitly licensed to cross, where those in charge of the engine failed to look out for his presence and guard against colliding with him,—especially where they failed to use reasonable care after discovering his presence, or were hindered from seeing him by steam from a defective steam chest upon the engine. *Hammill* v. *Louisville & N. R. Co.* (1892) 93 Ky. 343, 20 S. W. 263.

A servant who ordinarily has supervision of cars only when they are on the side track, but who, with the knowledge of the conductor and the station agent, goes on the main track to finish sealing a car on the conductor's demand of the station agent, is not a trespasser. *De Walt* v. *Houston, E. & W. T. R. Co.* (1900) 22 Tex. Civ. App. 403, 55 S. W. 534.

Where a section hand employed by a railroad company in handling wood

advantage where the matters upon which he was engaged were not immediately connected with the actual performance of the work un

boarded a train about noon to go some distance down the track to dinner which was the usual mode of going to dinner, adopted at the instance and request of the foreman in charge, in order to get back to their work in proper time, he was not in the position of a trespasser, and the company was bound to use ordinary care for his safety. *Boss* v. *Northern P. R. Co.* (1888) 5 Dak. 308, 40 N. W. 590 (struck by switch stand too close to track; error to direct verdict for defendant).

In a jurisdiction where the doctrine of common employment has been abrogated by statute, so far as regards persons engaged in the operation of railways, it has been held that a good cause of action is shown by a complaint which alleges substantially that a member of a bridge gang was injured by the negligent operation of the two hand cars by which, in accordance with an agreement, he and his fellow workmen were being transported from a certain station to the place of their day's labor. *Wallin* v. *Eastern R. Co.* (1901) 83 Minn. 149, 54 L. R. A. 481, 86 N. W. 76.

A requested instruction in an action by a conductor against a railroad company for personal injuries, that if the plaintiff's position on the locomotive contributed to his injury, and he had no business engagements thereon connected with his duty as conductor, the jury shall find for defendant, is properly refused, where the train consisted of the engine and one flat car only, and the plaintiff testified that he was in the cab, which was his usual place when attending to the discharge of his duties with such train, and there is no evidence tending to prove that that was not his proper place. *Geary* v. *Kansas City, O. & S. R. Co.* (1897) 138 Mo. 251, 60 Am. St. Rep. 555, 39 S. W. 774.

A declaration is not demurrable which alleges that the plaintiff was struck by an engine while he was walking across the tracks of the defendant railway company to its roundhouse, where he was employed, which course was necessarily taken to reach the place of his employment, and that such use of the tracks was known to and sanctioned by the defendant, who, through its servants, negligently ran an engine and car upon the plaintiff, injuring him. *Savannah, F. & W. R. Co.* v. *Chaney* (1897) 102 Ga. 814, 30 S. E. 437 (demurrer sustained on first appeal [1897] 101 Ga. 429, 28 S. E. 1001, on the ground that it did not appear that the plaintiff was obliged to walk on the track owing to the necessities of his work, nor that the company sanctioned this practice).

Whether or not the plaintiff, a section hand, injured while walking on the track, was a trespasser, is in each instance a question of fact, and it was erroneous for the court to give instructions framed on the assumption that he was a trespasser. *Kinsman* v. *Chicago & N. W. R. Co.* (1899) 85 Ill. App. 138.

In a case where the plaintiff was injured in an elevator accident, and it was shown that, according to the rules of the building, the elevator stopped running at 12:30 P. M.; that he was injured at about 12; and that it was necessary for the operator to use the elevator in the very work which was being done, and that he had habitually used it for such purposes, the court objected the contention that, when the accident happened, plaintiff and the operator were not acting within the scope of their employment, but were using the elevator without authority and for their own convenience, as being without merit. *Nutzmann* v. *Germania Life Ins. Co.* (1901) 82 Minn. 116, 84 N. W. 730; First Appeal (1900) 78 Minn. 501, 81 N. W. 518.

A chambermaid in a hotel, who with the consent, approval, or direction of the housekeeper or manager, who has power to employ and discharge chambermaids, uses the elevator in passing from one story to another in the performance of her duties, is not a mere volunteer who assumes the risk of the method of transit, unless she knows or has reason to believe that the housekeeper or manager has no right to allow her to use the elevator. *The Oriental* v. *Barclay* (1897) 16 Tex. Civ. App. 193, 41 S. W. 117; *Oriental Investment Co.* v. *Sims* (1897) 17 Tex. Civ. App. 692, 41 S. W. 130.

An instruction that, if one voluntarily went upon an elevator without his duty calling him there, or being directed to go by his employers, for the purpose of assisting another, he could not recover for an injury sustained by the fall of the elevator,—is misleading when it is undisputed that he was acting in the line

dertaken by him, and even where those matters were of a merely personal and private nature.[3]

of his duty. *Union Show Case Co.* v. *Blindauer* (1898) 75 Ill. App. 358. Affirmed in (1898) 175 Ill. 325, 51 N. E. 709.

An employee of an electric light company, killed on the roof of a house by contact with a live wire, was in the discharge of his duty while standing or moving in a space where he could readily answer the calls of his foreman, or render the assistance required by him, although he had taken two or three steps away. *Gremmis* v. *Louisville Electric Light Co.* (1899) 20 Ky. L. Rep. 1293, 49 S. W. 184.

Where a jointer in a stove factory went into the engine house to get oil and a whetstone, and was killed by an explosion of the boiler, between 6 and 6:20 in the morning, and the hours of work began at 6:30, it was held to be for the jury to say whether he had arrived at a reasonable time, the evidence being that he lived about a mile away, and was in the habit of using his time, between his arrival and the starting of the work, in oiling and getting ready the machine on which he worked. The jury was held to have been rightly instructed that the plaintiff would not have been in the line of his duty if he had come an hour or two before his time. *Walbert* v. *Troxler* (1893) 156 Pa. 112, 27 Atl. 65.

Where a master had provided several ways of approach to a building for the use of his servants, an instruction that, unless forbidden to do so, his servants might leave by any one of them which was most convenient, and if, in so doing, a servant was injured by the negligence of the master to keep it in a reasonably safe condition, the master was liable for the injury, was proper. *Rizaka* v. *Victor Mfg. Co.* (1900) 58 S. C. 369, 36 S. E. 700.

An employee who received an injury by falling into an open well dug by the employer on his premises near a tent where employees were boarded and lodged was in the course of his employment, when he was proceeding to a town near by, under direction of his employer, to find lodging. *Indiana Pipe Line & Ref. Co.* v. *Neusbaum* (1899) 21 Ind. App. 361, 52 N. E. 471. The court contrasted the cases in which a servant takes a certain route for his own convenience or pleasure.

A complaint alleging that the plaintiff, a blacksmith's helper, was injured by a piece of sheet iron which tepped over on him when he went into the bin where the scraps of iron were kept, to be used as they might be required, is not demurrable for the reason that there is no averment that the bin was a place provided for the defendant's servants to work in. *Baltimore & O. S. W. R. Co.* v. *Spalding* (1898) 21 Ind. App. 323, 52 N. E. 449.

[3] "The master's duty to furnish the servant a safe place in which to work extends to such portions of the premises as the master knows or ought to know his servants are accustomed to use in the performance of the work for which they are employed." *Edwards* v. *Tilton Mills* (1900) 70 N. H. 574, 50 Atl. 102. Action held maintainable where plaintiff struck his leg against a shipper rod, while walking along a passageway between two machines in a mill, which had for a long time been used, with defendant's assent, by its servants generally, though the injured employee had never before used it.

A brakeman who is sleeping in the caboose of another train before going out with his own train is within the scope of his employment, where he does so by the permission of the trainmaster. *Olson* v. *Minneapolis & St. L. R. Co.* (1899) 76 Minn. 149, 47 L. R. A. 796, 78 N. W. 975.

An employee who has [illegible] mitted the service of a railway [illegible] and who has rightfully entered a [illegible] car on the stopping of the train to which it is attached, is entitled to a reasonable time for the transaction of his business before the train is started, and to a proper warning of the purpose to start the train, to enable him to leave the car in safety. *New York, P. & N. R. Co.* v. *Coalbourn* (1888) 69 Md. 369, 1 L. R. A. 541, 9 Am. St. Rep. 439, 16 Atl. 208.

A workman who stays upon his employer's premises, and eats his dinner, during the period when work is suspended in the middle of the day, is not a trespasser. *Broderick* v. *Detroit Union R. Station & Depot Co.* (1885) 56 Mich. 261, 56 Am. Rep. 382, 22 N. W. 802.

The eating of his midday meal by an employee is not ordinarily an incident of his service, but will become such

there the injury in suit was received while the servant was traveling on a vehicle belonging to his master, and it is shown that he was authorized to travel in this manner, his right to maintain an action is not defeated by the mere fact that he was paying nothing for the privilege. This doctrine is applicable whether the servant was traveling in the course of his employment,[1] or for the purpose of transacting some private affair.[2]

where the master allows so short a time for this purpose that the employee must eat it on or in the immediate vicinity of the place of his work. There is then an implied invitation to remain on the master's premises, and he can recover damages, if injured, owing to the defective condition of the appliances, while he is eating the meal in a building which the employees have been using in pursuance of a long established custom. *Cleveland, C., C. & St. L. R. Co.* v. *Martin* (1895) 13 Ind. App. 485, 41 N. E. 1051.

In the last case it was held that to support a judgment against a railroad company for negligently causing the death of one of its section hands by the explosion of a boiler in one of its pump houses while he was eating his dinner there during the thirty minutes allowed for that purpose, the special findings of the jury must, notwithstanding the time allowed was too short to allow him to leave the company's premises, show that he was, at the time of the accident, in the particular pump house by express or implied invitation of the company.

A person employed in a laundry does not become a mere volunteer without the protection of a statute entitling an employee to recover for injuries arising from a defect in the arrangement of machinery, in standing on a bench to open a window for the purpose of letting steam and hot air escape, so as to prevent her recovery, for her hair being caught by an unguarded revolving horizontal shaft passing through the room near the ceiling and in front of the window. *McCloherty* v. *Gale Mfg. Co.* (1892) 19 Ont. App. Rep. 117.

Where miners were accustomed, with the knowledge and implied consent of the owner, to use the passages or entries in the mine as a place for congregating or passing to and fro during the hours of recreation, damages may be recovered for the death of one of them, which was caused by the negligence of the mine owner in extending along such an entry an electric wire, which is dangerous to the life of those who come in contact therewith, without properly insulating or inclosing the same, or giving notice of the danger to the miners, who would, as he should have seen, be likely to be brought into contact with it. *Thsworth* v. *Methamey* (1900) 51 L. R. A. 389, 44 C. C. A. 481, 104 Fed. 119.

A vessel is liable to a stevedore for injuries from falling through unguarded holes in a deck upon which he went to strip and leave his clothes before going to work in the hold, unless the evidence shows that he wandered to an improper distance from the hatch where he was to work. *The Illinois* (1894) 63 Fed. 161. In the same case it was also held down that the fact that the stevedore had also another purpose will not prevent his recovery for injuries from so falling.

A workman who, according to the custom of his employer, is being transported to the place of his work, is not a trespasser. *Denver & R. P. Rapid Transit Co.* v. *Dwyer* (1894) 20 Colo. 132, 36 Pac. 1106; *Rosenbaum* v. *St. Paul & D. R. Co.* (1888) 38 Minn. 173, 8 Am. St. Rep. 653, 36 N. W. 447 (injury caused by defective track).

One who had been working as a surveyor's assistant until he left the company's employ, about two weeks before the accident, for the reason that his wages were not paid, had the rights of a passenger when he boarded a passing train to proceed to a place where he was to purchase provisions. *Ohio & M. R. Co.* v. *Muhling* (1861) 30 Ill. 9, 81 Am. Dec. 336. The court remarked that he was "liable to no greater burdens, nor entitled to more privileges, than any other passenger similarly situated."

Other cases in which recovery was allowed where the employees were being transported gratuitously on trains by the conductor's permission are *State use of Abell* v. *Western Maryland R. Co.* (1884) 63 Md. 433; *Washburn* v. *Nashville & C. R. Co.* (1859) 3 Head, 638, 75 Am. Dec. 784, citing *Philadelphia & R. R. Co.* v. *Derby* (1852) 14 How. 468.

If the defendant relies upon the plea that he was not bound to anticipate the presence of the injured person at the particular place where the accident occurred, for the reason that he would not have been at that place if a statute or ordinance had been duly observed by himself and his coemployees, the action will, of course, not be barred, unless it appears that the enactment in question was applicable to such a situation as that which is disclosed by the evidence.[6]

b. Circumstances under which recovery has been denied. In a Scotch case it is intimated that the mere fact of the plaintiff's being out of his proper place at the time of the accident, contrary to the rules of work, does not prevent his recovering for injuries caused by defective machinery.[7] This may possibly be the correct doctrine applicable to cases in which the defense of contributory negligence is relied upon. (See subsec. *c, infra.*) But if the statement is intended to define the extent of the employer's obligations, it embodies a theory which is opposed to the general current of authority, which is in favor of the principle that "a master's duty in respect to furnishing his servants a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing his work, and to such other parts as he knows or ought to know they are accustomed to use while doing it."[8] The application of this

14 L. ed. 502 (where, however, the traveler was a stockholder, not a servant).

See also the cases cited in § 624, subsecs. *d* and *e*, *supra*.

[6] Where a railway company had put in evidence a city ordinance prohibiting it from using the crossing where plaintiff's intestate was injured for the storage of cars, and from permitting loaded and unloaded cars to stand thereon, it was held that the court properly instructed the jury that defendant could not plead its obligation thereunder as a defense to an action by one of its employees who, while engaged in coupling cars, was injured by reason of its failure to keep the crossing in repair. *Herrick* v. *Quigley* (1900) 41 C. C. A. 291, 101 Fed. 187.

[7] *Whitelaw* v. *Moffat* (1849) 12 Scots. Cas. 2d series, 434.

[8] *Morrison* v. *Burgess Sulphite Fiber Co.* (1900) 70 N. H. 406, 85 Am. St. Rep. 634, 47 Atl. 412.

The duty of an employer to provide a safe place of work is limited to the premises where the employee is required, for the purposes of his employment, to be. *Donnelly* v. *Chase* (1898) 119 Cal. 637, 63 Am. St. Rep. 153, 52 Pac. 33.

An employer is not called upon to so construct every part of his premises as to prevent the possibility of accident. *McCann* v. *Atlantic Mills* (1890) 20 R. I. 566, 40 Atl. 500.

An employer is under no duty to make all parts of his premises safe for a servant to ramble through in the dark, even if he is at work in a place where there is no danger. *Chicago & A. Smelting & Ref. Co.* v. *Collins* (1892) 43 Ill. App. 478.

Where plaintiff's deceased husband was injured by the falling of a sliding door in the store of the defendant, owing to the careless manner in which it had been opened by the men in charge of it, it was held that a verdict for the plaintiff should be set aside, it appearing that defendant had exercised reasonable care and skill in the selection of its servants, that the door was constructed with ordinary skill, and if the deceased was lawfully in the vicinity of the building in the course of his employment, he was a fellow servant with the men whose negligence inflicted the injury; or if he was a trespasser, or present by sufferance, the defendant owed no duty except to refrain from acts wilfully injurious. *Collyer* v. *Pennsylvania R. Co.* (1886) 49 N. J. L. 59, 6 Atl. 437.

principle has frequently prevented recovery in cases where the injury proximately resulted from the fact that the injured servant was occupying the dangerous position merely for his own convenience and accommodation. Under such circumstances his legal rights are no greater than those of a licensee.[9] The same principle is equally

[9] No action can be maintained where an employee, while off duty, goes from a passenger car to the engine, to which neither necessity nor duty calls him, and, while attempting to return to the car while the train is in rapid motion round a curve, falls on the track. *McDaniel* v. *Highland Ave. & Belt R. Co.* (1891) 90 Ala. 64, 8 So. 41.

An instruction in an action for personal injuries to a brakeman while riding on the pilot of the engine, that, if the jury believe he was not required or "permitted" to ride on the pilot in the discharge of the duties of his service, they will find for defendant, is not objectionable. *San Antonio & A. P. R. Co.* v. *Beam* (1899; Tex. Civ. App.) 50 S. W. 411.

To take a passenger coach without the knowledge of his superior, and have it drawn by a switch engine for the convenience of himself and his fellow servant, while not on duty, over a portion of the road, is not within the implied authority of a yard master, so as to give those servants the rights of passengers. Under such circumstances, the fact that the master mechanic has paid the engineer for the extra time spent in running the train cannot be construed as a ratification or adoption of the yard master's act. *Chicago, St. P. M. & O. R. Co.* v. *Bryant* (1895) 13 C. C. A. 249, 27 U. S. App. 681, 65 Fed. 969. On the first appeal ([1893] 4 C. C. A. 146, 12 U. S. App. 115, 53 Fed. 997) the case was held to be for the jury on the ground that one who is being conveyed on a vehicle which belongs to a common carrier, and is ostensibly designed for the transportation of passengers, is presumably on that vehicle by the invitation of an employee who has authority to bind the carrier by such invitation, and that, in the absence of countervailing circumstances to rebut this presumption, there was some evidence in the record proper for the consideration of the jury on the issue whether the injured person was a passenger or not. See note 2, *supra*.

A former employee riding on a freight train by the invitation of the conductor is presumed to know that such an invitation is not within the scope of his employment, and that he is therefore not traveling as a passenger. *Powers* v. *Boston & M. R. Co.* (1891) 153 Mass. 188, 26 N. E. 446.

A railroad company cannot be held liable for the death of an employee sent to a particular place on business, who, for his own convenience and pleasure, delays his return until after midnight, when he takes passage on a freight train while he could have returned earlier in the evening on a passenger train, on the ground that the injury was caused by the company's negligently retaining in its employ an incompetent coemployee. *West* v. *New York C. & H. R. R. Co.* (1897) 17 App. Div. 116, 45 N. Y. Supp. 93. The court said: "If the deceased had taken passage on the passenger train he would not have come to his death by reason of the negligence of a drunken employee. Was he at liberty to impose upon the company a greater risk and responsibility than it would otherwise have assumed? If the employee loses sight of the purposes for which he was sent, *viz.*, to attend to a particular business, departs from the line of his duty, and, for his own convenience and pleasure, delays his return until after midnight, and then takes a mode of conveyance that is not considered as safe as the one which he might have taken in a reasonable time after performing his duties, and sustains injuries by the act of a brakeman, can the company be charged with liability upon the ground that the latter was a 'coemployee' and the company was negligent in retaining him in its employ? Is he at liberty, under such circumstances, to create such brakeman employee *pro hac vice*? Surely the company ought not to be charged, by implication, with notice of his presence on this train. It was not by any act of the company that he was obliged to be on this train, and he was not being employed as a car inspector or repairer because of any exigency of the service demanding or requiring it. It was not by reason of any necessity or exigency of the business that he was riding on the freight train. There is no pretense

whatever that his work detained him until it was too late to take the passenger train at 8:12 P. M. He was not, therefore, put in a position where he was called upon to ride upon a freight train in order to return home in time for work on the following day."

A brakeman who, in accordance with a prevailing custom, leaves his working clothes upon a caboose, although he knows that such car will probably not be attached to the next outgoing train to which he is assigned, has license to visit the caboose to obtain his clothing; but where he is injured by a switch stand, while alighting from a moving train on which he has gone in search of his apparel he is not acting within the license, or in the line of his duty, and cannot recover for the injuries sustained. *Olson* v. *Minneapolis & St. L. R. Co.*, (1899) 76 Minn. 149, 48 L. R. A. 796, 78 N. W. 975.

In moving its engines and cars in its own yard, a railway company is not bound "to take special precautions or give special warnings to avoid injuring any unauthorized person who may, for his own convenience, go therein, until the presence of such person in a situation of danger has been discovered." *Louisville & N. R. Co.* v. *Hocker* (1901) 23 Ky. L. Rep. 982, 64 S. W. 638, 65 S. W. 119 (recovery denied where a telegraph despatcher, instead of going to the closet, stepped behind a car to urinate).

A railroad company is not liable for the death of an employee who, for purposes of his own, goes behind cars standing upon a spur track, without the knowledge of any superior employees, and is struck by such cars in consequence of a train entering a side track and coming in contact with them, although the warning given by the foreman is in English, and such employee does not understand the English language. *Gaylack* v. *Michigan C. R. Co.* (1895) 11 Ohio C. C. 59.

No recovery can be had where plaintiff, in going to get his coat, which he had left at a place unnecessarily remote from the place of work, fell down hatchway. *Kennedy* v. *Chase* (1898) 119 Cal. 637, 63 Am. St. Rep. 153, 52 Pac. 33.

A master is not liable for injuries to a servant who, in the dark, attempts to reach the place where he left his lunch, by crossing an unknown and unlighted portion of the building, and in so doing falls into an unguarded kettle filled with molten lead. *Chicago & I. Smelting & Ref. Co.* v. *Collins* (1892) 43 Ill. App. 478.

A servant who falls into a cistern not entirely fenced round, while he is searching for a pail of water cannot recover. *Hetzann* v. *Atlanta Mills* (1898) 20 R. I. 566, 40 Atl. 500.

In a case where a laborer, after loading ice from a wharf upon a vessel, went on board for the gratification of his curiosity, and there fell down an open hatchway and broke his leg, it was held that, as his work had been completely finished, he was not even a licensee, but was a mere trespasser. *Sweezy* v. *Nickerson* (1876) 120 Mass. 306, 21 Am. Rep. 514.

A coal miner who, during the noon hour, while not engaged in work, goes to a different part of the mine for the purpose of visiting with another miner, is not, while so absent, engaged in the line of his duty so as to impose upon the employer the duty of a master to see that the entry through which he passes from and to the part of the mine where he is employed is kept in a safe condition for his passage. *Ellsworth* v. *Metheney* (1900) 51 L. R. A. 389, 44 C. C. A. 484, 104 Fed. 119.

Where an employee of the owner of a mine, having a few moments' leisure, went into another room in the mine to see some fellow workmen, and was killed by the falling in of the roof, it was held that his administrator had no cause of action, although the owner acquiesced in a custom among the miners to visit each other when not actively engaged. The position taken by the court was that the implied licenses thus accorded to the miners did not authorize them to frequent dangerous places at the risk of their employer. *Wright* v. *Rawson* (1879) 52 Iowa, 329, 35 Am. Rep. 275, 3 N. W. 106.

No action is maintainable where a servant is injured by the fall of a rock while he is in a passage made solely for securing a circulation of air in the mine where he is working. *Lenk* v. *Kansas & T. Coal Co.* (1899) 80 Mo. App. 374.

Where an employee follows the invitation of a fellow servant to take a certain exit from a building where he is employed, which is not intended to be used as an exit for persons engaged in the employment in which plaintiff is engaged, and plaintiff is injured, he cannot recover therefor from his master. *Swift* v. *McInerny* (1900) 90 Ill. App. 294.

The question whether a narrow space close to cogwheels, into which an employee other than the engineer oils, receiving injury from the wheels, is an unsafe place for an employee to provide for workmen is not involved, where the space is not intended for workmen, but is separated, because of its danger, from the rest of the building by a barred fence 5 feet high, within which no one has occasion to go except the engineer when oiling machinery. *Casey v. Pennsylvania Asphalt Paving Co.* (1901) 198 Pa. 348, 47 Atl. 1128.

In *Stover Mfg. Co. v. Wilhite* (1901) 89 Ill. App. 532, it was held error to instruct a jury that the master was bound to provide a reasonably safe place of work, where the evidence was that the plaintiff's intestate was killed by the fall of an elevator under which he was passing, though his duties did not require him to do so.

Employees who, under a mere implied license, ride upon an elevator known to them to be intended only for carrying goods, do so at their own risk. *Wise v. Tekerman* (1892) 76 Md. 375, 25 Atl. 424. The court said: "There is no doubt that where an elevator is erected in a factory or warehouse, and is intended to be used only for the purpose of carrying and transferring goods and materials from one part of the building to another, and the employees in the establishment, familiar with the construction and operation of the elevator, and the purpose of its construction, ride thereon under a mere implied license, for their own pleasure or convenience, they must be taken to accept whatever risk that may be incident to such construction and operation; and, in such case they can only require of the defendant the use of ordinary care, either in the construction or operation of the machine. *O'Brien v. Western Steel Co.* (1889) 100 Mo. 182, 18 Am. St. Rep. 536, 13 S. W. 402; *Patterson v. Heacock* (1888) 148 Mass. 91, 12 Am. St. Rep. 523, 19 N. E. 15. But an elevator is in many respects a dangerous machine, and though it may be primarily intended only as a freight elevator, yet if the employees, in the course of their employment, are authorized or directed to use the elevator as means of personal transportation, the employer, controlling the operation of the elevator, is required to exercise great care and caution both in the construction and operation of the machine, so as to render it as free from danger as careful foresight and precaution may reasonably dictate."

An employee [illegible] at the invitation of a coemployee [illegible] for his own pleasure and convenience, rides upon an elevator intended only for freight, does so at his own risk. *Hockmann v. Hoss Laundering Co.* (1893) 4 Misc. 150, 23 N. Y. Supp. 787.

An employee whose duties did not require him to approach an elevator which was constructed and operated with due care, and of whose use he was fully apprised, cannot recover for injuries received by falling into the elevator well. *Atlanta Cotton Mills v. Ogier* (1902) 116 Ill. App. 634.

An employer is not charged with the act of an employee intrusted with the duty of constructing a freight elevator, in inviting a coemployee to ride on the elevator, instead of going by the stairway provided for the use of employees. Such coemployee accepts the invitation at his own risk. *Stover v. Peters Box & Lumber Co.* (1898) 151 Ind. 642, 50 N. E. 877. Rehearing denied in (1898) 151 Ind. 662, 52 N. E. 599.

The following extract from the dissenting opinion of Crawford, J., in *Atlanta Cotton Factory Co. v. Speed* (1882) 69 Ga. 137, 47 Am. Rep. 750 states what the present writer conceives to be the correct doctrine as established by the decisions. In the opinion of the majority the evidence in that case was viewed from a standpoint essentially different from that taken by the learned judge. But probably the abstract correctness of the doctrine enunciated would not have been disputed by his associates, if they had deemed that doctrine to be controlling under the circumstances. "This charge, to my mind, is erroneous because it actually lays down the law to be that anyone who was in the basement or the cloth room rightfully might go at will through the entire factory, either in light or darkness, whether dangerous or safe, and, if hurt, could recover damages therefor, provided he or she exercised care and caution in passing through such other portions thereof. The corporation, whilst completing its machinery or conveniences might allow visitors or operatives in some, and yet not in all, parts of their building. To be invited into the cellar basement, or cloth room by one authorized to do so makes it lawful to be in those rooms and in the house; yet it cannot be that such invitation gives the right to every part of it and into places where no one is invited and none expected. If, therefore, one should go

applicable w[illegible]e the injured servant was actually engaged in the performance [illegible] his duties.[10] But this predicament is more commonly consid[illegible]ed from the point of view exemplified in the next subsection.

c. *Right of recovery considered with reference to the culpable or nonculpable quality of the servant's conduct.* In some cases of the type now under consider[illegible]ti[illegible], the theory of the defense has been, not that the master owed no [illegible]uty to the servant [illegible] the ep[illegible], but that the servant was himself guilty of a want of p[illegible]e[illegible] in being at the place where he was when the accident occurred. Whether this plea is available to the master is a question for the jury where the evidence leaves room for doubt as to the quality of the servant's conduct.[11] But the servant will be pronounced negligent as a mat-

from a place of perfect safety where he has been invited, to a place of danger where he is not invited, and a casualty befall him, he certainly should not be allowed to recover his damages by showing that ordinary care and caution on his part in such place would not have prevented his injuries. [illegible] hold that being at a place where he had neither business nor an invitation, and where his presence was not anticipated, and therefore his protection not provided for, his risk was his own, and not that of the corporation. It would make, to my mind, as clear a case of *damnum absque injuria* as is to be found in the books. And such is the case."

In *Lumsden* v. *Russell* (1856) 18 Sc. Sess. Cas. 2d series, 468, it was held that a father could not recover for the death of his son, a young child not regularly in the employment, whom he had sent on an errand which he should have performed himself.

[10] A car inspector who is directed to carry an iron casting which has fallen from a car to a designated engine is not in the line of his duty, where he lays it down in a dangerous place, and subsequently returns to get it and carry it to the designated place. *East St. Louis Connecting R. Co.* v. *Craven* (1894) 52 Ill. App. 415 (casting left between tracks where there was not sufficient space to stand).

A switchman cannot recover for injuries received while [illegible]ttempting to get upon the front of a [illegible]ngine at what is called the pilot, when it is not his duty to get up there. *Grant* v. *Union P. R. Co.* (1891) 45 Fed. 673 (in charge to jury).

[11] *Aylock* v. *Champagne Lumber Co.* (1899) 33 C. C. A. 269, 13 U. S. App. 519, 90 Fed. 774.

Where it was the duty of the crew of a freight train to place it in proper position for unloading stones from the cars by means of derricks operated by an independent contractor, an action for the death of a brakeman killed by the fall of those derricks cannot be defeated on the ground that he was negligent in being on the car just ahead of the one which was being unloaded. *Gulf, C. & S. F. R. Co.* v. *Delaney* (1900) 22 Tex. Civ. App. 427, 55 S. W. 538.

An employee of a steam mill company, who went to the mill to inquire in respect to his work, was not guilty of contributory negligence which will prevent his recovery for injuries received by a portion of the machinery which became detached and struck him, because of his remaining in the mill longer than was strictly necessary for the purpose of his visit, and stepping a few feet out of his way to speak to the manager about something that attracted his attention in respect to the machinery. *Denham* v. *Trinity County Lumber Co.* (1889) 73 Tex. 78, 11 S. W. 151.

If the injury was received while the servant was passing from one part of the premises to another with a view to the subsequent performance of some duty, he is entitled to recover under any circumstances which would constitute a cause of action if he had actually been at work; and he is not chargeable with contributory negligence because at the precise moment when the accident occurred he happened to be exchanging a remark with a fellow employee with re-

ter of law, if an inference of culpability is the only one which can reasonably be drawn from the evidence.[12]

For other cases dealing with this predicament, see § 337, *ante*, and § 635, *post*.

627. Servant's use of the given instrumentality.— The duty of an employee to exercise reasonable care in seeing that any given instrumentality is in a proper condition to be used is owed only to such servants as are required, permitted, or in the course of the business expected, to make use of that instrumentality.[1] Any injuries which the instrumentality may cause to servants to whom that description is not applicable are regarded as events which the employer is not bound to anticipate, and which, for this reason, do not charge him with any liability.[2] See, generally, §§ 142–146, *ante*. Compare

gard to a matter of common interest to the master and himself,—such as the operation of a certain piece of machinery. *Moore* v. *W. R. Pickering Lumber Co.* (1901) 105 La. 504, 29 So. 990 (employee in sawmill injured by a flying piece of a belt which broke during such a conversation).

An employee in a mine is not, as matter of law, guilty of contributory negligence in leaving his work on hearing the noise of a cave-in of the mine, in order to ascertain the locality and magnitude. *Frank* v. *Bullion Beck & C. Min. Co.* (1899) 19 Utah, 35, 56 Pac. 419.

Recovery by an employee in a mine injured by an explosion of dynamite improperly thawed by an open fire without proper appliances is not defeated by his having left a safe place of employment and gone to such fire to warm himself, where the fire was built to allow the employees to warm themselves, as well as for such thawing, and the hands, including such employee, had several times on the same day gone there, to the knowledge of and without objection by the foreman. *Bertha Zinc Co.* v. *Martin* (1895) 93 Va. 791, 22 S. E. 869.

It is not error to refuse an instruction that a brakeman was guilty of negligence, if, when ordered to deliver a message to the engineer, he stayed from his post longer than necessary, where an instruction has been given that defendant was not liable for injuries received by the brakeman, owing to his being at a location on the train not within the scope of his duty. *Norfolk & W. R. Co.* v. *Warpole* (1899) 97 Va. 594, 34 S. E. 462.

[12] An intelligent boy nearly fifteen years old whose duties do not require him to go anywhere near an unguarded shaft with a collar upon it making 150 revolutions a minute, and who has been warned of the danger, is guilty of such contributory negligence in coming in contact with it as will prevent a recovery for his death. *Monforton* v. *Detroit Pressed Brick Co.* (1897) 113 Mich. 39, 71 N. W. 586.

An answer which relies upon unconsciousness resulting from defendant's negligence as an excuse for a servant's contributory negligence in being out of place when injured is, in the absence of evidence to support such plea, an admission of contributory negligence. *Lenk* v. *Kansas & T. Coal Co.* (1899) 80 Mo. App. 374.

A "tankman" on a railway who is injured by the derailment of the engine on which he was riding, without the permission of the conductor and in violation of a rule of the company, cannot recover damages, although he had been in the habit of riding on the engine, and at the point where he mounted it, there was a difficulty in getting into the caboose, where he ought to have been. *Martin* v. *Kansas City, M. & B. R. Co.* (1900) 77 Miss. 720, 27 So. 646.

[1] *McGill* v. *Maine & N. H. Granite Co.* (1899) 70 N. H. 125, 85 Am. St. Rep. 618, 46 Atl. 684.

[2] An employee about eighteen years of age, who for two years had worked in paper mills, cannot recover for the accidental loss of two of his fingers severed by a fan revolving in a drum near which he was at work cleaning a screen attached to a hopper, where his duties did not require him to touch the drum.

also the cases collected in §§ 26, 27, 342, *ante*, and those cited in the preceding section.

628. Servant's use of the given instrumentality in a certain manner. —In § 26, *ante*, it has been shown that a master's obligations in respect to furnishing instrumentalities are limited to seeing that they are reasonably safe for the performance of the functions for which they are designed. A few additional authorities in which this principle is recognized are cited below.[1] Compare also § 342, *ante*, where the cases have been collected which illustrate the circumstances under which negligence is inferred from the use of appliances for a purpose other than that for which they were designed.

629. Servant's unauthorized performance of certain work; generally. —In numerous cases the plea set up has been that, at the time of the accident in suit, the injured person was doing work which he had not been authorized by the defendant or his agent to undertake. If such unauthorized action is established, it is manifest that, in respect to the work thus done, the relation of master and servant did not exist between the person for whom it was done and the person who was doing it, and that the former did not owe to the latter any of those special duties which are deemed to be incidental to that relation.[1] The workman under the supposed circumstance occupies a

Schiefelbein v. *Badger Paper Co.* (1898) 101 Wis. 402, 77 N. W. 742.

Where the accident arose entirely from plaintiff's use of the trimmer-saw, and such use was not in the line of his employment, no inquiry can be made into the general management of the mill, or the particular management of the slab-cars, whatever negligence there may have been in furnishing a poor slab-car, or in requiring the plaintiff to use it. *Lindstrand* v. *Delta Lumber Co.* (1887) 65 Mich. 254, 32 N. W. 427.

Where railway employees, without the actual consent of the company's officers, but with their knowledge, have been accustomed to use a switch engine to carry them from the roundhouse to their meals, it is for the jury to say whether on such an occasion the engine is engaged in the company's business. *Reilly* v. *Hannibal & St. J. R. Co.* (1887) 94 Mo. 600, 7 S. W. 407 (minor injured by negligent operation of engine).

[1] An employer is not liable for injuries received by a servant in taking off a towel from the projecting end of a shaft upon which he had hung it solely for his own convenience, where his service was not connected with such shaft in any manner. The court refused to ascribe any differentiating significance to the fact that the injuries were due to its defective condition. *Kauffman* v. *Maier* (1892) 94 Cal. 269, 18 L. R. A. 124, 29 Pac. 481.

A finding to the effect that the plaintiff, who was injured by catching his clothes on the collar of a revolving shaft, while climbing over a cross beam, had no orders to do this for the purpose for which he did it, and that there was no necessity to put himself into the dangerous position, entitles the defendant to judgment. *Thorsen* v. *Babcock* (1888) 68 Mich. 523, 36 N. W. 723.

In an action for the death of a yard foreman alleged to have occurred while in discharge of his duties in coupling cars, it is competent to show the habit, custom, and duty of employees in making couplings, in the absence of a rule prescribing the method of coupling cars. It cannot be affirmed, as a matter of law, that the use of his own hands is outside the line of his duty, since this might have been requisite for the expeditious performance of his work. *Louisville & N. R. Co.* v. *York* (1900) 128 Ala. 305, 30 So. 676.

[1] See cases cited in the notes to the following sections.

position which is virtually, if not precisely, that of a trespasser or licensee, and has probably no right of action, except in cases where he has been wantonly injured by the defendant or his servants.[2]

630. Right of action where the injured person was not in the service of the defendant for any purpose.—A portion of the cases which deal with the applicability of the general principles stated in the preceding section relate to work done for persons who, prior to the time when they undertook that work, were strangers as regards the defendant. It is to such persons that the term "volunteer" is usually, but not exclusively, applied.[1] The essence of the defense in this instance is simply that a person cannot be subjected, without his own consent or that of his agent, to the obligations which the law has attached to the contract of hiring.[2] The decisions collected in the

[1] *Rhodes* v. *Georgia R. & Bkg. Co.* (1889) 84 Ga. 320, 20 Am. St. Rep. 362, 10 S. E. 922.

A railway company is not required to use care to anticipate and discover the peril of a person who enters upon its premises and voluntarily assists in its work, but only to use care after the peril is discovered. *Kentucky C. R. Co.* v. *Gastineau* (1885) 83 Ky. 119.

A boy who, at the request of the conductor of a train, assists in coupling cars, is entitled to recover if the servants of the company, after discovering that he has placed himself in a position of danger, fail to exercise reasonable care to preserve him from injury. *Evarts* v. *St. Paul, M. & M. R. Co.* (1894) 56 Minn. 141, 22 L. R. A. 863, 45 Am. St. Rep. 460, 57 N. W. 459.

An employer is not liable for injuries to a boy employee received in attempting to shift a belt running upon a revolving shaft, not in the performance of any duty owing to the employer, but merely for the purpose of demonstrating to other boys his ability to do so. *Pfeffer* v. *Stein* (1898) 26 App. Div. 535, 50 N. Y. Supp. 516.

Where plaintiff, employed as carpenter in a mill at defendant's stone quarry, was standing in front of a truck for the purpose of seeing whether stone with which the truck was loaded was properly sawed, when the truck, without notice to him, was moved, causing injury to his foot, he must be regarded as a mere volunteer, unless he was performing a regular duty, or was acting under special order of the foreman. Unless such was the case the company owed him no duty to keep a lookout. It was therefore error to instruct the jury that, if he was acting without an order from the foreman, they should find for the defendant unless they believed that the servant in charge of the truck knew, "or by the exercise of ordinary care might have known," of plaintiff's peril. The words between the quotation marks should have been omitted. *Bowling Green Stone Co.* v. *Capshaw* (1901) 23 Ky. L. Rep. 945, 64 S. W. 507.

See also the argument of Bramwell, B., in the *Degg Case* (1857) 1 Hurlst. & N. 773, 26 L. J. Exch. N. S. 171, 3 Jur. N. S. 395, as quoted in § 631, note 5, *infra*.

[1] By Lord Herschell a volunteer has been defined as, "A person who is not under any paid contract of service may nevertheless have put himself under the control of an employer to act in the capacity of servant, so as to be regarded as such." *Johnson* v. *Lindsay* [1891] A. C. 371, per Lord Herschell, 15 L. J. Q. B. N. S. 90, 65 L. T. N. S. 97, 40 Week. Rep. 405, 55 J. P. 644. But this remark can scarcely be deemed to carry an exclusive significance, or construed as a statement of his opinion that the term was not applicable to persons in the position of those discussed in the following section.

[2] "It is natural justice that one man should not be held liable for the act of another without his participation, his privity, or his authority." *Flower* v. *Pennsylvania R. Co.* (1872) 69 Pa. 210, 8 Am. Rep. 251.

In *Wisham* v. *Rickards* (1899) 136 Pa. 109, 10 L. R. A. 97, 20 Am. St. Rep. 900, 20 Atl. 532, the court, in comment-

note below will indicate sufficiently the varieties of phraseology in which the availability of this defense has been asserted, and the circumstances under which it has been declared or denied, to be a bar to the action.[3]

ing on the case of *Potter* v. *Faulkner* (1861) 1 Best & S. 800, 31 L. J. Q. B. N. S. 30, 8 Jur. N. S. 259, 5 L. T. N. S. 455, 10 Week. Rep. 93, cited in § 631, note 5, *infra*, remarked: "It will be perceived that the court considered the plaintiff to be a volunteer, notwithstanding he intervened only at the request of the defendant's servant. Now, while it may seem a little strained to call such a person a mere volunteer, the reason given for the nonliability of the master is more substantial,—to wit, that the plaintiff's act in associating himself with the defendant's servant in the performance of the work was done without the knowledge or consent of the master, and therefore he could acquire no better position than that of the servant with whom he associated himself."

The relation of master and servant and the duties and obligations which result from the existence of that relation cannot be created by a direction issuing from an unauthorized agent of the employer. *Nashville & C. R. Co.* v. *McDaniel* (1883) 12 Lea. 386.

One who undertakes to assist an employee at the latter's request, does not thereby "place himself within the protection of the company so that it is bound to anticipate and ascertain if he has placed himself in danger," unless the employee has express authority from the company to make the request, or occupies such a position toward the company and the act to be done that the authority can be fairly implied. *Kentucky C. R. Co.* v. *Gastineau* (1885) 83 Ky. 119.

[3] (a) *Liability denied.*—An employee whose duty it is to look after stock killed by trains and to look after any litigation has no authority to command a bridge watchman who is traveling to attend court, to help in clearing an obstruction from a tunnel. *Nashville & C. R. Co.* v. *McDaniel* (1883) 12 Lea. 386.

A passenger who, at the request of the conductor, goes upon the top of the car to help to give signals, when there is no real necessity for it, cannot recover if he is injured because of so doing. Under such circumstances the compliance with the request is merely a matter of accommodation. *Atchison, T. & S. F. R. Co.* v. *Lindley* (1889) 42 Kan. 714, 6 L. R. A. 646, 16 Am. St. Rep. 515, 22 Pac. 703.

Unless some exigency arises, an engineer has no authority, by virtue of his position as such, to employ a brakeman for the company; and, if he engages a person to assist him in the management of the train for his own convenience, such person, by reason of such employment, does not become the servant of the company. *Wickelson* v. *New East Tintic R. Co.* (1900) 23 Utah, 42, 64 Pac. 463 (injury caused by unblocked guard-rail).

Recovery was refused where plaintiff's own evidence showed that he put himself under the orders of the conductor, to work his way, instead of paying for it as a passenger, and that he was injured in obeying orders from a brakeman, without any express instructions from the conductor. *Sparks* v. *East Tennessee, V. & G. R. Co.* (1888) 82 Ga. 156, 8 S. E. 424.

The right of action has been denied where the injury was received by a man who voluntarily undertook to carry a message from a telegraph operator to the employees in charge of a train, and the evidence showed that he was a person in the service of the station agent, who assisted him in the business which he did in addition to his railway work, as agent for an express company; but there was no proof that the railway company had authorized the station agent to hire him, or had even paid him any wages, or that any of its officers knew that he had been thus employed. *Chicago & E. I. R. Co.* v. *Argo* (1898) 82 Ill. App. 667.

Where an engineer for his own convenience engages a person to assist him in the management of the train, the fact that the company knew of such employment and acquiesced therein, or that its agents saw such person working about the train on the day he was injured, does not entitle him to recover on the ground that he was a servant of the company, since the mere fact that an officer of a railway company sees a person engaged about its trains casts no duty on the company to take affirmative action, nor does mere silence amount to

631. Volunteers subject to same burdens as servants.— It is manifest from the foregoing section that the nonexistence of any duty to safeguard persons who belong to the category of volunteers is in every case a sufficient reason for denying their right to sue the party who was the owner of the instrumentality which inflicted the injury, or the employer of the workmen whose carelessness caused that injury. But in a large proportion of the cases which involve accidents to such persons the inability to recover may be, and often has been, referred

ratification of the employment. *Mickelson* v. *New East Tintic R. Co.* (1900) 23 Utah, 42, 64 Pac. 163.

See also cases cited in § 631, *infra*.

(b) *Liability affirmed.*—An employee injured while complying with the orders of one as to whose authority to give such orders there was some evidence cannot be said, as a matter of law, to have been improperly at work. *Patnode* v. *Warren Cotton Mills* (1892) 157 Mass. 283, 32 N. E. 161.

A conductor has implied authority to hire a man to take the place of a brakeman who has fallen ill while the train is on the road. *Georgia P. R. Co.* v. *Propst* (1887) 83 Ala. 518, 3 So. 764. The court said: "The conductor testified that he had no authority from the superintendent or from the defendant to engage or utilize the services of the plaintiff in the capacity of brakeman. Express authority for this purpose was not necessary. The circumstances themselves, about which there is no conflict of testimony, gave him the authority. In such an emergency, there must be discretion and authority somewhere, to supply the place of disabled or missing servants; and no one could exercise this power so well or so prudently as the conductor in charge of the train."

Where two brakemen are necessary for the safe operation of a train, the conductor has authority to hire a substitute for one who is laid off for a week's rest. *Sloan* v. *Central Iowa R. Co.* (1883) 62 Iowa, 728, 16 N. W. 331.

A conductor of a train who has only two brakemen to assist him has implied authority to hire a substitute, where one of them leaves his work temporarily while the train is making its regular round trip, and it is necessary for the safety of the passengers to have two brakemen. *Fox* v. *Chicago, St. P. & K. C. R. Co.* (1892) 86 Iowa, 368, 17 L. R. A. 289, 53 N. W. 259. In this case it was held that the mere fact that the train may have been safely operated for some distance with a single brakeman, thus showing that it is physically possible to operate it without the second brakeman, will not justify overruling the finding of a jury that the substitute was required for its proper operation.

A brakeman whose services are accepted by the yard master is not a trespasser on trains which he helps to make up. He is therefore entitled to be indemnified for an injury caused by a defective brake. *Central Trust Co.* v. *Texas & St. L. R. Co.* (1887) 32 Fed. 118.

In an action against a railway company for personal injuries, the plaintiff testified that defendant's train despatcher, to whom he had applied for a position as brakeman, had told him he should have the next place that was open, and that in the meantime he should assist the station agent at the station where he lived as he had been doing before; that thereafter he did assist said agent by doing various things under his direction, and said agent gave him a switch key so that he could open and close switches; that on the day of the accident the agent's regular assistant was absent, and the agent requested plaintiff to "help him out;" and that he was injured while riding to a switch for the purpose of closing it, which was a part of the work of the regular assistant. There was also testimony tending to show that the station agent had authority to employ a helper in the absence of any of the regular force. Held sufficient to sustain a finding by the jury that the plaintiff was at the time in the employ of the defendant. *Button* v. *Chicago, M. & St. P. R. Co.* (1894) 87 Wis. 63, 57 N. W. 1110.

A passer-by who complied with the request of the defendant's manager to assist his servants in moving a heavy weight was held not to be a volunteer in *Little* v. *Neilson* (1855) 17 Sc. Sess. Cas. 2d series, 310.

A person indirectly in the employ of

to the conception that, as they have, of their own free will, undertaken to do the work of servants, they may fairly be put upon the same footing as servants, and required to bear the burdens to which that position subjects those who occupy it by virtue of a contract of hiring.

One result of regarding the rights of a volunteer from this standpoint is seen in the doctrine that any rules which may have been framed for the conduct of the business in which he has chosen to participate are binding upon him under the same circumstances as they would be binding upon a regularly employed servant.[1] Another re-

a manufacturing company by contract with the superintendent, and receiving compensation in proportion to the amount of work done, may be treated as an employee of the company, and is entitled to the protection arising from the relation of master and servant. *Rumwell* v. *Dilworth P. & Co.* (1886) 111 Pa. 343, 2 Atl. 355, 363.

A person assisting in work at the request of the defendant's foreman is not in the position of a mere trespasser or volunteer, even though he does not expect any compensation for the work done. He is therefore entitled to the same protection as any of the regularly employed servants of the defendant. *Johnson* v. *Ashland Water Co.* (1888) 71 Wis. 553, 5 Am. St. Rep. 213, 37 N. W. 823. On a subsequent appeal, however, it was held that he could not recover, for the reason that the foreman was his fellow-servant. (1890) 77 Wis. 51, 45 N. W. 807.

Evidence tending to show that the plaintiff was employed by and was working under the directions of a foreman who was superintending the operation of the mine where the injury was received, and that the defendant was owning and operating the mine, is sufficient to make it a question for the jury to determine whether the relation of master and servant existed between the defendant and plaintiff. *Consolidated Coal Co.* v. *Bruce* (1894) 150 Ill. 454, 37 N. E. 912.

A car inspector has the right to call temporarily to his assistance his minor son, for the purpose of doing merely mechanical acts under his guidance. Under such circumstances the boy is not, as regards a company other than the one employing his father, a trespasser in such a sense as to preclude him from recovering for injuries received through the careless management of cars by its agents. *Pennsylvania Co.* v. *Gallagher* (1884) 40 Ohio St. 637, 48 Am. Rep. 689. The court said: "In the business of repairing the broken car, Daniel Gallagher was authorized to bring to his aid any instrument or agency necessary to the proper performance of his work. He availed himself of the necessary temporary assistance of his son, as he used other instrumentalities under his control. He did not delegate to another a charge committed to himself personally, because of his acknowledged skill and fitness, but directed his son to render assistance which was merely mechanical, and under the supervising guidance and control of the father's mind and will. Presumptively, Daniel Gallagher did not exceed his powers in calling upon his son for temporary assistance; and, though a contingency might have been possible in which the Baltimore & Ohio Railroad Company might have raised a question as to the son's right to recover of it, in an action for injuries received through his father's carelessness such possible contingency would not excuse a want of due care on the part of the Pennsylvania Company. Charles Gallagher was not a trespasser, nor wrongfully on the premises where he was injured. And we cannot reach the conclusion that he bore such a relation to the Baltimore & Ohio Railroad Company that, while rendering needed assistance to that company, in compliance with the directions of its agent with such implied authority, he was placed beyond the pale of protection against the carelessness of the plaintiff in error."

See also cases cited in § 632, *infra*.

[1] In *Pelm* v. *Louisville & N. R. Co.* (1895) 17 Ky. L. Rep. 1004, 33 S. W. 396, it was held that one who has volunteered under an arrangement with a station agent to assist the latter in per-

sult is that a volunteer is deemed to assume all the risks, ordinary as well as extraordinary, which are incident to the work undertaken by him.[2] The most frequent illustrations of this doctrine, as applied to the assumption of ordinary risks, are to be found in those cases which proceed upon the theory that the rule by which an employer is relieved from responsibility to a servant injured by the negligence of a fellow servant, in the course of their common employment, applies to the case of a person who is injured while voluntarily assisting the servants in their work.[3] The position of the person under

forming his duties, and has done so for eighteen months, is bound to the same observance of the company's rules as is required of the agent.

[2] "It is also well settled that a person who, without any employment, voluntarily undertakes to perform service for another, or to assist the servants of another in the service of the master, either at the request or without the request of such servants, who have no authority to employ other servants, stands in the relation of a servant for the time being, and is to be regarded as assuming all the risks incident to the business." *Meltaire Street R. Co.* v. *Bolton* (1885) 43 Ohio St. 224, 54 Am. Rep. 803, 1 N. E. 333.

A person not in the employ of the company, who complies with a request of a watchman to signal a train to stop, voluntarily assumes the service and risks, if he signals, and cannot recover against the company for injuries suffered in doing so. *Blair* v. *Grand Rapids & I. R. Co.* (1886) 60 Mich. 124, 26 N. W. 855.

A bystander who attempts to assist in the switching of cars of a construction train, at the request of the head brakeman left in charge of the switching while the conductor is temporarily absent attending to his usual duties at the station, is a mere volunteer and assumes all the risks incident to the situation. The head brakeman of such a train has no implied authority to employ additional men, even though the existing force of hands is insufficient for the work. *Church* v. *Chicago, M. & St. P. R. Co.* (1892) 50 Minn. 18, 16 L. R. A. 861, 52 N. W. 647 (injury caused by defective car).

The last-mentioned case was cited with approval in *Evarts* v. *St. Paul, M. & M. R. Co.* (1894) 56 Minn. 141, 22 L. R. A. 663, 45 Am. St. Rep. 460, 57 N. W. 459. But the decision turned upon the question whether the volunteer had been wilfully or wantonly injured after his dangerous position was discovered. See § 629, note 2, *supra*.

[3] *Degg* v. *Midland R. Co.* (1857) 1 Hurlst. & N. 773, 3 Jur. N. S. 395, 26 L. J. Exch. N. S. 171. The position of the court will be apparent from the following extract from the opinion of Bramwell: "The facts stated by the declaration and the plea demurred to may be thus summed up. The defendants were possessed of a railway and carriages and engines; their servants were at work on the railway in their service with those carriages and engines; the deceased voluntarily assisted some of them in their work; other of the defendants' servants were negligent about their work; and by reason thereof the deceased was killed; the defendants' servants were persons competent to do the work; the defendants did not authorize the negligence. We are of opinion that, under these circumstances, the action is not maintainable. The cases show that if the deceased had been a servant of the defendants, and injured under such circumstances as occurred here, no action would be maintainable; and it might be enough for us to say that those cases govern this, for it seems impossible to suppose that the deceased, by volunteering his services, can have any greater rights or impose any greater duty on the defendants than would have existed had he been a hired servant. But we were pressed by an expression to be found in those cases, to the effect that 'a servant undertakes, as between him and the master, to run all ordinary risks of the service, including the negligence of a fellow servant' (*Wiggett* v. *Fox* (1856) 11 Exch. 832, 25 L. J. Exch. N. S. 188, 2 Jur. N. S. 955), and it was said there was no such undertaking here. But in truth there is as much in the one case as in the other; the consideration may not be as obvious, but it is as competent for a man to

taking work which he was not authorized to undertake is in nowise strengthened by the fact that his intervention therein was induced by the order of his own superior.[4]

agree, and as reasonable to hold that he does agree, that, if allowed to assist in the work, though not paid, he will take care of himself from the negligence of his fellow workmen, as it would be if he were paid for his services."

"Nor do we give force to the argument that places the plaintiff's service in the duty of the inspector, outside of those which he assumed as a carpenter. He made no objection to the service, had, a dozen times before, as he himself states, undertaken it as incident to his employment, and voluntarily. He therefore stands upon the same footing as if this service was within the scope of his agreement. One who volunteers to act with other employees becomes one himself, so far as to introduce between them the same rule of legal responsibility." *Kirk* v. *Atlanta & C. Air-Line R. Co.* (1886) 94 N. C. 625, 55 Am. Rep. 621.

"A volunteer can have no greater right than those servants have who are engaged in the service in which he joins," since "he makes himself one of a class who, as against their masters, have no right of recovery for each other's negligence." *Wischam* v. *Richards* (1890) 136 Pa. 109, 10 L. R. A. 97, 20 Am. St. Rep. 900, 20 Atl. 532.

The doctrine that the rule as to co-service is a bar to an action by a volunteer, for the reason that a stranger cannot, by offering his assistance, impose upon the person to whom such assistance is given any greater liability than that to which he is subject with regard to the servants hired by him, is also recognized in *Potter* v. *Faulkner* (1861) 1 Best & S. 800, 8 Jur. N. S. 259, 31 L. J. Q. B. N. S. 30, 10 Week. Rep. 93, 5 L. T. N. S. 455 (see note 5, *infra*); *Barstow* v. *Old Colony R. Co.* (1887) 143 Mass. 535, 10 N. E. 255; *Osborne* v. *Knox & L. R. Co.* (1877) 68 Me. 49, 28 Am. Rep. 16; *Wanton* v. *Texas & P. R. Co.* (1885) 63 Tex. 77, 51 Am. Rep. 637; and the cases cited in the following notes.

cannot recover, although he was obeying the order of his own superior, given at the request of the foreman of the manufacturer for more help, as in such case the service was not a part of his duties, and his superior had no authority to order him to perform it. *Wischam* v. *Richards* (1890) 136 Pa. 109, 10 L. R. A. 97, 20 Am. St. Rep. 900, 20 Atl. 532. Commenting on the conclusion of the court below, that the plaintiff could not be regarded as a volunteer, but was rather one engaged in the performance of a duty, the court said: "At first blush this seems very forcible and quite reasonable, and it had much weight with the writer until a thorough study of the subject, and of the authorities, led him to a different view. As I regard the matter, the cases teach us that it is not because the associated servant is a volunteer that he is denied redress for the negligence of a fellow servant, but because it is the well-established law of the relation between the servants whom he joins, and their master, that there is no such liability on the part of the master. Hence, by joining them in their common service, he becomes, as to the master, one of them, with the same rights and duties as to the master, but with no higher rights as against him. Certainly, without his consent, he cannot reasonably be subjected to a greater obligation, by the act of one of his servants in engaging the service of another, than he is under to that servant. If this be so, as was held in the cases cited, how does it matter in what manner the request of the defendant's servant was communicated to the plaintiff? Let it be that it came in the form of an order from his own superior, and that he was in duty bound to obey the order. It was still only done at the request of the defendant's servant, and the question we have to decide is the liability of the master. We have seen that his liability cannot be increased, without his consent, by the act of his servant, and it is that reason which is fundamental in the discussion which demonstrates his freedom from obligation for his servant's act. But if this is the determining reason of the argument, it is just as applicable where the servant's request is communicated through, or made the basis of, an order by a third person to

[4] In a case already cited, it was held that a servant of a factory owner, injured while assisting in unloading machinery which it was the duty of the manufacturer to deliver, is a volunteer and hence a fellow servant with the employees of the latter, against whom he

A person suing for injuries received in the performance of work undertaken by him as a volunteer is placed in this dilemma,—that, if the evidence shows that he was not authorized to perform, as a servant, the work in question, the party for whom the work was done owed him no obligations as a master; while, on the other hand, if his claim to be put on the footing of a servant is admitted the doctrine of common employment operates as a bar to his recovery.[5]

the plaintiff. It is very plain, for that is decided, that if Wiegner, who was Wischam's superior, had himself joined the service at the request of Harvey, and been injured, he could not have recovered. How then, can he confer upon Wischam, who is at best only his representative, a right of action against Rickards which he did not possess himself? We cannot see. It may be true that Wischam was subject to a duty to obey Wiegner, but that was no duty to the defendant; it was no duty to which the defendant had any relation whatever, and it is only the defendant's obligation that is in question here. We cannot think, therefore, that the defendant's liability was in any manner increased, by the fact that Harvey's request for assistance was answered by Wischam's joining in the service in consequence of an order from his superior. It was still only a participation by Wischam in an associated service, the law of which excludes him from compensation to be recovered from the master for the negligence of his associates."

[5] In *Degg* v. *Midland R. Co.* (1857) 1 Hurlst. & N. 773, 26 L. J. Exch. N. S. 171, 3 Jur. N. S. 395, Bramwell, B., after laying down the doctrine that the action was barred by the doctrine of common employment (see note 2, *supra*), proceeded thus: "But we were also told that there was and could be no agreement; that Degg was a wrongdoer, and therefore the action was maintainable. It certainly would be strange that the case should be better if he were a wrongdoer than if he had not been. We are of opinion that this argument cannot be supported. We desire not to be understood as laying down any general proposition that a wrongdoer never can maintain an action. If a man commits a trespass to land, the occupier is not justified in shooting him, and probably if the occupier were sporting or firing at a mark on his land, and saw a trespasser, and fired carelessly and hurt him, an action would lie. Nor do we desire to give any opinion on the cases cited of *Bird* v. *Holbrook* (1828) 4 Bing. 628, 1 Moore & P. 607; and *Lynch* v. *Nurdin* (1841) 1 Q. B. 29, 4 Perry & D. 672, 5 Jur. 797. But it is obvious, and a truism, to say that a wrongdoer cannot, any more than one who is not a wrongdoer, maintain an action unless he has a right to complain of the act causing the injury, and complain thereof against the person he has made defendant in the action. Now, it may be that, had the mischief here resulted from the personal act of the master, he knowing that the deceased was there, the master would have been liable; and that, as the defendants' servants knew the deceased was on the railway, and because they knew that they were guilty of a wrong to him, they are liable to an action: but on what reason or principle should the defendants be? If a servant is driving his master in a carriage, and a person gets up behind, and, the servant knowing it, drives carelessly and injures that person, the servant may be liable, but why the master? The law, for reasons of supposed convenience, more than on principle, makes a master liable in certain cases for the acts of his servants—not only in cases in the nature of contract, which depend on different considerations, but in cases independent of contract,—such as negligent driving in the public streets, when damage is thereby done. This is a responsibility the law has put on them: there is a duty on them to take care that their servants do no damage to others by negligence in their work for their master, or to compensate the sufferer where such damage is done. The public interest may require this for the public benefit; but why should a wrongdoer have power to create such a responsibility and such a duty? No reason can be assigned. Some acts are absolutely and intrinsically wrong, where they directly and necessarily do an injury,—as a blow: others only so from their probable consequences. There is no absolute or intrinsic negligence; it is always relative to some circumstances of time,

The latter alternative arises where the injured person was an emergency assistant hired by an employee who had, under such circumstances, authority to engage him, although ordinarily he was not

place, or person. It is not negligent or wrong for a man to fire at a mark in his own grounds at a distance from others, or to ride very rapidly in his own park; but it is wrong so to fire near to, and so to ride on, the public highway; and though the quality of the act is not altered, it is wrong in whoever does it, and so far it is as though it were intrinsically wrong. So, the act of firing or riding fast in an inclosure becomes wrong if the person doing it sees that there is someone near, whom it may damage. But the act is wrong in him only for the personal reason that he knows of its danger: it would not be wrong in anyone else who did not know that. Now, for a wilful act intrinsically wrong by a servant the master is not liable. By a parity of reason he ought not to be where the act, not wrong in itself, is only so for reasons personal to the servant, and his wilful disregard of them. The master's liability ought to be limited to that which he may anticipate and guard against, namely, the middle class of cases we have put. However this may be, it seems to us there can be no action except in respect of a duty infringed, and that no man, by his wrongful act, can impose a duty: and as a direction by the master to drive furiously, or in the way called carelessly, in his park would not be wrong in the master, it cannot be made so by a trespasser getting there and being hurt; so that *quoad* the master it is *damnum absque injuria;* and if not a wrong in the master, when expressly ordered, it cannot be, if done by the servant against his orders. The defendants might, if they had thought fit, have directed their servants to move and propel trucks against other trucks without any notice or precaution,—in short, to do what the plaintiff complains of: and if their servants chose to work on those terms, although it might be a wasteful way of using their engines and carriages, no one could say it was wrongful; then the deceased cannot make it so by coming there himself. Upon these grounds, then, whether he is considered a wrongdoer or not, we are of opinion the action cannot be maintained, and that the plea is good."

In *Potter* v. *Faulkner* (1861) 1 Best & S. 800, 31 L. J. Q. B. N. S. 30, 8 Jur. N. S. 259, 5 L. T. N. S. 455, 10 Week. Rep. 93, the defendant's porters were lowering bales of cotton from the defendant's warehouse, and his carter was receiving them into his lorry (small wagon). The plaintiff, who was waiting with a lorry to receive a load of cotton for his master, at the request of the defendant's carter assisted him, and in consequence of the negligence of the defendant's porters a bale of cotton fell upon and injured him. It was held that the defendant was not liable to an action. Ex. Ch., J., said: "The plaintiff intervened to assist the servant who was in the cart, and, so far as the master was concerned, was a volunteer upon the occasion, and was injured by what was found to be negligence in the defendant's servants in the warehouse. The question is, Can the plaintiff, under the circumstances, sue the master for the negligence of his servants? This is the case of one who volunteers to associate himself with the defendant's servant in the performance of his work, and that without the consent or even the knowledge of the master. Such an one cannot stand in a better position than those with whom he associates himself, in respect of their master's liability; he can impose no greater obligation upon the master than that to which he was subject in respect of a servant in his actual employ; and it is clear law that the master would not have been liable if the servant below had been injured by the negligence of the servants above. As between master and servant, the duty of the master is to take due care to employ other servants of competent skill and ordinary carefulness: when he has done that, he has done his duty as between himself and his servants, and we are of opinion that the liability contended for by the plaintiff does not attach to an employer."

In *Flower* v. *Pennsylvania R. Co.* (1871) 69 Pa. 210, 8 Am. Rep. 251, while a locomotive was at a water station, the fireman asked a boy ten years old, who was standing there, to turn on the water. Whilst he was climbing on the tender to put in the hose, the remainder of the train came down with the ordinary force and struck the car attached to the engine; the jar threw the boy under the wheels and he was

invested with any such power;[6] or where the services, although voluntarily offered in the first instance, were accepted by the master's agent.[7]

632. Persons not deemed to be subject to the disabilities of volunteers.—The rule discussed in the preceding section is subject to the important qualification that, where one who has an interest in the work to be performed, and for his own convenience, or to facilitate or expedite his own work or that of his employer, assists the servants of another, at their request or with their consent, he is not thereby deprived of his right to be protected against the carelessness of the other's servants.[1] It will be observed that the essential ground upon

killed. In an action by the parents for his death, it was held that the company was not liable. Agnew, J., in delivering the opinion, said: "The true point of this case is that, in climbing the side of the tender or engine at the request of the fireman, to perform the fireman's duty, the son of the plaintiff did not come within the protection of the company. To recover, the company must have come under a duty to him which made his protection necessary. Viewing him as an employee at the request of the fireman, the relation itself would destroy his right of action. *Caldwell* v. *Brown* (1856) 53 Pa. 453; *Weger* v. *Pennsylvania R. Co.* (1867) 55 Pa. 460; *Cumberland Valley R. Co.* v. *Myers* (1867) 55 Pa. 288. Had the fireman himself fallen, in place of the boy, he could have had no remedy. It does not seem to be reasonable that his request to the boy to take his place, without any authority, general or special, can elevate the boy to a higher position than his own, and create a liability where none would attach had he performed the service himself."

Commenting on this case in *Wiscbam* v. *Rickards* (1890) 136 Pa. 109, 10 L. R. A. 97, 20 Am. St. Rep. 900, 20 Atl. 532, the court said: "The very important proposition declared in this case is that the servant of the company cannot impose a higher liability upon it than it was under to himself, by any act of his, and that the person rendering assistance in the service of the company, at the request of its servant, can have no other or different remedy against the company than the servant himself had. It seems to be a reasonable doctrine, founded in sound principles."

Where a casual passer by, at the request of an employee, gets on a car and applies brakes thereto, and is injured by the negligence of coemployees, he is not entitled to recover from the company. If the request was made by an employee having authority to employ him, he is in no better position than any other servant injured by the negligence of his coservants. If the request was made without authority, he is a mere interloper, to whom the company owes no duty either as a servant, passenger, or traveler. *Everhart* v. *Terre Haute & I. R. Co.* (1881) 78 Ind. 292, 41 Am. Rep. 567.

Whether, in rendering assistance in repairing a machine at the request of the foreman, the servant injured was acting within the scope of his employment or not is immaterial, so far as regards the application of the rule as to coservice to the duty and obligations of the employer, which are the same towards a volunteer as towards a servant acting within his employment. *Stevens* v. *Chamberlain* (1900) 51 L. R. A. 513, 40 C. C. A. 421, 100 Fed. 378.

[6] *Mathis* v. *Rochester R. Co.* (1899) 41 App. Div. 66, 58 N. Y. Supp. 210. An assistant in this case held to be a fellow servant of the employee who hired him.

A complaint alleging that it became necessary for the employees in charge of one of defendant's freight trains to call in assistance to operate it, which they had the right and power to do, and that plaintiff was injured in complying with a request of one of those employees to give such assistance, does not show that he was not a mere volunteer. *Watson* v. *Texas & P. R. Co.* (1885) 63 Tex. 577, 51 Am. Rep. 637.

[7] *Barstow* v. *Old Colony R. Co.* (1887) 143 Mass. 535, 10 N. E. 255.

[1] *Welch* v. *Maine C. R. Co.* (1893) 86 Me. 552, *sub nom.* *O'Donnell* v. *Welch*,

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men working for J. to
ing the earth out of the cars, and that, while they were so engaged, a broken car, unevenly loaded, tipped over and fell upon one of them, the plaintiff's decedent. Discussing the contention of the defendant that it was the duty of the servants of the railroad company to dump J.'s earth out of the cars, that they had no authority to employ J.'s men to [illegible] them, that the men were trespassers attempting to do so, and that, in assisting the railroad company [illegible] no duty, as under obligation to protect them against the negligence of its servants the court said: "The distinction running through the cases is this—that where a volunteer, that is one who has no interest in the work, undertakes to assist the servant of another, he does so at his own risk. In such a case the maxim of *respondeat superior* does not apply. But where one has an interest in the work, as a consignee or the servant of [illegible] or in any other capacity requests or with the consent of the master's servants undertakes to assist, he does not do so at his own risk, and if injured by their negligence is responsible. In such a case the maxim of *respondeat superior* does apply. [illegible] turn is the [illegible] of interest. In one case the party injured is a mere intruder, an officious meddler. In the other, he is in the regular pursuit of business, and entitled to the protection as anyone whose business with the master exposes him to injury from the careless[illegible] servants."

If the injured person is not a volunteer, but engaged at the request or with the permission of the railroad company in a transaction of interest as well to himself or his master as to the railroad company, he is entitled to the same protection against the negligence of the company's servants as if he were at the time attending to his own private affairs. Though performing a service beneficial to both, he is doing so in his own behalf, and not as a servant of the company. *Lawson v. Sabine & E. T. R. Co.* (1888) 65 Tex. 577, 57 Am. Rep. 606 (employee of mill company shipping lumber by railway company held not to be fellow servant of trainmen in helping to couple cars, so as to expedite the discharge of the lumber).

A passenger on a street railroad who assists, at the request of the driver in unmuring the car on a siding, which is necessary for the continuance of the journey, may recover for injuries inflicted by the negligence of the company's servants. *Wilmington Street R. Co. v. Belton* (1885) 43 Ohio St. 224, 54 Am. Rep. 803, 1 N. E. 333. The court, after laying down the rule as to the disabilities of volunteers (see § 634, note 2, *supra*), proceeded thus: "But it does not follow that, under all the circumstances, a person who assists the servants of another in the discharge of their duties, without employment by the master, is to be regarded as voluntarily assuming the relation of a fellow servant or the risks pertaining to that relation. To illustrate: suppose a servant in driving his master's team on the highway founders in such a manner as to prevent the use of the highway by others for the time being. Another person who is thus impeded in the use of the road assists the servant, either with or without request, to remove the impediment to travel from the highway. Such other person does not thereby become the fellow servant of the driver. Indeed, in no just sense has he voluntarily entered the service of the master. And the rule of law first above stated does not apply to the case supposed, and therefore it was not error in the court of common pleas to refuse it. . . . The plaintiff . . . was not a mere volunteer, within the meaning of the rule of law contended for by the plaintiff in error; but as a passenger on the northbound car was interested in having it driven to its destination. To this end it was necessary to pass the southbound car. This could only be accomplished by pushing the northbound car back upon the siding. In doing this, although it may not have been absolutely necessary for the passenger to assist the driver, it was a

those words.[3] The same general consideration, viewed from a different standpoint, is presumably the basis of the decision that a passer-by who is casually appealed to by a workman for information respecting a thing which the latter is doing in a public thoroughfare is not to be considered a volunteer assistant, so as to exonerate the workman's master from responsibility for an injury resulting to the former from the workman's negligent mode of doing the work.[4] Whether the rule itself or the qualification is to determine the liability of the defendant in any particular case depends upon the fact in evidence.[5]

prudent and reasonable act justified by the circumstances of the case,—not a wrongful interference and intermeddling with business in which he had no concern. It was not, in fact or in law, an assumption of risk from the carelessness of the defendant or any of its servants."

In *Louisville & N. R. Co.* v. *Ward* (1897) 98 Tenn. 123, 38 S. W. 727, where it was held that a man engaged by a shipper of goods to load them on cars did not become a volunteer, when complying with the request of a brakeman to assist in placing the cars in a more convenient situation, the court reasoned as follows: "It is earnestly insisted, however, that the rule of liability cannot exist unless there was a necessity on the part of the railroad to have the services of the plaintiff; and that, if the business was that of the railroad, and it had sufficient force to perform it, then the plaintiff must be considered a volunteer and intermeddler. But none of the cases holding the company liable proceed upon this ground, but upon the more satisfactory one, whether the plaintiff is to be regarded in such cases as expediting and forwarding his own business, or that of the railroad company, either as an accommodation or as a necessary help. In other words, was he engaged in his own business or that of the railroad? If the former, the road is liable if there is negligence; if the latter, it is not, because the negligence is that of a fellow servant: and this is equally so whether his aid is necessary to the road's performance of its duty or not. The emergency or necessity which will authorize him to aid the railroad, and protect him in so doing, is one that arises in his own business, and not in that of the railroad company."

A person who, with the station master's consent, assists in the shunting of a car on which goods for him have been brought, is not a mere volunteer, but is on the premises for the lawful purpose of assisting in the landing of the goods, and may recover if he is injured by the negligence of the company's servants. *Wright* v. *London & N. W. R. Co.* (1875) L. R. 10 Q. B. 298.

Where the putting of a heater in a distillery was the joint undertaking of the distillery company and the maker of the heater, the distillery company is liable to one of its servants, who assisted in the work by direction of its foreman, for an injury resulting from the breaking of a defective rope furnished for the work. *Old Times Distillery Co.* v. *Zehnder* (1899) 21 Ky. L. Rep. 753, 52 S. W. 1051.

[3] See language used by the court in *Wischam* v. *Rickards* (1890) 136 Pa. 109, 10 L. R. A. 97, 20 Am. St. Rep. 900, 20 Atl. 532; *Metairie Street R. Co.* v. *Bolton* (1885) 43 Ohio St. 224, 54 Am. Rep. 803, 1 N. E. 333; *Texas & P. R. Co.* v. *Sabine & E. T. R. Co.* (1886) 65 Tex. 377, 57 Am. Rep. 606.

[4] *Cleveland* v. *Spier* (1864) 16 C. B. N. S. 399.

[5] In *Wischam* v. *Rickards* (1890) 136 Pa. 109, 10 L. R. A. 97, 20 Am. St. Rep. 900, 20 Atl. 532, the facts of which are stated in the last section, the contention of plaintiff's counsel that the injured person was acting in his master's interest was thus rejected: "The plaintiff did become one of the servants of the defendant, to assist in the defendant's act of delivering the wheel. He was so acting in response to the request of one of the defendant's servants; he had a right or interest in the wheel or its delivery, and what he did was done on behalf of the defendant and in connection with the defendant's servants. The delivery was not completed, but was going on when the accident occurred.

633. Right of action where servants undertake new duties.—Cases determined upon principles identical with, or closely analogous to, those discussed in the preceding sections are those in which the injury was received by a person who, at the time when the accident occurred, was already in the employ of the defendant, but who is alleged to have gone outside the proper scope of his employment, without being directed to do so either by the master or by an agent who was authorized to transfer him to the new sphere of duty. The rule applicable to such circumstances has been formulated as follows: "If an employee quits the work assigned to him by his employer, and voluntarily undertakes to do work about which he had no duties to perform by virtue of the contractual relation existing between him and his employer, then, while such condition exists, the duty growing out of that relation of using care for his safety does not rest upon the employer."[1] In other words, a servant who voluntarily and without directions from the master, and without his acquiescence, goes into hazardous work which is not embraced in the contract of hiring, may be regarded as putting himself beyond the protection of his master's implied undertaking.[2] Numerous decisions exemplifying this rule are collected in the subjoined note.[3]

and the delivery was the act of the defendant. The participation of the plaintiff was not that of an owner receiving his own goods, but was that of a servant assisting the servants of the defendant; and this circumstance brings it within the rule of nonliability. The distinction is refined, but it seems to be substantial, and we feel constrained to recognize it and enforce it."

A messenger boy in a telegraph office, who, while traveling on a train, voluntarily performs a service as switchman, at the request of the foreman of the yard, is not forwarding his own private interest, but places himself thereby in the position of a fellow servant of the foreman and the engineer of the train. *Texas & N. O. R. Co.* v. *Skinner* (1893) 4 Tex. Civ. App. 661, 23 S. W. 1091.

[1] *Southern R. Co.* v. *Guyton* (1898) 122 Ala. 231, 25 So. 34.

A servant "could not voluntarily do an act which he was not required to do, and charge the master with responsibility for the resulting injury."—especially where the dangers incident to the work undertaken were obvious. *McCue* v. *National Starch Mfg. Co.* (1894) 142 N. Y. 106, 36 N. E. 809.

Where a servant, merely to oblige a fellow servant, volunteers to do work which the master did not employ or require him to do, and which he did not undertake to do, there can be no recovery, even if the machinery by which he was injured was in a defective condition. *Quaid* when work the relation of master and servant does not exist. *Knox* v. *Stephens* (1870) 1 Viet. L. Rep. (L.) 102.

A servant who attempts to perform work outside the scope of his employment, without or contrary to the orders of the master, assumes his own risk, and cannot recover for injuries caused by defective machinery. *Ray* v. *Diamond State Steel Co.* (1900) 2 Penn. (Del.) 525, 47 Atl. 1017 (in charge to jury).

A servant who, in disregard of the master's instructions, but in compliance with those of a vice principal, does work outside of and more hazardous than his regular employment, assumes the risk, notwithstanding that, prior to the special instructions of the master to him, a general instruction that all employees were to look to the vice principal had been given. *Indiana Natural & Illuminating Gas Co.* v. *Marshall* (1898) 22 Ind. App. 121, 52 N. E. 232.

[2] *Pittsburgh, C. & St. L. R. Co.* v. *Adams* (1885) 105 Ind. 151, 5 N. E. 187.

[3] (a) *Recovery denied.*—Where a sec-

634. Same subject continued.— The scope of a servant's duties in relation to the rule illustrated by the cases cited in the last section

tion man is taken off his section to perform a service for his foreman individually, the company cannot be held liable unless its course of conduct was such as to furnish a reasonable ground for his believing that the foreman had authority to engage him in such employment. *Hurst* v. *Chicago, R. I. & P. R. Co.* (1878) 49 Iowa, 76, disapproving instructions which made the company liable in any event for injuries caused by defects in the hand car on which the plaintiff was traveling, if the services required of him were apparently in the line of his employment.

A switchman injured in coupling cars at the request of the engineer cannot recover. *Bradley* v. *Nashville, C. & St. L. R. Co.* (1884) 14 Lea, 374.

A railway employee who "stakes off" cars, without any directions from an agent of his employer, and merely at the request of a fellow servant, cannot recover. *Watts* v. *Hart* (1893) 7 Wash. 178, 34 Pac. 423, 771.

The fact that a brakeman has received directions to comply with the instructions of the engineer will only justify his obedience to such instructions in so far as they relate to matters which are within his proper duty as a brakeman, and does not warrant his complying with an order to pass from his post on the last car to the front end of the train, while it is in motion, for the purpose of getting off in time to shift the points and mount the train while it is still moving. *Sutherland* v. *Mookland R. Co.* (1857) 19 Sc. Sess. Cas. 2d series, 1004. [The American practitioner should remember that the cars with reference to which this ruling was made were not constructed like those used in the United States, with a view to trains being traversed from end to end, while in motion.]

An employee injured in loading rails on a moving car cannot recover for an injury caused by his attempting to straighten a rail after it was put on the car, where the evidence is that this was a duty not required of him by his employer. *Cleveland, C. C. & St. L. R. Co.* v. *Carr* (1901) 95 Ill. App. 576.

Where a freight conductor, on being informed by the road superintendent that the culverts on each side of a trestle situated a short distance beyond the station where the intelligence was given were probably in a dangerous condition, owing to a heavy fall of rain, detached the engine and proceeded to examine the structures, it was held that, in view of the emergency and of the fact that he was exercising such ordinary care as was necessary for the safe movement of the train, his action was not outside the scope of his employment, and that he was therefore entitled to recover for injuries resulting from the collapse of the trestle (about the condition of which nothing had been said by the superintendent) while the engine was crossing it to reach the second culvert. *Terre Haute & I. R. Co.* v. *Fowler* (1900) 154 Ind. 682, 48 L. R. A. 531, 56 N. E. 228.

Where the evidence shows that the injured servant left a place where he was in no danger, in order to stop a runaway car passing on a side track, and closed a switch left open to prevent car running onto the main track; that, while in pursuit of the car on the main track he was run over by a second runaway car; and that he had no duty to perform about such car or its operation, and acted without request or direction,— no recovery can be had, though such car ran away because of a defective brake, since the proximate cause of injury was the servant's voluntary act. *Wetzell* v. *Maine & N. H. Granite Co.* (1899) 70 N. H. 125, 85 Am. St. Rep. 618, 46 Atl. 684.

No action can be maintained for an injury received by a servant while he was making certain repairs which it was no part of his duty to make, the evidence being that he had commenced the performance of the work of his own free will, upon the suggestion of a fellow workman, after he had asked and obtained the consent of his own immediate superior. Under such circumstances, he was declared to be only a volunteer, and to stand in no better position than a stranger would have done, who should have offered and been permitted to make the same repairs. *Walker* v. *Merchants' Mfg. Co.* (1890) 150 Mass. 362, 5 L. R. A. 792, 23 N. E. 100.

Where a weaver complied with the request of the "loom fixer" to assist him in adjusting a belt, it was held that the risks of the work undertaken were assumed by the weaver, as there was no evidence that the machinery or belting

is defined by what he was employed to perform, and by what, with the knowledge and approval of his employer, he actually did per-

was defective, or that the "loom fixer" had any authority to permit or require plaintiff to assist him. *Parent* v. *Nashua Mfg. Co.* (1900) 70 N. H. 199, 47 Atl. 261.

Recovery was denied under the same circumstances in *Martin* v. *Highland Park Mfg. Co.* (1901) 128 N. C. 264, 83 Am. St. Rep. 671, 38 S. E. 876.

Recovery has been denied where the plaintiff asked his foreman to adjust a belt which communicated power to a machine, and tried to do this himself, when the foreman refused his request, saying that he had no time, and that, if plaintiff wanted it, he could put the belt on himself. *Thompson* v. *Cary Mfg. Co.* (1901) 62 App. Div. 279, 70 N. Y. Supp. 1086.

No cause of action is stated by a complaint which alleges that plaintiff was a machinist in the employ of defendant, and while in the engine room he placed his hand on the latchet of the engine, at the request of the engineer, while the latter was making a wedge fastening, and that in so doing his hand was badly hurt, and charges negligence of defendant in furnishing defective appliances, and in not stopping the engine for repairs, but which contains no averment that defendant required plaintiff to make any repairs while the engine was in operation, or that the engineer was his superior officer, with power to direct his services. *Branham* v. *Camden Cotton Mill* (1901) 61 S. C. 491, 39 S. E. 708.

An employer is not liable for an injury to a servant, received while making repairs upon the machinery used by him, because of its failure to instruct him as to the danger attending such work, where it was not the duty of the servant to make the repairs, but merely to report the fact that repairs were needed, to a machinist in the same building. *McCue* v. *National Starch Mfg. Co.* (1894) 142 N. Y. 106, 36 N. E. 809.

Where an elevator tender, instead of reporting the existence of a defect in the elevator to the employee charged with keeping it in repair, exposes himself to danger in putting it to rights, he cannot recover. *Degnan* v. *Jordan* (1895) 164 Mass. 84, 41 N. E. 117.

A servant injured while attempting to put a belt on a line shafting cannot recover therefor if the act was out of the line of his employment, and undertaken without the order or consent of the employer. *Chadosky* v. *Hoopes & T. Co.* (1894) 1 Marv. (Del.) 273, 40 Atl. 1127 (in charge to jury).

Where plaintiff went outside the scope of her duties, and without any request or direction by the superintendent volunteered to assist him in ascertaining the cause of the defective condition of the machine which she operated, she cannot recover for injuries received while she was so doing. *Allen* v. *Hixson* (1900) 111 Ga. 460, 36 S. E. 810 (plaintiff took hold of unwrapped cloth for the purpose of showing the condition of the machine, and had her hand drawn into the machine as a result of a sudden jolt). This decision, however, seems to be a very dubious application of the general rule, as the superintendent was standing by the employee, and it would seem to have been at least a question for the jury whether his acquiescence should not have been regarded as being the legal equivalent of an antecedent order.

A coal miner who accepts the invitation or obeys the order of another not authorized to command him, and voluntarily places himself in a dangerous position in aiding the latter in performing a service which it was not his duty to perform, cannot maintain an action against the coal company for an injury sustained by him while performing such act. *Knox* v. *Pioneer Coal Co.* (1891) 90 Tenn. 546, 18 S. W. 255 (piece of slate fell on plaintiff).

(b) *Recovery allowed.*—The fact that a servant engages in the performance of special duties different from those for which he was employed does not make him a volunteer, where he was acting under the orders of a superior who was authorized to call for his services under the circumstances. *Blackman* v. *Thomson-Houston Electric Co.* (1897) 102 Ga. 64, 29 S. E. 120.

A fireman who, while looking from the cab to see if a journal had become heated and was smoking, was struck by a leaning telegraph pole but 4 inches distant from the locomotive, is deemed to have received his injuries within the line of his duty. *Renthan* v. *New York C. & H. R. R. Co.* (1897) 24 App. Div. 303, 48 N. Y. Supp. 503.

A special conductor in charge of certain cars in a train, who, at the request of the regular conductor, undertakes to uncouple and divide the train, takes upon himself the risk of the act which he thus undertakes to perform; but if, after he has performed it and resumed his proper position relative to the train, the car on which he is standing is suddenly jerked forward by the negligence of the engineer, he may be entitled to recover for the injuries thereby caused to him. *Cumberland Valley R. Co.* v. *Myers* (1867) 55 Pa. 288.

Where the yard master of a railroad company has authority to employ necessary assistants in his department, a person working therein as a brakeman with his permission or by his direction is a servant of the company, the same as the paid employees, and not a trespasser. *Central Trust Co.* v. *Texas & St. L. R. Co.* (1887) 32 Fed. 148.

Where a conductor on a freight train, who had been such for seven years, and who was a brakeman a number of years before that, attempted to make a coupling of a car when his train was several minutes late and the brakeman had made three unsuccessful attempts to make the coupling, and was run over and killed while so engaged, the railroad company is not relieved from liability on the ground that he was not authorized to couple cars. *Sidy* v. *Southern P. Co.* (1890) 6 Utah, 319, 23 Pac. 751. In the Supreme Court of the United States (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530) recovery was denied on the grounds of assumption of obvious risk and contributory negligence in coupling where there was a defective frog. The above point was not noticed.

A telegraph operator in the employ of a railroad company does not, by going on a the railroad track to stop a train which has failed to obey his signal, in order to avoid a collision, become a trespasser, so as to lose his right to have the company exercise the utmost care for his safety. *Illinois C. R. Co.* v. *Mahon* (1896) 17 Ky. L. Rep. 1200 34 S. W. 16.

A submission to the jury of the question whether the plaintiff was working within the scope of his employment is warranted by evidence to the effect that, having had no experience in milling, he was placed at the rear of a planer, and directed to receive the planed boards as they came through; that the planer was supplied with a blower pipe, through which the shavings were brought; that in consequence of this pipe being defective the shavings were packed beneath the machine, and obstructed its operations; that he was given no directions as to his duties, and understood that he was to clean away the shavings; that in doing this, while the machine was in operation, he lost his hand by its coming in contact with the knives of the machine; and that, according to the testimony of plaintiff's brother, who had charge of the machine and who was an experienced workman, the man who took away the boards was required to keep the shavings away. *Bennett* v. *Warren* (1901) 70 N. H. 564, 49 Atl. 105. In this case it was held not to be error for the court to charge that defendant would not be responsible for any orders given by plaintiff's brother in regard to plaintiff's duties, if plaintiff was doing an act not a part of his duty when injured, but that the question was whether plaintiff was acting within the scope of his employment when he was injured, and, if not, defendant was not liable, though plaintiff's brother directed him to do the act.

A machinery company which puts up a wringer in a laundry, and subsequently sends an engineer to make changes therein, is liable to an employee of the laundry, who, while complying with the request of such engineer to assist him in making the changes, is injured by a failure to properly secure the wringer for the work required of it. *Troy Laundry Mach. Co.* v. *Brady* (1895) 66 Ill. App. 379.

A man employed in the press room of a newspaper, who during the few days he has been at work has been assisting to set up a new printing machine, cannot be said, as a matter of law, to have acted as a mere volunteer in complying with the request for assistance made by another workman who is operating one of the machines already in use, where the evidence is that the same foreman had charge of all the servants in the room and it does not appear that there was any distinct line drawn between the departments of those engaged in setting up the machines and those engaged in operating them. *Voyer* v. *Dispatch Printing Co.* (1895) 62 Minn. 393, 64 N. W. 1138.

When there is evidence that servants used an elevator as they had occasion; that there was no one to take charge of it; that the belt by which it was operated was liable to come off, the various employees were in the habit of

form, rather than by the mere verbal designation of his position.[1] The question whether the injured person was acting in the course of his employment is for the jury, where the evidence is conflicting,[2] or where a difference of opinion may reasonably be entertained with

putting it on, and that there were no rules of the employer forbidding or regulating the putting on of the belt,—it cannot be said, as a matter of law, that an employee injured while putting on the belt in the usual manner was acting negligently and without the scope of his employment, and that the employer was free from negligence. *Daley* v. *American Printing Co.* (1891) 152 Mass. 581, 26 N. E. 135.

An employee charged to keep a machine running and to tie in a bolt if it fell out was injured in the line of his duty, if he was hurt while attempting to secure the bolt as instructed. *Greenville Oil & Cotton Co.* v. *Harkey* (1899) 20 Tex. Civ. App. 225, 48 S. W. 1005.

Closing one of the large doors of a pier left open during the day is in the line of duty of a night watchman employed to prevent pilfering by river thieves, and recovery may be had for his death, resulting from injuries sustained by him while attempting to close the door, on account of its defective condition. *Upton* v. *Bartlett* (1891) 37 N. Y. S. R. 193, 13 N. Y. Supp. 151.

A workman who eats his dinner, according to his usual custom, upon his master's premises during the noon day intermission of work, is not a trespasser, as he has an implied permission to stay there. Under such circumstances, if he is called upon to resume labor before the regular period of intermission has expired, it is his duty to do so, and whatever he does in compliance with such a request is not voluntary on his part, as being outside the scope of his employment. *Broderick* v. *Detroit Union R. Station & Depot Co.* (1885) 56 Mich. 261, 56 Am. Rep. 382, 22 N. W. 802.

Where an employee in a sawmill, while on his way to discharge a duty which he had been ordered to perform, in passing along one of the open thoroughfares of the mill, stopped to exchange a remark with a fellow employee concerning the operation of the machinery, and was injured by the breaking of a belt, such action on his part was not inconsistent with the proper discharge of his duty, and he was not precluded from recovery on the ground that he was not engaged in the discharge of any work. *Moore* v. *W. B. Pickering Lumber Co.* (1901) 105 La. 504, 29 So. 990.

The chief of a fire company composed wholly of railroad employees, and which has been voluntarily organized for the protection of the railroad property, but which is not under the control of the railroad company, although the latter furnishes the apparatus and allows the firemen to drill during work hours without deducting any time, and also allows the chief an hour once a week without deduction to inspect its premises,—owes the duty to the company to aid in extinguishing a fire, and in doing so acts as its employee and not as a mere volunteer who must assume all the risks of such action. *Collins* v. *Cincinnati, N. O. & T. P. R. Co.* (1892) 13 Ky. L. Rep. 670, 18 S. W. 11.

That the foreman of one gang of section men, under whose direction a member of another gang was working at the time he received an injury, supposed the latter was a mere volunteer with reference to the particular work, does not affect the master's liability, where he in fact was directed by his own foreman to work under the direction of the other foreman. *Southern R. Co.* v. *Guyton* (1898) 122 Ala. 231, 25 So. 34.

Where it was a part of plaintiff's duty to wheel sand to a sand sifter, the contention that he was not entitled to recover, because he would not have been injured had he remained at work under the stage, where he had been placed at work by the defendant, and that he was under no obligation to sift sand at the request of the mortar man, was held not to be sustainable, where one of the members of defendant corporation was present, and made no objection to his doing the work requested. *Witkowski* v. *George W. Carter & Sons Co.* (1901) 60 App. Div. 577, 70 N. Y. Supp. 232.

[1] *Rumwell* v. *Dilworth, P. & Co.* (1885) 111 Pa. 343, 2 Atl. 355, 363.

[2] *Southern R. Co.* v. *Guyton* (1898) 122 Ala. 231, 25 So. 34.

regard to the proper inference to be drawn from the testimony.[1] Otherwise that question is decided as one of law by the court.[2]

Any evidence which has a bearing upon the actual scope of the servant's duties is admissible.[3] One of the most important circumstances to be considered is whether the servant had ever, upon any other occasion, engaged in work similar to that which he was doing when the injury was received. If the conditions under which such work had previously been performed were such as to warrant the inference that the enlargement of his regular functions had been acquiesced in to the extent shown, a court will, in most instances, decline to say, as a matter of law, that the servant was injured outside the proper scope of his employment.[4] The acquiescence upon which

[1] Whether an engineer of a pump engine in a mine was acting beyond the range and scope of his employment when killed by the sudden descent of tram cars, which were being pulled up the tramway on the mining slope ahead of him, is a question for the jury, where he was obliged to go to and from his work along the slope, and was charged with the duty of looking after water pipes extending along the slope through its entire length, and at the moment of the accident he was wanted at the mouth of the mine by the foreman. *Whatley* v. *Zenida Coal Co.* (1899) 122 Ala. 118, 26 So. 124.

[2] See cases cited in notes 3, subd. (a), to last section, and 6, *infra*.

[3] In an action by a brakeman against the company for injuries while coupling cars, a printed rule of the company, describing the duties and authority of conductors in the management of trains, was admissible to show that the plaintiff was acting under the lawful authority of the defendant at the time of the injury. *Louisville, N. A. & C. R. Co.* v. *Fearley* (1886) 110 Ind. 18, 9 N. E. 594.

In a case where it is a matter of dispute whether the plaintiff was in the line of his duty in attempting to adjust a belt which operated an elevator, it is error to exclude evidence to the effect that the belt was frequently off the pulley, that there was no one specially charged with the duty of putting it on, and that everyone using the elevator had to put the belt on. *Daley* v. *American Printing Co.* (1889) 150 Mass. 77, 22 N. E. 439.

[4] An employee in a mill, who has at previous times assisted in repairing machinery, injured while replacing a chain on a wheel in response, and in good faith, to the call of the operator of the machine and to prevent the suspension of the work of forty men, in the absence of the persons whose regular duty it is to replace the chain, is acting within the scope of his employment, and not as a mere volunteer. *Mullin* v. *Northern Mill Co.* (1893) 53 Minn. 29, 55 N. W. 1115.

The question whether one employed to wash bottles in the basement of a building, who was killed while carrying a load of bottles on an elevator, was acting under the orders of one having authority to so direct him, is for [illegible] where the foreman gave the order three employees generally, of whom the injured servant was one, without specifying which one was to obey him, and he had done such work before and had not been forbidden to do it. *Dallemand* v. *Saalfeldt* (1898) 175 Ill. 310, 48 L. R. A. 753, 67 Am. St. Rep. 214, 51 N. E. 645, Affirming 73 Ill. App. 151.

The fact that the injured employee was engaged in other than his regular work at the time of injury cannot destroy the employer's liability for such injury, when it is shown that work other than the regular assigned duties was customary among employees of such employer. *East Line & R. River R. Co.* v. *Scott* (1887) 68 Tex. 694, 5 S. W. 501 (man engaged to watch pile-driving engine at night; was ordered to go out and help to operate it, and was injured by an explosion of the boiler).

An employee required to remove work from a mangle as it comes through, who is directed by her employer as he sees her standing idle, to assist in putting wet clothes through the machine, is not

the right of action in this point of view depends will of course be inferred only where it appears that the fact of the servant's having discharged the additional duties was known to the master or his agent *ad hanc vicem*.[3]

635. Performance of unauthorized duties, considered as being indicative of negligence.— (Compare § 626 subd. *c*, *supra*). In several cases involving circumstances similar to those reviewed in the last two sections the courts, instead of making the right of recovery turn upon the question whether the defendant did or did not owe any duties as a master to the injured person, have determined that right with reference to the conception that the injured person was or was not guilty of contributory negligence in undertaking the work upon which he was engaged at the time of the accident.[1]

a volunteer in subsequently putting dry clothes through the machine while the one employed for that purpose is absent. *Fitzhenry* v. *Lamson* (1897) 19 App. Div. 54, 45 N. Y. Supp. 875.

[3] In *Goff* v. *Chippewa River & M. R. Co.* (1893) 86 Wis. 237, 56 N. W. 465, the court, in holding that a neglect of the duty to furnish a safe place of work could not be relied upon as a ground of action, where the servant, without the knowledge, authority, privity, or consent of his employer, and of his own volition, occupied an unsafe and dangerous place, even though the same service had been performed at other times by other employees for the employer in the same place, said: "The employer is responsible only for his express or implied direction to an employee to work in an unsafe or dangerous place. The work of the employer is to be under his own control, and under the responsibility which the law places upon him; and it is for him or his lawful agent to give such orders or directions as he may judge discreet in respect to the place where his employees shall work, having in view their skill, prudence, and experience. He or his rightful agent may assume the risk in any given case; but the employee cannot, of his own mere mandamized motion, take the risk, and hold the employer responsible for disastrous consequences. The liability does not exist unless the employer or his agent knows, or has good reason to believe, that the employee is serving him in a dangerous place or position; for without such knowledge the duty of warning or protecting the employee does not arise and will not exist, for the plain reason that the liability is not absolute, but relative, and is founded solely on the employer's negligence, which cannot be affirmed without knowledge or notice of duty in the particular instance, such as would warn the employer and afford him a fair opportunity to discharge it."

In a case where a "station helper" was merely shown to have handled a little of the baggage on the trains now and then, it was held that he could not recover for injuries caused by a defective hand-hold on a baggage car. The court was of opinion that the acts done were not of such a "continuous, definite, and prominent character" as to imply that the agents of the defendant on the train (conductor and train master) had notice of the same, and accepted the service. *Wagen* v. *Minneapolis & St. L. R. Co.* (1900) 80 Minn. 92, 82 N. W. 1107.

[1] (a) *Recovery denied.*—An employee whose duties did not require him to adjust belts was guilty of contributory negligence which will prevent recovery for his death by being caught by a belt which came off the pulley, but was left in a safe position, when it was placed in an unsafe position by his attempting to adjust it, and he failed to stand back when warned so to do by the person whose duty it was to adjust the belt. *Frechery* v. *St. Paul Plow Works* (1892) 48 Minn. 99, 50 N. W. 1026.

Recovery has been denied where a boy of fourteen, employed to operate a foot machine in a tinware factory, voluntarily left his place and went to another part of the establishment to adjust a belt, and while thus engaged received fatal injuries. *Daly* v. *H. Haller Mfg. Co.* (1896) 48 La. Ann. 214, 19 So. 116.

Some of the decisions rendered upon this basis would seem to embody the doctrine that the culpability of the servant becomes an inference of law, as soon as it has been shown that he was not authorized to do the work on which he was engaged when the injury was received. It may be conceded that such an inference is proper, where the departure from the ordinary course of his employment exposed the servant to obvious peril of an abnormal nature, or where that departure constituted an infraction of specific prohibitory directions. But, as a matter of ultimate analysis, it seems scarcely permissible to say that, without regard to the particular circumstances involved, negligence must always be a legal conclusion from evidence which shows that at the time of the accident the servant was engaged upon an unauthorized piece of work. The practitioner would at all events do wisely to avoid this possibly disputable issue, and found his plea upon the more certain ground furnished by the doctrine that in the case supposed the master does not, as a master, owe the servant any duties.

An employee engaged in running an elevator, who was not competent to determine the cause of the failure of the car to operate, or to apply the remedy, was guilty of contributory negligence where, in the belief that such failure was due to the loosening of the cable and that the car was suspended by the safety "dogs," when in fact it was caught on a projecting bolt, he undertook to adjust the cable, exposing himself to inevitable injury if the car descended, without calling upon skilled men whom he knew were provided by the employer for such emergencies, and who would have instantly discovered the difficulty. *Nelson* v. *Sanford Mills* (1896) 89 Me. 219, 36 Atl. 79.

A railroad company is not liable for the death of a freight conductor who, unnecessarily and without any emergency, undertook to perform the duty of a brakeman, and, with knowledge that one of the cars had no bumper or drawhead and was fastened to the next car with a chain, went between the cars for the purpose of unchaining or uncoupling them, and was caught between the cars as the train started. *Whitton* v. *South Carolina & G. R. Co.* (1899) 106 Ga. 796, 32 S. E. 857.

Other cases exemplifying a like point of view are *Honor* v. *Albrighton* (1880) 93 Pa. 475 (plaintiff went on an errand wholly outside the servants' line of duty, at the call of a coservant); *Sears* v. *Central R. & Bkg. Co.* (1875) 53 Ga. 630 (conductor of freight train negligent if he couples or uncouples cars, except in case of a pressing emergency of the existence of which the jury must judge); *Central R. & Bkg. Co.* v. *Jones* (1895) 96 Ga. 769, 22 S. E. 273 (servant undertook to operate a defective machine outside the scope of his regular employment when there was no emergency to justify it); *Alabama G. S. R. Co.* v. *Hall* (1894) 105 Ala. 599, 17 So. 176 (brakeman voluntarily and without orders from anyone having authority over him undertook to perform the duties of a fireman).

See also *Indiana Car Co.* v. *Parker* (1885) 100 Ind. 181 (*arguendo*, p. 198); *Daley* v. *American Printing Co.* (1891) 152 Mass. 581, 26 N. E. 135.

The inference of negligence is, of course, conclusive, where the change of duties was in direct violation of orders. *Brown* v. *Byroads* (1874) 47 Ind. 135 (catcher in stave factory undertook to act as sawyer, and was struck by piece of a band-wheel which broke). See, generally, § 363, *ante*.

(b) *Recovery allowed.*—The mere fact that a railroad employee required by the terms of his contract of employment to couple and uncouple cars when necessary, or when ordered to do so by the conductor, has exchanged employment with another employee with whom he has often worked as a fellow servant in the same general line of employment without the expression of dissatisfaction

636. Minority as an element.— Several decisions embody the doctrine that in regard to the inability of volunteers to maintain an action against the persons for whom they did the work in question, there is no distinction between adults and minors.[1] For the purposes of this doctrine it is assumed that, in cases where the injury is alleged to have been received while the servant was engaged in work undertaken *proprio motu*, or in compliance with the unauthorized request of an employee of the defendant, the controlling question is simply whether the defendant owed such complainant any of those duties imposed by the law upon employers for the benefit of their servants, and not whether such complainant was a trespasser, or negligent. In this point of view it is clear that the fact of the complainants being of immature age is a wholly immaterial element.[2]

On the other hand the doctrine applicable to young persons has

on the part of superior officers, does not render him guilty of contributory negligence in undertaking to uncouple a car in discharge of the duty of such other employee, although in doing so he disobeys the express order of the conductor. *Hudson* v. *Charleston, C. & C. R. Co.* (1893) 55 Fed. 248.

The fact that an express messenger upon a train was, at the request of the superintendent of the road, acting as a brakeman at the time of the accident by which he was injured, is not necessarily such negligence on his part as will prevent his recovery for the injury. *Chamberlain* v. *Milwaukee & M. R. Co.* (1860) 11 Wis. 239.

[1] No action can be maintained for the death of a boy who was killed while attempting to climb onto the tender of an engine for the purpose of performing a service at the request of the fireman. *Flower* v. *Pennsylvania R. Co.* (1871) 69 Pa. 210, 8 Am. Rep. 251.

The relation of master and servant did not exist between a lumber company and a lad who, at the request of the company's engineer, assisted in loading upon the engine ties to be taken to a break in the company's tramway, and, for amusement, rode in the engineer's cab to the break, and at the latter's request threw a few sticks of wood into the furnace of the engine. The company was accordingly held not to be liable for injuries to him due to the defective condition of the steps of the cab. *Holmes* v. *Cromwell & S. Lumber Co.* (1899) 51 La. Ann. 352, 25 So. 265.

A railroad company is not liable for an injury to a boy fifteen years of age, suffered while he was acting as brakeman upon the invitation of the conductor of the train. A conductor has no authority to hire train hands, except in an emergency. *Hot Springs R. Co.* v. *Dial* (1893) 58 Ark. 318, 24 S. W. 500.

The failure of an employer to station a watchman to prevent volunteers from helping to push street cars over a trench excavated under the track in which a servant is at work is not such negligence as renders him liable for injuries to the servant from the fall upon him of a boy who was so volunteering. *Craven* v. *Mayers* (1896) 165 Mass. 271, 42 N. E. 1131.

A girl who was hired to do household work, and undertook to operate a straw cutter, cannot recover. *McMahon* v. *O'Donnell* (1891) 32 Neb. 27, 48 N. W. 821.

The master was held not liable where a boy thirteen years of age undertook *proprio motu* to remove a tin cup from a machine in which it had stuck, and was injured by the starting of the machine. *Gillen* v. *Rowley* (1890) 134 Pa. 209, 19 Atl. 504.

An inexperienced boy of sixteen who, at the request of a fellow workman not authorized to call others to his assistance, leaves his regular work of marking, assorting and weighing certain bales of cotton, and undertakes to clean out a gin stand, cannot recover for injuries resulting from his hand being caught in the gin saw. *Werner* v. *Trautwein* (1901) 25 Tex. Civ. App. 668, 61 S. W. 447.

[2] *Flower* v. *Pennsylvania R. Co.* (1871) 69 Pa. 210, 8 Am. Rep. 251.

been stated in the qualified form that a minor volunteer cannot recover from the negligence of the defendant's servants, where he is of sufficient age and capacity to know the distinction between good and evil in the particular instance, and to protect himself.[3] The rationale of the doctrine thus enunciated is that a child without discretion, although a trespasser, occupies with relation to the company a position similar to that of an adult who is not a trespasser, save that a greater degree of caution should be exercised as to the former by reason of his helplessness.[4]

Of these two antagonistic doctrines the former is manifestly the more logical. The essential ground upon which the inability of volunteers to recover really rests is that no one can be subjected to the contractual obligations of a master without his express or implied consent. See § 630, *supra*. This being the situation, it is impossible to admit that the capacity of a volunteer to understand the danger of the work undertaken by him can even be a relevant or material factor in the inquiry. Under certain circumstances, no doubt a minor volunteer may recover, although an adult would have been without a remedy. But it seems clear that this differentiated responsibility can never be deduced from the mere fact that the injured person was too young to understand the risk to which he was exposing himself, and that it can be predicated only upon some positive breach of duty, as inferred from the omission of the defendant to take such precautions, whether by way of prevention or warning, as may have been obligatory, in view of his actual or constructive knowledge of the likelihood that the minor would attempt to perform the work in question.

[3] *Rhodes* v. *Georgia R. & Bkg. Co.* (1889) 84 Ga. 320, 20 Am. St. Rep. 362, 10 S. E. 922.

A boy of eleven, who has never had any relation with the owner or employees of a brig, does not become a fellow servant of the latter by gratuitously attempting to release the stern hawser in an emergency, at the request of the employees, while the brig is being towed out of the harbor. *Geibel* v. *Elwell* (1897) 19 App. Div. 285, 46 N. Y. Supp. 76 (no cases are cited, and it is not very apparent what is the precise rationale or scope of the decision).

[4] *Kentucky C. R. Co.* v. *Gastineau* (1885) 83 Ky. 119 (disapproving *Flower* v. *Pennsylvania R. Co.* (1877) 69 Pa. 210, 8 Am. Rep. 251, *supra*). The court laid it down that it was for the jury to say whether a boy of about fourteen, killed while uncoupling cars, had discretion enough to appreciate the danger and guard against it; and that the jury should have been instructed that if, by reason of his age, the injured person lacked such discretion and knowledge of the danger, and if the company, by the exercise of ordinary care by its employees, might have become aware of and prevented the accident, it was bound to exercise that care and guard against the injury.

No recovery can be had where a boy of seventeen was killed owing to the fall of a piano which he was assisting to carry at the request of a brakeman. The risk of being injured by the negligence of the other men engaged in the work is deemed to have been within his comprehension. *Cincinnati, N. O. & T. P. R. Co.* v. *Finnell* (1900) 108 Ky. 135, 57 L. R. A. 266, 55 S. W. 902.

CHAPTER XXXIV.

EFFECT OF GENERAL STATUTES UPON THE EXTENT OF A MASTER'S LIABILITY.

637. When employees are within the purview of such statutes.
638. Effect of such statutes considered with relation to the doctrine of common employment.

As to statutes shifting the burden of proof, see chapter XLII., subd. B, *post*.

637. When employees are within the purview of such statutes.—In cases which turn upon the right of a servant to take advantage of a general statute which affects the obligations of that class of individuals or corporations to which his employer belongs, the first question to be determined is whether, considering the language in which the statute is couched, and the particular mischief which it is designed to remedy, or the peculiar advantage which it is designed to confer, the intention of the legislature was that servants as well as strangers should fall within its purview. A number of decisions showing the conclusion of the courts as to various enactments of this description are tabulated below.[1]

[1](a) *Statutes prescribing certain precautions in regard to the operation of railways.*—The statutes which declare railway companies to be liable for the damage done by the running of trains, or prescribe the observance of certain precautions in regard to the operation of trains, are not deemed to be applicable to railways which are under construction. Thus, under §§ 1166, 1167 of the Tennessee Code, by which it is provided that "when any person, animal, or other obstruction appears upon the road the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident;" and that "every railroad company that fails to observe these precautions or cause them to be observed by its agents and servants shall be responsible for all damages to persons or property occasioned by or resulting from any accident or collision that may occur,"—it has been held that the servant of a contractor, who, while riding on the pilot of an engine, is injured by its collision with a stationary car while the road is still under construction, cannot recover. *Griggs* v. *Houston* (1881) 104 U. S. 553, 26 L. ed. 840 (engine, on the pilot of which the servant of a contractor was riding, collided with a car standing on the track).

Under another statute of this type (Ga. Code, § 2979), it has been held that a railway company was not liable to the servant of a contractor, who was injured by the fall of a trestle over which a car was being drawn while the road was being graded. *Central R. & Bkg. Co.* v. *Grant* (1872) 46 Ga. 417.

The various statutes requiring a bell to be rung or a whistle to be blown on railway trains when they are within a certain distance from a public crossing are considered to be enacted for the benefit of such members of the public as may be using the crossing, and not

638. Effect of such statutes considered with relation to the doctrine of common employment.—In cases where it has been determined or

of the railway employees themselves. Thus, it has been held that § 1111 of the Alabama Code of 1886, which is to this effect, has no application to the case of employees on the top of cars which are passing under a low overhead bridge. *Louisville & N. R. Co.* v. *Hall* (1888) 87 Ala. 708, 4 L. R. A. 710, 13 Am. St. Rep. 81, 6 So. 277; *Louisville & N. R. Co.* v. *Markee* (1893) 103 Ala. 160, 49 Am. St. Rep. 21, 15 So. 511.

Nor does a provision of this tenor create a duty in favor of a watchman stationed to look out for the trains and guard the public. *Ruane* v. *Lake Shore & M. S. R. Co.* (1896) 64 Ill. App. 359.

That such a statute is not enacted for the protection of employees was also held down in *Union P. R. Co.* v. *Elliott* (1893) 54 Neb. 299, 74 N. W. 627.

The fact that the point at which the injured person was crossing the track when the accident occurred was within that distance from a public crossing at which the signal should have been sounded will not enable him to recover. *Evans* v. *Atlantic & P. R. Co.* (1876) 62 Mo. 49 (a decision upon Mo. Gen. Stat. 1865, chap. 63, § 38).

The absence of a flagman required by a city ordinance to be provided for each street crossing was held not to be a failure of duty on the part of the railroad company to its employees, such an ordinance being passed to save the public traveling along the streets from injury from passing trains. *Kansas City, Ft. S. & M. R. Co.* v. *Kirkson* (1891) 9 C. C. A. 321, 22 U. S. App. 94, 60 Fed. 999.

To the same effect, see *Bohlnick* v. *Pacific R. Co.* (1869) 43 Mo. 187, where the court, referring to the Missouri act cited above, said: "It is obvious that the enactment of the law was intended primarily for the protection of the traveling public and passengers. At a public crossing or street, frequented by travelers and persons engaged in business, the danger of collision and accident is constant and recurring, without a signal warning them of the approach of the train. Not only is danger to be apprehended to those who may happen to be on the track, but the lives of the passengers are also jeopardized. The law, in a previous part of the section, subjects the company to a penalty for omission of duty in ringing the bell; but, lest that might be deemed exclusive, it also makes it responsible in damages at the suit of any person injured. There is a strong and peculiar reason why this precaution of giving a signal should be observed as regards passengers and the traveling public, but it is not apparent when it comes to be applied to the servants of the road. There is nothing to show that from their business and occupation they are in greater hazard at a public crossing than at a private crossing or anywhere else on the track. That the draftsman of the law used the word 'person' in the sense that it should apply to the classes above referred to, and without any intention of changing the common law construction, can scarcely be questioned. In this view of the law we are strengthened by the different phraseology used in the 2d section of the act relating to damages, and on which *Schultz* v. *Pacific R. Co.* (1863) 36 Mo. 13, was based. That section provides that 'whenever any person shall die from any injury resulting from or occasioned by the negligence, misfeasance, or criminal intent of any officer, agent, servant, or employee, whilst running, conducting, or managing any locomotive, car, or train of cars, etc., it shall be responsible to the representatives of the deceased.' Both acts were passed by the same legislature. They show clearly that the law as it existed was understood by that body; that in one case a modification was intended to be made, and in the other not. If it had been intended that the 38th section should change the law, so as to allow persons to sue who had been previously barred, words of similar import to those used in the damage act would have been employed."

A railway servant who is himself responsible for the nonobservance of statutory precautions is, of course, precluded from recovering damages for injuries resulting from such nonobservance. *East Tennessee, J. & G. R. Co.* v. *Rush* (1885) 15 Lea, 145. A decision was rendered with regard to §§ 1166 *et seq.* of the Tennessee Code, quoted *supra*. The court said: "This last clause, it seems to me, strikes the true note. The statute was intended for the benefit of the general public, not for the servants of the company, and clearly not for a servant whose negligence caused, or contributed to cause, the acci-

conceded that the given statute is one which inures to the benefit of servants of the class to which the injured person belongs, a second

dent. The legislature surely never intended that a railroad company, by a mere noncompliance with certain precautionary forms made obligatory as to strangers, whether their observance would have prevented the act or not, should become liable to an employee whose plain dereliction of duty caused the accident. In such a case, to use the language of Judge McFarland in *Louisville & N. R. Co.* v. *Robertson* (1872) 9 Heisk. 276, the liability of the company to its agent for injuries resulting from the misconduct or negligence of that agent must be determined, not by statute, but by common-law principles."

On the other hand, it has been held that railroad employees are entitled to the same protection as other persons in crossing railroad tracks within the city limits in the performance of their duties, under a city ordinance requiring a bell on the engine to be rung continuously while a train is within the city limits. *Illinois C. R. Co.* v. *Gilbert* (1895) 157 Ill. 354, 41 N. E. 724. Affirming (1894) 51 Ill. App. 404; *Gulf, C. & S. F. R. Co.* v. *Calvert* (1895) 11 Tex. Civ. App. 297, 32 S. W. 216.

A track repairer injured while working at a place where there were many tracks, by a train backing upon him without its bell ringing or having a man stationed on the car farthest from the engine, as required by a city ordinance, may recover for his injuries. *Kelly* v. *Union R. & Transit Co.* (1888) 95 Mo. 279, 8 S. W. 420.

A railway servant who is run over a train while engaged in his duties is as much entitled as any stranger to hold his employer responsible for injuries caused by such employer's violation of an ordinance fixing the limits of the speed at which trains can run within city limits. *Bluedorn* v. *Missouri P. R. Co.* (1891) 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103.

A trackman is entitled to rely on the company's performance of its statutory duty not to run its train at any greater speed than 6 miles an hour. *Schn* *Chicago & N. W. R.* (1878) 44 Wis. 639.

The violation of an ordinance lating speed and signals of trains . not a risk assumed by a railroad employee, but obedience to the ordinance is n duty owing by the railroad company to its employees. *Pittsburgh, C. C. & St. L. R. Co.* v. *Moore* (1891) 132 Ind. 345, 44 L. R. A. 638, 31 N. E. 950.

In *Dick* v. *Indianapolis, C. & L. R. Co.* (1882) 38 Ohio St. 389, it was thought unnecessary to consider whether the act of 1872 (69 Ohio Laws, 69) by which railroad companies were made liable in damages for injuries occasioned by a failure of the engineer to sound the whistle and ring the bell at a public crossing on the same level with its tracks was for the protection of travelers on the public way only, or extended to persons working upon the track, and held that, even in the absence of such a statute, it was the duty of the company to make and enforce reasonable rules and regulations to guard against danger at such crossings and in dangerous places.

A railway servant who sues on the ground that a train was negligently operated by the engineer within the meaning of a statute, and seeks to sustain the charge of negligence by showing that the train was run over an unsafe piece of track, cannot recover unless it is proved that the engineer knew, or ought to have known, of the unsafe condition of the track. *Wolfenson* v. *Missouri P. R. Co.* (1893) 51 Mo. App. 161. (action on Mo. Rev. Stat. 1879, § 2121, Mo. Rev. Stat. 1889, § 1425).

(b) *Statutes requiring the blocking of frogs, etc., on railway tracks.*—The Canadian railway act (51 Vict. chap. 29, § 289), by which any person injured by violation of the act is entitled to recover damages, inures to the benefit of railway employees in such a sense that they may recover for an injury caused by a frog not blocked as required by § 262. *Le Roy* v. *Canadian P. R. Co.* (1890) 17 Ont. App. Rep. 293.

The consideration which was emphasized by the three judges who delivered opinions was that a provision such as that relating to the packing of frogs must have been intended primarily to afford protection to employees, as being the very persons who usually sustain injury from the omission of such a precaution. The American decisions relied upon by defendant's counsel were distinguished on the ground that their actual effect was merely that general statutes could not be construed as abrogating the defense of common employ-

question will sometimes present itself for settlement, *viz.*, whether in view of the terminology of its provisions, and the circumstances

ment (see next section), while in the case under review the default was that of the company itself in regard to the non-delegable duty of seeing that the track was properly constructed before trains were run over it. Hagarty, C. J., O., intimated that a different conclusion might possibly have been arrived at if the frog had been duly packed at the time when the road was put in operation, and had not been repacked owing to a fellow servant's neglect. The other judges did not express any opinion on this particular question. See generally, as to the point thus adverted to, §§ 565, 569, *ante*.

(c) *Statutes regarding railway fences and cattle guards.*—Both reason and authority sustain the doctrine that, in the absence of provisions showing a different intention on the part of the legislature, a statute requiring railway companies to fence their tracks should be construed as inuring to the benefit of the employees of those companies.

In Wisconsin, employees of a railway company are regarded as being within the purview of a statute declaring all such companies to be liable to "persons" generally for injuries caused by the want of a fence. Wis. Laws 1881, chap. 193. *Quackenbush* v. *Wisconsin & M. R. Co.* (1885) 62 Wis. 411, 22 N. W. 549. The court did not argue the question at length, but merely remarked that "no good reason was perceived" why servants should be an exception.

In a case decided a few years later the New York court of appeals took the ground that the duty to fence, under a statute, is one which exists as to all the world; and held that, where a brakeman is injured by the collision of his train with an animal which has come upon the track through a defective fence, the company is liable for the damages, under the New York general railroad act of 1850, § 44. *Donnegan* v. *Erhardt* (1890) 119 N. Y. 468, 7 L. R. A. 527, 23 N. E. 1051, Disapproving *Langlois* v. *Buffalo & R. R. Co.* (1854) 19 Barb. 364, so far as it holds a different doctrine.

These two decisions were cited with approval and followed in *Atchison, T. & S. F. R. Co.* v. *Reesman* (1894) 9 C. C. A. 20, 19 U. S. App. 596, 23 L. R. A. 768, 60 Fed. 379 where the following rule was formulated: "If, through a failure of the railroad company to erect and maintain a sufficient fence as required by the statute, an animal gets onto the track, whereby a train is derailed, and an employee on that train is injured by such derailment, the latter is entitled to maintain his action for damages against the company." The court said: "It is doubtless true that, where a right is given by statute, only those to whom the right is in terms given can avail themselves of its benefits; but it does not follow that, when a duty is so imposed, a violation of that duty exposes the wrongdoer to liability to no person other than those specifically named in the statute. On the contrary, it is not unreasonable to say that every party who suffers injury by reason of the violation of any duty is entitled to recover for such injuries. At any rate, it is clear that the fact that certain classes of persons were intended to be primarily protected by the discharge of a statutory duty will not necessarily prevent others, neither named nor intended as primary beneficiaries, from maintaining an action to recover for injuries caused by the violation of such legislative command. It may well be said that, though primarily intended for the benefit of one class, it was also intended for the protection of all who need such protection. In this case a technical argument might be made from the mere language of the section. It provides that the corporation shall be liable in double the amount of all damages, not only for those 'done by its agents, engines, or cars to horses, cattle,' etc., but also for those done 'by reason of any horses, cattle,' etc., 'escaping' from such contiguous fields. As the presence of the steer on the track was the cause of the derailing of the train, and as that steer escaped from the adjoining field through the defective fence, it may plausibly be argued that the recovery in this case comes within the express language of the statute as being for damages done by reason of the escape of the steer from the adjoining field through the defective fence. But we do not care to rest our conclusions upon this technical construction. The purpose of fence laws of this character is not solely the protection of proprietors of adjoining fields. It is also to secure safety to trains. That there should be no obstruction on the track is a matter

under which the injury was received, the master can avail himself of the defense of common employment. The general principle de-

of the utmost importance to those who are called upon to ride on railroad trains. Whether that obstruction be a log placed by some wrongdoer, or an animal straying on the track, the danger to the trains and those who are traveling thereon is the same. To prevent such obstruction being one of the purposes of the statute, any one whose business calls him to be on a train has a right to complain of the company, if it fails to comply with this statutory duty."

In Missouri a like doctrine prevails. *Dickson* v. *Omaha & St. L. R. Co.* (1891) 124 Mo. 140, 25 L. R. A. 320, 46 Am. St. Rep. 429, 27 S. W. 476. The court said: "We are taught by common experience that cattle and other animals, unless restrained, will stray upon the track of railroads and cause serious and dangerous obstructions to the operation of trains thereon, thereby imperiling the lives, not only of persons carried, but, to a greater degree, of each employe engaged in the duty of managing them. We can see no reason why, at common law, the railroad company would not as well be required to use reasonable care to prevent such obstructions, as to see that the ties and rails are sound, and the roadbed secure. I can conceive of no more adequate method that could be adopted by a railroad corporation for keeping domestic animals off the track of its road than that of inclosing it by fences. So it has been held that if the want of a proper fence makes a railway unsafe, and an accident happens to a passenger in consequence, the company are responsible to him, although they are under no obligation to the adjacent landowner. *Buxton* v. *North Eastern R. Co.* (1868) L. R. 3 Q. B. 549, 37 L. J. Q. B. N. S. 258, 18 L. T. N. S. 795, 16 Week. Rep. 1124, 9 Best & S. 824. It is true that the statute requiring railroad corporations to fence their tracks only in express terms gives to the owners of cattle or other animals killed or injured in consequence of a neglect to perform this duty a right of action, yet it has been held in this state that the law was designed likewise for the protection and safety of the traveling public. *Briggs* v. *St. Louis & S. F. R. Co.* (1892) 111 Mo. 173, 20 S. W. 32, and cases cited."

Similarly in Illinois it is held that a railroad engineer killed by the derailing of his train by collision with a cow which strayed upon the track at a place where there was no fence is within the protection of Hurd's (Ill.) Stat. chap. 114, § 62, imposing on railroad companies an absolute duty to erect and maintain fences along their rights of way, and providing that if such fences are not made and kept in good repair the companies shall be liable for the damage to stock on the road. *Terre Haute & I. R. Co.* v. *Williams* (1898) 172 Ill. 379, 64 Am. St. Rep. 44, 50 N. E. 116, Affirming (1897) 69 Ill. App. 392. In the court of appeals the general principle was relied upon that "whenever a duty arises, whether upon common-law or statutory grounds, an action will lie for a breach thereof in favor of any one injured by reason of such breach, though if a mere right is conferred by a statute, only those to whom it is specially given may avail themselves thereof." The reasoning of the supreme court was as follows: "It is true that the statute contains a provision that, if such fences or cattle guards are not made or kept in good repair, such railroad corporation shall be liable for all damages which may be done by the agents, engines, or cars of such corporation, to cattle, horses, sheep, [illegible] other stock thereon; but this [illegible] cannot be held to exclude all [illegible] duty which may arise from a [illegible] the railroad company to fence [illegible] cattle guards, as required by [illegible] may be that the statute was primarily intended for the benefit of the owners of stock when their stock was killed on the railroad track, but, at the same time, the statute was doubtless intended for the benefit of all classes of persons who might need protection. The person whose business requires that he should take passage as a passenger on a train has a deeper interest in having the track protected from obstructions of every character than the owner of stock. So, also, the employee of a railroad train has a deep interest. The lives of the passenger and employee are alike at stake when the railroad is not properly protected from obstructions which are likely to be upon the track where it is not properly fenced. It is, therefore, unreasonable to suppose that the legislature would provide a law for the pro-

ducible from the authorities cited below would seem be this, that an intention on the part of the legislature to preclude him from

tection of property, and make no provision whatever for the protection of life."

This decision disposes of the doubt expressed in *Wabash R. Co.* v. *Brown* (1878) 2 Ill. App. 516, as to the right of a servant to sue under this statute.

Another authority for the same doctrine is *Fleming* v. *St. Paul & D. R. Co.* (1880) 27 Minn. 111, 6 N. W. 448; but the action was held to be barred by the servant's knowledge of the want of fences, and consequent assumption of the resulting risk. The statute there construed (Minn. Rev. Stat. 1878, chap. 34, § 55) declared that railroad companies which failed to erect and maintain fences and cattle guards should be liable for all damages sustained by any person in consequence of such failure.

On the other hand, it has been held that the Virginia Code, § 1258, enacting that every railway company shall erect "on both sides of its roadbed, through all inclosed land or lots, lawful fences . . . and shall keep the same in proper repair, and with which the owners of adjoining lands may connect their fences at such places as they may deem proper," relates only to the protection of stock, and does not impose any additional liability as to passengers or employees. *Venesom* v. *Norfolk & W. R. Co.* (1896) 81 Fed. 133. Affirmed in (1897) 35 L. R. A. 135, 23 C. C. A. 659, 42 U. S. App. 282, 78 Fed. 94. Train was derailed by cattle straying on the track. The court said: "Had the legislature intended to provide an additional liability on railroad companies for injuries to persons brought about by the failure of such companies to construct fences at the places designated in said statute, it would certainly, concerning a matter of such universal importance, have used apt and unequivocal language. Indeed, we think it quite clear from a careful study of the legislation in question—from an examination of the original act, its title, and the recitals in the first section thereof, in the nature of a preamble—that the legislature did not intend to make any change in the common law other than that relating to the compensation to the owners of the stock killed or injured on the tracks of railroads not fenced as required by said statute; and to hold otherwise we must give to the words used a meaning quite different from that usually accorded them. It is evident that the railroad company is only required to fence along its lines when the same pass through inclosed land, dividing it, or leaving part of such land of one owner on both sides of the roadbed. In such cases, the owner having already inclosed his land by lawful fences around its exterior limits, and finding his property, by virtue of the roadbed, virtually thrown open to the commons, his stock liable to stray away or be injured, or the stock of others to enter upon his premises and do him damage, the legislature says to him that the railroad company shall erect and keep in repair lawful fences along its line through his land, except that it shall not be required so to do along that part of its road located within the corporate limits of a city or town, or within an unincorporated town for the distance of one quarter of a mile either way from the company's depot, nor at a place where there is a cut or embankment with sides sufficiently steep to prevent the passage of stock, nor at any place if the company has compensated the owner of the adjoining inclosed land through which the railroad runs for making and keeping in repair said fencing. And so it follows, as we understand the said statute, that a railroad company can fully comply with the law, and yet, in fact, not construct a single panel of fence along its entire line. Surely this could not be if the legislative intent was to protect the public, the passenger, and employee, as well as to guard the stock and property on the inclosed land through which the road passes. If the public and those on the trains as passengers and others were to have additional safety provided for it and thereby the enactment, why was it that the fencing was not required along the entire line? Why was one mile of the line to be fenced, provided the owner of the land through which it passed did not contract to dispense with it, and the next ten miles permitted to be without a fence for the reason that the land through which such part of the line passed was not inclosed. The inference is quite irresistible that the legislative mind was not considering the general public, and that it did not contemplate greater safety for passengers and em-

relying upon that plea will not be inferred unless such intention is explicitly declared.[1]

ployees. If the legislative intent was to change the common law in the manner referred to, as claimed by the plaintiff in error, the language employed was extremely unfortunate, and the actual result attained the most lamentable failure that has come to our attention in the history of legislative effort." The New York and Missouri cases above cited were distinguished as being decided with reference to statutes of a radically different tenor.

For reasons analogous to those relied upon in the decision last cited, it has been held that the omission of a railway company to construct cattle guards in accordance with a statute requiring the company to fence both sides of its track for the protection of inclosures cannot be imputed to it as negligence by an employee injured by the derailment of a train, consequent upon its collision with trespassing cattle. *Ward* v. *Bonner* (1891) 80 Tex. 168, 15 S. W. 805.

(d) *Statutes requiring notice of blasts to be given.*—Maine Rev. Stat. chap. 17, §§ 23, 24, requiring that seasonable notice of a blast shall be given so that all persons or teams approaching shall have time to retire to a safe distance, is not applicable as between workmen in quarries. *Hare* v. *McIntire* (1890) 82 Me. 240, 8 L. R. A. 450, 17 Am. St. Rep. 476, 19 Atl. 453.

(e) *Acts imposing liability upon municipal corporations for injuries caused by defects in streets.*—Under the South Carolina act of 1892 (21 Stat. at L. 91, Rev. Stat. § 1582), which provides that "any person who may receive bodily injury . . . by reason of defect or mismanagement of anything under the control of the corporation . . . may recover . . . damages," an action may be maintained by an employee engaged in repairing the streets, who is injured through the negligent management of a steam roller by the engineer in charge of it. *Barksdale* v. *Laurens* (1900) 58 S. C. 413, 36 S. E. 661. The court considered that, as the action was wholly statutory, it was unnecessary to consider whether the doctrine of coservice was applicable.

A statute giving an action against a town to "any" person injured by an obstruction, inures to the benefit of a foreman or other member of a civic fire brigade. *Coots* v. *Detroit* (1889) 75 Mich. 628, 5 L. R. A. 315, 43 N. W. 17. The court said: "Our statute giving damages to any person injured by reason of streets and highways not being in good repair, or in a condition reasonably safe and fit for travel, through the negligence of the city or township, makes also no exception of persons or their occupations; and there is no reason in the law or in good sense why an engine driver in the employ of the fire department, whether in or out of the line of his employment at the time of the injury, should suffer such injury without redress or recompense under the statute from and by reason of the city's negligence in the care of its streets, than should any other citizen. A fireman takes, like every other employee, certain risks by reason of his employment. He may be injured by his fellow firemen, by falling walls or building, or by a score of accidents that are liable to happen at a fire, or going to or from one. But the injury he receives from the negligence of the city in the care of the streets through which his employment takes him is no more one of the risks he voluntarily takes in his employment than would be an injury that he might receive from the negligence or wrong of some one of his fellow citizens of Detroit, as he was passing along the street. If this hole in the street, for instance, had been an excavation made by some abutting lot owner on the street, and negligently left open, is there any sound reason why the plaintiff could not have recovered from such lot owner damages for his injuries, if such injuries were occasioned through no fault of plaintiff? The answer is obvious. The fact that plaintiff was a fireman would weigh no more in such case than if he was an express-wagon driver or of any other occupation."

To the same effect see *Palmer* v. *Portsmouth* (1861) 43 N. H. 265. The court did not see any reason why an exception should be made in the case of a servant.

[1](a) *Damage acts.*—In one or two early decisions the position was taken that the damage acts, by which the personal representatives of a decedent whose death was due to a tort are enabled to recover damages from the delinquent party, created a right of action which could not be defeated by showing that

the decedent was a fellow servant of the culpable party, and therefore could not have maintained the action himself if he had survived. *The Highland Light* (1867) Chase Dec. 150, Fed. Cas. No. 6,477; *Schultz* v. *Pacific R. Co.* (1865) 36 Mo. 13. See this note, *infra*.

But it is now settled by a great preponderance of authority that this defense is available to the master in any case in which, if death had not resulted from the injury, it would have barred an action by the injured person himself. It is difficult to understand how any other theory can ever have met with favor. The English act from which all the legislation in the United States is copied was passed simply for the purpose of remedying the anomalous situation which resulted from permitting the common-law maxim, *Actio personalis cum persona moritur*, to shield the culpable party in the very cases in which the damage done by him is most serious, and the propriety of requiring him to pay compensation is most apparent. The act gives no new cause of action to the relatives, but only a right in substitution for the right of action which the deceased would have had if he had survived. *Read* v. *Great Eastern R. Co.* (1868) L. R. 3 Q. B. 555, 9 Best & S. 714, 37 L. J. Q. B. N. S. 278, 18 L. T. N. S. 822, 16 Week. Rep. 1040. Approved in *Griffiths* v. *Dudley* (1882) L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 47 L. T. N. S. 10, 30 Week. Rep. 797, 46 J. P. 711. The obvious and natural inference, therefore, is that the legislatures, in passing these acts, merely intended to put certain persons in the shoes of the decedent, so far as the right of action is concerned, and to leave the question whether there is any specific bar to the action to be decided by the principles which would have been controlling if the injured person had survived, and was himself suing for an indemnity.

The effect of such a statute in this point of view was elaborately discussed in *Proctor* v. *Hannibal & St. J. R. Co.* (1876) 64 Mo. 112, where the court overruled *Schultz* v. *Pacific R. Co.* (1865) 36 Mo. 13 (see this note, *supra*), and adopted the opinion of two out of five judges in *Connor* v. *Chicago, R. I. & P. R. Co.* (1875) 59 Mo. 285. The contention of the plaintiff was that under § 2 of the Missouri damage act, providing that if a servant shall die from an injury resulting from, or occasioned by, the negligence of any officer, agent, or servant, whilst running, conducting, or managing any locomotive, car, or train of cars, his representative may sue and recover $5,000 of the master, the action of such servant, if he had survived the injury, would have been barred by the defense of coservice. "This conclusion," said Norton, J., "is reached from the language used in the act,—'when any person shall die,' etc. It is true that these words, in their literal signification, are comprehensive enough to include a servant or employee, and to these terms their plain and natural import should be given, unless absurd consequences follow, and inconsistencies in the act are brought to light by such meaning. Adopting the construction insisted upon by plaintiff, a servant injured by a fellow servant while operating a locomotive or train of cars, although he may be maimed, mangled, and disfigured, and may suffer for an indefinite period of time the most excruciating tortures, can have no action against the master or employer; yet if he die, his representative may recover of the employer $5,000. Under the view of plaintiff the right to sue is not a transmitted right, but an original right, arising or appearing for the first time at the instant of the death of him or her through whom the right is derived. The very face of the 2d section is at war with any other idea than that the right to sue was intended to be a transmitted right, and not an original right. This is shown by the character of the parties authorized to sue. They must be, first, either the husband or wife of the deceased; second, if there be no husband or wife, or he or she fails to sue in six months after the death, then the minor child or children of the deceased; third, if such deceased be a minor and unmarried, then by the father and mother; or, if either be dead, then the survivor. It manifestly appears from these provisions,—for they apply to the injuries alluded to in § 3 as well as to those in § 2,—that it must have been in the mind and intention of the legislature only to confer upon the above classes of persons the right to sue in cases where the husband, wife, or child could have sued had not death been the result of the injury. If the suit is instituted by the husband for the death of the wife, he would be required to allege and approve the fact that at the time the injury was received, occasioning the death, he was her husband, before he would be entitled to recover. This

would be the initial and necessary step in the case, for he might prove by a thousand witnesses the death and the occasion of it, yet it would avail him nothing unless the relationship of husband and wife was established. If the words 'any person' in the act are to be construed as including servants, then the inconsistent if not absurd conclusion follows that although under the common law rule the master has committed no wrong against the servant, has violated no law and done nothing which imposes upon him a legal liability to answer in damages in action brought by the servant himself, yet upon his death a cause of action which never before had an existence is at once developed and brought to light, and is lodged in the representatives of the deceased. Not only is the above conclusion involved in the construction contended for by plaintiff, but also the further conclusion that the party receiving the injury, if he lives, say one year, may himself sue and recover, for the injury inflicted upon him, damages in any amount which the jury trying the case may give under the facts of the case; and if death afterwards ensues from the injury, his representatives may sue under § 2 of the statute, and recover an additional sum of $5,000, thus holding the party liable in two actions to two different parties for the same wrong. . . . This reading of the section also conclusively refutes the interpretation or meaning given by plaintiff to the words 'any person' in the 1st clause of the 2d section. According to the plaintiff's interpretation of these words, the representatives of a servant, injured by the negligence of a fellow servant, while engaged in running and operating the road, without fault of the master, could sue and recover against the master $5,000, although the servant, had he lived, could not have sued at all for the injury; yet the representative of the servant whose death was occasioned by defective track or defective machinery could not sue for and recover anything under the 2d section, although the servant, had he lived, could have sued the master, and have recovered any damage which he may have sustained by reason of an injury inflicted upon him in consequence of a defective road or defective machinery used in operating it. It seems to us to be a manifest misinterpretation of the 2d section to construe it so as to say that the legislature in the 1st clause intended to give the representatives of a servant who would have had no cause of action had he lived, a right to sue and recover $5,000, and in the 2d clause of the same section denied to the representative of a servant who would have had a cause of action had he lived the right to sue and recover damages under that section. And the fact that, in the 2d clause of this section, the legislature, by not extending the right, did deny the right of the representative of a servant dying from an injury received from a defective road or machinery to sue and recover under that section, is conclusive proof that they did not intend to include under the term 'any person' a fellow servant injured by the negligence of a fellow servant, without fault of the master."

Henry, J., dissented in an elaborate opinion: the theory of the majority of the court, that the 3d section was the key to the meaning of the 2d, was, he considered, erroneous, as the 2d section was penal in its character, while the 3d was compensative and merely preserved common-law rights of action. As regards the argumentation *ad absurdum* (see above),—that under the plaintiff's construction of the act a servant, however seriously injured, could recover no damages, while if he died his representatives could recover $5,000,—he considered that there was no valid reason for asserting that, because the legislature may have thought it best that the common-law rule should remain in force as respects the servant himself, it should be concluded that the legislature did not intend that his representatives should have a right of action, when the language of the law was broad enough to give it. Another point made by the learned judge was that as the decision in the *Schultz Case* had been recognized as the law of the land for about ten years, it should be left to the legislature to say whether a new enactment should be passed, establishing another rule.

Other cases in which the same doctrine has been adopted are *Chapman* v. *Reynolds* (1896) 23 C. C. A. 166, 33 U. S. App. 686, 77 Fed. 274; *Lutz* v. *Atlantic & P. R. Co.* (1892) 6 N. M. 496, 16 L. R. A. 819, 30 Pac. 942.

In *Hood* v. *Mississippi C. R. Co.* (1874) 50 Miss. 178, counsel argued that the words "any person" included employees. The court decided against the plaintiff on general grounds, without any express comment as to this contention.

It is, of course, not disputed that, under any statute which permits the maintenance of an action for a death resulting from negligence, a personal representative of a servant who was killed can recover damages if the delinquent employee was, by virtue of the common-law doctrines prevalent in the particular jurisdiction where the accident occurred, not a fellow servant of the decedent. *Sullivan* v. *Missouri P. R. Co.* (1888) 97 Mo. 113, 10 S. W. 852 (applying the above doctrine between a trackwalker and a trainman; or where the negligence which caused the death was that of an employee of whose incompetency the defendant had notice. *Galveston, H. & S. A. R. Co.* v. *Davis* (1898; Tex. Civ. App.) 45 S. W. 956. (1898) 92 Tex. 372, 48 S. W. 570.

(b) *Acts imposing liability on tort feasors generally.*—Under § 1382 of the Code of Napoleon, providing that every act which causes damages subjects him by whose default it happened to repair it, an employer cannot be held liable for an injury caused by a coservant of the plaintiff unless the delinquent was unfit for his work. *Hubgh* v. *New Orleans & C. R. Co.* (1851) 6 La. Ann. 496, 54 Am. Dec. 565.

(c) *Acts imposing liability for injuries caused by the negligence of common carriers.*—(See also subd. (f), *infra*.) Upon grounds very similar to those which have been deemed conclusive where the effect of the damage acts has been in question, the courts have determined that a statute which, in general language, requires a railway company or other common carrier to answer for the negligence of their agents in the operation of trains, etc., does not preclude them from relying on the plea that the delinquent was a coservant of the injured person.

By Mass. Pub. Stat. chap. 112, § 212, it is provided that, when the life of a passenger, or of a person being in the exercise of due diligence, and not a passenger nor in the employment of such corporation, is lost "by reason of the negligence or carelessness of a corporation operating a railroad or street railway, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business," certain damages might be recovered by indictment to the use of certain persons named. This provision was amended by the Statute of 1883, chap. 243, by adding the words "and if an employee of such corporation, being in the exercise of due care, is killed under such circumstances as would have entitled the deceased to maintain an action for damages against such corporation if death had not resulted, the corporation shall be liable in the same manner, and to the same extent, as it would have been if the deceased had not been an employee." In an action under this statute for the death of an employee, no recovery can be had if the only negligence shown is that of the fellow servants of the person injured. The court said: "If the plaintiff's intestate had survived, he could not have maintained an action for his injury. The purpose of the statute is to permit the administrator to maintain an action for the death when the intestate could have maintained an action if he had recovered, and not otherwise. When his action would have been defeated by the defense of common employment if he had sued, the action of his administrator will be barred in the same way in a suit brought on account of his death. This seems the only reasonable interpretation of the statute."

The transfer of freight by a railroad company from a vessel to its car is a railroad operation, within the words of this statute. *Daley* v. *Boston & A. R. Co.* (1883) 147 Mass. 102, 16 N. E. 690.

Mere failure of an engineer to stop a train at a distance, on seeing men at work on the track trying to remove a telegraph pole, without evidence that he saw that the pole extended on the track, is not such "gross negligence" as will give a right of action for the death of one of the men, under this statute. *Chisholm* v. *Old Colony R. Co.* (1893) 159 Mass. 3, 33 N. E. 927.

In *Atchison, T. & S. F. R. Co.* v. *Farrar* (1883) 6 Colo. 498, the statute under discussion provided that "whenever any person shall die from any injury resulting from, or occasioned by, the negligence, unskilfulness, or criminal act of any officer, . . . while running . . . any locomotive, car, or train of cars, . . . and when any passenger shall die from any injury resulting from, or occasioned by, any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car," the employer of the delinquent "shall forfeit and pay for every person and passenger so injured the sum of not exceeding $5,000, and not less than $3,000." The court said: "The act contains four other sections, but there is nothing therein giving a right of action for such injuries to the employee

himself, if he survive the same. The position of appellee and the district court, therefore, is, that the legislature intended to say that the common law rule depriving the employee injured, himself, of any remedy, unless his case be covered by one of the exceptions, shall remain in force; but that, if he die from the injury, a right of action in favor of some third person shall spring into existence; that, though he be rendered a helpless cripple and invalid, and a burden and expense to his friends, through the negligence of a coemployee, still he shall have no right of action against his employer, while, if he be instantly killed, his widow or heirs may recover $5,000 from such employer. The legislature had the power to create this distinction, but their intent to do so should appear clearly from the context of the act itself; for, if there be doubt about it, and the statute will bear in other reasonable interpretation, one which is not in conflict with the common law, the latter should be adopted. The 1st section above quoted may be divided, with reference to the individual injured, into parts: First, where any person dies from an injury caused by the negligence, unskilfulness, or criminal intent of an officer, servant, or employee; and secondly, where the death of a passenger is occasioned by a defect or insufficiency of a railroad, locomotive, car, stage-coach, or other public conveyance. It would not be contended that the word 'passenger' includes employees, although they are upon the defective car or conveyance and receive fatal injuries through such defect. Why should the legislature discriminate between the two causes of death? Why should they say that a right of action shall be given to the widow when death results from the negligence of a fellow servant, but deny the same when it is due to defects in the car or conveyance upon which the servant is compelled to ride? The employer or master is no more at fault in one case than in the other. His responsibility and liability are, in law, no greater in the choosing of competent and careful servants than they are in the selection and purchase of safe machinery and appliances."

By the Mississippi Anno. Code of 1892, § 3557 it is provided that "every railroad company shall be liable for all damages which may be sustained by any person in consequence of the neglect or mismanagement of any of its agents, engineers, or clerks, or for the mismanagement of its engines; but for injury to any passenger upon any freight train not being intended for both passengers and freight, the company shall not be liable except for the gross negligence or carelessness of its servants." This provision is not applicable to employees. *New Orleans, J. & G. N. R. Co.* v. *Hughes* (1873) 49 Miss. 258.

In *Curl* v. *Bangor & P. Canal & R. Co.* (1857) 43 Me. 269, it was argued that the common law had been modified by Me. Rev. Stat. chap. 81, § 21, providing that "every railroad corporation shall be liable for all damages sustained by any person in consequence of any neglect of the provisions of the foregoing section, or of any other neglect of any of their servants, or by any mismanagement of their engines, in an action on the case by the person sustaining such damages." This contention did not prevail. "The general purpose of this statute," said the court, "seems to be to fix and establish the rights and obligations of railroad corporations as between themselves and third persons not their servants, and the language relied on in the section cited has reference to the liabilities of such corporations for the neglects of their agents or servants. Notwithstanding its literal construction might entitle a negligent servant to recover for injuries sustained through his own fault, or any servant to recover for injuries occasioned by the fault of a fellow servant, still such a construction is wholly inadmissible. Statutes, unless plainly to be otherwise construed, should receive a construction not in derogation of the common law. Considering the general design of this statute, we are of opinion that it was not the intention of the legislature to change the nature of, or the incidents connected with, any contracts between such corporations and their servants. If such had been the intention, we think it would have been more plainly or directly expressed. The words, any person, in that section of the statute relied on, must be limited in their application to such persons as were not the servants of the corporation, and who may have sustained damages without any contributing fault on their part; thus leaving such servants, who are presumed to have arranged their compensation with their eyes open, and to have assumed the relation with all its ordinary dangers and risks without any remedy against the corporation for such injuries as may be incident to the service they have engaged to perform."

It has also been held that employees

are not within the purview of the Maine statute which declares that when the life of a person is lost through the carelessness of a railroad corporation or its servants, compensation shall be made to the heirs of the deceased. *State* v. *Maine C. R. Co.* (1872) 60 Me. 490. "It is certain," said the court, "that the act of 1855, which is the basis of the existing law, did not apply to the employees of the corporation. The 1st section of the act applied only to passengers. The 2d section of the act applied to persons other than passengers, but expressly excluded the employees of the road. In the Revised Statutes, these several provisions are crowded into one section of only seven lines, and the language employed is more general. But there is nothing to lead us to believe that a change of the law was intended. Our conclusion, therefore, is that the existing statute is not applicable to the employees of the road. To hold otherwise would endanger the safety of travelers. Their safety requires that the persons in charge of a train of cars should be regarded as a unit; that each should feel responsible not only for his own conduct, but also for the conduct of all the others. They should be made to feel that it is their duty not only to be watchful of themselves, but to be watchful of each other. And this end will be best secured by making them the insurers of their own safety."

The Kansas act of March 2, 1870, providing that all railroads "shall be liable for all damages done to persons or property when done in consequence of any neglect on the part of the railroad companies" is applicable only where a railroad company, as a company, has been negligent; and has no application to a case where the negligence of an employee produces injury to a coemployee. *Kansas P. R. Co.* v. *Salmon* (1873) 11 Kan. 83.

The death of a steamboat employee on a steamboat, caused by the negligence of a fellow servant, is held not to be within R. I. Pub. Stat. chap. 204, § 15, making common carriers by steamboat liable for loss of life of "any person, whether a passenger or not, in the care of" such common carrier, caused by its negligence or that of its servants. *Miller* v. *Caffin* (1895) 19 R. I. 164, 36 Atl. 6.

(d) *Acts requiring warning signals on railway trains.*—The larger part of the cases which deal with the scope of statutes providing that warning signals shall be given when trains are approaching crossings have been determined without any direct reference to the availability of the defense of common employment. See § 637, note 1, subd. (a), *supra*. In some of the cases referred to, as the conclusion was that the statute under discussion was not applicable at all to the servants, the investigation never reached the stage at which it might have become necessary to consider the question whether that defense was a bar to the action. In the remainder of those cases,—those in which servants were held to be entitled to take advantage of the statute,—the courts seem to have tacitly proceeded upon the theory that the duty imposed was nondelegable.

But in some cases where a statute of this description was under discussion it has been expressly laid down that the mere fact that the railway company is declared to be liable to "any person" for a breach of the duty so imposed does not operate so as to supersede the general rule of law which exempts an employer from liability to his own servants for the fault of their fellow servants. *Randall* v. *Baltimore & O. R. Co.* (1883) 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322 (a decision with reference to a statute of W. Va. 1873, chap. 88, § 31). The court cited *O'Donnell* v. *Providence & W. R. Co.* (1859) 6 R. I. 211; *Hartu* v. *Central R. Co.* (1870) 42 N. Y. 468, as authorities for the doctrine that the main, if not the sole, object of the statute was to protect travelers on the highway, but suggested that it might, perhaps, include passengers on the trains, or strangers who were not trespassers on the line of the road.

See, however, *Cameron* v. *Walker* (1898) 25 Sc. Sess. Cas. 4th series, 409, cited under the following section.

(e) *Statutes defining liability of railway companies in connection with the procuring of rights of way.*—The Iowa act of 1853, "granting to railroad companies the right of way" provided (§ 14) that every railroad corporation shall be liable for all damages sustained by any person in consequence of any neglect of the provisions of this act, or of any other neglect of their agents, or of any mismanagement of their engineers. It was held that this section did not cover damages accruing to a servant from the neglect of locomotive engineers after the road was built. Such a construction was deemed to be precluded because, first, no such object was indicated by the title; second, to ascribe to the law

such an effect would render it partial, and not uniform, in its application. *Sullivan* v. *Mississippi & M. R. Co.* (1860) 11 Iowa, 421.

(f) *Kentucky statute imposing liability for wilful neglect.*—Under 2 Ky. Rev. Stat. 510 (act of March 10, 1851), a right of action was given to the personal representative of an employee injured by the wilful neglect of the agents of a railroad company. The "wilful neglect" here mentioned is the creature of statute, and applies only in cases where death results from the injury. *Craddock* v. *Louisville & N. R. Co.* (1891) 13 Ky. L. Rep. 18, 16 S. W. 125.

The phrase has been said to imply "a reckless indifference to the safety of the public, or an intentional failure to perform a manifest duty." *Collins* v. *Cincinnati, N. O. & T. P. R. Co.* (1892) 13 Ky. L. Rep. 670, 18 S. W. 11, denying recovery in case where an employee was injured by the explosion of a gas tank, and the plaintiff sought to bring the case within the statute by contending that wilful neglect was indicated by evidence showing that a tar roof had been used instead of a slate or iron one on a gas house; that there was no vent in it for the escape of leaking gas; and that gas tanks which were 90 feet outside the gas building, with a fire wall between them and the fires under the gas retorts, were too near those fires.

The statute has no application to an action against a steamboat owner for damages, where an employee on the steamboat was shot and killed by another employee. *Morgan* v. *Thompson* (1884) 82 Ky. 383, following *Spring* v. *Gibson* (1876) 12 Bush, 172, where it was laid down that the statute gives no right to the personal representative to maintain an action when the killing is malicious and intentional.

This statute has now been repealed by § 241 of the Kentucky Constitution, providing that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the corporations and persons so causing the same."

This provision does not give a right of action for the death of a servant, caused by the negligence of a fellow servant of equal grade, in the same field of labor. *Linck* v. *Louisville & N. R. Co.* (1899) 107 Ky. 370, 54 S. W. 184. But it improves the position of a servant to this extent, that, whereas no action could be maintained before the change in the law for the negligence of a superior fellow servant unless that negligence was wilful, recovery may now be had for the death of a servant, caused by the ordinary negligence of such a fellow servant. *Southern R. Co.* v. *Barr* (1900) 21 Ky. L. Rep. 1615, 55 S. W. 900; *Linck* v. *Louisville & N. R. Co.* (1899) 107 Ky. 370, 54 S. W. 184.

It has been held in a late case that the instructions in an action against a railroad company for personal injuries to an employee should not make any reference to wilful negligence. *Louisville & N. R. Co.* v. *Foard* (1898) 104 Ky. 456, 47 S. W. 342.

For a general review of the Kentucky cases regarding coservice, see § 549, *ante*.

CHAPTER XXXV.

STATUTES ENACTED EXPRESSLY FOR THE BENEFIT OF SERVANTS — INTRODUCTORY CHAPTER.

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639. On what footing these statutes are construed.

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c. Extraordinary risks; how far assumed, in the absence of express provisions on the subject.

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651. Contributory negligence.

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b. Availability of the defense, as dependent on the provisions of the statute sued upon.

c. Availability of defense inferred from language of statute.

d. Knowledge of risk, how far negligence is inferable from.

652. Limits of the doctrine that contributory negligence is a bar to an action.
652a. *Volenti non fit injuria.*

As to the conflict of laws in cases where a statute affecting the liability of an employer is an element, see chapter XLVI., *post*.

As to the necessity of showing that the breach of the statute, which is the gravamen of the complaint, was the proximate cause of the injury in suit, see chapter XLII., and § 667, *post*.

A. Construction and effect of such statutes.

639. On what footing these statutes are construed.—What general canon of construction shall be applied in determining the effect of statutes of the class reviewed in this and the following chapters will depend upon whether their meaning is to be defined with reference to the consideration that they augment the common-law liability of employers, or with reference to the consideration that they are of a remedial character.

As regards statutes of the class which includes the English employers' liability act and those copied from it, it is scarcely possible to say that any fixed principle of construction has been generally and definitely adopted. But on the whole the tendency seems to be in the direction of treating them as enactments of a remedial character, and construing them in a sense favorable to the servant.[1]

It has been laid down that the Massachusetts employers' liability act of 1887 (see chapter XXXVII., *post*) should be construed liberally in favor of employees.[2] It has also been held that the Illinois statutes which provide for the health and safety of persons employed in mines are to be liberally construed.[3]

In some states the principle upon which statutes affecting the liability of employers are construed is settled by a special provision expressly declaring that the rule by which statutes in derogation of the

[1] In *Walsh* v. *Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, Lord Esher recognized that there had always been two schools of thought with regard to cases of injuries to servants, the one proceeding upon the theory that enactments with regard to masters and workmen should be construed as strictly as possible, the other taking the position that in construing such statutes the fact that a master and his servants are not on an equal footing should be taken into account, and that a liberal construction was appropriate. The learned judge declared himself to be an adherent of the latter school.

[2] *Rygate* v. *Mechanics' Mills* (1889) 150 Mass. 190, 5 L. R. A. 667, 22 N. E. 766, per Holmes, J.

[3] *Beard* v. *Skeldon* (1885) 113 Ill. 584; *Carterville Coal Co.* v. *Abbott* (1898) 81 Ill. App. 279.

common law are to be strictly construed shall not be applicable to certain statutes.[4]

640. Employer not responsible for unauthorized acts of statutory vice principal.— The effect of many of the statutes reviewed in the preceding chapters is to convert into vice principals employees who, under common-law doctrines, would be regarded as fellow servants of the persons for whose benefit the statutes have been enacted. This alteration in the status of such employees does not affect the operation of the principle that a master is not liable for the acts of a servant which are entirely outside the scope of his functions as a servant, and therefore unauthorized. In other words, it is not deemed to have been the intention of the legislature to create, in favor of injured employees, a liability more extensive than that which they would incur to strangers under a similar showing of facts.[1]

641. When the statutory right of action accrues and is terminated.— On the one hand the liability of an employer is determined by the law as it was at the time the injury was received, and is not affected by a statute passed while the servant's action is pending.[1] On the other hand the repeal of an act does not affect the right of action for an injury received while it was in force.[2]

[4] See, for example, Tex. Rev. Stat. Gen. Prov. § 2; provision applied in *Turner* v. *Cross* (1892) 83 Tex. 218, 15 L. R. A. 262, 18 S. W. 578.

[1] Under the Iowa act (chapter XXXIX., *post*), a railroad company is not liable for an injury to a section hand from being thrown off a hand car in consequence of another employee's wilfully striking, while engaged in a political discussion, a third employee, who, in attempting to avoid the blow, pushed the former off the car. *Kincade* v. *Chicago, U. & St. P. R. Co.* (1899) 107 Iowa, 682, 78 N. W. 698.

Under the Wisconsin act (chapter XXXIX., *post*), a railway company is not liable for the death of an employee through the negligence of a superintendent, of which he was guilty while he was assisting such employee outside of his duties. *Hartford* v. *Northern P. R. Co.* (1895) 91 Wis. 374, 64 N. W. 1033.

Under the Missouri act (chapter XXXVIII., *post*), a railway company is not liable for the negligence of an engine wiper, who undertakes to operate an engine, and runs over a coservant. By the words "agents or servants" in the statute are meant coemployees acting in the course of their employment. *Boquette* v. *St. Louis, I. M. & S. R. Co.* (1900) 86 Mo. App. 601.

Under the Texas act (chapter XXXVIII, *post*), the negligence of a fireman in jumping from a rapidly moving train upon a section hand standing several feet from the track cannot be imputed to the railroad company in the absence of anything to show that the fireman was acting within the scope of his employment. *Jackson* v. *Galveston, H. & S. A. R. Co.* (1896) 14 Tex. Civ. App. 385, 37 S. W. 786.

For another affirmation of the doctrine in the text, see *Southern Cotton Oil Co.* v. *De Vond* (1894; Tex. Civ. App.) 25 S. W. 43.

[2] *Blood* v. *St. Louis & S. F. R. Co.* (1893) 58 Ark. 66, 41 Am. St. Rep. 83, 22 S. W. 1089.

But where the statute in question is merely declaratory of common law principles so far as regards the obligations which it imposes on the employer, it is not prejudicial error for the trial judge to read its provisions to the jury as being part of the law applicable to the case. *Hess* v. *Adamant Mfg. Co.* (1896) 66 Minn. 79, 68 N. W. 774.

[3] *International & G. N. R. Co.* v. *Cul*

The cases in which certain acts were declared to take effect immediately are noticed in the sections in which those acts are dealt with.

642. Necessity of proving knowledge on the defendant's part.—In all cases where the establishment of an employer's statutory liability depends upon its being proved that he was guilty of negligence in the premises, the general rule of the common law is applicable that culpability cannot be inferred, unless it is shown that the defendant had actual or constructive knowledge of the conditions for which it is sought to make him responsible.[1] See chapters VII., VIII., *ante*. This prerequisite to the maintenance of the action is covered by the express terms of the English employers' liability act of 1880, and the statutes copied therefrom. See § 674, *post*.

pper (1897; Tex. Civ. App.) 38 S. W. 818.

[1] In a California case it was contended that the provision of § 1970 of the Civil Code of that state, which exempts an employer from liability for the negligence of the fellow servant of the plaintiff, unless he has failed to use ordinary care "in the selection" of such servant, did not apply to cases in which negligence in retaining only was shown; but the court declined to accept this view, remarking that, if necessary, it would not hesitate to construe the employer's acts, under such circumstances, as constituting a new selection of the negligent employee, but that this was not requisite, because § 1971 declared generally that the employee must "in all cases indemnify his employee for losses caused by his want of ordinary care," and that such want might be shown as well by the retention of an unfit employee after knowledge of the fact, as by a failure to use due diligence at the time of his selection. *Gier* v. *Los Angeles Consol. Electric R. Co.* (1895) 108 Cal. 129, 41 Pac. 22.

With regard to the similar provision of Dak. Civ. Code, § 1131, it has been held to be culpable negligence on the part of a railroad company to allow machinery to remain out of repair, when its condition is brought to the notice of an officer [here a yard master] whose knowledge is imputed to the company, or might have been ascertained, upon proper inspection, by its agent charged with the duty of keeping them in repair. *Northern P. R. Co.* v. *Herbert* (1886) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590.

Where there is no reason but the lapse of time for supposing that repairs are needed in a structure, the failure to repair does not constitute "wilful neglect" within the purview of a statute (Ky. Gen. Stat. chap. 57, § 3) giving the widow, etc., of one killed by such negligence a right to recover punitive damages. *Reinder* v. *Black & P. Coal Co.* (1890) 12 Ky. L. Rep. 30, 13 S. W. 719.

Under the same statute, the fact that a car by which a brakeman was killed while coupling it with another was improperly loaded by reason of the fact that lumber projected over the end so as to interfere with the space necessary for coupling, or even the fact that the conductor knew that the car was improperly loaded, does not of itself show wilful neglect; but to constitute such neglect it must appear that the conductor or other person in charge of the train knew, or by the use of ordinary care could have known, that the car was so improperly loaded as to imperil the life of the servant or employee. *Louisville & N. R. Co.* v. *Brice* (1886) 84 Ky. 298, 1 S. W. 483.

Under the Missouri act of March 23, 1881, §§ 14, 16, giving a right of action for an injury caused by the "wilful failure" of the owner, etc., of a coal mine to keep a supply of timber for props, and send it down, when required, it is a condition of recovery that defendant had notice that the timber and props were required, and, with such notice, neglected and refused to supply them. *Leslie* v. *Rich Hill Coal Min. Co.* (1892) 110 Mo. 31, 19 S. W. 308.

In an action under a damage act by the representative of a deceased servant,

Mutatis mutandis, a similar principle, is controlling where it is sought to establish negligence in regard to some detail of the work on the part of an employee whom a statute has converted into a vice principal. Such negligence is not inferable, unless the employee is proved to have had knowledge, actual or constructive, of the existence of the conditions which rendered the act in question dangerous to the complainant.[2] See, generally, chapter X, *ante*.

B. Constitutionality.

643. Statutes entirely abrogating the doctrine of common employment with respect to all employers.— The subject of the Colorado statute (set out in chapter XXXIX., *post*) is sufficiently expressed by the title "An Act Concerning Damages Sustained by Agents, Servants, and Employees," within the meaning of Colo. Const. art. 5, § 21, providing that the subject of an act shall be clearly expressed in its title.[1]

644. Statutes modifying the doctrine of common employment in regard to all private corporations.— The clause in the Indiana statute (chapter XXXVII., *post*) by which a railway servant is enabled to recover as if he were a stranger, when the injury is caused by the negligence of locomotive engineers or trainmen, etc., whether the employee was acting in obedience to some superior at the time, or on his own initiative, is not in conflict with the equality clauses of the Federal and state Constitutions, as an unreasonable discrimination against railroad companies, subjecting them to liability to a class of employees with respect to which other employers are not made liable.[1]

there can be no recovery unless knowledge is brought home to the defendant. *Elliott* v. *St. Louis & I. M. R. Co.* (1878) 67 Mo. 272.

See also § 801, note 2, *post*.

[2] *Connell* v. *Surrey Dock Co.* (1887; Q. B. D.) 3 Times L. Rep. 630; *Booker* v. *Hess* (1887; Q. B. D.) 3 Times L. R. 618; *Kelly* v. *Davidson* (1900) 31 Ont. Rep. 521; *Caldwell* v. *Mills* (1893) 24 Ont. Rep. 462.

[1] *Colorado Mill & Elevator Co.* v. *Mitchell* (1899) 26 Colo. 284, 58 Pac. 28. Affirming (1898) 12 Colo. App. 277, 55 Pac. 736.

[1] In *Indianapolis Union R. Co.* v. *Houlihan* (1901) 157 Ind. 494, 54 L. R. A. 787, 60 N. E. 943, the court said: "It is competent for the legislature in the exercise of the police power to take steps for the protection of the lives and limbs of all persons who may be exposed to dangerous agencies in the hands of others. The powerful forces in railroading that are under the direction or control of those in charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine, or train upon a railway' were proper to be selected as sources of unusual danger which should be guarded against; the object to be accomplished was to incite railroad companies to use the utmost diligence in the selection and supervision of their servants who are put in charge of these dangerous agencies, so that fewer lives and limbs of those who are entitled to claim the protection of our laws would be sacrificed. The legislature evidently considered that stran-

also been deemed that the subsequent clause in the same section, which has the effect of making a [illegible] liable to an employee injured by the negligent act of a fellow servant, is not unconstitutional as being a denial to such [illegible] of the equal protection of the laws.[2]

645. Statutes abrogating or modifying the doctrine of common employment with respect to all the servants of railroad companies.—*a. Georgia.*—The validity of the Georgia [illegible] (see chapter XXXIX., *post*) has been impugned on the ground [illegible] is class legislation. But this objection has been declared to be [illegible] for the reasons that the law dealt with "persons engaged [illegible] hazardous and dangerous occupation, standing in peculiar relations [illegible] principal, their fellow employees, and to the public,"[1] and that it is applicable to all railway companies alike.[2] In spite of the disclaimer in the passage

gers and employees (the attorney and the ticket seller, for example) who were not fellow servants of those in charge of the agencies named were sufficiently protected by the railroad companies' existing liability to them for the negligent operation of those dangerous agencies. The legislature evidently determined to protect all persons who were not already protected from the negligent use of particular instruments. The classification is made on the basis of the peculiar hazards in railroading, relates directly to the object to be accomplished, and applies equally to all employees within the class. To separate railroading from other business was not an unconstitutional discrimination, because the dangers (the basis of the classification) do not arise from the same sources; but the claim that a classification not made on the basis of the dangerous agencies employed in the business, but founded on the question whether the employee, who was injured without his fault by a fellow-servant's negligent use of a dangerous agency, was acting at the time on his own initiative in the line of his duty, or under the orders of a superior, is the only constitutional classification, is unwarranted. A train is wrecked through the negligence of the engineer; two brakemen are injured without fault on their part, one acting at the time in obedience to the conductor's orders, the other acting on his own initiative, within the line of his duty; there should be and there is no constitutional limitation upon the legislature's exercise of the police power by which a law may not be enacted to protect both brakemen [illegible] ly from the negligence of the engineer."

[1] *Tullis* v. *Lake Erie & W. R. Co.* (1899) 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136. The contention of defendant's counsel was that the decisions sustaining the statutes of Kansas, Iowa, and Ohio (see chapter XXXIX., *post*) were not in point, as the Indiana statute classified railroad companies arbitrarily by name, and not with regard to the business in which they were engaged.

[1] In *Georgia R. & Bkg. Co.* v. *Oaks* (1874) 52 Ga. 410, the court said: "The legislation does not relate to the railroad companies because they are such, but because of the peculiar and special nature of their business. The law for this reason gives them special privileges,—they are specially protected from trespassers, their employees are exempted from various public duties, etc., etc. It might, with just as much force, be said that laws as to carriers, brokers, warehousemen, mechanics, laborers, etc., etc., vary the general laws by special legislation. The law is general, it applies to all railroad companies, and to all employees engaged in running trains."

[2] In *Georgia R. Co.* v. *Ivey* (1881) 73 Ga. 499, the court said: "It would be more special and less general, if applicable only to those engaged in running the trains. It is a general law embracing in its terms all railroads and their employees. Nor is it a special law affecting private rights, which varied a general law without the free consent in writing of all persons to be affected

cited in note 2, the second of the reasons thus assigned for upholding the act would seem to place this court in a real antagonism with those whose rulings are reviewed in the next section. The contention that the statute is repugnant to the 14th Amendment of the United States Constitution has also been rejected.[3]

b. Missouri.—It has been held that the Missouri act (see chapter XXXVIII., *post*) does not deny the equal protection of the law, since there is no evasion of the rule of equality, where all companies are subject to the same duties and liabilities under similar circumstances; that it does not deprive railway companies of property without due process of law; and that it is not class legislation.[4]

c. North Carolina.—The North Carolina act (chapter XXXIX. *post*) does not violate art. 1, § 7, of the state Constitution, which forbids the conferring of an "exclusive privilege upon any set of men," since it applies to a well-defined class, and operates equally as to all within that class.[5]

d. Ohio.—The Ohio act of 1890 (see chapter XXXVIII., *post*) has been held by one of the Federal courts of appeals not to be in contravention of the constitutional provision requiring all laws of a general nature to have a uniform operation throughout the state.[6]

e. Texas.—With regard to the employer's liability act of this state (see chapter XXXVIII., *post*) it has been held that the legislature has the right to declare what employees shall for the future be deemed

thereby,' in the sense of this language in our Constitution. It would be so if it affected one railroad company without such consent, and left out all others. But this affects all railroad companies and their employees. It might as well be said that a law affecting all lawyers or doctors was special legislation, if it regulated their treatment of clerks or students differently from that of common or unprofessional people. The cases cited from the Iowa reports are not in point. The Constitution and statutes there are unlike ours. If that court had so construed statutes like ours, we should differ with them with all deference to their judgment; but they do not collide, we think, with what we decide on our Constitution and our statutes."

[3] *Georgia R. & Bkg. Co.* v. *Hilley* (1892) 90 Ga. 571, 16 S. E. 939. Following *Missouri P. R. Co.* v. *Mackey* (1888) 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1167.

[4] *Powell* v. *Sherwood* (1901) 162 Mo. 605, 63 S. W. 485. In a later case it was expressly held that the act does violate the equality clause of the Federal Constitution, although it does not confine such liability to acts performed in the operation of the road, but extends it to risks similar to those incurred by the employees of persons or corporations engaged in other lines of work. *Callahan* v. *St. Louis Merchants' Bridge Terminal R. Co.* (1902) 170 Mo. 473, 60 L. R. A. 249, 71 S. W. 208.

[5] *Hancock* v. *Norfolk & W. R. Co.* (1899) 124 N. C. 222, 32 S. E. 679, approving the Federal decisions as to the Kansas and Iowa statutes.

[6] In *Peirce* v. *Van Dusen* (1897) 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693, the court said: "As it applies to all railroad corporations operating railroads within the state, it is, within the meaning of the state Constitution, general in its nature; and as it applies to all of a given class of railroad employees it operates uniformly throughout the state."

fellow servants;[7] that the subject of the act is sufficiently expressed in the title;[8] and that, as it affects all classes of railway corporations alike, it is not unconstitutional as denying railroads the equal protection of the law.[9]

f. Utah.—In this state (for the statute, see chapter XXXVIII., *post*) it has been held that the legislature has, unquestionably, authority to make the common master liable to one of his employees or servants for all damages to him caused by the negligence of another of his servants, while the latter is acting about the business or labor which he is authorized to do, regardless of the fact that such servants would, under the general rule, be regarded as fellow servants.[10]

g. Wisconsin.—The Wisconsin act of 1875, chap. 173 (see chapter XXXIX., *post*), was declared, prior to its repeal, not to be repugnant to the constitutional principle which prohibits unequal and partial legislation on general subjects.[11]

646. Statutes abrogating the doctrine of common employment with respect to railway servants engaged in the operation of the road.—The statutes of Iowa, Kansas, and Minnesota are couched in substantially identical words (see chapter XXXIX., *post*), and may be considered together.

The contention that they are in conflict with the 14th Amendment of the United States Constitution, because they deprive railway companies of the equal protection of the laws, has been held not to be

[7] *Galveston, H. & S. A. R. Co.* v. *Worthy* (1894: Tex. Civ. App.) 27 S. W. 426.

[8] *Gulf, C. & S. F. R. Co.* v. *Calvert* (1895) 11 Tex. Civ. App. 297, 32 S. W. 246.

[9] *Galveston, H. & S. A. R. Co.* v. *Gibson* (1899: Tex. Civ. App.) 54 S. W. 77.

[10] *Dryburg* v. *Mercur Gold Min. & Mill. Co.* (1898) 18 Utah, 410, 55 Pac. 367.

[11] *Ditberner* v. *Chicago, M. & St. P. R. Co.* (1879) 47 Wis. 138, 2 N. W. 69, disapproving the doctrine implied in the Iowa decisions (see § 646, *post*), that the statute of that state was valid only because the recovery was limited to cases where the injuries were caused by the negligent operation of railways. The court said: "It is conceded that the act would be a valid exercise of legislative power were its provisions restricted to cases of injury caused by the negligent operation of railways. But it assumed that the statute is not so restricted; that by its terms it seeks to make a railway company liable for an injury to an employee caused by the negligence of another employee, although the negligent act may have no connection with the operation of the railway of the company. The argument is that, because the same liability is not imposed upon other corporations, the statute is void within the rule of *Durkee* v. *Janesville* (1871) 28 Wis. 464, 9 Am. Rep. 500. . . . The case of *Atty. Gen.* v. *Chicago & N. W. R. Co.* (1879) 35 Wis. 425, decides the question under consideration adversely to the position maintained by the learned counsel for the railway company. It was held in those cases that a statute which limited the rates to be charged by railway companies for fares and freights was a valid enactment, although such limitations were not imposed upon other common carriers, whether corporate or individual. The statute was held to be a proper exercise by the legislature of the power granted to it by the Constitution to alter or repeal the charters of those corporations. Const. art. II. § 1. The same principle is involved in this case. If the legislature can impose limitations and restrictions upon railway companies

tenable.[1] Nor are they repugnant to that amendment which prohibits the taking of property without due process of law.[2]

not imposed upon other common carriers, whether corporate or otherwise, it may in like manner impose liabilities upon such companies from which other common carriers and other corporations are exempt."

[1] In *Missouri P. R. Co.* v. *Mackey* (1887) 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, the court said, in discussing this objection to the Kansas law of 1874: "It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the clause of the 14th Amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors, so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the 14th Amendment, if all persons subject to it are treated alike under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed. It is conceded that corporations are persons within the meaning of the amendment. *Santa Clara County* v. *Southern P. R. Co.* (1885) 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Min. & Mill. Co.* v. *Pennsylvania* (1887) 125 U. S. 187, 31 L. ed. 653, 21 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737. But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar danger to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories." The decision of the state court in (1885) 33 Kan. 298, 6 Pac. 291, was accordingly affirmed. To the same effect, see *Missouri P. R. Co.* v. *Haley* (1881) 25 Kan. 35; *Atchison, T. & S. F. R. Co.* v. *Kochler* (1887) 37 Kan. 463, 15 Pac. 567.

The doctrine thus laid down was treated as the law of the case in a decision with regard to the Minnesota act *Minneapolis & St. L. R. Co.* v. *Herrick* (1887) 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176, Affirming (1883) 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413.

The same objection to the validity of the Iowa act was raised in *Buckle* v. *Central Iowa R. Co.* (1884) 64 Iowa, 603, 21 N. W. 103, and was thus disposed of: "The argument, briefly stated, is that under the statute railroad corporations are subjected to penalties and liabilities which other persons and corporations engaged in a like business are not subjected to. That the business of operating a railway is peculiarly hazardous to employees engaged in the operation of the road must be admitted. Counsel have not called our attention to any business which is equally hazardous, and as the statute is applicable to all corporations or persons engaged in operating railroads, it seems to us it does not discriminate in favor of or against any one. . . . The provisions of section 30 of article 3 of the

order to save the Iowa and Minnesota acts from the imputation ing repugnant to the constitutional provision which prohibits class legislation, it has been deemed necessary to hold that although the words employed by the legislature are perfectly general, they should be construed as being applicable only to servants engaged in the actual operation of the road.[5]

Constitution of the state and the 14th Amendment to the Constitution of the United States are quite similar, if not in spirit identical, in so far as either can be said to prohibit the legislature from conferring excessive privileges on any person or imposing penalties upon any corporation which are not shared by others under like circumstances."

In *Missouri P. R. Co.* v. *Mackey* (1887) 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, the court said: "The contention of the company, as we understand it, is that that law [*i. e.*, of Kansas] imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken; and thus authorizes, in such cases, the taking of property without due process of law, in violation of the 14th Amendment. The plain answer to this contention is that the liability imposed by the law of 1874 arises only for injuries subsequently committed; it has no application to past injuries, and it cannot be successfully contended that the state may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every state. The hard-ship or injustice of the law of Kansas of 1874, if there be any, must be relieved by legislative enactment. The only question for our examination, as the law of 1874 is presented to us in this case, is whether it is in conflict with clauses of the 14th Amendment. The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine and fixes a like liability upon railroad companies, where injuries are subsequently suffered by employees, though it may be by the negligence or incompetency of a fellow servant in the same general employment and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt."

In *Deutsch* v. *Mississippi & M. R. Co.* (1866) 20 Iowa, 338, and *Voy* v. *Dubuque & S. C. R. Co.* (1866) 20 Iowa, 347, it was held that the law was not repugnant to art. 3, § 30, of the Constitution, which requires that "all laws shall be general and of uniform operation throughout the state." The ground of the decisions was that "the same liability is extended by the act upon the same terms to all in the same situation."

In *Doppe* v. *Chicago, R. I. & P. R. Co.* (1872) 36 Iowa, 52, the court said: "If the statute should be so construed as to apply to all persons in the employ of railroad corporations without regard to the business they were employed in, then it would be a clear case of class legislation, and would not apply upon the same terms to all in the same situation, and hence would be unconstitutional, and manifestly so. To illustrate: Suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the land owner employs a like number of persons to cut the timber on a strip of equal length alongside such right of way. If one of each set of employees shall be injured by the negligence of a coemployee, and the employee of the railroad company can, under the statute, maintain an action against his employer, and the other cannot, then it is clear that the law does not apply upon the same terms to all in the same situation. The law, then, would not

647. Statutes imposing special duties upon various classes of employees.—*a. Street car companies.*—The Minnesota law of 1893, chap. 53, requiring street railway companies to provide inclosures at the front of their cars to protect the employees operating them from the inclemency of the weather during the winter season, has been held not to be invalid on any of the following grounds: (1) That it is not an exercise of the police power of the state; (2) that it is class-

have uniform operation, but would be violative of the Constitution, just as much as a law that should prescribe under the same circumstances different liabilities for merchants, for mechanics, and for laborers. The manifest purpose of the statute was to give its benefits to employees engaged in the hazardous business of operating railroads. When thus limited it is constitutional; when extended further it becomes unconstitutional."

These decisions were cited with approval in *Foley* v. *Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 644, 21 N. W. 124.

In *Nichols* v. *Walter* (1887) 37 Minn. 264, 33 N. W. 800, it was laid down that in order to exempt a statute from the imputation of being class legislation, the distinctions which it creates must be based upon some apparent natural reason—some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them.

Applying this test in *Lavallee* v. *St. Paul, M. & M. R. Co.* (1889) 40 Minn. 249, 41 N. W. 974, the court said: "It is impossible to avoid the conclusion that the statute, if construed as appellant claims it ought to be, would be class legislation, not applying upon the same terms to all in the same situation, nor having any apparent natural reason for any distinction. The frequency and magnitude of the dangers to which those employed in operating railroads are exposed; the difficulty, sometimes impossibility, of escaping from them with any amount of care, when they come; the fact that a great number of men are employed, co-operating in the same work, so that no one of them can know all the others, their competency, skill, and care, so that he may be said to voluntarily assume the risk arising from the want of skill or care by any one of the number,—are a sufficient reason for applying a rule of liability on the part of the employer to the employee so employed, different from that ordinarily applied between master and servant. But no just reason can be suggested why such difference should be founded, not on the character of the employment, nor of the dangers to which those employed are exposed, but on the character only of the employer. We can see why the employer's liability should be greater when the business is that of operating a railroad, but cannot see why one individual or corporation should be held to a rule of liability different from that applied to another, when the employment and its hazards are precisely the same."

Other decisions to the same effect are *Pierce* v. *Central Iowa R. Co.* (1887) 73 Iowa, 140, 34 N. W. 783; *Rauborn* v. *Central Iowa R. Co.* (1888) 71 Iowa, 637, 35 N. W. 606, 38 N. W. 520.

In *Johnson* v. *St. Paul & D. R. Co.* (1890) 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156, the court argued as follows: "If a distinction is to be made as to the liability of employers to their employees, it must be based upon a difference in the nature of the employment, and not of the employers. One rule of liability cannot be established for railway companies, merely as such, and another rule for other employers, under like circumstances and conditions, unless upon the theory suggested in *Missouri P. R. Co.* v. *Mackey* (1887) 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, that the state may 'prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters.'—a proposition which, as thus broadly stated, that court, in view of its later utterances, could hardly have intended to announce. . . . Hence, most courts, as, notably, in Iowa and Kansas, have held that similar statutes, although general in their terms, embrace only 'the peculiar hazards of railroading.' But, when we come to examine the adjudicated cases,

legislation; (3) that it impairs the obligation of a contract; (4) that it interferes with the liberty of contract between street railway companies and their employees; (5) that it imposes an excessive fine.[1]

we confess we are unable to discover any definite, consistent, or logical rule which the courts have applied in determining whether, upon the facts of a particular case, it fell within or without the statute. In some cases it has been held that the statute applied, because the duty of the employees required them to ride upon the cars to the place of work, although the injury was not sustained while thus riding, and was not caused by, or in any manner connected with, the operation of the road. Such a position seems to us wholly illogical. Other cases have been held within the statute because the work being performed was necessary to the use and operation of the road, although the injury sustained was not caused by, or connected with, such use and operation. This, we think, is equally illogical. In fact, the proposition is so broad and definite as to bring within the act all employees, regardless of the nature of their employment; for the work of all, even clerks in offices, is, in a sense, necessary to the use and operation of the road. Therefore, after mature consideration, our conclusion is that, if any limitation is to be placed by the courts upon the application of this statute (and on constitutional grounds there must be), the only one which will furnish any definite or logical rule is to hold that it only applies to those employees who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers."

[1] In *State* v. *Smith* (1894) 58 Minn. 35, 25 L. R. A. 759, 59 N. W. 545, the court said: "What are called 'trailing cars' are excluded from this requirement, so that it applies only to cars on which the motive power is operated or controlled. The law was passed with reference to the fact that the man operating or controlling the motive power of such cars was required to stand where his person was almost wholly exposed to cold, storm, and wind, having but little protection except such as the clothing affords. . . . It is stipulated as a fact, what everybody knows,—that electric cars are run at a rate of speed of from 4 to 15 miles an hour, and at an average rate of between 8 and 9 miles an hour. Anyone acquainted with the extreme cold of much of the weather in this climate between the 1st of November and the 1st of April, and who knows, as everybody does, that the motorman on an electric car is obliged to stand in one place, always on the alert, his whole attention given to the means of controlling the motive power and the brake, and to looking out ahead, and unable, with due regard to his duties, to give attention to protecting himself from the cold, must appreciate that, when going at the rate of 8 or 9 miles an hour, perhaps against a head wind, and with the mercury below zero, the position of the motorman is one not merely of discomfort, but of actual danger to health, and sometimes to life, and the tendency of which is to disable him to some extent to perform his duties in the way that care to safety of his passengers and of travelers on the streets requires.

"It has never been questioned that the police power of the state extends to regulating the use of dangerous machinery, with a view to protecting, not only others, but those who are employed to use it; and if it be conceded, as it must be, that the state may intervene by regulations in such a case, we do not see why it may not in such a case as this. The act is within the police power. When a subject is within that power, the extent to which it shall be exercised and the regulations to effect the desired end are generally wholly in the discretion of the legislature. The legislature might in this case have required the use of the prescribed inclosure only at such times when the cold reached a certain degree, or when storms prevailed, but it was thought fit to make sure of the result aimed at by covering the time of year when extreme cold and bitter storms may occur at any time; and that was within its exclusive province.

"The objection that this is class legislation is based on the fact that the act is confined to street cars propelled by cable, steam, or electricity, and does not include street cars drawn by mules and horses, or carriages or wagons; and it is assumed that here is an attempt at purely arbitrary classification for the purpose of the act. The evil sought to be remedied does not exist in case of the slowly going mule or horse car, or carriage or wagon, to the same degree as in

It has been declared that the Missouri act of March 5, 1897, requiring every electric street car to be provided during the winter with a screen for the protection of the motorman, and declaring a penalty for violation of the act, is a valid exercise of the police power, since the state has an interest in the health of its citizens and the safety of the passengers on such cars; and that it infringes neither the 14th Amendment of the United States Constitution, nor art. 2, § 30, of the Missouri Constitution, providing that no person shall be deprived of liberty or property without due process of law.[2]

b. Operators of mines.—The clause in Pa. act March 3, 1871, requiring a signal system, cage covering, and brakes, as a provision for the safety of persons employed in coal mines, is within the police power of the state.[3]

The provision in Ill. Rev. Stat. 1874, §§ 1, 2, p. 704, requiring the operators of a coal mine or colliery employing ten or more men to have made an accurate map of the workings, is a proper exercise

the case of cable, electric, or steam cars. But where an evil exists in a variety of cases, it is a sufficient ground for classification in legislating, so as to include some and exclude others, that in the former the evil can be remedied, while in the latter it cannot be. The man in control of the cable, electric, or steam railway car may be boxed in without impairing his power of control in the slightest degree; but to box in the driver of a horse or mule car, or of a stagecoach or carriage or wagon, separating him from his animals, while, of course, it could be done, would bring about greater evils than those sought to be remedied. The difference in this respect between cars included in this act and those not included is such as to justify difference in legislating.

"The claim that the act impairs the obligation of a contract is based on the fact that in each case the railway company had a contract with the city, made before the passage of the act, in which the former bound itself to run cars of 'the best modern style and construction' and this act requires something in addition thereto. We need only say that, where parties contract on matters within the police power of the state, they do so subject to the exercise of that power whenever the legislature chooses to exercise it. If one contract with the state or a municipal corporation, acting under authority of the state, even if it were conceded that the legislature can, by contract or by giving authority to make a contract, bind the state not to exercise the police power, the legislative intent to do so would have to appear unmistakably. There is nothing to suggest such intent in the charter of either city. What we have said on the third point made by appellants applies with equal force to the fourth.

"The act imposes a fine of not less than $50 nor more than $[illegible] for a violation of the law, and makes each [illegible] that cars shall be run without complying with the law a separate offense. A fine of from $50 to $100 could not be called excessive. It is true the party may, by repeatedly committing the offense, add up a large aggregate of fines; so might the offender against any other law, the law against larceny or embezzlement, or any other; but that would not make the punishment excessive."

State v. *Whitaker* (1901) 160 Mo. 59, 60 S. W. 1068. In this case it was held that the title of the act, "An Act Requiring Persons, Associations and Corporations Owning or Operating Street Cars to Provide for the Well-Being and Protection of Employés" (Acts 1897, p. 102), sufficiently indicates the subject matter to be a requirement that electric street cars be equipped with screens for protection of motormen and the imposition of a penalty for operation of such cars without the screen.

[3] *Com. ex rel. Wilbur* v. [illegible] (1871) 8 Phila. 534.

of the police power, and not unconstitutional as being merely arbitrary, having no tendency to protect health or life, and compelling land owners to expend money for the mere convenience of their neighbors.[4]

The subject matter of the Montana statute (Laws 1897, p. 215), by which it is declared to be unlawful for any corporation to sink or work through any vertical shaft where running cages are used, to a greater depth than 300 feet, unless such shaft shall be provided with an iron-bonneted safety cage, is sufficiently expressed in its title, *viz.*, "An Act to Amend Section 775 of Title X. of the Penal Code of the State of Montana, to Have the Cages in All Mines Cased in."[5]

The Missouri act of 1894 (Mo. Laws, p. 182), amending Rev. Stat. 1889, § 7074, by which $10,000 damages may be recovered for the death of a miner killed by the negligence of his employer, the sum recoverable by the general damage act being only $5,000, is not unconstitutional, as it is a general law applicable to all persons of a certain class.[6]

648. Statutes restricting the defenses open to employers.—A statute making void a contract by a corporation for its release or relief from liability to an employee for negligence of a fellow servant is not unconstitutional.[1]

A statute which excludes the defense of contributory negligence, and imposes an absolute liability on railway companies for injuries received by any person in consequence of their failure to fence their roads, is not unconstitutional. Such a liability is merely a penalty for failure to conform to a regulation considered by the legislature to be essential for the protection of life and property.[2]

C. Defenses available in actions under statutes.

649. Generally.—The general theory upon which the courts have proceeded is that, in the absence of language evincing a contrary intention on the part of the legislature, a statute which so far changes the common law as to impose upon a master duties to which he had not been before subject, or to render him liable for the negligence of certain classes of servants resulting in injury to other servants whose right of action would, if common-law doctrines were applied, be

[4] *Daniels* v. *Hilgard* (1875) 77 Ill. 610.

[5] *State* v. *Anaconda Copper Min. Co.* (1900) 23 Mont. 498, 59 Pac. 851.

Fisher v. *Central Lead Co.* (1900) 156 Mo. 479, 56 S. W. 1107.

[1] *Pittsburgh, C. C. & St. L. R. Co.* v. *Montgomery* (1898) 152 Ind. 1, 49 N. E. 782.

Quackenbush v. *Wisconsin & M. R. Co.* (1885) 62 Wis. 411, 22 N. W. 519.

barred by the rule as to fellow employees, should not be construed in such a sense as to preclude the master from availing himself of any of those defenses which, as explained in § 255, *ante*, are based upon the fact that the injured person adopted a certain course of conduct with a full appreciation, actual or constructive, of the risk from which his injury eventually resulted. The extent to which this theory inures to the benefit of the master will be shown in the remaining sections of this subtitle.

650. Assumption of risks.—*a. Ordinary risks assumed.*—In some instances the statutory provisions which are considered in this and the following chapters operate so as to convert what would be an ordinary risk under the common law into an extraordinary one. But unless this be their effect, they are not deemed to change in any way the rule that a servant assumes all the ordinary risks which are manifestly incident to the employment. This proposition of course amounts merely to an assertion, in a form applicable to the circumstances, of the general principle that proof of negligence on the employer's part is a prerequisite to the establishment of the servant's right to maintain an action.[1]

[1] Under the Massachusetts act of 1887 (chapter XXXVII., *post*), it has been held, on the ground that the risk was an ordinary one, that the servant could not recover for injuries caused by the permanent construction of a building. *Hoard* v. *Blackstone Mfg. Co.* (1900) 177 Mass. 69, 58 N. E. 180. Nor for injuries caused by an imperfectly insulated wire belonging to another company, which used the same poles as the servants' own employers. *Chisholm* v. *New England Teleph. & Teleg. Co.* (1900) 176 Mass. 125, 57 N. E. 383.

For the same reason it has been held, with reference to the Wisconsin act of 1893 (chapter XXXIX., *post*), that a railway servant could not recover, where his hand was caught while coupling cars, owing to their being suddenly moved. *Andrews* v. *Chicago, M. & St. P. R. Co.* (1897) 96 Wis. 348, 71 N. W. 372.

In other cases the right of action for an injury resulting from a mere accident has been denied. *Hunter* v. *Kansas City & M. R. & Bridge Co.* (1898) 29 C. C. A. 206, 54 U. S. App. 653, 85 Fed. 379; *Hamilton* v. *Chicago, R. I. & P. R. Co.* (1894) 93 Iowa, 46, 61 N. W. 415.

Under a contract by a minor of sufficient discretion to comprehend the dangers of the employment, made with his father's assent, both father and son assume all the risks incident to the service, and neither can recover against the employer for any injury resulting from negligence of a coemployee in and about the common service. This doctrine is not modified by Ala. Code § 2588, or by the employees' act (Ala. Code, §§ 2590-2593; chapter XXXIX., *post*). *Lovell* v. *De Bardelaben Coal & I. Co.* (1889) 90 Ala. 13, 7 So. 756. The court said: "The question must be determined on the terms of that act (*i. e.*, employees' itself, and without reference to § 2588 of the Code (recovery for injuries causing death of minor), or any other statute. It relates to a class of cases in which, before, no cause of action existed,—to a class of injuries the damages for which, at common law, and under our statutes, had been bartered away before they accrued. The statute was one of enlargement purely. No existing right was curtailed, limited, or taken away. The only limitations in the act were upon causes of action created by the act, and having no existence outside of it. Giving its limitations the fullest interpretation, the broadest significance, they do not trench upon any right a father, who has consented to his minor son's entering an employ-

b. Possibility of future negligence on the part of statutory vice principal, not a risk assumed.—The possibility that an employee for whose acts and defaults a master is declared by a statute to be liable may at some future time be guilty of negligence in the discharge of his duties is not one of those risks which is undertaken by a servant who is within the protection of the statute. A different doctrine would manifestly have the effect to render such a statute ineffectual for the purpose for which it was framed.[2]

c. Extraordinary risks; how far assumed, in the absence of express provisions on the subject.—The inference that the injured servant assumed the risk in question will not be drawn in the case of an infraction of a statutory duty, any more than in the case of a common-law duty, where the evidence is not conclusive as to his ap-

ment in which he is injured by a co-employee, has to sue the employer for such injury, since he never had that right. In creating this new cause of action, it was, therefore, not only entirely competent for the legislature to confine it, in cases where the injury produced death, to the personal representative; but, in doing so, no existing right to sue was taken away from the parents. If the minor's employment was against the will of the father, he could maintain the action before the 'employees' act,' and afterwards, though not under it. If, with his consent, as in this case, he could sue neither before or after, nor under or without the statute, if we are to give any force whatever to § 2591, which designates the only person who may sue under the act, where the injury results in death, and particularly and peremptorily makes provision for the disposition of the recovery, which can only be carried out by the personal representative. Why the lawmakers engrafted this limitation on the prosecution of the cause of action, created by the act, is not for us to inquire; it is wholly immaterial. It provides for all servants and employees,—infants, as well as adults. Had either class been omitted, that class would have been without remedy for the negligence of coservants. Neither class was omitted, either in giving the remedy, or in requiring suit, in case of death, to be brought by the personal representative. To avoid judicial legislation, we must and do hold that the father, under the averments of this complaint, has no standing in court to recover damages for the death of his minor son, resulting from the negligence of fellow servants. *Stewart* v. *Louisville & N. R. Co.* (1887) 85 Ala. 493, 4 So. 373."

[2] *Davis* v. *New York, N. H. & H. R. Co.* (1893) 159 Mass. 532, 34 N. E. 1070, per Holmes, J.; *Murphy* v. *City Coal Co.* (1898) 172 Mass. 324, 52 N. E. 503; *Mobile & O. R. Co.* v. *George* (1891) 94 Ala. 199, 10 So. 115; *St. Louis, I. M. & S. R. Co.* v. *Toohey* (1899) 67 Ark. 209, 54 S. W. 577; *Georgia R. & Bkg. Co.* v. *Rhodes* (1876) 56 Ga. 645.

In *Woodward Iron Co.* v. *Andrews* (1896) 114 Ala. 243, 21 So. 440, the court argued thus: "One theory of defense under these counts is that the plaintiff must be held to have assumed the risks incident to Neal's negligence by remaining on the hand car when Neal caused it to be run into this dangerous place. This idea is unsound. To sustain it would be to emasculate the employer's liability act in respect of its second, third, and fifth clauses, and to rehabilitate the common-law doctrine of fellow servants as applicable to the cases provided for in those clauses, when the clear purpose of the act is to destroy the defense of assumption of risk by the injured employee in the several cases stated in the counts referred to. An employee in such cases may be guilty of such contributory negligence as will bar his recovery, but he does not assume the risks incident to the negligence of a superintendent, or of a person to whose orders he was bound to conform and did conform, or of a person in charge and control of a locomotive engine, car, etc."

In *Hall* v. *Chicago, R. & N. R. Co.* (1891) 46 Minn. 439, 49 N. W. 239, the

precaution of that risk.[1] See § 271, *ante*. Nor should the court take the case from the jury, where it is a reasonable inference that the action of the servant in subjecting himself to the given risk was neither entirely voluntary, nor accompanied by a full comprehension of that risk.[4] But if that appreciation is established, the inability of the servant to recover becomes a peremptory conclusion of law, unless the terms of the statute are such as to preclude the court from declaring the action to be barred on this ground.[5]

court refused to accept the contention of the defendant's counsel, that a servant assumes all the risks resulting from the negligence of other employees in violating the company's rules.

[3] *Peterson* v. *Johnson-Wentworth Co.* (1897) 70 Minn. 538, 73 N. W. 510 (unguarded machinery).

[4] Where a boy twelve years old, employed as a messenger, is placed at work by his master in the factory of the latter, in violation of Laws 1897, chap. 415, § 70, the act of the child in working therein is not, as a matter of law, a waiver of the protection of the statute. *Murino* v. *Lehmaier* (1901) 62 App. Div. 43, 70 N. Y. Supp. 790.

[5] (a) *General employers' liability acts.*—The doctrine in the text has frequently been held to be a bar to an action under the Massachusetts act of 1887 (chapter XXXVII., *post*). *O'Maley* v. *South Boston Gaslight Co.* (1893) 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119; *Fisk* v. *Fitchburg R. Co.* (1893) 158 Mass. 238, 33 N. E. 510; *Gleason* v. *New York & N. E. R. Co.* (1893) 159 Mass. 68, 34 N. E. 79; *Doyle* v. *Lawrence Mfg. Co.* (1893) 159 Mass. 378, 34 N. E. 458; *Kleinest* v. *Knudsen* (1895) 160 Mass. 230, 35 N. E. 458; *Cassady* v. *Boston & A. R. Co.* (1895) 164 Mass. 170, 41 N. E. 129; *O'Connor* v. *Whittall* (1897) 169 Mass. 563, 18 N. E. 840; *Dacey* v. *New York, N. H. & H. R. Co.* (1897) 168 Mass. 479, 47 N. E. 418; *McPhee* v. *Scully* (1895) 163 Mass. 216, 39 N. E. 1007; *Cunningham* v. *Lynn & B. Street R. Co.* (1898) 170 Mass. 298, 49 N. E. 449; *Corrigan* v. *Washburn & M. Mfg. Co.* (1898) 170 Mass. 79, 48 N. E. 1079; *French* v. *Columbia Spinning Co.* (1897) 169 Mass. 531, 48 N. E. 269; *McCauley* v. *Springfield Street R. Co.* (1897) 169 Mass. 301, 47 N. E. 1006; *Flaherty* v. *Norwood Engineering Co.* (1898) 172 Mass. 134, 51 N. E. 463; *Ford* v. *Mt. Tom Sulphite Pulp Co.* (1899) 172 Mass. 544, 48 L. R. A. 95, 52 N. E. 1065; *Demers* v. *Mershall* (1899) 172 Mass. 548, 52 N. E. 1066; *Swallow* v. *Kellogg* (1897) 169 Mass. 514, 48 N. E. 622; *Tenanty* v. *Boston Mfg. Co.* (1898) 170 Mass. 323, 49 N. E. 654.

The servant was declared to have assumed the risk, in several decisions under the Alabama employers' liability act. But the language and reasoning of the court show that the defense really meant was contributory negligence. The decisions referred to are therefore collected in §§ 651, 652, *infra*.

It may also be mentioned here that a father who consents to the employment of his minor son in a dangerous service cannot recover in an action under the Texas statutes for the death of his son, resulting from his inexperience and the failure of the employer to instruct him regarding the dangers incident to the employment. *Missouri, K. & T. R. Co.* v. *Evans* (1897) 16 Tex. Civ. App. 68, 41 S. W. 80.

(b) *Acts imposing specific duties.*—On the ground that the risks in question were appreciated, and therefore assumed, the action was held not to be maintainable in the following cases: *Collins* v. *Patten & S. R. Co.* (1899) 94 Me. 80, 44 Atl. 361 (blocking of frog); *Girard* v. *Michigan C. R. Co.* (1890) 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837 (unblocked frog); *Fleming* v. *St. Paul & D. R. Co.* (1880) 27 Minn. 111, 6 N. W. 448 (railway not fenced); *Sweeney* v. *Central P. R. Co.* (1880) 57 Cal. 15 (railway not fenced); *Fitzgerald* v. *New York C. & H. R. R. Co.* (1891) 59 Hun. 225, 12 N. Y. Supp. 932 (no warning signals near a low bridge); *Abbot* v. *McCadden* (1892) 81 Wis. 563, 29 Am. St. Rep. 910, 51 N. W. 1079 (servant knew of custom of running trams at an unlawful rate of speed); *Thompson* v. *Johnston Bros. Co.* (1893) 86 Wis. 582, 57 N. W. 298 (unguarded machinery); *Williams* v. *Chicago Lumber Co.* (1901) 110 Wis. 578, 86 N. W. 157 (unguarded gears); *Debaker* v. *Hal*

The intention of the legislature to deprive employers of the benefit of this defense in so far as its rests upon the conception of an implied contract has been inferred in the case of a statute in which it is expressly declared that, under the circumstances specified, the servant shall have the same right to compensation and remedies as if he were not in the service of the defendant.[a]

ing (1900) 107 Wis. 218, 83 N. W. 60 (unfenced machinery); *Kimball v. Ubsa Paper Co.* (1900) 51 Misc. 538, 42 N. Y. Supp. 597 (unguarded machinery); *Anderson v. C. A. Nelson Lumber Co.* (1899) 67 Minn. 79, 69 N. W. 640 (unguarded machinery); *E. S. Heaton Coupler Co. v. Clarke* (1897) 25 C. C. A. 220, 51 U. S. App. 71, 79 Fed. 900 (unguarded machinery); *Wheeler v. Cottrell Lithographic Co.* (1902) 171 N. Y. 631, 30 N. E. 236 (unguarded machinery); *Manzi v. Friedl* (1898) 33 App. Div. 217, 53 N. Y. Supp. 482 (employee permitted to go on an elevator cradle while in motion); *Nichols v. Rebus* (1896) 3 App. Div. 582, 38 N. Y. Supp. 214 (elevator not covered); *Speer v. Osage Coal & Min. Co.* (1895) 58 Mo. 68 (no fence at entrance of mine); *Babbit v. Brazil Block Coal Co.* (1901) 25 Ind. App. 654, 58 N. E. 856 (uncovered cage in mine); *Island Coal Co. v. Sherwood* (1899) 153 Ind. 699, 53 N. E. 1135 (mining act); *Powell v. Ishpeming Iron & Steel Co.* (1897) 98 Wis. 35, 73 N. W. 573.

The owner of a coal mine is not liable for an injury to an employee, caused by a fall of top coal from the roof of the mine at the place where he was at work, where he was an experienced miner, and had thoroughly tested the roof shortly before the fall and believed it to be perfectly safe, although Ind. Rev. Stat. 1894, § 7472, makes it the duty of the mining boss to examine every working place in the mine as often as every alternate day, and see that the same is properly secured by props or timber, and that safety is in all respects assured. *Island Coal Co. v. Greenwood* (1898) 151 Ind. 176, 50 N. E. 36.

Compare also cases cited in § 651, note 4, *infra*.

(c) *Municipal ordinances.*—On the ground that the servant understood the risk caused by the violation of a municipal ordinance, recovery was denied in the following cases: *Browne v. Siscel, C. & Co.* (1901) 191 Ill. 226, 60 N. E. 815, Affirming (1900) 90 Ill. App. 49; *Swift & Co. v. Fue* (1896) 66 Ill. App. 651 (guarding of machinery); *Martin v. Chicago, R. I. & P. R. Co.* (1901) 87 N. W. 651 (the speed of trains); *Hann v. L. Wolff Mfg. Co.* (1901) 91 Ill. App. 122 (unguarded machinery); *Chicago Packing & Provision Co. v. Robin* (1892) 47 Ill. App. 610.

[a] In *Weblin v. Ballard* (1886) L. R. 17 Q. B. Div. 122, 55 L. J. Q. B. N. S. 25, 54 L. T. N. S. 532, 34 Week. Rep. 65, 50 J. P. 597, it was ruled that the Employers' liability act of 1880 (compare XXXIII. *post*) had taken away the common-law defense that the servant assumed the risks of his employment. This view was adopted by all the Lords Justices in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. Lord Esher stated his views as follows: "The first thing to consider is, What is the true construction of the employers' liability act 1880? It has been suggested that this act has only the effect of doing away with the doctrine of the immunity of the master from damage arising from the negligence of another servant in the common employment of the master. To my mind it is clear that the statute has taken away from the master another defense. It was, no doubt, held that a servant could not sue a master for injuries arising from the negligence of a fellow servant, but it was also held that a man who went into any employment undertook to take all the ordinary risks incident thereto, unless they were concealed or were known to the master, and not to the servant. It seems to me clear that the act has taken away that defense from the master. I can see no difference between contracting to take a risk upon oneself and undertaking an employment to which risk attaches. No one ever suggested that there could be such a contract in the case of any person other than a servant, so that when a servant is put on a footing with other persons that defense of the master is gone. The case is reduced, therefore, to a personal action, founded on negligence."

It has also been held, quite recently, that the defense of assumption of risks is not available to a master who is sued for noncompliance with a statutory duty, for a breach of which a penalty has been imposed. The position taken was that, if he were allowed to protect himself by this defense under such circumstances, he would be enabled virtually to nullify a penal statute, and that a doctrine leading to such a result was contrary to public policy.[7]

d. Effect of express provisions with regard to assumption of extraordinary risks.—The effect of such a provision as that which is found in § 2 of the North Carolina act of 1897 (chapter XXXIX. *post*) is manifestly to deprive the employee altogether of the benefit of a defense which presupposes that an agreement, whether it be express or implied, to waive the right of action for an injury resulting from the negligence of the master himself, or his agent, is valid and binding upon a servant.[8]

In cases where the statute provides that an assumption of the risk shall not be inferred from the servant's continuance of work,[9] or that knowledge by an employee of the unsafe character of an appliance shall be no defense to an action for injuries caused thereby,[10] the intention of the legislature to exclude altogether the defense of assumption of the risk would seem to be not an unreasonable inference. But the decisions upon this subject are not entirely consistent.[11]

In some of the employers' liability acts discussed in chapter

The supreme court of Massachusetts has arrived at a different conclusion with regard to the effect of the similar statute of that state. See note 5, subd. (a), *supra*.

[7] *Nasmore* v. *Cleveland, C. C. & St. L. R. Co.* (1899) 48 L. R. A. 68, 37 C. C. A. 499, 96 Fed. 298. Another decision to the same effect is *Boyd* v. *Brazil Block Coal Co.* (1898; Ind. App.) 50 N. E. 368 (violation of mining act). But it seems to be inconsistent with the Indiana cases cited in note 5, subd. (b), *supra*.

[8] It has been laid down that the doctrine of assumption of risks "has no application, where the law requires the adoption of new devices to save life or limb (as, self-couplers), and the employee, either ignorant of that fact, or expecting daily compliance with the law, continues in service with the appliances formerly in use." *Greenlee* v. *South. R. Co.* (1898) 122 N. C. 977, 41 L. R. A. 399, 65 Am. St. Rep. 734, 30 S. E. 115 (no self couplers); *Coley* v. *North Carolina R. Co.* (1901) 128 N. C. 531, 57 L. R. A. 817, 39 S. E. 43 (no hand holds on tender).

[9] As, by § 8 of the act of Congress of March 2, 1893 (27 Stat. at L. 532, chap. 196, U. S. Comp. Stat. 1901, p. 3174), which (§ 4) declares it to be "unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

[10] As under the Constitutions of Mississippi and South Carolina. See chapter XXXVIII. *post*.

One of the Federal courts of appeals has held that the meaning of such a provision is that the knowledge of the defect in question is a circumstance which the jury should be directed to consider in determining whether the servant was guilty of contributory negligence in intending to assume the risk of handling the appliance. *Cleveland, C. C. & St. L. R. Co.* v. *Baker* (1899) [illegible]

XXXVIII., clauses are inserted which change the common law doctrine of assumption of risks to the extent of making the availability of that defense a question for the jury, even though it may be shown clearly that he fully appreciated the given risk.[12]

651. Contributory negligence.—*a. Generally.*- The doctrine established by the great weight of authority is that a servant who is seeking indemnity for injuries alleged to have resulted from a breach of a statutory duty or from the negligence of a statutory vice principal cannot recover, if the evidence shows that he was himself wanting in ordinary care, and that he contributed by the carelessness to the injuries complained of.

b. Availability of the defense, as dependent on the provisions of

908, 63 U. S. App. 553, 91 Fed. 221, construing the statute referred to in note 9, *supra*.

The provision in the South Carolina Constitution (chapter XXXVIII., *post*) applies to an action by a section master for personal injuries by failure of the company to furnish a sufficient number of persons to perform the work. *Bodie* v. *Charleston & W. C. R. Co.* (1901) 61 S. C. 408, 39 S. E. 715.

Under this provision a motion for a nonsuit on the ground that undisputed evidence showed that a brakeman suing a railroad for injuries resulting from defective mechanism or the defects complained of before using such mechanism, and thereby assumed the risk, is properly denied, since the Constitution meant that such prior knowledge of defects would not defeat the action. *Youngblood* v. *South Carolina & G. R. Co.* (1901) 60 S. C. 9, 85 Am. St. Rep. 824, 38 S. E. 232.

A requested charge in an action for injuries to a servant, that "knowledge, by an employee injured, of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby,—such as injury resulting from a defective switch, coupler, or other appliance in use by railroad companies," was properly granted, since, except the last clause, which is illustrative and applicable to the case, it is in the language of § 15 of the Constitution. *Ibid.*

A requested instruction in an action for injuries to a servant, that a servant assumes all risks, except those arising from unsafe or defective machinery and keeping the same in repair, could not be complained of, as failing to state that risks from obvious defects in machinery were assumed, in the absence of a request to charge on the specific proposition, since the general proposition of law was correctly stated. *Ibid.*

[12] *New York*.—(See chapter XXXVII. subtitle V, *post*).

Ontario.—55 Vict. chap. 30 (Ont. Rev. Stat. 1897, chap. 160), § 6, cl. 3. (See chapter XXXVII. subtitle V, *post*.) That this provision, so far as regards its effect upon the servant's right of action, embodied the doctrine finally established in *Smith* v. *Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 10 Week. Rep. 392, 55 J. P. 660, was pointed out in *McCloherty* v. *Gale Mfg. Co.* (1892) 19 Ont. App. Rep. 117. But it should be remembered that the English case referred to was concerned, not with the availability of the defense of a contractual assumption of risks, but with the meaning and effect of the maxim, *Volenti non fit injuria*. See § 377, *ante*, and § 652a, *infra*.

In one case it was held that a verdict for the servant will not be set aside where, although he knew that the defect which caused the injury had not been remedied at the time he returned to work, after an interval, he did not appreciate the nature and extent of the risk. *Haight* v. *Wortman & W. Mfg. Co.* (1894) 24 Ont. Rep. 618. The contention of the counsel that the statutory provision only applied to cases in which the plaintiff had continued to work without any intermission was rejected.

British Columbia.—In this Province the legislature has used the same language as that found in the Ontario statute. Acts of 1891, chap. 10 (B. C. Rev. Stat. 1897), § 6.

the statute sued upon.—In some instances this conclusion necessarily follows from the language of the statute itself, the absence of contributory negligence being explicitly declared to be a condition precedent to recovery.[1]

c. Availability of defense inferred from language of statute.—In

[1] A provision to this effect is inserted in the employers' liability acts of the following states:

Florida—(See chapter XXXIX., *post.*) The Florida statute of June 7, 1877, § 3741, having been adopted from the Code of Georgia, the construction placed upon that Code by the courts of the latter state has been followed in Florida. (See next subdivision.) An employee of a railway company, therefore, cannot recover for an injury caused by the fault of a coemployee, unless he was himself entirely free from negligence. *Daral* v. *Hunt* (1894) 34 Fla. 85, 15 So. 876.

The provisions in the first section of the act relating to the apportionment of damages have no application to such cases. *Florida C. & P. R. Co.* v. *Mooney* (1898) 40 Fla. 17, 24 So. 118.

Georgia—(See chapter XXXIX., *post.*) It is declared by the Civil Code that an employee of a railway company may recover for an injury caused by the negligence of a coemployee, and "without fault or negligence on the part of the person injured."

Construing this provision in connection with that which declares, with respect to strangers, that "no person shall recover damage from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence," and that "if the complainant and the agents of the company are both at fault the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him," the supreme court has held that the only distinction between an injured employee and other persons is that the employee must be wholly blameless to authorize a recovery, while others may recover though partly at fault. *Thompson* v. *Central R. & Bkg. Co.* (1875) 54 Ga. 509.

That the injured employee cannot recover unless he was wholly free from fault was also declared in the following cases: *Rowland* v. *Cowan* (1866) 35 Ga. 105; *Atlanta & R. Air Line R. Co.* v. *Ayers* (1874) 53 Ga. 12; *Sears* v. *Central R. & Bkg. Co.* (1875) 53 Ga. 630; *Campbell* v. *Atlanta & R. Air Line R. Co.* (1874) 51 Ga. 488 (1876) 56 Ga. 586; *Marsh* v. *South Carolina R. Co.* (1876) 56 Ga. 274; *Georgia R. & Bkg. Co.* v. *Goldwire* (1876) 56 Ga. 196; *Central R. & Bkg. Co.* v. *Ivey* (1877) 58 Ga. 185, (1878) 61 Ga. 500; *Central R. & Bkg. Co.* v. *Sears* (1877) 59 Ga. 136, (1878) 61 Ga. 279; *Central R. Co.* v. *Mitchell* (1879) 63 Ga. 173; *Central R. & Bkg. Co.* v. *Henderson* (1882) 69 Ga. 715; *Mehaffy* v. *Georgia R. Co.* (1878) 60 Ga. 119; *East Tennessee, V. & G. R. Co.* v. *Maloy* (1886) 77 Ga. 237, 2 S. E. 941; *Central R. & Bkg. Co.* v. *Lanier* (1889) 83 Ga. 587, 10 S. E. 279; *Countryman* v. *East Tennessee, V. & G. R. Co.* (1892) 89 Ga. 835, 16 S. E. 84; *Georgia R. & Bkg. Co.* v. *Hicks* (1894) 95 Ga. 301, 22 S. E. 612; *Baker* v. *Western & A. R. Co.* (1882) 68 Ga. 699.

To entitle an injured employee to recover, he must have been free from negligence immediately, remotely, directly or indirectly contributing to the injury. *Walker* v. *Atlanta & W. P. R. Co.* (1899) 103 Ga. 820, 30 S. E. 503.

This rule does not mean that, in order to entitle him to recover, the employee must have been absolved by reason of the discharge of duties wholly disconnected with the catastrophe, but merely that he must be faultless in respect to something which contributed to produce the catastrophe. "If he immediately or remotely, directly or indirectly, caused it or any part of it, or contributed to it at all, then he cannot recover, but though he had been at fault about something wholly disconnected with the transaction, or was at the time at fault about a matter that had nothing to do with the catastrophe, then he may recover." *Central R. Co.* v. *Mitchell* (1879) 63 Ga. 173. See generally §§ 323, 321, *ante.*

As the Code makes no distinction between the different classes or grades of employees, it is error for a court to give an instruction which would permit a plaintiff to recover, although negligent, provided his injury was caused by his obedience to an order of a superior officer to whose authority he was subject.

other instances the same inference has been drawn from the fact that the servant is given a right of action for an injury "caused" or "occasioned" by an abnormally dangerous condition of the plant, or by the negligence of certain classes of coemployees. Evidence which shows that the servant was guilty of contributory negligence necessarily implies that the negligence complained of was not the proximate cause of the accident.[2]

But in order to let in this defense, it is not necessary that the

and by whom he was liable to be discharged for disobedience. *Western & A. R. Co.* v. *Adams* (1875) 55 Ga. 279.

In the trial of an action against a railway company for the homicide of an employee, resulting from an act in which deceased participated, a charge so worded as to convey to the jury the idea that they would be authorized to find for the plaintiff solely on account of the defendant's negligence, without regard to the question of the exercise of ordinary care by the deceased in getting into a dangerous position, is erroneous. *Western & A. R. Co.* v. *Jackson* 1901) 113 Ga. 355, 38 S. E. 820.

Indiana — (See chapter XXXVII., *post.*) Under this act it has been laid down that an employee of a corporation is not relieved from the obligation of using that degree of care which is required by the common law. *Whitcomb* v. *Standard Oil Co.* (1899) 153 Ind. 513, 55 N. E. 440.

Recovery has been denied on the ground of the servant's failure to use such care, in *Dixon* v. *Western U. Telg. Co.* (1895) 68 Fed. 630; *American Car Co.* v. *Jackson* (1900) 24 Ind. App. 390, 56 N. E. 862.

Massachusetts — (See chapter XXXVII., *post.*) Contributory negligence has been held to be a bar to the action in the following cases: *Shea* v. *Boston & W. R. Co.* (1891) 154 Mass. 31, 27 N. E. 672; *Cunningham* v. *Lunn & B. Street R. Co.* (1898) 170 Mass. 298, 49 N. E. 440; *Doherty* v. *Norwood Engineering Co.* 1898) 172 Mass. 134, 51 N. E. 463; *Scallan* v. *Kellogg* (1897) 169 Mass. 511, 48 N. E. 622; *Gustafsen* v. *Washburn & M. Mfg. Co.* (1891) 153 Mass. 468, 27 N. E. 179; *Knight* v. *Overman Wheel Co.* (1899) 171 Mass. 455, 51 N. E. 890.

Minnesota — (See chapter XXXIX., *post.*) The qualification of the company's liability by the insertion of the words, "without contributory negligence on his part," is not intended to change the rule of evidence or burden of proof. This proviso was added from motives of caution, that it might not be supposed that the declared liability of the master was intended to be absolute, and without regard to any negligence of the complainant contributing to the result. The language recited simply preserves, as an express limitation of the declared liability, the recognized principle of the common law as to the effect of contributory negligence.

Texas — Act of 1897. (See chapter XXXIX., *post.*)

Wisconsin — (See chapter XXXIX., *post.*)

[2] (a) *Employers' liability acts.*— The construction mentioned in the text was that which has been put upon the English employers' liability act of 1880 (chapter XXXVII., *post*). *Martin* v. *Connah's Q. & H. Ry. Co.* (1885) 33 Week. Rep. 216. Other English and Colonial cases in which the inability of a negligent servant to recover under that act or one of those copied from it has been recognized, though not always with explicit reference to its terminology, are *Thomas* v. *Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 527, 35 Week. Rep. 555, 51 J. P. 516; *Ilen* v. *Liverpool Welsh Channel Co.* (1886; Q. B. D.) 2 Times L. R. 547; *Ayres* v. *Bull* (1889) 5 Times L. R. 202; *Bunker* v. *Midland R. Co.* (1883) 47 L. T. N. S. 476, 31 Week. Rep. 231; *M'Shane* v. *Barter* (1890; Q. B. D.) 7 Times L. R. 58; *Stuart* v. *Evans* (1883) 49 L. T. N. S. 138, 31 Week. Rep. 706; *M'Coy* v. *Waterford S. S. Co.* (1886) Ir. Rep. 18 C. L. 159; *Tennant* v. *Rudolph* (1895) 22 Ont. App. Rep. 250; *O'Brien* v. *Sanford* (1892) 22 Ont. Rep. 137; *Patterson* v. *Stevens* (1890) 11 New So. Wales L. R. (L.) 83; *Eureka Ext. Co.* v. *Allen* (1883) 9 Vict. L. R. (L.) 341; *Davidson* v. *Wright* (1887) 13 Vict. L. R. (L.) 351 (error not to submit question of contributory negligence to jury.

statute relied upon should contain words which, either expressly or by implication, make the absence of contributory negligence a prerequisite to success in the action. A large number of cases have been decided upon the theory that, in the absence of language indicative of a contrary intention, a statute which deprives an employee, either wholly or partially, of the protection afforded by the doctrine of common employment, or which subjects him to a new duty for the benefit of his servants, does not preclude him from availing himself of the plea that the injured person was himself negligent, and that his negligence was a proximate cause of his injury.[3]

where plaintiff's own evidence shows that he ought to have observed the defect which caused his injury).

That contributory negligence is a bar to an action under the Alabama statute, which is couched in the same words as those just mentioned (see chapter XXXVII., *post*), has been frequently held. *Anniston Pipe Works* v. *Dickey* (1890) 93 Ala. 418, 9 So. 720; *Hissong* v. *Richmond & D. R. Co.* (1890) 91 Ala. 514, 8 So. 776; *Birmingham Furnace & Mfg. Co.* v. *Gross* (1892) 97 Ala. 220, 12 So. 36; *Wilson* v. *Louisville & N. R. Co.* (1887) 85 Ala. 269, 4 So. 701; *Mobile & O. R. Co.* v. *George* (1891) 94 Ala. 200, 10 So. 145; *Southern R. Co.* v. *Harbin* (1900) 110 Ga. 808, 36 S. E. 218 (a decision as to an accident which occurred in Alabama).

See also cases cited in note 4, *infra*.

(b) *Statutes imposing specific duties.* — In a case where one of the mining acts was being construed, it was held that the injury was not "occasioned" by a breach of its provisions, where there had been contributory negligence on the plaintiff's part. But such cases are usually decided with reference to the more general principle exemplified by the authorities cited in the next note. *Spica* v. *Osage Coal & Min. Co.* (1885) 88 Mo. 68.

[3](a) *Statutes declaratory of common-law principles.*—It has been held that the Minnesota act set out in chapter XXXVI., *post*, does not change the rule as to contributory negligence. *Lundberg* v. *Sherlin-Carpenter Co.* (1897) 68 Minn. 135, 70 N. W. 1078; *Soutar* v. *Minneapolis International Electric Co.* (1897) 68 Minn. 18, 70 N. W. 796; *Hess* v. *Adamant Mfg. Co.* (1896) 66 Minn. 79, 68 N. W. 774.

(b) *Statutes affecting the operation of the doctrine of common employment.* —The rule in the text has been applied under several of the statutes reviewed in chapter XXXIX., *post*. *Hoben* v. *Burlington & M. River R. Co.* (1866) 20 Iowa, 562; *Way* v. *Illinois C. R. Co.* (1875) 40 Iowa, 341; *Kansas P. R. Co* v. *Pearcy* (1885) 34 Kan. 472, 8 Pac. 780; *Chicago, K. & N. R. Co.* v. *Brown* (1890) 44 Kan. 384, 24 Pac. 497 (fact that servant's negligence was slight, held to be immaterial); *Hancock* v. *Norfolk & W. R. Co.* (1899) 124 N. C. 222, 32 S. E. 679; *Nelson* v. *New Orleans & N. E. R. Co.* (1900) 40 C. C. A. 673, 100 Fed. 731 (Missouri act).

(c) *Statute imposing specific duties.* —In the following decisions with reference to statutes of the type reviewed in chapter XLI., *post*, contributory negligence has been held to be a good plea: *Farquhar* v. *Alabama & V. R. Co.* (1900) 78 Miss. 193, 28 So. 850 (trains run at unlawful speed); *Lake Erie & W. R. Co.* v. *Craig* (1896) 19 C. C. A. 631, 37 U. S. App. 654, 73 Fed. 642 (unblocked frog); *Grand* v. *Michigan C. R. Co.* (1890) 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837 (unblocked frog); *Holum* v. *Chicago, M. & St. P. R. Co.* (1890) 80 Wis. 299, 50 N. W. 99 (unblocked frog); *Finlay* v. *Miscampbell* (1890) 20 Ont. Rep. 29 (unguarded opening in floor); *Headford* v. *McClary Mfg. Co.* (1893) 23 Ont. Rep. 335 (unguarded opening); *Clarke* v. *Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405 (unguarded machinery); *Groves* v. *Wimborne* [1898] 2 Q. B. 402, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47 Week. Rep. 87 (unguarded machinery), per Vaughan Williams, L. J. (p. 419); *Pringle* v. *Grosvenor* (1894) 21 Sc. Sess. Cas. 4th series, 532 (unguarded machinery); *E. S. Higgins Carpet Co.* v. *O'Keefe* (1897) 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900 (unguarded machinery); *Thompson* v. *Edward P. Allis*

d. Knowledge of risk, how far negligence is inferable from.—Whether the mere fact of the servant's knowledge of the danger caused by that particular breach of a statutory duty to which his injury was attributable will render him chargeable, as a matter of law, with negligence, is a question the answer to which has been in some instances determined partially, at least, by the phraseology of the provision imposing the duty infringed. [illegible] the whole it may be said that the

Co. (1895) 89 Wis. 523, 62 N. W. 527 (unguarded machinery). Following *Curry* v. *Chicago & N. W. R. Co.* (1878) 43 Wis. 665 (fence statute), and Distinguishing *Quackenbush* v. *Wisconsin & M. R. Co.* (1885) 62 Wis. 411, 22 N. W. 519, on the ground that the statute there construed created an absolute liability for injuries occasioned, "in whole or in part," by the failure to fence: *Helmke* v. *Thilmany* (1900) 107 Wis. 216, 83 N. W. 360 (unguarded machinery); *Anderson* v. *C. A. Nelson Lumber Co.* (1896) 67 Minn. 79, 69 N. W. 630 (unguarded machinery); *Wabash, St. L. & P. R. Co.* v. *Thompson* (1884) 15 Ill. App. 117 (unguarded machinery); *Rogers* v. *Hamilton Cotton Co.* (1893) 23 Ont. Rep. 425 (unguarded machinery); *Reynolds* v. *Lindman* (1871) 32 Iowa, 146 (unboxed tumbling rod on threshing machine); *Keenan* v. *Edison Electric Illuminating Co.* (1893) 159 Mass. 379, 34 N. E. 366 (no automatic gates to elevator); *Guenther* v. *Lockhart* (1891) 40 N. Y. S. R. 942, 16 N. Y. Supp. 717 (no automatic doors on elevator); *Christner* v. *Cumberland & E. L. Coal Co.* (1891) 146 Pa. 67, 23 Atl. 221 (uncertificated mining boss employed); *Adams* v. *Kansas & T. Coal Co.* (1900) 85 Mo. App. 486 (mining act; provision as to props); *Victor Coal Co.* v. *Muir* (1894) 20 Colo. 320, 26 L. R. A. 435, 46 Am. St. Rep. 299, 38 Pac. 378 (mining act; provision as to props); *Graham* v. *Newburg Orrel Coal & Coke Co.* (1893) 38 W. Va. 273, 18 S. E. 584 (mining act); *Krause* v. *Morgan* (1895) 53 Ohio St. 26, 40 N. E. 886 (failure to keep mine free from gas); *Queen* v. *Ohio Coal & L. Co.* (1895) 95 Tenn. 158, 30 L. R. A. 82, 49 Am. St. Rep. 935, 32 S. W. 460 (employment of boy under twelve in a coal mine).

Although the Pennsylvania act, April 18, 1877 (Pub. Laws, 56, § 6), requires a traveling way at the bottom of the shaft for miners to pass, yet if a miner fails to look and listen before stepping under a descending cage, he cannot recover. *Arnould* v. *Rockhill Iron & Coal Co.* (1896) 135 Pa. 1, 19 Atl. 797.

A statute requiring railway companies to construct safe crossings and cattleguards, and declaring them to be liable for all damages caused by their neglect or refusal to do so, and providing that in order that the injured party may recover it is only necessary for him to prove such neglect or refusal, does not by implication exclude any defense which would ordinarily be available. Such a provision merely affects the burden of proof. *Ford* v. *Chicago, R. I. & P. R. Co.* (1891) 91 Iowa, 179, 24 L. R. A. 657, 59 N. W. 5.

Where plaintiff was injured by a fall of part of the roof of a coal mine in which he was employed, and he had no control over the roof of the mine, and had been directed not to remove any slate therefrom, he was not guilty of contributory negligence for failing to prop the roofs, under McClain's (Iowa) Code, § 2463, making it a misdemeanor for a miner to fail to prop the roofs and entries under his control in the mine where he is working. The statute has no application to such a case. *Taylor* v. *Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249.

An instruction that the question of contributory negligence is not in the case is erroneous, where, although it is proved that the defendant company had violated a statute requiring that all its own cars should have ladders at the ends, and not at the sides, the evidence is also susceptible of the inference that the plaintiff was negligent in trying to mount the train at night while it was moving at a dangerous rate of speed. *Kilpatrick* v. *Grand Trunk R. Co.* (1900) 72 Vt. 263, 47 Atl. 827.

In the following cases the defense was held to be a bar to an action for injuries caused by a breach of a municipal ordinance: *Chicago Packing & Provision Co.* v. *Rohan* (1892) 47 Ill. App. 640

evidential significance of this element in each jurisdiction depends upon the doctrine which is applied in common-law actions.[4]

It has already been mentioned in this section that some statutes expressly provide that the servant's knowledge shall not of itself be sufficient to prevent recovery. The effect of such a provision is manifestly to preclude a court from declaring, as a matter of law, that the servant was negligent, unless something more is shown than his knowledge of the abnormal conditions which caused his injury.[5]

(servant, owing to want of "proper safeguards," fell into vat containing a hot liquid): *Pitrowsky* v. *J. B. Reedy Elevator Mfg. Co.* (1894) 54 Ill. App. 253 (plaintiff injured by revolving shaft which should have been covered): *Swift & Co.* v. *Fae* (1896) 66 Ill. App. 651 (same point).

[4] In the earlier decisions regarding the Alabama employers' liability act (chapter XXXVII., *post*), the position was taken that, provided the employer knew of the defect which caused the injury complained of, the servant did not forfeit his right of action under the statute merely because he continued to work with knowledge of that defect. *Mobile & B. R. Co.* v. *Holborn* (1887) 84 Ala. 133, 4 So. 146; *Highland Ave. & Belt R. Co.* v. *Walters* (1890) 91 Ala. 435, 8 So. 357. The theory propounded in the latter case was that this doctrine was a proper implication from the provision in the last paragraph of § 2590 of the Code of 1886, pronouncing the master not to be liable if the servant knew of a defect and failed to notify the master thereof in a reasonable time. It was, however, recognized in the latter case that he could not recover if the injury was so imminent and impending that a prudent man would not have continued in the service under like circumstances.

In another case the court again recognized the principle that, if the known danger to be encountered is so imminent that a reasonable and prudent man would not venture upon it, he is not free from negligence if he continues in the employment. *Louisville & N. R. Co.* v. *Orr* (1890) 91 Ala. 518, 8 So. 360.

In a somewhat earlier case the obligation of the servant to quit the employment within a reasonable time, if the master fails to remedy a defect of which he has been notified by the servant, had also been affirmed. *Columbus & W. R. Co.* v. *Bradford* (1888) 86 Ala. 574, 6 So. 90.

The qualified doctrine thus formulated was explicitly discarded in *Birmingham R. & Electric Co.* v. *Allen* (1894) 99 Ala. 359, 20 L. R. A. 157, 13 So. 8, where it was laid down that the statute has left unchanged the rule that a servant's knowledge of a risk precludes recovery for an injury caused by it. To the same effect, see *Louisville & N. R. Co.* v. *Stutts* (1891) 105 Ala. 368, 3 Am. St. Rep. 127, 17 So. 29 (engineer lost control of his engine while switching cars on a high and short trestle, the consequence being that the engine was precipitated over the end of the trestle, danger held to be a proximate): *Louisville & N. R. Co.* v. *Barnes* (1894) 101 Ala. 508, 16 So. 547 (dangerously overhead bridge about which servant had been warned).

The mere fact that, when an accident occurred to a minor, he was at a place where his duties did not require him to be, will not necessarily preclude him from recovering. In such a case charges which ignore the fact of the intestate's tender age and childish instincts, and that he was put to work not only in a dangerous place, but in proximity to other dangers, are erroneous, and properly refused. *Tuscaloosa Coal, Coke & I. Co.* v. *Enslen* (1900) 129 Ala. 336, 30 So. 590.

In the following cases the plaintiff's knowledge was held not to be conclusive proof of negligence: *Stuart* v. *Lee* (1883) 79 L. T. N. S. 138, 31 Week. Rep. 706 (employers' liability act of 1880): *Durant* v. *Lexington Coal M. Co.* (1888) 97 Mo. 62, 10 S. W. 48 (mining act): *Eureka Ext. Co.* v. *Allen* (1883) 9 Viet. L. Rep. (L.) 311 (regulation of mines statute of 1877).

[5] So held in actions under the provisions of the South Carolina and Mississippi Constitutions (chapter XXXVII., *post*). *Yonaghead* v. *South Carolina R. Co.* (1900) 60 S. C. 9, 56 Am. St. Rep. 824, 38 S. E. 232: *Welch* v. *Alabama & V. R. Co.* (1892) 70 Miss. 20

A statute which expressly declares that the action of a servant injured by a breach of its provisions is not barred by the defense of an assumption of the risk manifestly does not prevent the master from relying on the defense of contributory negligence.[6]

As to the effect of a promise to remedy defects, see chapter XXII., *ante*.

652. Limits of the doctrine that contributory negligence is a bar to an action.—Contributory negligence is in many cases held to be no defense to an action for a breach of a statute which amounts to a wilful, wanton, or intentional wrong.[1] But in order to bring a case within the scope of this principle something more than the mere

11 So. 723; *Buckner* v. *Richmond & D. R. Co.* (1895) 72 Miss. 873, 18 So. 449; *Illinois C. R. Co.* v. *Bowles* (1894) 71 Miss. 1003, 15 So. 138.

[6] *Cleveland, C. C. & St. L. R. Co.* v. *Baker* (1899) 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224 (decision as to the act of Congress respecting the use of grab irons on railway cars, see § 650, note 9, *supra*).

[1] *Louisville & N. R. Co.* v. *York* (1900) 128 Ala. 305, 30 So. 676.

In Illinois the position has been taken that the effect of the provision in the mining act by which owners and operators are declared to be liable for a "wilful violation" of the duties which it imposes on them is that an injured servant may recover, even though he may have been guilty of contributory negligence. *Bartlett Coal & Min. Co.* v. *Roach* (1873) 68 Ill. 174; *Litchfield Coal Co.* v. *Taylor* (1876) 81 Ill. 590; *Catlett* v. *Young* (1892) 143 Ill. 74, 32 N. E. 447 (a ruling under the act of 1872); *Carterville Coal Co.* v. *Abbott* (1899) 181 Ill. 495, 55 N. E. 131, Affirming (1899) 81 Ill. App. 279; *Odin Coal Co.* v. *Denman* (1900) 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192, Affirming (1899) 84 Ill. App. 190; *Western Anthracite Coal & Coke Co.* v. *Bearer* (1901) 192 Ill. 333, 61 N. E. 335, Affirming (1901) 95 Ill. App. 95; *Pawnee Coal Co.* v. *Royce* (1900) 184 Ill. 402, 56 N. E. 621, Reversing (1898) 79 Ill. App. 469; *Illinois Fuel Co.* v. *Parsons* (1890) 38 Ill. App. 182; *Girard Coal Co.* v. *Wiggins* (1893) 52 Ill. App. 69.

But this view has been rejected by the courts of other states in which the mining acts contain substantially similar provisions. See *Spiro* v. *Osage Coal & Min. Co.* (1885) 88 Mo. 68; *Victor Coal Co.* v. *Muir* (1894) 20 Colo. 320, 26 L. R. A. 435, 46 Am. St. Rep. 299, 38 Pac. 378; *Krause* v. *Morgan* (1895) 52 Ohio St. 662, 44 N. E. 1140; *Bodell* v. *Brazil Block Coal Co.* (1900) 25 Ind. App. 654, 58 N. E. 856.

In actions under the Kentucky statute of 1854 (now repealed—see § 638, note 1, subd. (f), *ante*), which provided that punitive damages might be recovered where the life of one person had been lost owing to the "wilful neglect" of another, a servant who was merely lacking in ordinary care was held not to be precluded from recovery. *Louisville, C. & L. R. Co.* v. *Mahony* (1870) 7 Bush, 235 (Citing *Louisville & N. R. Co.* v. *Yandell* [1856] 17 B. Mon. 586; *Louisville & N. R. Co.* v. *Sieking's* [1868] 5 Bush, 1, 96 Am. Dec. 320; *Louisville & N. R. Co.* v. *Collins* [1865] 2 Duv. 114, 87 Am. Dec. 486; *Louisville & N. R. Co.* v. *Robinson* [1868] 4 Bush, 507; *Louisville & N. R. Co.* v. *Filbern* [1869] 6 Bush, 574, 99 Am. Dec. 690); *Derby* v. *Kentucky C. R. Co.* (1887) 9 Ky. L. Rep. 153, 4 S. W. 303; *Needham* v. *Louisville & N. R. Co.* (1887) 85 Ky. 423, 3 S. W. 797, 11 S. W. 306; *Owen* v. *Louisville & N. R. Co.* (1888) 87 Ky. 626, 9 S. W. 698; *Newport News & M. Valley Co.* v. *Deutzel* (1890) 91 Ky. 42, 14 S. W. 958; *Louisville & N. R. Co.* v. *Hurst* (1892) 14 Ky. L. Rep. 632, 20 S. W. 817.

The fact that he was himself guilty of wilful negligence was deemed to be a good defense. But an employee of a railroad company, in the discharge of whose duty of taking the numbers of cars upon a side track it is customary, convenient, and necessary to stand upon the main track, is not guilty of wilful negligence in so standing while taking such numbers, after the passage of an engine which has been detached from a train for the purpose of hauling such cars,

breach of a duty imposed by a statute or municipal ordinance must be shown.[2]

In Tennessee it has been held that a statute requiring railroad companies to have some person keeping a lookout continually on locomotives, and providing that a company which fails to have this precaution observed "shall be responsible for all damages to persons or property, occasioned by, or resulting from, any accident or collision that may occur," precludes a company from pleading contributory negligence, though it may be considered in mitigation of damages.[3]

In one case the position was taken that, where the abnormal conditions are the result of a breach of a statutory duty, a servant is entitled to presume that the company will proceed to perform its duty without any unnecessary delay, and is, therefore, not necessarily negligent in continuing to work.[4]

In an action by a government inspector for a breach of the English factory act, which provides that the whole or any part of the fine inflicted may be applied for the benefit of the injured person, it was held that the fact of the injury's having been occasioned by the act of the plaintiff in taking up a forbidden position would not prevent recovery.[5]

652a. Volenti non fit injuria.— In §§ 376, 377, *ante*, it has been shown that, in all the decisions, it is assumed that, where a servant is suing under the English employers' liability act of 1880, or any

without looking out for the cars forming such train. *Louisville & N. R. Co.* v. *Pott* (1891) 92 Ky. 30, 17 S. W. 185.

[2] *Brown* v. *Siegel, C. & Co.* (1901) 191 Ill. 226, 60 N. E. 815. Affirming (1900) 90 Ill. App. 49, where contributory negligence was held to be a good defense to an action for injuries caused by noncompliance with an ordinance.

The statement in the text is also supported by the language used in *Girard Coal Co.* v. *Wiggins* (1893) 52 Ill. App. 69.

[3] *Nashville & C. R. Co.* v. *Smith* (1871) 6 Heisk. 174; *Chattanooga R. Co.* v. *Walker* (1872) 11 Heisk. 383; *Nashville & C. R. Co.* v. *Norelin* (1878) 1 Lea, 523.

In Illinois it is conceded that wilful negligence on the part of the injured person himself is a bar to an action. *Litchfield Coal Co.* v. *Taylor* (1876) 81 Ill. 590.

In *Victor Coal Co.* v. *Muir* (1894) 20 Colo. 320, 26 L. R. A. 435, 46 Am. St. Rep. 299, 38 Pac. 378, the decision was that wilful negligence on the part of the plaintiff in disregarding his own statutory duties debarred him from recovery, and the court does not make it altogether plain whether any lesser degree of negligence would have defeated the action.

[4] *Quackenbush* v. *Wisconsin & M. R. Co.* (1885) 62 Wis. 411, 22 N. W. 519.

The theory propounded in this case has not, so far as the writer knows, been relied upon elsewhere. The correctness of the decision, at all events as an embodiment of a general rule, may well be doubted.

[5] *Blenkinsop* v. *Ogden* [1898] 1 Q. B. 783, 67 L. J. Q. B. N. S. 537, 78 L. T. N. S. 554, 46 Week. Rep. 542. Assuming that the conduct of the servant here adverted to was culpable, this decision creates a somewhat curious situation, since it seems to enable a servant, by the indirect means of a government prosecution, to obtain compensation, under circumstances which would preclude recovery if he were to seek indemnity in a civil action. See cases cited in note 3, subd. (c), *supra*.

of the statutes modeled thereon, the maxim is available as a defense, and that the only essential point upon which a conflict of opinion exists is the extent of the power of a court to declare the servant to have been *volens* in regard to the risk in question.

As regards the operation of the maxim in cases where the master has violated a statute which prescribes certain specific precautions and safeguards in the construction, arrangement, or use of particular instrumentalities, the authorities, as they stand, exhibit a somewhat curious conflict of opinion. In one English case it was held that the servant was not necessarily debarred from recovering by the fact that he knew of the danger created by the breach of a legislative obligation of this description.[1] By none of the judges who took part in that decision was it intimated that the master was altogether precluded from relying upon the maxim. In fact it is clear that they fully recognized his right to avail himself of this defense, provided the evidence was adequate to establish voluntary action on the servant's part. But a subsequent statement of two members of the court of appeal,[2] to the effect that, where a person has a statutory right to protection, the defendant does not discharge his legal obligations by merely affecting the plaintiff with knowledge of a danger, which, but for the former's breach of duty, would not have existed, was soon afterwards construed by two judges in the Queen's Bench Division as being an affirmation of the doctrine that the maxim does not apply at all, if the injury resulted from the breach of a specific statutory obligation. By one of those judges this doctrine was considered to be sustainable upon grounds of public policy, which is concerned in the discouragement of agreements between two persons, the effect of which is that one of them shall be at liberty to break a law enacted for the protection of the other.[3] This exclusion of the maxim as an element in such cases is certainly not justified either by the statement relied upon, nor by the decision with reference to which that

[1] *Britton* v. *Great Western Cotton Co.* (1872) L. R. 7 Exch. 130, 41 L. J. Exch. N. S. 99, 27 L. T. N. S. 125, 20 Week. Rep. 525. (See § 377, note (2), *ante*.)

[2] *Thomas* v. *Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516 (Bowen and Fry, LL. J. J.).

[3] In *Baddeley* v. *Granville* (1887) L. R. 19 Q. B. Div. 423, 56 L. J. Q. B. N. S. 501, 57 L. T. N. S. 268, 36 Week. Rep. 63, 51 J. P. 822. Wills, J., said: "If the supposed agreement between the deceased [servant] and the defendant [his master], in consequence of which the principle of *Volenti non fit injuria* is sought to be applied, comes to this—that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others as well as of himself,—such an agreement would be in violation of public policy and ought not to be listened to."

statement was made.[4] The suggested construction of the expressions used by the court of appeal is singularly forced, and is, moreover, quite inconsistent with the general tenor of the opinions delivered. The consequence of adopting that construction is that the court must be assumed to have taken the position that, while the master is entitled to avail himself of the maxim as a defense if the suit is brought under a general employers' liability act, he is, so far as the effect of the maxim is concerned, absolutely liable, if the servant is claiming damages under an act imposing some specific duty. Such a distinction would be purely arbitrary, so far as can be seen, and cannot reasonably be deduced from the language used by the lords justices.

Some New York cases embody a doctrine similar to that which has just been criticised. But it is now fully settled in that state that the maxim is a defense to an action for a breach of a specific statutory duty.[5]

[4] The case cited by the court of appeal as an illustration of this theory was *Clarke* v. *Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 505, which, according to Bowen, L. J., had been so explained in subsequent decisions. These are not cited by name; but one of those referred to is apparently *Indermaur* v. *Dames* (1866) L. R. 1 C. P. 274, 287, 35 L. J. C. P. N. S. 184, 12 Jur. N. S. 432, 14 L. T. N. S. 484, 14 Week. Rep. 586, 1 Harr. & R. 243. It seems to be fairly open to question, however, whether the actual rationale of the ruling in *Clarke* v. *Holmes* is not simply that the promise of the master to remedy the defective conditions prevented the inference that would otherwise have been drawn from the servant's continuance of work. See chapter XXII., *ante*. And in any event it was certainly not intended to propound the doctrine that the servant's knowledge of the master's breach of duty, and the risks to which that breach exposes him, cannot, under any circumstances, operate as a bar to his claim.

[5] The subject was exhaustively discussed in a case in which the supreme court held that an employee does not waive the noncompliance by his employer with N. Y. Laws 1892, chap. 673, requiring machinery to be properly guarded, by continuing in the employment with knowledge of the unprotected condition. *Simpson* v. *New York Rubber Co.* (1894) 80 Hun, 415, 30 N. Y. Supp. 339 (dissenting, Brown, P. J.). In delivering the prevailing opinion, Judge Cullen referred to the common law rule that a servant assumes the risks of his employment, even though the appliances are not the best and safest of their kind, and proceeded as follows: But the question presented in this case is a different one. The statute has enacted that certain safeguards shall be had for the security of employees of the factory. The failure to provide these statutory safeguards is criminal. It is doubtless true that parties can waive statutory provisions for their benefit, and can even make laws for themselves which the courts are bound to administer, provided there is no question of public policy involved. (*Re New York, L. & W. R. Co.* [1885] 98 N. Y. 447; *Scutomis* v. *Landon* [1893] 140 N. Y. 463, 37 Am. St. Rep. 569, 35 N. E. 650.) But is there no question of public policy involved here? To our mind there is, and that public policy should induce us to hold, unless a contrary doctrine is settled by authority, that this statutory protection cannot be waived. Our notion of government has confined state interference with the freedom of individual action within narrow limits, but such interference has never been wholly prohibited. Experience has shown that in some matters persons must be protected from their own imprudence. If there were to be considered only the interest of the individual in his personal security the statute would be unnecessary. The end sought to be accomplished could equally well be secured by contract between

In Indiana the doctrine has quite recently been propounded that the defense based upon the maxim is not available, as a matter of law, where the injury was caused by the violation of a specific statutory duty.[6]

That the maxim, considered as an embodiment of the principle that a plaintiff is debarred from recovery if his own negligence contributed to his injury (see § 371, *ante*), constitutes a valid defense, even where

the employer and the employee. The matter has always been a subject of contract,—that is, no law has ever forbidden employees making the guarding of machinery a condition of their service. Yet such contracts are unknown. If, therefore, assent can dispense with the statutory protection, the subject, for practical purposes, is left in the same condition as it was before the enactment of the statute. . . . The doctrine of waiver or contributory negligence under this statute is but the equivalent of the contention "*in pari delicto*" under the usury statute, a claim always repudiated by the courts.

It was conceded that the view of the court was different from that adopted in *Freeman* v. *Glens Falls Paper Mill Co.* (1893) 70 Hun, 530, 24 N. Y. Supp. 403, and that this case had been affirmed, without opinion, by the court of appeals (1893) 142 N. Y. 639, 37 N. E. 567; but the position was taken that, as the effect of this affirmance was to make the higher court responsible only for the point decided, and not a guarantor of all the reasons given or opinions advanced (*Rogers* v. *Decker* [1892] 131 N. Y. 490, 30 N. E. 571), and the case in question was not based on the statute, it could not be said that the ruling as to waiver of the statutory provision had received the approval of the court. The force of this particular argument, which is, at best, rather unconvincing, was soon afterwards greatly weakened by the fact that the court of appeals has affirmed another judgment of the supreme court, in which precisely the same view was adopted as in the *Freeman Case* (*White* v. *Wittemann Lithographic Co.* [1892] 131 N. Y. 631, 30 N. E. 236), though, as no opinion was filed, it was still possible to reason, as with regard to the *Freeman Case*, that the question was not really passed on.

In *Knisley* v. *Pratt* (1894) 75 Hun, 323, 26 N. Y. Supp. 1010, another case in which it was held that the servant does not assume the risks arising from the breach of the employer's statutory duty, the court reconciled its view with the judgment of the court of appeals in the *White Case* by advancing the theory that Judge Earl's opinion showed that the true reason why the charge, to the effect that the servant assumed the risks, was not held to be reversible error was that it was apparent from the evidence that, even if the master had performed his statutory duty, the accident would not have been prevented.

The desperate efforts of the supreme court to reconcile its views with those of the court of appeals were at length brought to a close by a decision of the latter court, in which it held, reversing the judgment in the case last cited, that the maxim was available as a defense where the servant had entered and remained in an employment knowing that his master had not complied with the provisions of the factory act (Laws 1890, p. 756, chap. 398, § 12), requiring the guarding of cogwheels ([1896] 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986).

This decision was followed in *Graves* v. *Brewer* (1896) 4 App. Div. 327, 38 N. Y. Supp. 566 (same statute); *Horton* v. *Vulcan Iron Works* (1897) 13 App. Div. 508, 43 N. Y. Supp. 699 (act requiring set screws in shafts to be guarded); *DeYoung* v. *Irving* (1896) 5 App. Div. 499, 38 N. Y. Supp. 1089 (clause forbidding cleaning of machinery in motion by women under twenty-one years of age).

[6] *Monteith* v. *Kokomo Wood Enameling Co.* (1902; Ind.) 58 L. R. A. 944, 64 N. E. 610 (unguarded machinery), holding that in such an action an averment of the want of knowledge was unnecessary.

To same effect, see *Boyd* v. *Brazil Block Coal Co.* (1898; Ind. App.) 50 N. E. 368 (breach of a provision of the mining act; citing with approval *Baddeley* v. *Granville* [1887] L. R. 19 Q. B. Div. 423, 56 L. J. Q. B. N. S. 501, 57

the duty violated is statutory, has for a long time been an established doctrine in England.[7]

L. T. N. S. 268, 38 Week. Rep. 63, 54 J. P. 822, note 3, *supra*).

[7] *Cowan* v. *Worth* (1856) 5 El. & Bl. 849, 25 L. J. Q. B. N. S. 121, 2 Jur. N. S. 116 (person lawfully on the premises of another, who wrongfully set machinery in motion, was held unable to take advantage of a statute requiring such machinery to be fenced).

CHAPTER XXXVI.

STATUTES DECLARATORY OF COMMON LAW DOCTRINES.

A. Minnesota.
652b. Text of statute.
653. Effect of this statute.
B. California and Dakota.
653½. Text of statutes.
653½. Effect of these statutes.
C. Georgia.

A. Minnesota.

652b. Text of statute.—Gen. Laws 1895, chap. 173. An Act Defining the Duties of Masters and Employers to Employees in Certain Cases: Be it Enacted by the Legislature of the State of Minnesota:

Sec. 1. Every master or employer in this state shall use reasonable care to provide the person or persons in his employ with reasonably safe, suitable, and sufficient tools, implements, and instrumentalities with which to do the master's work, and also use reasonable care to provide a reasonably safe and suitable place for his servants to perform the duties assigned to them by the master.

It shall also be the master's duty to use reasonable care to establish safe and suitable rules and regulations or methods for the performance of the work required of his servants, and to direct and supervise the performance of the work in a reasonably safe and prudent manner.

Sec. 2. Whenever a master or employer delegates to anyone the performance of his duties, which he, as master or employer, owes to his servants, or any part or portion of such duties, the person so delegated, while so acting for his master or employer, shall be considered the vice principal and representative of the master.

Sec. 3. This act shall take effect and be in force from and after its passage.

Approved April 23, 1895.

653. Effect of this statute.—This statute is merely declaratory of the common law.[1] In an action under it, just as in an action at common law, the nature of the duties or services an employee performs, and not his rank or his authority over other employees, determines whether he is a vice principal or fellow servant.[2]

[1] *Hess* v. *Adamant Mfg. Co.* (1896) 66 Minn. 79, 68 N. W. 774.

[2] *Lundberg* v. *Sherlin-Carpenter Co.* (1897) 68 Minn. 135, 70 N. W. 1078.

B. California and Dakota.

653½. Text of statutes.—By the Civil Codes of California and Dakota it is provided as follows:

An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee. Cal. Civil Code, § 1970; Dak. Civil Code, § 1130; S. D. Civil Code § 4942; N. D. Civil Code, § 4096.

An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care. Cal. Civil Code, § 1971, Dak. Civil Code, § 1131 S. D. Civil Code, § 4943; N. D. Civil Code, § 4097.

653¾. Effect of these statutes.— In construing these provisions the courts have proceeded upon the theory that it was the intention of the legislatures to frame an enactment which should embody certain common-law principles assumed to have been previously adopted.[1] Accordingly, we find decisions illustrating the principle that there can be no recovery where the delinquent and injured servants were engaged in the same kind of work;[2] that coservice is not necessarily

[1] In California it has been explicitly laid down that the statute has not changed the rule as to common employment which prevailed prior to its enactment. *Congrave* v. *Southern P. R. Co.* (1891) 88 Cal. 360, 26 Pac. 175. The case of *Chicago, M. & St. P. R. Co.* v. *Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184 (see § 532, *ante*), was cited by plaintiff's counsel, but was not followed because of the language used in the statute.

The Civil Code of Dakota was declared by the territorial court to have simply enacted into a statute the common-law doctrine. *Elliot* v. *Chicago, M. & St. P. R. Co.* (1889) 5 Dak. 523, [illegible] A. 363, 41 N. W. 758; *Herbert* v. *Southern P. R. Co.* (1882) 3 Dak. 3[illegible] W. 349. That this is also the view taken by the Supreme Court of the United States is shown by the following language used in the judgment rendered on the appeal of the latter case: "We do not perceive that the provision of the 6th section of the Civil Code of Dakota, that in the territory 'there is no common law in any case where the law is declared by the Codes,' at all affects the question before us. There cannot be two rules of law on the same subject contradicting each other. Therefore, where the Code declares the law, there can be no occasion to look further; but where the Code is silent, the common law prevails. What constitutes the 'same general business' is not defined by the Code, but may be explained by adjudged cases. The declaration by the Code of a general rule which is conformable to existing law does not prevent the courts from looking to those cases for explanation any more than it prevents them from looking into the dictionary for the meaning of words." *Northern P. R. Co.* v. *Herbert* (1885) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590. The defense of coservice is an affirmative defense, and the burden is on the defendant to establish it. *Bjerman* v. *Scotia Redwood Co.* (1894) 104 Cal. [illegible], 38 Pac. 451 (instruction held erroneous, which told the jury that the burden was on the plaintiff to prove that the injury was caused by the negligence of the defendant, and not by any one else, or by a fellow servant of the plaintiff).

[2] *Long* v. *Coronado R. Co.* (1892) 96 Cal. 269, 31 Pac. 170 (conductor injured by negligence of engineer on the same train); *Brown* v. *Central P. R. Co.* (1887) 72 Cal. 523, 14 Pac. 138 (conductor injured by negligence of brakeman); *Vizelich* v. *Southern P. R. Co.* (1899) 126 Cal. 587, 59 Pac. 129 (brakeman injured by negligence of another brakeman); *Kocern* v. *Providence Gold*

negatived by the fact that the delinquent and the injured servants were engaged in different kinds of work;[3] that, if the delinquent and injured servants were engaged in essentially dissimilar kinds of work, the case does not fall within the purview of the statute;[4] that vice principalship is not predicable merely on the ground that the delinquent servant exercised control over the injured one,[5] even though

Silver Min. Co. (1880) 70 Cal. 392, 11 Pac. 710 (miner injured by negligence of a fellow workman).

[3] A conductor and track walker are both coservants of a laborer employed to remove snow, etc., from the track. *Fagundes* v. *Central P. R. Co.* (1889) 79 Cal. 97, 3 L. R. A. 821, 21 Pac. 437 (track walker, by interfering with a switch, and conductor, by not being sufficiently on the alert, caused a collision between two trains).

The operator of an elevator is a coservant of a carpenter engaged in repairing the shaft. *Mann* v. *O'Sullivan* (1899) 126 Cal. 61, 77 Am. St. Rep. 149, 58 Pac. 375 (carpenter injured by the starting of the elevator without warning).

The engineer of a regular train and a road master on a construction train are coservants. *Holland* v. *Southern P. Co.* (1893) 100 Cal. 240, 34 Pac. 666 (engineer ran train too fast).

An engineer of a mining company's hoisting machinery is a coservant of a miner injured while being hoisted. *Tregatha* v. *Buchanan Gold Min. & Mill. Co.* (1892) 96 Cal. 491, 28 Pac. 571, 31 Pac. 561.

[4] In *Northern P. R. Co.* v. *Herbert* (1885) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590, the court stated its opinion as follows: "We do not consider that the first of these sections changes the law previously existing as to the exemption of an employer from responsibility for injuries committed by a servant to a fellow servant in the same general business, or identifies the business of providing safe machinery and keeping it in repair with the business of handling and moving it. The two kinds of business are as distinct as the making and repairing of a carriage is from the running of it. They are, as stated in the case decided by the supreme court of Massachusetts, from which we have cited above, separate and independent departments of service, though the same person may, by turns, render service in each. The person engaged in the former represents the employer, and in that business is not a fellow servant with one engaged in the latter. The words 'same general business' in the section have reference to the general business of the department of service in which the employee is engaged, and do not embrace business of every kind which may have some relation to the affairs of the employer, or even be necessary for their successful management. If any other construction were adopted there would, under the section, be no such thing as separate departments of service in the business of railroad companies; for whatever would tend to aid in the transportation of persons and property would come under the designation of its general business."

The decision there was that a brakeman injured by reason of defective, worn out, and broken brakes, which an employee of the railroad company was charged with the duty of keeping in repair, could maintain an action against the railroad company, without regard to the company's negligence in the selection of the employee charged with the duty of keeping the brakes in repair. (Bradley, Matthews, Gray, and Blatchford, JJ., diss.)

[5] *Brown* v. *Central P. R. Co.* (1887) 72 Cal. 523, 14 Pac. 138 (conductor); *Daves* v. *Southern P. Co.* (1893) 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708 (section foreman); *Elliot* v. *Chicago, M. & St. P. R. Co.* (1889) 5 Dak. 523, 41 N. W. 758 (section foreman); *Noyes* v. *Hood* (1889) 102 Cal. 389, 36 Pac. 768 (foreman of farm); *Donnelly* v. *San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559 (superintendent of construction of a bridge); *Catlan* v. *Bull* (1896) 113 Cal. 595, 45 Pac. 1017 (foreman of construction); *Stephens* v. *Doe* (1887) 73 Cal. 26, 14 Pac. 378 (foreman of mine); *Donovan* v. *Ferris* (1900) 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519 (foreman of work of blasting a tunnel, there being also a general superintendent); *Vivoe* v. *Selby Smelting & Lead Co.* (1894) 102 Cal. 458, 36 Pac. 803 (foreman of silver room in smelting works); *Fisk* v. *Central P. R.*

the exercise of control may have been accompanied by the power of hiring and discharging.[6]

The supreme court of California seems to have recognized in some cases the doctrine that an employee who exercises a discretionary authority and discharges such functions as are ordinarily intrusted to a manager, as that term is commonly understood, is a vice principal.[7] That the character of the act which caused the injury is a test of the relation which exists between a delinquent and an injured servant is also recognized in actions under the statute.[8] But both the doctrine

Co. (1887) 72 Cal. 38, 1 Am. St. Rep. 22, 13 Pac. 144 (foreman of boiler shop); *Burns* v. *Sennett* (1893) 99 Cal. 363, 33 Pac. 916 (foreman of gang of stevedores); *McDonald* v. *Hazeltine* (1878) 53 Cal. 35 (foreman of gang of longshoremen); *Livingston* v. *Kodiak Packing Co.* (1894) 103 Cal. 258, 37 Pac. 149 (mate of vessel).

In *Northern P. R. Co.* v. *Hogan* (1894) 11 C. C. A. 51, 27 U. S. App. 184, 63 Fed. 102 (conductor held not to be a vice principal), the court considered itself bound to reject the doctrine of *Chicago, M. & St. P. R. Co.* v. *Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, and defer to the authority of the state court in *Ell* v. *Northern P. R. Co.* (1891) 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222.

[6] *Stevens* v. *San Francisco & N. P. R. Co.* (1893) 100 Cal. 554, 35 Pac. 165.

[7] *McLean* v. *Blue Point Gravel Min. Co.* (1876) 53 Cal. 255 (foreman of the entire work of a mine did not notify a miner that a blast was about to be fired); *Beeson* v. *Green Mountain Gold Min. Co.* (1880) 57 Cal. 20 (superintendent of mine caused injury to miner by his failure to furnish safe appliances); *Brown* v. *Sennett* (1885) 68 Cal. 225, 58 Am. Rep. 8, 9 Pac. 74 (stevedore's foreman, to whom was delegated the entire management of the work of unloading a vessel, "with full discretion to control and supervise it," failed to signal for the stoppage of an overhauled bucket which was swinging dangerously, and finally discharged its load on a workman in the hold).

The last cited case was criticised in *Comyare* v. *Southern P. R. Co.* (1891) 88 Cal. 360, 26 Pac. 175, as being hard to reconcile with other rulings, particularly with *Collier* v. *Steinhart* (1875) 51 Cal. 116 (see note 9, *infra*). It was also suggested that *Beeson* v. *Green Mountain Gold Min. Co.* (1880) 57 Cal. 20, went no further than to decide that the duty of providing suitable appliances is non-delegable. The decision thus explained may doubtless stand on this footing, but the report seems to show that it was rather based on the theory that the delinquent represented the master by virtue of his official position, as superintendent. At all events the decision in *McLean* v. *Blue Point Gravel Min. Co.* (1876) 51 Cal. 255, is a clear recognition of the doctrine that a superintendent in full control of an industrial concern is a vice principal as to all matters affecting the safety of his subordinates, whether those matters do or do not involve the discharge of a non-delegable duty. And such is also the effect of *Ryan* v. *Los Angeles Ice & Cold Storage Co.* (1896) 112 Cal. 241, 32 L. R. A. 524, 44 Pac. 471, where the defendant was held liable for the negligence of the engineer of a refrigerating machine who, while in sole charge while the general manager was absent, allowed inexperienced men to do work for which they were unfitted.

[8] A carpenter employed to construct a scaffold for the bricklayers engaged on a building in course of construction was held to be a vice principal, "even though his work promoted the erection of the building." *McNamara* v. *Macdonough* (1894) 102 Cal. 575, 36 Pac. 911.

A nonsuit is erroneous where the evidence tends to show that the injury was due to the giving way of loose planks on which a servant had to stand while he was working near a revolving shaft. *Mullin* v. *California Horseshoe Co.* (1894) 105 Cal. 77, 38 Pac. 535.

As against positive allegations that the acts and omissions complained of were by the defendant it cannot be presumed, for the purposes of a demurrer that they were those of a fellow servant of the injured person. *Beaucy* v. *Central P. R. Co.* (1885) 68 Cal. 171, 8 Pac. 808 (held to be error to sustain demurrer to a complaint alleging a breach

that a general manager is a vice principal and the doctrine that the selection of fit servants is a non-delegable duty seem to be rejected in one decision."

C. Georgia.

See chapter xxxix., subd. B, *post*.

of duty on the defendant's part to show a right signal for the guidance of the plaintiff, an engineer; two judges dissented).

A materialman and train despatcher who employs and discharges the men and directs the movements of the trains on a line under construction is a vice principal. *McKune* v. *California Southern R. Co.* (1885) 66 Cal. 302, 5 Pac. 482.

On the other hand, the temporary adjustment of the several parts of a hoisting apparatus used in unloading a ship is not a personal duty of the master. *Burns* v. *Scandrett* (1893) 99 Cal. 363, 33 Pac. 916. Nor is the detail of giving a laborer in a quarry warning that a blast is about to be fired. *Donovan* v. *Ferris* (1900) 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519.

"*Collier* v. *Steinhart* (1875) 51 Cal. 116, where a complaint was held demurrable, which alleged that the defendant did not use ordinary skill in selecting the negligent servant, but which also recited facts showing that such servant was employed by the defendant's superintendent, and contained no averment that such superintendent had been negligently selected. This ruling seems inconsistent with the others, cited above, in which the master was held liable.

CHAPTER XXXVII.

ENGLISH EMPLOYERS' LIABILITY ACT OF 1880 AND THE AMERICAN CANADIAN, AND AUSTRALIAN STATUTES MODELED THEREON.

653a. Introductory.

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654. England.
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656. Massachusetts.
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681. — under the Alabama act.
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684. Master liable though injured servant was not under the control of the negligent employee.
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692. Temporary substitutes for regular foreman, status of.
693. To what orders a servant is bound to conform.
694. When a servant is deemed to have acted under orders.
695. Necessity of establishing a causal connection between the order and the injury.
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a. What is an engine under the statute.
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705. Persons having "charge or control of a train."
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c. What employees are deemed to have "charge or control" of a train: conductors.
d. Employees other than conductors.
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708. Notice a condition precedent to the maintenance of an action under the statute.
709. Notice not essential to recovery if facts constitute a cause of action at common law.
710. Notice must be given in writing.
711. Service of the notice.
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b. Service through the postoffice.
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713. Scope of this subtitle.
714. Death of employer: effect of.
715. Death of plaintiff: pending action abated by.
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J. Persons entitled to sue under the acts.
717. General remarks.
718. Servants temporarily under the control of the defendant.
719. Volunteers.
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721. Independent contractors.
721a. Servants of independent contractors.
722. Railway servant.
723. Workmen.
a. Domestic or menial servant.
b. Laborer.
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e. Artificer.
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h. Persons "otherwise engaged in manual labor."
i. "Working under a contract with an employer."
724. Seamen.
725. Servants working in government departments.

K. Damages recoverable.
726. Damages recoverable where the injured servant is himself the plaintiff.
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730. Service of summons; waiver of irregularity in.
731. Joinder of employer and negligent coemployee as parties defendant
732. Institution of distinct suits at common law and under these acts.
733. Joinder of causes of action under the different provisions of these acts.
734. Joinder of causes of action under these acts and at common law.
734a. Joinder of causes of action under these acts and other statutes.
735. Election between different counts.
736. Former recovery in action under another statute or at common law.
737. Complaint.
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d. Sufficiency of the allegation of negligence.
e. Notice of injury.
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738. Sufficiency of the plea.
739. Instructions to jury.
740. Provinces of court and jury.
741. Removal of actions to higher courts.
741a. Appointment of assessors.
742. Questions which may be reviewed on appeal.

653a. Introductory.—In this chapter it is proposed to review the decisions construing the English employers' liability act of 1880, and the American, Canadian, and Australian statutes in which the language of that act has been followed more or less closely.

A. Text of the statutes.

654. England.—The dissatisfaction which the doctrine of common employment, as applied in the earlier English decisions, has naturally

provoked among those classes of the community who suffered most severely from its operation, was at last brought to a head by the famous case of *Wilson* v. *Merry*.[1] After several years of vigorous agitation, both in and out of Parliament, a select committee of the House of Commons, which made a careful investigation of the subject, declared in favor of a modification of the law. One of the recommendations was embodied in the following passage of the report, submitted in 1877: "Your committee are of opinion that in cases such as these,—that is, where the actual employers cannot personally discharge the duties of masters, or where they deliberately abdicate their functions and delegate them to agents,—the acts or defaults of the agents who thus discharge the duties and fulfil the functions of masters should be considered as the personal acts or defaults of the principals and employers, and should impose the same liability on such principals and employers as they would have been subject to had they been acting personally in the conduct of the business, notwithstanding that such agents are technically in the employment of the principals." It was also suggested that the doctrine of common employment should be narrowed so as to be applicable only to those cases where each servant "is an observer of the conduct of the other, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precaution and employ such agents as the safety of the whole party may require."[2] Proposals of a much more radical nature were put forward in the draft report submitted by Mr. Lowe.[3]

A bill framed on the lines thus suggested was introduced into Parliament in 1879, but withdrawn at the close of the session. It was reintroduced in 1880, and after a reference to a select committee, and a good deal of discussion, which bore fruit in various amendments, was finally passed. The text of the act, which came into operation on January 1, 1881, is as follows:

Sec. 1. Where, after the commencement of this act, personal injury is caused a workman:

Subs. 1. By reason of any defect in the condition of ways, works, machinery or plant, connected with or used in the business of the employer; or

Subs. 2. By reason of the negligence of any person in the service of the employer, who has any superintendence intrusted to him whilst in the exercise of such superintendence; or

[1] (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30.

[2] For the decisions of the American courts which have adopted this principle independently of statutes, see §§ 500 *et seq.*, *ante*.

[3] A good deal of useful information on this and other matters connected with the history of the events which preceded the passage of the act in its final form will be found in Mr Fell's Pamphlet on Employers' Liability.

Subs. 3. By reason of the negligence of any person in the service of the employer, to whose orders or directions the workman, at the time of the injury, was bound to conform, and did conform, where such injury resulted from his having so conformed; or

Subs. 4. By reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

Subs. 5. By reason of the negligence of any person in the service of the employer, who has the charge or control of any signal points, locomotive engine, or train upon a railway,—the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

Sec. 2. A workman shall not be entitled under this act to any right of compensation or remedy against the employer in any of the following cases, that is to say:

Subs. 1. Under subsection 1 of section 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition;

Subs. 2. Under subsection 4 of section 1, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of Her Majesty's Principal Secretaries of State, or by the Board of Trade, or any other department of the government, under or by virtue of any act of Parliament, it shall not be deemed, for the purposes of this act, to be an improper or defective rule or by-law;

Subs. 3. In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.

Sec. 3. The amount of compensation recoverable under this act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade, employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

Sec. 4. An action for the recovery under this act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death; provided, always, that in case of death the want of such notice shall be no bar to the maintenance of such action, if the judge shall be of opinion that there was reasonable excuse for such want of notice.[4]

[4] Under the interpretation act (52 & 53 Vict.) chap. 63, § 3, a "month" means a calendar month.

Sec. 5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this act, any penalty or part of a penalty which may have been paid in pursuance of any other act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this act, and payment has not previously been made of any penalty or part of a penalty under any other act of Parliament in respect of the same cause of action, such workman, representatives, or person shall not be entitled thereafter to receive any penalty or part of a penalty under any other act of Parliament, in respect of the same cause of action.

Sec. 6, subs. 1. Every action for recovery of compensation under this act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed;

Subs. 2. Upon the trial of any such action in a county court before the judge without a jury, one or more assessors may be appointed for the purpose of ascertaining the amount of compensation;

Subs. 3. For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this act in a county court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied, and repealed from time to time, in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts.

"County court" shall, with respect to Scotland, mean the "sheriff's court," and shall, with respect to Ireland, mean the "civil bill court."

In Scotland any action under this act may be removed to the court of session at the instance of either party, in the manner provided by and subject to the conditions prescribed by section 9 of the sheriff courts (Scotland) act 1877.

In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

Sec. 7. Notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

The notice may also be served by post, by a registered letter addressed to the person on whom it is to be served, at his last known place of residence or place of business, and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at, or by sending it by post in a registered letter addressed to, the office, or, if there be more than one office, any one of the offices, of such body.

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defense by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

Sec. 8. For the purposes of this act, unless the context otherwise requires,—

The expression "person who has superintendence intrusted to him" means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor;

The expression "employer" includes a body of persons corporate or unincorporate;

The expression "workman" means a railway servant, and any person to whom the employers and workmen act of 1875 applies.

Sec. 9. This act shall not come into operation until the first day of January, 1881, which date is in this act referred to as the commencement of this act.

Sec. 10. This act may be cited as the employers' liability act 1880, and shall continue in force till the thirty-first day of December, 1887, and to the end of the then next session of Parliament, and no longer, unless Parliament shall otherwise determine; and all actions commenced under this act before that period shall be continued as if the said act had not expired.

By successive renewals, this act has been kept in force up to the present time; but since 1897 it has subsisted side by side with the much more drastic workmen's compensation act, and its amendment of 1900. See chapter XL., *post*. Its inadequacy as a piece of remedial legislation, designed mainly for the redress of the grievances of the poorest and most illiterate members of the community, has long been notorious.[5] But it has certainly mitigated some of the harshest and most objectionable features of the common law. That its repeal will not be long postponed may be reasonably conjectured from the tendencies of social and economic development in England at the present conjecture. Its abrogations, however, will not destroy the practical interest which it possesses for the lawyers of the American states which legislated on the same lines; for under a familiar principle of statutory construction, the decisions of the English judges with regard to its provisions are, in those states, of something more than a merely persuasive authority.[6]

[5] See Pollock, Torts, pp. 90, 91 and the same author's Essays in Jurisprudence (1882) chap. 5. The Report of a Select Committee of the House of Commons on Amending Bills 1886 (192), may also be consulted.

The preface to Mr. Beven's work on Employers' Liability, 2d. ed., contains some suggestive remarks on the over-refinements in which some judges have been too apt to indulge in construing the act.

[6] In *Ryalls v. Mechanics' Mills* (1889) 150 Mass. 190, 5 L. R. A. 667, 22 N. E. 766, it was remarked that, as the Massachusetts statute was a close copy of that of England, the court could not deal with it quite on the same footing as if the legislature had framed it in their own language, used for the first time, but "must assume that they were content with the expounded meaning of the words which they adopted."

In *Mobile & B. R. Co. v. Holborn*

The text of the various statutes in which the language of this act has been more or less closely copied is set out in the ensuing sections.

655. Alabama.—Laws 1884-85, p. 115, Civil Code 1886, § 2590 (Civil Code, 1896, chap. 3, § 1749): **Liability of Master or Employer to Servant or Employee for Injuries.**—When a personal injury is received by a servant or employee in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employee as if he were a stranger and not engaged in such service or employment, in the cases following:

(1) When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in the business of, the master or employer;

(2) When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence;

(3) When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employee, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed;

(4) When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf;

(5) When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal points, locomotive engine, switch, car, or train upon a railway, or of any part of the track of a railway.

But the master or employer is not liable under this section if the servant or employee knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless he was aware that the master or employer, or such superior already knew of such defect or negligence; nor is the master or employer liable under subdivision 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer.

(1887) 84 Ala. 133, 4 So. 146, the court said: "Our statute, as far as it goes, is a substantial copy of the English act entitled the 'employers' liability act,' some of the provisions of which had previously received a judicial construction. Its enactment by the legislature, in substantially the same language, is persuasive of a legislative adoption of that construction."

In another case the same court, speaking of the construction placed upon the English statute by English judges, said: "In view of the source whence our statute came, this judicial construction is, of course, entitled to very great weight and influence with this court—an influence even beyond that which in ordinary cases the ability and learning of those courts command." *Kansas City, M. & B. R. Co.* v. *Burton* (1893) 97 Ala. 240, 12 So. 88.

That the Colorado act was "presumably adopted with the construction given to it by the courts of Massachusetts" see *Colorado Mill & Elevator Co.* v. *Mitchell* (1899) 26 Colo. 284, 58 Pac. 28. This is, of course, equivalent, for practical purposes, to acknowledging the authority of the English decisions to which the courts of Massachusetts defer.

or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant, were in proper condition.

Sec. 2591 (1751). Personal Representatives may Sue if Injury Results in Death:—If such injury results in the death of the servant or employee, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distributions.

Sec. 2592 (1759). Damages Exempt:—Damages recovered by the servant or employee, of and from the master or employer, are not subject to the payment of debts, or any legal liabilities incurred by him.

Sec. 2593. Liability of Personal Representative and Sureties:—The personal representative and the sureties on his bond are liable to the parties in interest for the due and legal distribution of all damages recovered by such representative under section 2588, or section 2589, or section 2591, but are subject to all remedies which may be pursued against such representative and sureties for the due administration of personal assets.

656. Massachusetts.—Laws 1887, chap. 270, § 1.—Where, after the passage of this act, personal injury is caused to an employee, who is himself in the exercise of due care and diligence at the time:

Subs. 1. By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; or

Subs. 2. By reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence; [or, in the absence of such superintendent, of any person acting as superintendent with the authority and consent of such employer]. The bracketed words were inserted by Mass. Stat. 1894, chap. 499, § 1.

Subs. 3. By reason of the negligence of any person in the service of the employer, who has the charge or control of any signal, switch, locomotive engine, or train upon a railroad, the employee or, in case the injury results in death, the legal representatives of such employee, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of, nor in the service of the employer, nor engaged in its work.

The following provision was added to this section by Mass. Stat. 1892, chap. 260:—And in case such death is not instantaneous, or is preceded by conscious suffering, said legal representatives may, in the action brought under this section, except as hereinafter provided, also recover damages for such death. The total damages awarded hereunder, both for said death and said injury, shall not exceed $5,000, and shall be apportioned by the jury between the legal representatives and the persons, if any, entitled under the succeeding section of this act, to bring an action for instantaneous death. If there are no such persons, then no damages for such death shall be recovered, and the damages, so far as the same are awarded for said death, shall be assessed with reference to the degree of culpability of the employer herein, or the persons for whose negligence he is made liable.

Another addition to this section was made by the Laws of 1893, chap. 259, to

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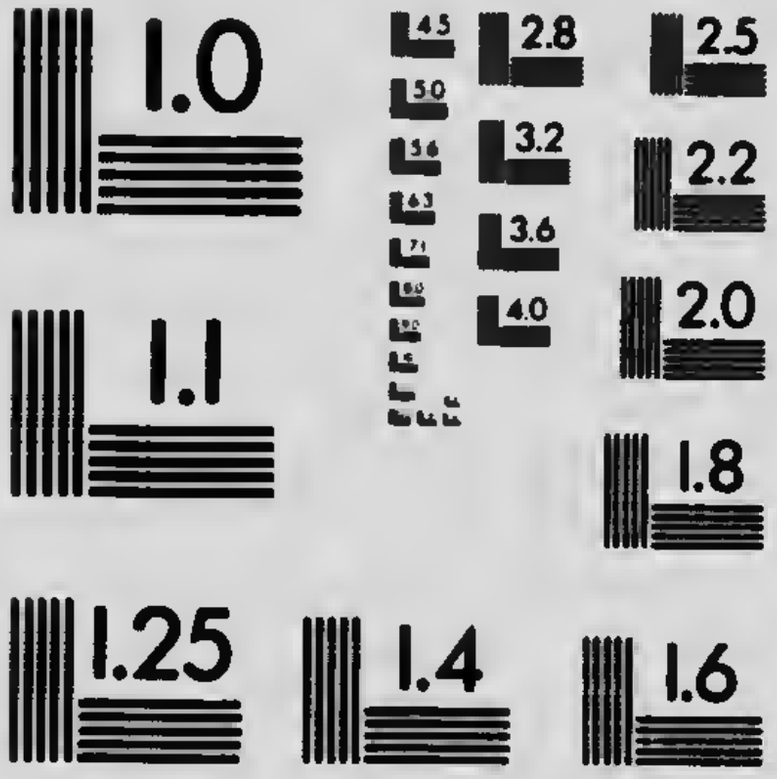

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this effect:—A car in use by or in the possession of a railroad company shall be considered a part of the ways, works, or machinery of the company using or having the same in possession, within the meaning of this act, whether such car is owned by it or by some other company or person.

Sec. 2. Where an employee is instantly killed, or dies without conscious suffering, as the result of the negligence of an employer or of the negligence of any person for whose negligence the employer is liable under the provisions of this act, the widow of the deceased, or, in case there is no widow, the next of kin, provided that such next of kin were at the time of the death of such employee dependent upon the wages of such employee for support, may maintain an action for damages therefor, and may recover in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered.

Sec. 3. The amount of compensation receivable under this act in cases of personal injury shall not exceed the sum of $4,000. In case of death, compensation in lieu thereof may be recovered in not less than $500 and not more than $5,000, to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable; and no action for the recovery of compensation for injury or death under this act shall be maintained, unless notice of the time, place, and cause of the injury is given to the employer within thirty days, and the action is commenced within one year, from the occurrence of the accident causing the injury or death.

In 1888 the following words were inserted here:—The notice required by this section shall be in writing, signed by the person injured or by someone in his behalf; but if, from physical or mental incapacity, it is impossible for the person injured to give the notice within the time provided in said section, he may give the same within ten days after such incapacity is removed; and in case of his death without having given the notice, and without having been, for ten days, at any time after his injury, of sufficient capacity to give the notice, his executor or administrator may give such notice within thirty days after his appointment. Mass. Pub. Stat. chap. 155, § 1, March 22, 1888.

But no notice given under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of the injury; provided it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby.

By Mass. Stat. 1892, chap. 260, § 2, it was enacted that the following words should precede the first sentence of the above section: "Except in actions brought by personal representatives under section 1 of this act, to recover damages for both the injury and death of an employee;" and that, after the word "death" in the third line, there should be inserted the words: "which follows instantaneously, or without conscious suffering."

Sec. 4. Whenever an employer enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work, or whenever such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employees of such contractor or subcontractor, by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer, or furnished by him, and if such defect arose or had not been discov-

ered or remedied through the negligence of the employer or of some person intrusted by him with the duty of seeing that they were in proper condition.

Sec. 5. An employee or his legal representatives shall not be entitled under this act to any right of compensation or remedy against his employer in any case where such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who had intrusted to him some general superintendence.

Sec. 6. Any employer who shall have contributed to an insurance fund created and maintained for the mutual purposes of indemnifying an employee for personal injuries for which compensation may be recovered under this act, or to any relief society formed under chapter 244 of the acts of the year 1882, as authorized by chapter 125 of the acts of the year 1886, may prove, in mitigation of the damages recoverable by an employee under this act, such proportion of the pecuniary benefit which has been received by such employee from any such fund or society on account of such contribution of said employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

Sec. 7. This act shall not apply to injuries caused to domestic servants or farm laborers, by other fellow employees, and shall take effect on the first day of September, 1887.

The various amendments and additions which, as above indicated, had been from time to time inserted in this act, were incorporated in the consolidated statute cited as Rev. Laws, 1902, chap. 106; and as the text of some of the sections not affected by these alterations was also modified to some extent by the same statute, it has been deemed advisable to set it out in full.

Rev. Laws 1902, chap. 106:—Sec. 71. If personal injury is caused to an employee who, at the time of the injury, is in the exercise of due care, by reason of:

First. A defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied in consequence of, the negligence of the employer, or of a person in his service who had been intrusted by him with the duty of seeing that the ways, works, or machinery were in the proper condition; or,

Second. The negligence of a person in the service of the employer, who was intrusted with and was exercising superintendence, and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer; or

Third. The negligence of a person in the service of the employer, who was in charge or control of a signal, switch, locomotive engine, or train upon a railroad,—the employee or his legal representatives shall, subject to the provisions of the eight following sections, have the same rights to compensation and of action against the employer as if he had not been an employee, nor in the service, nor engaged in the work, of the employer.

A car which is in use by, or which is in possession of, a railroad corporation shall be considered as a part of the ways, works, or machinery of the corporation which uses or has it in possession, within the meaning of clause 1 of this section.

whether it is owned by such corporation or by some other company or person. One or more cars which are in motion, whether attached to an engine or not, shall constitute a train within the meaning of clause 3 of this section, and whoever, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, locomotive engine or train, shall be deemed to be a person in charge or control of a signal, switch, locomotive engine, or train within the meaning of said clause.

Sec. 72. If the injury described in the preceding section results in the death of the employee, and such death is not instantaneous, or is preceded by conscious suffering, and if there is any person who would have been entitled to bring an action under the provisions of the following section, the legal representatives of said employee may, in the action brought under the provisions of the preceding section, recover damages for the death, in addition to those for the injury.

Sec. 73. If, as the result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under the provisions of section 71, an employee is instantly killed, or dies without conscious suffering, his widow, or, if he leaves no widow, his next of kin, who at the time of his death were dependent upon his wages for support, shall have a right of action for damages against the employer.

Sec. 74. If, under the provisions of either of the two preceding sections, damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable.

The amount of damages which may be awarded in an action under the provisions of section 71 for a personal injury to an employee, in which no damages for his death are awarded under the provisions of section 72, shall not exceed $4,000.

The amount of damages which may be awarded in such action, if damages for his death are awarded under the provisions of section 72, shall not exceed $5,000 for both the injury and the death, and shall be apportioned by the jury between the legal representatives of the employee and the persons who would have been entitled, under the provisions of section 73, to bring an action for his death if it had been instantaneous or without conscious suffering.

The amount of damages which may be awarded in an action brought under the provisions of section 73 shall not be less than $500 nor more than $5,000.

Sec. 75. No action for the recovery of damages for injury or death under the provisions of sections 71 to 74, inclusive, shall be maintained unless notice of the time, place, and cause of the injury is given to the employer within sixty days, and the action is commenced within one year, after the accident which causes the injury or death. Such notice shall be in writing, signed by the person injured or by a person in his behalf; but if, from physical or mental incapacity, it is impossible for the person injured to give the notice within the time provided in this section, he may give it within ten days after such incapacity has been removed; and if he dies without having given the notice and without having been, for ten days, at any time after his injury, of sufficient capacity to give it, his executor or administrator may give such notice within sixty days after his appointment. A notice given under the provisions of this section shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place, or cause of the injury, if it is shown that there was no intention to mislead, and that the employer was not in fact misled thereby. The provisions of section 22 of chapter 51 shall apply to notices under the provisions of this section.

Sec. 76. If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employees of such contractor or subcontractor, caused by any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer or are furnished by him, and if such defect arose, or had not been discovered or remedied, through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition.

Sec. 77. An employee or his legal representatives shall not be entitled under the provisions of sections 71 to 74, inclusive, to any right of action for damages against his employer, if such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who was intrusted with general superintendence.

Sec. 78. An employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employee for personal injuries for which compensation may be recovered under the provisions of sections 71 to 74, inclusive, or to any relief society formed under the provisions of sections 17, 18, and 19 of chapter 125, may prove, in mitigation of the damages recoverable by an employee under the provisions of said sections, such proportion of the pecuniary benefit which has been received by such employee from any such fund or society on account of such contribution of said employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

Sec. 79. The provisions of the eight preceding sections shall not apply to injuries caused to domestic servants or farm laborers by fellow employees.

657. Colorado.—Laws 1893, chap. 77 (Mill's Anno. Stat. Supp. 1891–1896, § 1511a):—Sec. 1. Where, after the passage of this act, personal injury is caused to an employee, who is himself in the exercise of due care and diligence at the time:

(1) By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, and machinery were in proper condition; or

(2) By reason of the negligence of any person in the service of the employer, intrusted with exercising superintendence, whose sole or principal duty is that of superintendence;

(3) By reason of the negligence of any person in the service of the employer, who has the charge or control of any switch, signal, locomotive engine, or train upon a railroad, the employee, or in case the injury results in death, the parties entitled by law to sue and recover for such damages, shall have the same right of compensation and remedy against the employer as if the employee had not been an employee of, or in the service of, the employer or engaged in his or its works.

Sec. 2 (1511b). The amount of compensation recoverable under this act, in case of a personal injury resulting solely from the negligence of a coemployee, shall not exceed the sum of $5,000. No action for the recovery of compensation for injury

or death under this act shall be maintained unless written notice of the time, place, and cause of the injury is given to the employer within sixty days, and the action is commenced within two years, from the occurrence of the accident causing the injury or death. But no notice given under the provisions of this section shall be deemed invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of injury: Provided, It is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby.

Sec. 3. (1511c). Whenever an employer enters into a contract, either written or verbal, with an independent contractor, to do part of such employer's work, or whenever such contractor enters into a contract with a subcontractor to do all or a part of the work comprised in such contract or contracts with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employees of such contractor or subcontractor, by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer or furnished by him, and if such defect arose or had not been discovered or remedied through the negligence of the employer or of some person intrusted by him with the duty of seeing that they were in proper condition.

Sec. 4 (1511d). An employee, or those entitled by law to sue and recover under the provisions of this act, shall not be entitled under this act to any right of compensation or remedy against his employer in any case where such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give or cause to be given information thereof to the employer, or to some person superior to himself in the service of his employer, who had intrusted to him some general superintendence.

Sec. 5. (1511e). If the injury sustained by the employee is clearly the result of the negligence, carelessness, or misconduct of a coemployee, the coemployee shall be equally liable under the provisions of this act with the employer, and may be made a party defendant in all actions brought to recover damages for such injury. Upon the trial of such action the court may submit to and require the jury to find a special verdict upon the question as to whether the employer or his vice principal was or was not guilty of negligence proximately causing the injury complained of; or whether such injury resulted solely from the negligence of the coemployee; and in case the jury by their special verdict find that the injury was solely the result of the negligence of the employer or vice principal, then and in that case the jury shall assess the full amount of plaintiff's damages against the employer, and the suit shall be dismissed as against the employee; but in case the jury by their special verdict find that the injury resulted solely from the negligence of the coemployee, the jury may assess damages both against the employer and the employee.

Approved April 8, 1893.

This act is now superseded to some extent by the statute set out in chapter XXXIX., *post*.

658. Indiana.—Acts 1893, chap. 130, p. 294; 3 Rev. Stat. 1894, §§ 7083-7087; Horner's Rev. Stat. 1897, §§ 5206-5210; Burns's Rev. Stat. 1901, §§ 7083-7087;

Rev. Stat. § 7083. Liability for Personal Injuries:—1. That every railroad or other corporation, except municipal, operating in this state, shall be liable in damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases:

First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools, and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person intrusted by it with the duty of keeping such way, works, plant, tools, or machinery in proper condition;

Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform, and did conform;

Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation, or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf;

Fourth. Where such injury was caused by the negligence of any person in the service of such corporation, who has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine, or train upon a railway, or where such injury was caused by the negligence of any person, coemployee, or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, coemployee, or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws.

Sec. 7084. When Damages not Recoverable:—2. Neither an employee nor his legal representative shall be entitled under this act to any right of compensation or remedy against the corporation in any case where the injury results from obedience to any order which subjects the employee to palpable danger; nor where the injury was caused by the incompetency of the coemployee, and such incompetency was known to the employee injured, or such injured employee, in the exercise of reasonable care, might have discovered such incompetency; unless the employee so injured gave or caused to be given information thereof to the corporation or to some superior intrusted with the general superintendence of such coemployee, and such corporation failed or refused to discharge such incompetent employee within a reasonable time, or failed or refused within a reasonable time to investigate the alleged incompetency of the coemployee or superior, and discharge him if found incompetent.

Repealed by act 1894, chap. 64.

Sec. 7085. Measure of Damages:—3. The measure of damages recoverable under this act shall be commensurate with the injury sustained, unless death results from such injury, when, in such case, the action shall survive and be governed in all respects by the law now in force as to such actions: Provided, That where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and pending such appeal the injured person dies, and the judgment rendered in the court below be thereafter reversed, the right of action of such person shall survive to his legal representative.

Sec. 7086. Contracts of Release Void:—5. All contracts made by railroads or other corporations with their employees, or rules or regulations adopted by any corporation, releasing or relieving it from liability to any employee having a right of action under the provisions of this act, are hereby declared null and void. The provisions of this act, however, shall not apply to any injuries sustained before it takes effect; nor shall it affect in any manner any suit or legal proceedings pending at the time it takes effect.

In effect March 4, 1893.

659. New York.—An Act to Extend and Regulate the Liability of Employers to Make Compensation for Personal Injuries Suffered by Employees.—Laws 1902 chap. 600:—Sec. 1. Where, after this act takes effect, personal injury is caused to an employee who is himself in the exercise of due care and diligence at the time,

1. By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition;

2. By reason of the negligence of any person in the service of the employer intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer, the employee, or in case the injury results in death, the executor or administrator of a deceased employee who has left him surviving a husband, wife, or next of kin shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of, nor in the service of, the employer nor engaged in his work. The provisions of law relating to actions for causing death by negligence, so far as the same are consistent with this act, shall apply to an action brought by an executor or administrator of a deceased employee suing under the provisions of this act.

Sec. 2. No action for recovery of compensation for injury or death under this act shall be maintained unless notice of the time, place, and cause of the injury is given to the employer within 120 days and the action is commenced within one year after the occurrence of the accident causing the injury or death. The notice required by this section shall be in writing and signed by the person i[illegible] by someone in his behalf; but if, from physical or mental incapacity, possible for the person injured to give notice within the time provid[illegible] section, he may give the same within ten days after such incapacity i[illegible] In case of his death without having given such notice, his executor or trator may give such notice with[illegible]n sixty days after his appointment; but no notice under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of the injury, if it be shown that there was no intention to mislead and that the party entitled to notice was not in fact misled thereby. The notice required by this section shall be served on the employer, or if there is more than one employer, upon one of such employers, and may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. The notice may be served by post, by letter addressed to the person on whom it is to be served, at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter contain-

ing the same would be delivered in the ordinary course of the post. When the employer is a corporation, notice shall be served by delivering the same or by sending it by post, addressed to the office or principal place of business of such corporation.

Sec. 3. An employee, by entering upon or continuing in the service of the employer, shall be presumed to have assented to the necessary risks of the occupation or employment, and no [illegible]. The necessary risks of the occupation or employment shall, in all cases arising after this act takes effect, be considered as including those risks, and those only, inherent in the nature of the business, which remain after the employer has exercised due care in providing for the safety of his employees, and has complied with the laws affecting or regulating such business or occupation for the greater safety of such employees. In an action maintained for the recovery of damages for personal injuries to an employee received after this act takes effect, owing to any cause for which the employer would otherwise be liable, the fact that the employee continued in the service of the employer in the same place and course of employment after the discovery by such employee, or after he had been informed of, the danger of personal injury therefrom, shall not, as a matter of law, be considered as an assent by such employee to the existence or continuance of such risks of personal injury therefrom, or as negligence contributing to such injury. The question whether the employee understood and assumed the risk of such injury, or was guilty of contributory negligence, by his continuance in the same place and course of employment with knowledge of the risk of injury, shall be one of fact, subject to the usual powers of the court in a proper case to set aside a verdict rendered contrary to the evidence. An employee, or his legal representative, shall not be entitled under this act to any right of compensation or remedy against the employer in any case where such employee knew of the defect or negligence which caused the injury, and failed, within a reasonable time, to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who had intrusted to him some general superintendence, unless it shall appear on the trial that such defect or negligence was known to such employer, or superior person, prior to such injuries to the employee.

Sec. 4. An employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employee for personal injuries, for which compensation may be recovered under this act, or to any relief society or benefit fund created under the laws of this state, may prove in mitigation of damages recoverable by an employee under this act such proportion of the pecuniary benefit which has been received by such employee from such fund or society on account of such contribution of employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

Sec. 5. Every existing right of action for negligence or to recover damages for injuries resulting in death is continued, and nothing in this act contained shall be construed as limiting any such right of action; nor shall the failure to give the notice provided for in section 2 of this act be a bar to the maintenance of a suit upon any such existing right of action.

Sec. 6. This act shall take effect July 1, 1902.

660. Ontario and other Canadian provinces.—The English act has

naturally been followed very closely in all the colonies which have adopted a similar statute.

In Newfoundland the original act is followed word for word.

In Ontario the legislatures, while preserving the provisions of that act in the essential features, have made some important additions. As the statutes of these colonies are virtually identical, it will be sufficient to give the text of that of Ontario, so far as it is of general interest.

The statute at present in force is 55 Vict. chap. 30 (Ont. Rev. Stat. 1897, chap. 160). In this is incorporated, with some unimportant verbal variations, the provisions of the earlier act, 49 Vict. chap. 28 (Ont. Rev. Stat. 1887, chap. 141). Several new sections are also added.

Any of the alterations which it seems advisable to note are mentioned.

Sec. 1. This act may be known and cited as "the workingmen's compensation for injuries act." 55 Vict. chap. 30, § 1.

Sec. 2. Where the following words occur in this act, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:

Subs. 1. "Superintendence" shall be construed as meaning such general superintendence over workmen as is exercised by a foreman, or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labor.

Subs. 2. "Employer" shall include a body of persons corporate or unincorporate, and also the legal personal representatives of a deceased employer, and the person liable to pay compensation under section 4 of this act. 55 Vict. chap. 30, § 2 subs. 1, 2.

[Subsecs. 1 and 2 are altered from the earlier act, but not so as to affect the extent of the master's liability.]

Subs. 3. "Workman" does not include a domestic or menial servant, or servant in husbandry, gardening, or fruit growing, where the personal injury caused to any such servant has been occasioned by or has arisen from or in the usual course of his work or employment as a domestic or menial servant, or as a servant in husbandry, gardening, or fruit-growing; but, save as aforesaid, means any railway servant and any person who, being a laborer, servant, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labor, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract is made before or after the passing of this act, is expressed or implied, oral or in writing, and is a contract of service or a contract personally to execute any work or labor. 56 Vict. chap. 26 § 1.

Subs. 4. "Packing" shall mean a packing of wood or metal, or some other equally substantial and solid material, of not less than 2 inches in thickness, and which, where filled in, shall extend to within 1½ inches of the crown of the rail-

in use on any railway, shall be neatly fitted so as to come against the web of such rails, and shall be well and solidly fastened to the ties on which such rails are laid.

Subs. 5. "Railway servant" shall mean and include a railway servant, tramway servant, and street railway servant. 55 Vict. chap. 30, § 2, subs. 4, 5.

Sec. 3. Where personal injury is caused to a workman:

Subs. 1. By reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings, or premises connected with, intended for, or used in, the business of the employer; or

Subs. 2. By reason of the negligence of any person in the service of the employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence; or

[See § 2, subs. 1.]

Subs. 3. By reason of the negligence of any person in the service of the employer, to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed; or

Subs. 4. By reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by the employer or by any person delegated with the authority of the employer in that behalf; or

Subs. 5. By reason of the negligence of any person in the service of the employer, who has the charge or control of any points, signal, locomotive engine, machine, or train upon a railway, tramway, or street railway,—the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work. 55 Vict. chap. 30, § 3.

Sec. 4, subs. 1. Where the execution of any work is being carried into effect under any contract, and

(a) The person for whom the work, or any part thereof, is done, owns or supplies any ways, works, machinery, plant, buildings or premises used for the purpose of executing the work; and

[This provision is not inserted in the Manitoba act.]

(b) By reason of any defect in the condition or arrangement of such ways, works, machinery, plant, buildings, or premises, personal injury is caused to any workman employed by the contractor or by any subcontractor; and

(c) The defect or the failure to discover or remedy the defect arose from the negligence of the person for whom the work or any part thereof is done, or of some person being in his service and intrusted by him with the duty of seeing that such condition or arrangement is proper,—the person for whom the work, or that part of the work, is done, shall be liable to pay compensation for the injury as if the workman had been employed by him, and for that purpose shall be deemed to be the employer of the workman within the meaning of this act: Provided, always, That any such contractor or subcontractor shall be liable to pay compensation for the injury as if this section had not been enacted, so, however that double compensation shall not be recoverable for the same injury.

Nothing corresponding to this provision is found in the English act. It should be compared with section 4 of the Massachusetts act.

Subs. 2. Nothing in this section contained shall affect any rights or liabilities of the person for whom the work is done and the contractor and subcontractor (if any), as between themselves. 55 Vict. chap. 30, § 4.

Sec. 5. Where, within this Province, personal injury is caused to a workman employed on or about any railway:

Subs. 1. By reason of the lower beams or members of the superstructure of any highway or other overhead bridge, or any other erection or structure over said railway, not being of a sufficient height from the surface of the rails to admit of an open and clear headway of at least 7 feet between the top of the highest freight cars then running on such railway, and the bottom of such lower beams or members; or,

Subs. 2. By reason of the space between the rails in any railway frog, extending from the point of such frog backward to where the heads of such rails are not less than 5 inches apart, not being filled in with packing; or,

Subs. 3. By reason of the space between any wing rail and any railway frog and between any guard rail and any other rail fixed and used alongside thereof as aforesaid, and between all wing rails where no other rail intervenes (save only where the space between the heads of any such wing rail and railway frog as aforesaid, or between the heads of any such guard rail and any other rail fixed and used alongside thereof as aforesaid, or between the heads of any such wing rails where no other rail intervenes as aforesaid, is either less than 1⅛ of an inch or more than 5 inches in width) not being at all times during every month of April, May, June, July, August, September, October, and November, filled in with packing,—such injury shall be deemed and taken to have been caused by reason of a defect within the meaning of clause numbered 1 of section 3 of this act: but nothing in this section contained shall be taken or construed, as in any respect, or for any purpose, restricting the meaning of the said clause. 55 Vict. chap. 30, § 5; 60 Vict. chap. 15, Schedule A (57).

[The above provisions are not found in Rev. Stat. 1887, and are peculiar to this Canadian statute, and the two others which are copied from it.]

Sec. 6. A workman, or his legal representatives, or any person entitled in case of his death, shall not be entitled under this act to any right of compensation or remedy against the employer in any of the following cases: that is to say:

Subs. 1. Under clause 1 of section 3, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer or of some person intrusted by him with the duty of seeing that the condition or arrangement of the ways, works, machinery, plant, building, or premises are proper;

Subs. 2. Under clause 4 of section 3, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned: Provided, That where a rule or by-law has been approved, or has been accepted as a proper rule or by-law, either by the lieutenant-governor in council, or under and pursuant to any provision in that behalf of any act of the Legislature of Ontario or of the Parliament of Canada, it shall not be deemed for the purposes of this act to be an improper or defective rule or by-law;

Subs. 3. In any case where the workman knew of the defect or negligence which caused his injury, and failed without reasonable excuse to give, or cause to be given within a reasonable time, information thereof to the employer or some

person superior to himself in the service of his employer, unless he was aware that the employer or such superior already knew of the said defect or negligence: Provided, however, That such workman shall not, by reason only of his continuing in the employment of the employer with knowledge of the defect, negligence, act, or omission, which caused his injury, be deemed to have voluntarily incurred the risk of the injury. 55 Vict. chap. 30, § 6; 60 Vict. chap. 14, § 85.

Sec. 7. The amount of compensation recoverable under this act shall not exceed either such sum as may be found to be equivalent to the estimated earnings during the three years preceding the injury, of a person in the same grade, employed during those years in the like employment within this province, or the sum of $1,500, whichever is larger; and such compensation shall not be subject to any deduction or abatement, by reason of any account or in respect of any matter or thing whatsoever, save such as is specially provided for in section 12 of this act. 55 Vict. chap. 30, § 7.

Sec. 8. When in any action under this act compensation is awarded in the case of the death of a workman, for an injury sustained by him in the course of his employment, the amount recovered, after deducting the costs not recovered from the defendant, may, if the court or judge before whom the action is tried otherwise directs, be divided between the wife or husband, parent and child of the deceased in such shares as the court or judge, with or without assessors, as the case may be, or, if the action is tried by a jury, as the jury may determine. 55 Vict. chap. 30, § 8.

Sec. 9. Subject to the provisions of sections 13 and 14, an action for the recovery, under this act, of compensation for an injury, shall not be maintainable against the employer of the workman, unless notice that injury has been sustained is given within twelve weeks and the action is commenced within six months[1] from the occurrence of the accident causing the injury, or in case of death within twelve months from the time of death: Provided, always, That in case of death the want of such notice shall be no bar to the maintenance of such action, if the judge shall be of opinion that there was reasonable excuse for such want of notice. 55 Vict. chap. 30, § 9.

Sec. 10. No contract or agreement made or entered into by a workman shall be a bar or constitute any defense to an action for the recovery under this act of compensation for any injury,

Subs. 1. Unless for such workman entering into or making such contract or agreement there was other consideration than that of his being taken into or continued in the employment of the defendant; nor

Subs. 2. Unless such other consideration was, in the opinion of the court or judge before whom such action is tried, adequate and adequate; nor

Subs. 3. Unless, in the opinion of the court or judge, such contract or agreement, in view of such other consideration, was not, on the part of the workman, improvident, but was just and reasonable; and the burden of proof in respect of such other consideration, and of the same being ample and adequate, as aforesaid, and that the contract was just and reasonable and was not improvident, as aforesaid, shall, in all cases, rest upon the defendant: Provided, always, That, notwithstanding anything in this section contained, no contract or agreement whatsoever, made or entered into by a workman, shall be a bar or constitute any defense to an action for the recovery under this act of compensation for any injury happening

[1] Under the interpretation act (Ont. subs. 15, a "month" means a calendar month.

or caused by reason of any of the matters mentioned in section 5 of this act. 55 Vict. chap. 30, § 10.

Sec. 11. Notwithstanding anything contained in this act, an action under section 3, 4, or 5 shall lie against the legal personal representatives of a deceased employer. 55 Vict. chap. 30, § 11.

Sec. 12. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this act, any penalty or damages, or part of a penalty or damages, which may, in pursuance of any other act, either of the Parliament of Canada or of the legislature of Ontario, have been paid to such workman, representatives, or persons in respect of the same cause of action: and where an action has been brought under this act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this act, and payment has not previously been made of any penalty or damages, or part of a penalty or damages under any such act, either of the said Parliament or of the said legislature, in respect of the same cause of action, such workman, representatives, or persons shall not, so far as the said legislature has power so to enact, be entitled thereafter to receive in respect of the same cause of action, any such penalty or damages, or part of a penalty or damages, under any such last-mentioned act. 55 Vict. chap. 30, § 12.

Sec. 13, subs. 1. Notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

Subs. 2. The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served;

Subs. 3. The notice may also be served by post, by a registered letter addressed to the person on whom it is to be served, at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered;

Subs. 4. Where the employer is a body of persons corporate or unincorporate the notice shall be served by delivering the same at, or by sending it by post in a registered letter addressed to, the office, or, if there be more than one office, any one of the offices of such body;

Subs. 5. The want or insufficiency of the notice required by this section, or by section 9 of this act, shall not be a bar to the maintenance of an action for the recovery of compensation for the injury, if the court or judge before whom such action is tried, or, in case of appeal, if the court hearing the appeal is of opinion that there was reasonable excuse for such want or insufficiency, and that the defendant has not been thereby prejudiced in his defense.

Subs. 6. A notice under this section shall be deemed sufficient if in the form or to the effect following:—

To A. B., of (*here insert employer's address*) or To the Company (*or as the case may be*).

Take notice, that on the day of 18 , C. D., of (*insert address of injured person*) a workman in your employment sustained personal injury (*add*, of

which he died, *if such be the case*), and that such injury was caused by (*state shortly the cause of injury, e. g.*, the fall of a beam).

(Date.)

Yours, etc.,
X. Y.

55 Vict. chap. 30, § 13.

Sec. 14. If the defendant in any action against an employer for compensation for an injury sustained by a workman in the course of his employment intends to rely for a defense on the want of notice or the insufficiency of notice, or on the ground that he was not the employer of the workman injured, he shall, not less than seven days before the hearing of the action, or such other time as may be fixed by the rules regulating the practice of the court in which the action is brought, give notice to the plaintiff of his intention to rely on that defense; and the court may, in its discretion, and upon such terms and conditions as may be just in that behalf, order and allow an adjournment of the case for the purpose of enabling such notice to be given; and, subject to any such terms and conditions, any notice given pursuant to and in compliance with the order in that behalf, shall, as to any such action and for all purposes thereof, be held to be a notice given pursuant to and in conformity with sections 9 and 13 of this act. 55 Vict. chap. 30, § 14.

Sec. 15. In an action brought under this act, the particulars of demand or statement of claim shall state in ordinary language the cause of the injury, and the date at which it was sustained, and the amount of compensation claimed; and where the action is brought by more than one plaintiff, the amount of compensation claimed by each plaintiff; and where the injury of which the plaintiff complains shall have arisen by reason of the negligence, act, or omission of any person in the service of the defendant, the particulars shall give the name and description of such person. 55 Vict. chap. 30, § 15.

Sec. 16. (End of act deals merely with the appointment of assessors to ascertain the proper amount of compensation, and with other details of local practice.)

The Manitoba workmen's compensation act 1893, and that of British Columbia 1801, are couched in virtually the same phraseology as the Ontario statute.

660a. Australian statutes.— The Australian statutes are those specified in the subjoined list. They are not copied verbatim from the original English act, but the changes are of much less importance than those made by the legislature of Ontario, and it will be unnecessary to reproduce any of them in this volume.

New South Wales. Employers' liability act 1886 (50 Vict. No. 8). This, with its amendment as enacted in 1893 (56 Vict. No. 6), was superseded by the present act of 1897 (61 Vict. No. 28).

Victoria. Employers' and employees' act 1890, No. 1087, pt. III. [amended in 1891, No. 1219].

Queensland. Employers' liability act 1886.

South Australia. Employers' liability act 1884, No. 325.

New Zealand. 46 Vict. No. 20.

B. Effect of the statutes as a whole.

661. Generally.—Speaking of the English act, Lord Justice Fry remarked: "The statute is one which has created considerable difficulty in many cases, and I must observe that it appears to me to be a piece of legislation which does not carry into effect any one simple idea, but is, on the contrary, a compromise, so to speak, between two contending schemes of legislation or lines of thought on the subject of the liability of a master to an employee. Every word of it represents the result of a conflict or struggle of thought, and therefore the statute must be considered with great care, having reference to the particular words used in each portion of it."[1]

According to Lord Watson, "the main, although not the sole, object of the act of 1880 was to place masters who do not, upon the same footing of responsibility with those who do, personally superintend their works and workmen, by making them answerable for the negligence of those persons to whom they intrust the duty of superintendence, as if it were their own. In effecting that object the Legislature has found it expedient in many instances to enact what were acknowledged principles of the common law."[2]

The effect of the provision that the injured "employee shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of, nor in the service of, the employer, nor engaged in its work," is simply that, in the cases specified, the defense of common employment with the person through whose negligence the injury was caused is taken away.[3] According

[1] *Whatley* v. *Holloway* (1890) 62 L. T. N. S. 639, 54 J. P. 645.

[2] *Smith* v. *Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392. See also, to same effect, the extract from the opinion of Field, J., in *Griffiths* v. *Dudley* (1882) L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 4 J. P. 711, 47 L. T. N. S. 10, 30 Week. Rep. 797, note 3, *infra*.

[3] *Coffee* v. *New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128. "The scope and operation of the statute is to make the employer answerable in damages for an injury caused by his own negligence, or the negligence of a coemployee of the same or superior grade, in the enumerated classes of cases." *Mobile & O. R. Co.* v. *George* (1891) 94 Ala. 199, 10 So. 145.

"The only effect of the statute is to take away a plea which might exclude an action based upon the common law, in the event of the wrong complained of having been done by a fellow workman." *Morrison* v. *Baird* (1882) 10 Sc. Sess. Cas. 4th series, 271.

"The employers' liability act," observed Field, J., "was passed to obviate the injustice to workmen that employers should escape liability where persons having superintendence and control in the employment were guilty of negligence causing injury to the workmen. The employer was, before the passing of the act, clearly liable where he himself was guilty of negligence. It is also clear now that for the negligence of a fellow workman not coming within any of the classes of persons specified in the act the employer is not liable. But before the passing of the act, *Wilson* v. *Merry* (1868) L. R. 1 H. L. Sc. App.

to circumstances, therefore, the right of an employee to maintain an action under this statute may be greater or may be less than at common law.[4]

Proof that the injury was due to the carelessness of any servant not belonging to the classes specially designated is a bar to the action.[5] And although the negligent servant may belong to one of those classes, it is clear that, under the general principles of the law of agency, the employer cannot be held responsible for his negligence unless the act in question was one which was within the scope of his authority.[6]

662. Modified operation of these acts in the case of servants of municipal corporations.—Although the series of acts now under review inure

Cas. 326, 19 L. T. N. S. 30, had decided that where the injury was caused through the negligence of a superior person in the employment, the workmen could recover no damages from their common employer. The object of the act was to get rid of the inference arising from the fact of common employment with respect to injuries caused by any persons belonging to the specified classes." *Griffiths* v. *Dudley* (1882) L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 47 L. T. N. S. 10, 30 Week. Rep. 797, 4 J. P. 711.

Since these acts confer upon a servant the same rights of action as a stranger, wherever the injury was caused by the negligence of any of the employees for whose delinquencies the employer is required to answer, a master is liable for the wanton, wilful, or intentional misconduct of such an employee. *Southern R. Co.* v. *Moore* (1901) 128 Ala. 434, 29 So. 659; *Louisville & N. R. Co.* v. *York* (1901) 128 Ala. 305, 30 So. 676.

[4] *Coffee* v. *New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128.

See also the language used in *Ashley* v. *Hart* (1888) 147 Mass. 573, 1 L. R. A. 355, 18 N. E. 416.

[5] *Thyng* v. *Fitchburg R. Co.* (1892) 156 Mass. 13, 32 Am. St. Rep. 425, 30 N. E. 169 (brakeman injured by negligence of employees engaged in making up a train, held not entitled to recover).

"The burden of proof in such a case as this is upon the plaintiffs to show that the negligence was that of a fellow workman for whose negligence the employers are made liable by the statute." *Gibbs* v. *Great Western R. Co.* (1884) L. R. 12 Q. B. Div. (C. A.) 208, 32 Week. Rep. 329, per Brett, M. R.

"To entitle plaintiff to recover by virtue of the statute, he must both aver and prove a case coming within one of the enumerated classes of cases." *Mobile & O. R. Co.* v. *George* (1891) 94 Ala. 199, 10 So. 145.

[6] A railroad company is not liable for injuries to an employee engaged in cleaning an engine of which the engineer is at the time in sole charge, by the blowing out of the packing of a valve, due to the act of a hostler who gets upon the engine and opens the throttle for the purpose of moving it. *Louisville & N. R. Co.* v. *Richardson* (1893) 100 Ala. 232, 14 So. 208 (deemed to be the act of a mere trespasser).

The foreman of a contractor is acting within the scope of his duties when he orders the workmen to attend some ten minutes before the regular hours of work to clear the ground of certain obstructions, which the employees of the principal employer are in the habit of leaving over night, and are such that the contract work cannot go forward unless they are removed. *Sweeney* v. *McGilvray* (1886) 14 Sc. Sess. Cas. 4th series, 105.

Where one has served a municipal corporation in the capacity of superintendent of certain work carried on by said city, and the municipal authorities have accepted such service and received the benefit of his skill and labor, the municipal corporation cannot avoid its responsibility for injuries resulting from his negligence in the doing of work within the scope of the service he was rendering, by denying the legality of his appointment. *Sheffield* v. *Harris* (1893) 101 Ala. 564, 14 So. 357.

See also § 674, note 12, *infra*, § 685, note 2, *infra*, § 687, note 1, subd. (b), *ad finem*, *infra*, § 691, note 2, *infra*.

Compare also § 537, *ante*, for the rule applied in common-law actions.

to the benefit of employees of municipal corporations, they do not operate so as to override the familiar principle that "no private action, unless authorized by express statute, can be maintained against a city for a neglect of a public duty imposed on it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage." [1]

663. Employers' liability acts: whether strictly or liberally construed.—(See also § 639, *ante*.) In one of the earlier cases dealing with the English act of 1880, it was considered by Brett, M. R., that, this statute "having been passed for the benefit of workmen," it was the duty of the court "not to construe it strictly as against workmen, but in furtherance of the benefit which it was intended by Parliament should be given to them, and, therefore, as largely as reason enables one, to construe it in their favor and for the furtherance of the object of the act." [1] The same view was expressed a few years later by the same eminent judge, who had in the meantime become Lord Esher, though there was, as he observes in the following passage, a difference of judicial opinion on the subject.[2]

[1] *Pettingell* v. *Chelsea* (1894) 161 Mass. 368, 24 L. R. A. 426, 37 N. E. 380, where the court, on the authority of *Hill* v. *Boston* (1877) 122 Mass. 344, 23 Am. Rep. 332, held that a city is not liable to a lineman on its fire-signal system, for negligence in respect to the condition of a pole which breaks and injures him.

[1] *Gibbs* v. *Great Western R. Co.* (1884) L. R. 12 Q. B. Div. 208, 32 Week. Rep. 329.

[2] "There have always been, I think, two schools of thought in relation to cases of this kind,—that is to say, cases of injury happening to workmen while in the employment of their masters. The view of one school has been that, in order to prevent injustice to masters, the construction of these enactments relating to masters and workmen should be narrowed, and that they should be construed as strictly as possible. The view of the other school is that masters and workmen are not really on an equal footing; that if there is danger in the employment it does not exist with regard to the master, but only in the case of the workman; and the workman is not on an equal footing because he must run the risk or give up his employment. These two schools of thought may easily be traced in the cases on the subject of masters and workmen. When the subject was investigated before a committee of the House of Commons, before the act was passed, conflicting views were presented to the committee, one being that the then existing law of master and servant, with regard to the liabilities of the master, was a just and right law, the other being that the law on the subject had been laid down by the judges on wrong principles and was unfair to the workmen, and that it ought to be altered; and it was upon these conflicting views that this legislation took place. The title of the employers' liability act 1880, itself indicates that it was passed in favor of the workmen. Its object clearly was to alter the law in favor of the workmen and to extend the liabilities of masters. Since the passing of the statute it appears to me that the same conflict of views which existed previously has still been in operation. Some judges have construed the act as narrowly as possible, with a view to preventing what they conceived to be injustice to masters. Other judges have considered that the act, having been passed to extend the liabilities of masters in favor of workmen, ought to be construed liberally in favor of the workmen. I myself have always belonged to the latter school. I think that those who belonged to the former school have approached the enactment with too much timidity, and on the other hand, have been too bold in interfering with

In the United States a theory of construction has been applied which appears to be virtually the same as that which has been adopted by the English judges."

664. Concurrent rights of action under the statutes and at common law.—(Compare § 661, *supra*, and § 730, *infra*.) A servant is not precluded by the provisions of any of these statutes from recovering damages in a common-law action, if the circumstances are such as would have enabled him to maintain an action before it was passed.[1]

the verdicts of juries. I must say I thought it was well settled by the House of Lords that the verdicts of juries ought not to be interfered with, except upon the strongest grounds." *Walsh* v. *Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38.

See also the language used by Wright, J., in *Brannigan* v. *Robinson* [1899] 1 Q. B. 344, 61 L. J. Q. B. N. S. 202, 66 L. T. N. S. 647, 56 J. P. 328.

[2] Thus the supreme court of Alabama has declared that, as the statute of that state is in derogation of the common law, the inference is that its terms clearly import the changes intended, and that their operation will not be enlarged by construction further than may be necessary to effectuate the nearest ends. But it goes on to say: "Notwithstanding, a narrow and restrictive view of the act should not be taken. In its construction the court should consider its objects, have regard to the intentions of the legislature, and take a broad view of its provisions, commensurate with the proposed purposes. The doctrine that prevailed prior to its passage had been carried to an extent which met with disfavor; and the tendency of the legislation has been, in many of the states, to abrogate as to particular corporations, or to modify as to all masters or employers, the rules which had governed their nonliability." *Mobile & B. R. Co.* v. *Holborn* (1887) 84 Ala. 133, 4 So. 146.

Similarly, one of the Federal courts of appeals, in discussing the Ohio act of April 2, 1890 (see chapter XXXVIII., *post*), has remarked that, although it is in derogation of the common law, it is "a remedial statute," and that, as it is of that nature, a servant "is entitled to invoke a construction that will give effect to the intention of the lawmaker." *Hornsby* v. *Eddy* (1893) 5 C. C. A. 560, 12 U. S. App. 404, 56 Fed. 461.

[1] In *Ryalls* v. *Mechanics Mills* (1889) 5 L. R. A. 667, 150 Mass. 190, 22 N. E. 766, Holmes, J., after saying that the court would not undertake to decide, until it was necessary, whether § 1, cl. 1, of the Massachusetts act had not an operation in excluding the defense of implied assumption of risk, when the defect, although manifest, was still properly attributable to the negligence of the master or of a person intrusted by him, nor whether the act would apply to cases in which, under the earlier decisions in that state, negligence in making small repairs, needed from day to day, might still be attributed to a fellow servant, proceeded thus: "If the act does apply to such cases, there is the stronger reason for saying that its only purpose is to extend the common-law liability to the previously excluded cases. And if the object is to make a rule which will reach extremes not touched by the common law, the fact that this is done by a new and broader rule, the terms of which necessarily are wide enough to include the narrower common-law principle, does not show an intention to prejudice rights which the statute was not needed to create. Whether or not an action could be maintained under the statute in a case where there is a common-law remedy, as assumed in a passage which we have quoted concerning the English act, we need not decide. If the facts warrant a recovery at common law, it is not likely that any plaintiff will wish to rely upon the statute, although, when it is uncertain how the facts will turn out, it may be necessary and proper to join a count on the statute with one on the common-law liability."

See also, to the same general [illegible]
Clark v. *Merchants & M. Trans.* (1890) 151 Mass. 352, 24 N. E. [illegible]; *Colorado Mill. & Elevator Co.* v. *Mitchell* (1899) 26 Colo. 284, 58 Pac. 28.

A plaintiff who is required to elect between a common-law and a statutory count, and, as a consequence of electing

This rule of construction is of considerable importance in view of the requirements as to notice, etc., which must be complied with by a servant who wishes to avail himself of the right of action conferred by the statute on which he relies.

665. Liability of infants under the statutes.—So far as the present writer knows, there is no reported case which bears directly or indirectly upon the important question, whether an infant can be made responsible as an "employer" under these acts. Mr. Ruegg (Employers' Liability Act, p. 118) has expressed the opinion that the new responsibilities imposed by the English statute do not extend to an infant. The reason advanced by this learned author is that a suit to recover damages from him for the negligence of one of the agents specified in the act could not be maintained without recognizing the validity of the contract which defines the relations between him and that agent. His conclusion, therefore, is that the case falls within the scope of the general principle that an infant, although he is liable for his torts, cannot be sued for a wrong, where the cause of action is in substance *ex contractu*, or so directly connected with the contract that the action would be an indirect way of enforcing the contract.[1]

There would, however, seem to be good grounds for arguing that an agreement for the hire of another person to assist in carrying on a business belongs to the beneficial class, and is therefore binding upon the infant employer as long as the services continue to be performed.[2] If this be the correct doctrine he must, it would seem, be responsible for the nonperformance of any of the obligations which are either implied as incidents of the contract, irrespective of statute, or which are imposed by the legislature upon all those who enter into the contract.

C. Liability for defects in the ways, etc.

English act of 1880, § 1, subs. 1, § 2, subs. 1.
Alabama act: Code, § 2590, subs. 1.
Massachusetts act of 1887, § 1, subs. 1.

to stand on the latter, is nonsuited, cannot have the nonsuit set aside on the ground that he was prejudiced by being required to make such election, where the evidence shows that in a common-law action the defenses of common employment and assumption of risks would both have been open to the master. *May v. Whittier Mach. Co.* (1891) 154 Mass. 29, 27 N. E. 768.

A policy by which an assurance company agrees to indemnify an employer for "all sums which such employer shall become liable for, under or by virtue of the employers' liability act of 1880," does not render it liable for damages recovered in a common-law action, even though the circumstances were such that the employer might have been held liable under the act also. *Morrison v. Scottish Employers' Co.* (1888) 16 Sc. Sess. Cas. 4th series, 212.

[1] See Pollock, Torts, p. *74.

[2] See Pollock, Contr. p. *66.

Colorado act of 1893, § 1, subs. 1.

Indiana act: Rev Stat. 1894, § 7083, subs. 1.

Ontario act: Rev. Stat. 1897, § 3, subs. 1, § 6, subs. 1.

666. Effect of the statutory provisions as to defects; generally.— The effect of these provisions, as a whole, is to give, under the circumstances specified, a statutory sanction to a doctrine which, so far as the common law is concerned, has been greatly restricted in England and the English Colonies by the well-known case of *Wilson* v. *Merry*,[1] but which has been fully developed and is applied in all the American states—the doctrine, namely, that the master is absolutely responsible for the proper discharge of certain duties, whether he undertakes to perform them in person, or employs an agent to perform them in his stead. See chapter XXXI., *ante*. In other words, the injured servant is given a right to recover damages in the cases enumerated, although the abnormal conditions which caused his injury may have been created or suffered to continue through the negligence of a fellow servant.[2] Hence, in order to establish the allegations of a complaint framed on the theory that the master is liable under this section, it is not necessary to show that he was himself negligent.[3]

So far as regards the character of the actual physical conditions which warrant the inference of culpability on the part of the immediate actor, whether he be the master himself or an employee, the evidential prerequisites to establishing a right to indemnity are essentially the same under the statutes as at common law. See §§ 670–673, *infra*.

667. Master not liable unless defect alleged was the proximate cause of the injury.— Under the general principles of the law of negligence (see § 804, *post*), as well as by the express terms of the statutes, the injured servant cannot maintain an action unless he shows that the defect alleged was the proximate cause of his injury.[1] Thus, he cannot recover if his injuries are due to an occurrence which was a mere accident,[2] nor if the negligence of a fellow-servant in the use of the de-

[1] (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30. As to the precise effect of this decision, see §§ 529, 531, 568, 569, *ante*.

[2] See the remarks of the court in *Ashley* v. *Hart* (1888) 147 Mass. 573, 1 L. R. A. 355, 18 N. E. 416.

[3] *Lynch* v. *Allyn* (1893) 160 Mass. 248, 35 N. E. 550. There the action was for personal injuries occasioned to the plaintiff by the falling upon him of a bank of earth, which he was engaged in undermining by direction of the defendant's superintendent. Held, that the defendant was not entitled to a ruling that "the plaintiff cannot recover under the second count of his declaration, as there was no evidence that there was any negligence on the part of the defendant."

[1] *Southern R. Co.* v. *Guyton* (1898) 122 Ala. 231, 25 So. 34.

[2] *McManus* v. *Hay* (1882) 9 Sc. Sess. Cas. 4th series, 125.

A freight brakeman cannot recover for personal injuries alleged to have

fective appliance was the actual, efficient cause of the injury,[3] nor if the defect in question would not have caused any injury, if he had not himself been guilty of negligence in dealing with the defective appliance.[4]

But proof that a defect for the existence of which the master was responsible was the sole proximate cause of the injury is not a condition precedent to recovery. It is only requisite to show that it was one of the efficient causes.[5]

668. What instrumentalities are covered by the terms "ways," etc.—The words used to designate the instrumentalities for the defects of which the master is made responsible are not precisely the same in the statutes now under discussion. In all of them the terms "ways, works, and machinery" are found. But the expression "plant," which occurs in the English act, as well as in those of the various British colonies and of Alabama, is omitted in the statutes of Massachusetts and Colorado. The list of instrumentalities enumerated in the English act is enlarged in the Ontario act by the addition of the words "buildings and premises," and in the Indiana act by the addition of the word "tools." That these variations of phraseology imply corresponding differences in the total extent of the master's liability cannot be affirmed in view of the decisions as they stand, though possibly some case may hereafter arise in which they may be found material.

a. Two or more descriptive terms used in combination.—In the cases where the court in affirming or denying the defendant's liability has coupled together two or more of the instrumentalities specified in the statute under review, it is impossible to say with certainty to which

been caused by defects in a brake which he was trying to let loose, causing the brake to stick or be retarded in its revolutions, and throwing him from the top of a box car, in the absence of proof that the brake was defective, or that his falling was not due to his slipping or to some other cause wholly unconnected with any defect of the brake. *Louisville & N. R. Co.* v. *Binion* (1893) 98 Ala. 570, 14 So. 619.

In *Hamilton* v. *Grocsbeck* (1891) 18 Ont. App. 437, Affirming (1889) 19 Ont. Rep. 76, the court of appeal held the action not maintainable for the reason that the proximate cause of the injury was not the unguarded condition of the saw by which the plaintiff was hurt, but the fact that he tripped over a pile of staves.

[3] The fact that a defect existed and that the plaintiff had to be assigned to the work of remedying it is not the proximate cause of an injury received by him in consequence of a fellow servant negligently setting machinery in motion while plaintiff is engaged in the work. *Mackay* v. *Watson* (1897) 24 Sc. Sess. Cas. 4th series, 383.

[4] A defect in the machinery is not the cause of an injury received by a workman in consequence of his using it in an unsafe manner, when he knew how to use it with safety to himself. *Warton* v. *Connah's Quay Alkali Co.* (1885) 33 Week. Rep. 216, where the plaintiff knew that a car brake was bent and did not see that it was in its proper position before signaling to the engineer to move the car. See also *Mulligan* v. *M'Alpine* (1888) 15 Sc. Sess. Cas. 4th series, 780, as stated in § 673, note 4, *infra*.

[5] A plaintiff is entitled to retain a verdict in his favor where the jury find that the injury was caused by a defect

designation it was intended to refer the instrumentality which caused the injury.[1]

b. "Ways."—In its ordinary sense this term may be regarded as embracing any part of the master's premises over which the servants pass, on foot or otherwise, from one point to another.[2] To constitute a "way" within the purview of the act, it is not necessary that it should be marked out by metes and bounds or by habitual user.[3]

in the plant, and also by the negligence of a fellow servant. *Bean* v. *Harper* (1892) 18 Vict. L. Rep. (L.) 388. For common law cases to the same effect, see §§ 815, 816, *post*.

[1] A defect in the "ways, works, machinery, or plant," enumerated in the Alabama statute, has been held to exist where the supply pipe of a water tank extended over a railroad track so as to knock a brakeman off the top of a freight car. *East Tennessee, V. & G. R. Co.* v. *Thompson* (1891) 94 Ala. 636, 10 So. 280.

In an Alabama case it has been held that a rope used for lowering timber in the construction of a trestle along a railroad track, by means of which heavy timbers are put into their places, is in no sense a part of the ways, works, machinery, or plant of a railroad company. *Southern R. Co.* v. *Moore* (1901) 128 Ala. 434, 29 So. 659. The court seems to have assumed that the authority of the two cases cited in subs. *d, infra*, declaring such an appliance not to be "machinery," was conclusive against the right of the servant to maintain the action. But there is no apparent reason why the rope in question should not be regarded as a part of the "plant."

The shorter formula "ways, works, and machinery," which occurs in the Massachusetts statute, has been construed in several cases. It includes a truck used by a railroad company as a part of the appliances of the repair shop, consisting of axles, wheels, and a frame, all fastened together and fitted to the tracks. *Gunn* v. *New York, N. H. & H. R. Co.* (1898) 171 Mass. 417, 50 N. E. 1031.

A temporary staging erected by the side of a woodpile, to enable the workmen to place wood thereon and pile it higher, and which is taken down and put up from time to time in different places, and intended to be used from four days to a week at a time in each place, is a part of the owner's ways, works, and machinery while in use at a particular place. *Premlible* v. *Connecticut River Mfg. Co.* (1893) 160 Mass. 131, 35 N. E. 675 (held to be competent for the jury to find this).

A temporary derrick at a stone yard, erected to move stones from cars to where stonecutters, who had nothing to do with setting it up, could use them, is a part of the "ways, works, and machinery" connected with the yard. *McMahon* v. *McHale* (1899) 174 Mass. 320, 54 N. E. 854 (considered to be a part of the fitting of the stone yard rather than an appliance to be put together and set up and moved from place to place by the workmen who were using it. See § 676, *infra*).

Loaded freight cars received from other lines form a part of the "works and machinery" of the receiving company. *Bowers* v. *Connecticut River R. Co.* (1894) 162 Mass. 312, 38 N. E. 508.

[2] "The course which a workman would in ordinary circumstances take in order to go from one part of a shop where a part of the business is done, to another part where business is done, when the business of the employer requires him to do so, must be regarded as a 'way.'" *Willetts* v. *Watt* (C. A.) [1892] 2 Q. B. 92, 61 L. J. Q. B. N. S. 540, per Lord Esher. Compare the statement that the word applies to such places as a workman or servant is called upon to pass over in the performance of his duty. *Caldwell* v. *Mills* (1893) 24 Ont. Rep. 462, holding that a plank put down to serve as a fulcrum for a lever, if it is placed in such a position that servants have to pass over it in the course of their duties, is a "way." For specific instances of "defects" in what were conceded to be "ways," see § 671, subd. (a), *infra*.

This word does not cover a pile of boards. *Campbell* v. *Dearborn* (1900) 175 Mass. 183, 55 N. E. 1042.

[3] In *Willetts* v. *Watt* (C. A.) [1892] 2 Q. B. Div. 92, 61 L. J. Q. B. N. S. 540, Fry, L. J., said (p. 99): "In de

In a more technical sense the term signifies a path or track, which is specially constructed for the purpose of drawing or propelling with greater facility certain kinds of appliances which are used, and certain kinds of substances or manufactured articles which are handled, by the servants in the course of their work.[4]

The "ways" with which the cases deal are usually horizontal or sloping. But presumably the term also covers such instrumentalities as the vertical shaft of a mine or of an elevator.[5]

c. "*Works.*"—In one well-known case this word seems to be regarded as connotative of the same idea as "system."[6] For other cases indicative of its significance, see § 669, subds. *b*, *c*, *infra*.

d. "*Machinery.*"—The term "machine" has been defined as "every mechanical device or combination of mechanical powers and devices to perform some function, and produce a certain effect or result."[7] Nor

terminlng what is a 'way,' we should, I think, look to the fact that workmen have to go through places where sometimes there is an open space, while at other times what was an open space is covered with stores or other things used in the business. We should consider, further, the case of an open yard, where the whole or only a small part might be used at any time, according as there were a great many or only a few workmen going through it. I think that these and other considerations show that we should answer in the negative the question whether metes and bounds are necessary to a 'way' under the statute. There are many ways which persons have a right to use that are not defined by any physical boundary, and to hold that such a boundary is necessary would be to withdraw from the protection given by the statute a large number of places used by workmen in which the mischief at which the statute was aimed might arise. For the purpose of this case, I should say that wherever there is a large space connected with or used in the business of the employer, over which the workmen pass in the course of their employment, when that space is for the time being vacant, and is so used, it is a 'way' within the meaning of the statute."

[4] The most familiar instance of such a way is a railway track. See *Kansas City M. & B. R. Co.* v. *Burton* (1893) 97 Ala. 240, 12 So. 88; *Louisville & N. R. Co.* v. *Bouldin* (1895) 110 Ala. 185, 20 So. 325; *McQuade* v. *Dixon* (1887) 14 Sc. Sess. Cas. 4th series, 1039.

A roadway of iron plates, along which loads are conveyed in a car, was held to be a way in *McGiffin* v. *Palmers Shipbuilding & Iron Co.* (1882) L. R. 10 Q. B. Div. 5, 52 L. J. Q. B. N. S. 25, 47 L. T. N. S. 346, 31 Week. Rep. 118, 47 J. P. 70. Doubtless the term would also be held to include the ways in a shipbuilding yard or the skids used for the transfer of heavy articles, such as logs, barrels, etc., or the posts between which the hammer of a pile-driver moves up and down.

[5] In *Pegram* v. *Dixon* (1886) 55 L. J. Q. B. N. S. 447, 54 J. P. 198, it was apparently assumed that a lift-well in a building under construction becomes a "way" when workmen place ladders in it for the purpose of obtaining access to the upper floors.

[6] *Smith* v. *Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 167, 55 J. P. 660, 40 Week. Rep. 392. There Lord Watson, in commenting on the finding of the jury that the manner in which the apparatus in question was used betokened negligence, first referred to the method adopted as being a "defective system" (p. 353), and in a later passage of his opinion (p. 354) remarked that the evidence brought the case within the operation of the rule that a dangerous arrangement of machinery and tackle constitutes a "defect" in the condition of the works.

[7] *Corning* v. *Burden* (1853) 15 How. 267, 14 L. ed. 690 (patent case).

Such a definition obviously excludes such an appliance as a hammer, disconnected from other mechanical appliances and operated only by muscular strength. *Georgia P. R. Co.* v. *Brooks* (1887) 84

does this word include a steel bar used to align the track on a railway bridge.[8]

For specific examples of appliances viewed as "machinery," the point actually involved being whether there was a "defect," see § 671, subd. b, *infra*.

c. "Plant."—(See also under § 669, *infra*.) This term includes "whatever apparatus is used by a business man for carrying on his business—not his stock in trade which he buys or makes for sale, but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business."[9] For examples of defective instrumentalities assumed to come within this definition, see § 671, subd. d, *infra*.

669. Significance of the qualifying phrase, "connected with or used in the business of" the employer.—*a. Instrumentalities temporarily used by the defendant's servants in the transaction of his business.*—The mere fact that the defendant did not own the defective instrumentality which caused the injury will not protect him if, as a matter of fact, it was being used in his business at the time of the accident.[1] Whether there was such use within the meaning of the statutes is determined with reference to various considerations.

Ala. 138, 4 So. 239 (scale flying from an iron rail when struck by a hammer wielded by a fellow servant injured plaintiff). It would seem that, if the rail was in such a condition as to render such an accident probable, the defendant should have been held liable as for a defect in the "plant" or in the "works."

[8] *Clements* v. *Alabama G. S. R. Co.* (1900) 127 Ala. 166, 28 So. 643. The reason assigned was that the bar was "disconnected from any other mechanical appliances, and operated by muscular strength directly applied." Apparently the action might have been maintained both in this case and the other Alabama decision cited in note 7, *supra*, if the pleader had alleged the existence of defects in the "plant."

[9] *Yarmouth* v. *France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, per Lord Esher, who thus disposed of the contention that a horse was not a part of the "plant:" "It is suggested that nothing that is animate can be plant; that is, that living creatures can in no sense be considered plant. Why not? In many businesses, horses and carts, wagons, or drays, seem to me to form the most material part of the plant. They are the materials or instruments which the employer must use for the purpose of carrying on his business, and without which he could not carry it on at all. The principal part of the business of a wharfinger is conveying goods from the wharf to the houses or shops or warehouses of the consignees; and for this purpose he must use horses and carts or wagons. They are all necessary for carrying on of the business. It cannot for a moment be contended that the carts and wagons are not 'plant.' Can it be said that the horses, without which the carts and wagons would be useless, are not?"

To same effect, see *Haston* v. *Edinburgh Tramway Co.* (1887) 14 Sc. Sess. Cas. 4th series, 621; *Fraser* v. *Hood* (1897) 15 Sc. Sess. Cas. 4th series, 178.

[1] *Coffee* v. *New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128; *Engel* v. *New York, P. & B. R. Co.* (1893) 160 Mass. 260, 22 L. R. A. 283, 35 N. E. 547; *Louisville & N. R. Co.* v. *Davis* (1899) 91 Ala. 487, 8 So. 552; *Trask* v. *Old Colony R. Co.* (1892) 156 Mass. 298, 31 N. E. 6.

In some cases the essential question is whether or not he himself or his agent had, at the time when the injury was received, adopted the instrumentality as a part of the plant by means of which the plaintiff was expected to perform his duties. If such adoption is shown, he is considered to have assumed, as regards this temporary addition to his plant, a liability which, it would seem, is of precisely the same character and extent as that to which he is subject as regards his own property.[2] Manifestly, no adoption within the meaning of this doctrine can be inferred, where the plaintiff or his fellow workmen took and made use of the defective instrumentality without any authority, either express or implied, from the employer himself or his agent. Under such circumstances no liability can be predicated from the fact that there was a defect, and that a proper inspection would have disclosed it.[3]

The rationale of other decisions is that the words of the provision now under discussion imply that "the defect must be one which the employer has a right to remedy if he does discover it, and of a kind which it is possible to charge a servant with the duty of setting right."[4] A corollary of this doctrine is that, unless there is something

[2] Lack of ventilation of the hold of a vessel belonging to a navigation company, in which coal is shipped by contractors to supply coal to a railway at another port where such contractors have to unload the coal, in consequence of which one of their employees is injured by an explosion of gas accumulating in the hold, is a defect in the plant of such contractors. *Carter* v. *Clarke* (1898) 78 L. T. N. S. 76.

It has been laid down, without qualification, that a defect in a cart hired temporarily to carry a load is not a defect in the plant. *Allmarch* v. *Walker* (1885; Q. B. D.) 78 L. T. Journ. 391. But this ruling seems to be inconsistent with the one last cited, and to be unjustifiable on general principles. The report is so meager that it is impossible to say precisely what the standpoint of the court may have been.

[3] A verdict for the plaintiff has been set aside where the injury was caused by the giving way of a ladder which the workmen themselves had taken and used simply because they found it lying on the premises where they were sent to work, and which had not been borrowed, so as to become a part of the plant, by any person having authority to make it a part of such plant. *Jones* v. *Burford* (1884; Q. B. D.) 1 Times L. R. 137.

A complaint of which the gravamen is that the plant was defective is not sustained by evidence showing that the plaintiff, a painter in the employ of a firm of contractors doing work on a government building, asked his foreman for a ladder; that, being referred by the foreman to the government official in charge of the work, he was told he might have a ladder belonging to the government; and that the ladder which he thus obtained leave to use was so defective that it broke under him. *Perry* v. *Brass* (1889; Q. B. D.) . Times L. R. 253. The court relied mainly on the fact that the ladder did not belong to the defendants, but Denman, J., also laid stress on the fact that their foreman knew nothing about it. The correctness of this decision under the particular facts in evidence seems somewhat dubious, as it may fairly be argued that the permission of a foreman to use whatever appliance a designated person may supply should have the effect of making the appliance actually selected a part of the plant.

[4] *Engel* v. *New York, P. & B. R. Co.* (1893) 160 Mass. 260, 22 L. R. A. 283, 35 N. E. 547, holding that a railroad track owned, maintained, and repaired by a manufacturing company, and used by a railroad company only under a

to put him on inquiry, a master is not under any active duty of inspection with regard to an instrumentality not under his control.[5]

license or invitation to deliver freight under a contract, is not a part of the railroad company's "ways." In delivering the opinion of the majority of the court, Holmes, J., said: "We think that neither the language of the statute nor good sense would permit us to hold an employer liable under the act for defects which he cannot help, in a place out of his control, to which his employees once in a while may be called for a few minutes."

A railroad company that only goes upon the track of another under a license to take cars therefrom, and which has no control over it, is not liable for an injury to an employee caused by its defective character. *Trask* v. *Old Colony R. Co.* (1892) 156 Mass. 298, 31 N. E. 6.

An employee of a gas company hired to remove gas pipe from a trench dug by authority of the city has no right to expect his employer to shore the sides of the trench or make it safer than it was, for he must be taken to know that his employer had no control over it. *Hughes* v. *Malden & M. Gaslight Co.* (1897) 168 Mass. 395, 47 N. E. 125.

The location of the tracks of a street car company being determined by the municipal authorities, it cannot be charged with failure to provide a safe place for its conductor, for the reason that there is a tree close to the side of the car, unless it is shown that the company had a right to remove the tree. *Hall* v. *Wakefield & S. Street R. Co.* (1901) 178 Mass. 98, 59 N. E. 668.

The want of a fence at the top of a declivity at one side of a public street used by the employer as an approach to his place of business is not a defect for which he can be held liable. *Stride* v. *Diamond Glass Co.* (1895) 26 Ont. Rep. 270 (Following *Engel* v. *New York, P. & B. R. Co.* [1893] 160 Mass. 260, 22 L. R. A. 283, 35 N. E. 547). Discussing the question whether the defective condition of a public street which was used by the employer in connection with his business was a defect in a "way used in the business," within the meaning of the Ontario employers' liability act, § 3, subs. 1, Boyd, C., said: "Light is thrown upon the scope of these words by § 6, subs. 1, which provides that the workman shall not be able to recover unless the defect arose from, or had not been remedied owing to the negligence of, the employer. That means some defect on his premises, or on a place over which he had control, that could be made right by the employer. Such is not the case in regard to a public street upon which the employer had no right to construct a fence or barrier as is here suggested. One part of the street is higher than the other, but it is the business of the corporation of the city to deal with the alleged defect in the interests of the public, or be exposed to action by injured persons."

A coal master is not liable to a servant for injuries caused by defects in wagons sent by a railway company to be loaded with coal for carriage, and left at the pit in charge of his servants. Such wagons are not a part of the coal master's plant, and even if they are, he is not, under such circumstances, under the duty of inspecting them before allowing the servants to use them. *Robinson* v. *Watson* (1892) 20 Sc. Sess. Cas. 4th series 144.

An auctioneer selling goods on the premises of a stranger is not responsible to his servants for the sufficiency of the appliances for bringing forward and removing the goods which are to be sold. *Nelson* v. *Scott* (1892) 19 Sc. Sess. Cas. 4th series, 425.

[5] The failure of a gas company to ask how long a trench dug by the city has been dug, and to tell its employee the length of time, before sending such employee into same to remove gas pipe therefrom, does not render it liable for an injury the employee caused by the caving-in the trench. *Hughes* v. *Malden & M. Gaslight Co.* (1897) 168 Mass. 395, 47 N. E. 125. "He," said the court, "had a right to expect that, if the defendant knew of any danger which the plaintiff did not know and ought not to be assumed to know, it would inform him. But no such knowledge on the part of the defendant was shown. It does not appear to have known anything except what was visible to the eye, or to have been able or bound to infer from what was visible anything which the plaintiff with his experience was not equally able to infer. What more could it have done? There is no reason to suppose that inspection would have disclosed anything beyond the visi

The cases involving the liability of a railway company for defects in a car received from another road have been made to turn upon the question whether they were loaded or empty. Loaded cars, it is said, form a part of the works and machinery of the receiving company, inasmuch as it is not bound to use them in its train if, on inspection, they are found to be unsafe.[6] But an isolated empty car on its way to be returned to its owner is a part of the ways, works, or machinery connected with or used in the business of a railroad company which received it loaded.[7] It is, however, not apparent why the right of rejection which undoubtedly exists in this instance as well as in the former should not create a similar obligation. The distinction taken and its rationale are, it is submitted, unsatisfactory. In Massachusetts it is no longer of importance since § 1 of the act was amended, as shown in § 656, *supra*.

In one case the principle is applied that a "defect" within the meaning of these statutes exists, where the physical conditions resulting from a use to which the servant's employer permits a stranger to put his premises are of such a nature that negligence would have been a warrantable inference if they had been created by the act of the employer himself or his agent.[8]

ble facts, and therefore it is not necessary to consider whether the duty of inspection existing with regard to cars received from connecting lines to be forwarded on a railroad would be held to exist in such a case as this."

In the absence of any allegation of particular circumstances which would impose the duty of inspecting the fittings of a ship in which a stevedore or other person has contracted to do work, defendant's servant cannot maintain an action against him for an injury caused by defects in these fittings. *Simpson* v. *Paton* (1896) 23 Sc. Sess. Cas. 4th series, 590.

In *McLachlan* v. *S. S. Pevcrel Co* (1896) 23 Sc. Sess. Cas. 4th series, 753, a complaint based on existence of duty to inspect was held to be demurrable. Lord Young dissented on the ground that the stevedore was not wholly exempt from the duty of supervision, and declined to assent to the proposition that there would be no liability if things are wrong, and by proper supervision without requiring anything out of the way on his part, he would have discovered that they were in that condition. See also *Robinson* v. *Watson* (1892) 20 Sc. Sess. Cas. 4th series, 144, as stated in note 4, *supra*.

[6] *Bowers* v. *Connecticut River R. Co* (1894) 162 Mass. 312, 38 N. E. 508 settling this point, which was left undecided in the next case cited.

[7] In *Coffee* v. *New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128, the court said: "By the terms 'ways, works, or machinery connected with or used in the business of the employer,' we understand something in the place, or means, appliances, or instrumentalities provided by the employer for doing or carrying on the work which is to be done. The use of other words may not make the meaning clearer, but it would seem that there must be a defect in something which can in some sense be said to be provided by the employer."

[8] *New York, N. H. & H. R. Co.* v. *O'Leary* (1899) 35 C. C. A. 562, 93 Fed. 737, where a railway company which permitted a guy to be stretched by a third person across its tracks, at a point where the volume of business required great diligence and care as to the condition of the track, was held liable for an injury to an employee, caused by failure to see that the guy was placed at a particular height to avoid such injury. (The statute construed was that of Massachusetts.)

As the decisions holding a master not to be liable for an injury due to a defect in an instrumentality belonging to another person may be regarded as being in their essence merely declarations that the wrong party was being sued, there would, at first sight, seem to be no serious practical objection to such an application of the general principle that responsibility is a juridical incident of the power of control, and does not exist apart from such power. But the extremely nebulous condition of the law defining the nature and extent of a stranger's liability to the servants of one with whom he has business relations, involving the use of, or contact with, his property,[9] renders it wholly unwarrantable to assume that, in all the cases in which the defendant will be absolved for the reason that he had no control over the defective instrumentality, the plaintiff will be able to maintain an action against the actual owner of that instrumentality. It is manifest, therefore, that the employment of this test to determine the applicability of these statutes will sometimes result in leaving the injured servant entirely remediless. Under these circumstances, the doctrine that the possession or nonpossession of the power of control is the main differentiating factor in cases in which the existence or absence of authority to use the defective instrumentality is not involved, as one of the determinant elements, deserves to be somewhat closely scrutinized.

It is submitted that the clause in question may, upon a perfectly reasonable construction, be made to comprehend instrumentalities over which the employer has no control. The opposite contention would doubtless be irresistible if the failure to "remedy" defects were mentioned as the sole ground of liability. But the declaration of an alternative liability for the negligent failure to "discover" defects seems to be hardly susceptible of any other interpretation than that it was intended to extend the employer's responsibility beyond the cases in which the right to apply a remedy may be predicated. Such a declaration may fairly be regarded as a recognition of the principle that the application of a remedy is neither the only duty which the law implies, nor the only method by which the master can free himself from the imputation of negligence. On the one hand, where it is in his power to apply a remedy to the defect thus actually or constructively known to him, it may conceivably be, and in fact frequently is, his duty to warn his servants as to the existence of the defect, or to discontinue the use of the defective instrumentality until it has been restored to a safe condition. On the other hand, where it is not in his power to apply a

[9] See the article contributed by the present writer to the Law Quarterly Review (vol. XVI., pp. 168 *et seq.*), and the Canada Law Journal (vol. XXXVI., pp. 178 *et seq.*), and his note published in 46 L. R. A. pp. 33 *et seq.*

remedy, the duties of warning or discontinuance become imperative, and by performing them he fully discharges his obligations to his servants. It is clear, therefore, that there are certain obligations to which he may be subject in respect to instrumentalities which are out of his control, and that the negligence which consists in the failure to discover a defect cannot be dissociated from the negligence which consists in the breach of those obligations, for the reason that they arise as soon as the defect is known, and that it is presumed to be known wherever it would have been known if due care had been exercised. It is submitted, therefore, that the balance of probability is in favor of the inference that the Legislature intended to create a responsibility for injuries due to instrumentalities not controlled by the master, provided they are "connected with his business," and that, upon the true construction of the statute, the absence of the power of control merely affects the extent of that responsibility.[10]

The Ontario case in which the master was held not to be liable under the statute for the want of a fence on a public street which was used

[10] Some of the unsatisfactory consequences of the doctrine that the statute does not apply to cases where there is no power of control are pointed out in the dissenting opinion of Knowlton, J., in *Engel* v. *New York, P. & B. R. Co.* (1893) 160 Mass. 260, 22 L. R. A. 283, 35 N. E. 547: "The employee finds a track of this kind, used like other side tracks belonging to the corporation, adapted to the convenient transaction of its freighting business. Ordinarily he has no means of knowing whether the track is owned and maintained by the railroad corporation or by the manufacturer whose freight is brought over it. All he can see or know is that it is connected with and used in the business of the corporation in delivering freight. Whether an additional price is paid for the transportation of its cars or of the cars of other railroads over that track, he does not know, nor is it important for him to know. It is a place specially fitted for the work of his employer, on which his employer sets him at work, and in which the employer presumably has rights for the time being. It ought to make no difference under the statute how the employer procures the ways, works, or machinery connected with and used in his business, or by what kind of title he holds them. So long as they are connected with his business and used in it, it is his duty to have them safe, so that his employees may not be unnecessarily exposed to danger. If another owns and furnishes them, and agrees to keep them safe, it is his duty, as between him and his employee, to see that the owner properly does what he agrees to do. It is a general rule of the common law that a railroad corporation is liable for an injury to a passenger, or for loss of freight arising from a defect in a track of another corporation over which it runs its cars, as if it owned the track. As between the two corporations, the only duty to maintain the track in repair under their contract may be upon the owner of the road: but as between the first mentioned corporation and a passenger or owner of freight, it is the duty of the carrier to have the track safe, whether it owns it or hires it. . . . The duty of a railroad corporation to furnish for its employees safe tracks, cars, locomotive engines, and other machinery, tools, and appliances with which its business is to be carried on, is similar in kind to its duty to passengers in these respects, although the degree of care required is less. In either case, its duty is the same when the tracks, cars, and engines are hired, or used under a license from others as when they are owned by the employer. . . . The doctrine contended for by the defendant, as I understand it, comes to this,—if a manufacturer, instead of owning the ways, works, and machinery necessary

as an approach to the master's place of business[11] seems to have been improperly referred to the analogy of the other cases cited in this section. The true ground upon which a servant is precluded from maintaining an action against his master under the circumstances there in evidence is that which was alluded to in the opinion, *viz.*, so far as regards his right of recovery for injuries which are due simply to the manner in which streets are laid out, graded, and protected, he is in the same position as any other member of the public. His remedy, if any, must be sought from the municipal body which is responsible for the creation and continuance of those conditions.

b. Structures, etc., in course of erection or demolition.—According to the most recent of the English authorities, these statutes should be so construed as to enable a servant of a contractor to recover for injuries due to the abnormally dangerous conditions of the building itself which is in course of erection or demolition by that contractor himself. The broad principle relied upon was that premises which are in the possession of a person for the purposes of his business are to be regarded as the "works" of such person so long as he is carrying on his business there.[12] The contention that the case of *Howe* v. *Finch* (see following subsection) was a controlling precedent against the plaintiff was easily disposed of on the ground that the employer who was sued there was the owner, not the builder of the premises. But, singularly enough, no reference was made to the cases cited in

to be used in his business, arranges with another person who owns a manufacturing establishment to furnish it for his use and to keep it constantly in good condition, and if one of his employees is instantly killed by a defect negligently suffered to be in the ways, works, or machinery which he is using under this arrangement, he will not be liable under the statute, because the ways, works, and machinery are not his. The owner will not be liable under the statute for he is a stranger to the manufacturing business carried on there, and the person killed is not his employee. Neither the employer nor the owner of the establishment will be liable at the common law, for the common law permits no recovery for a death resulting from negligence. The widow and children of the deceased employee will therefore be left remediless. It seems to me that such a construction of the statute tends to defeat the purpose of the legislature."

[11] See note 4, *supra*.

[12] *Brannigan* v. *Robinson* [1892] 1 Q. B. 344, 61 L. J. Q. B. N. S. 202, 66 L. T. N. S. 647, 56 J. P. 328 (house was being pulled down). The doctrine of this case is in harmony with two other English decisions, though this particular point was not directly raised. In *Moore* v. *Gimson* (1889) 58 L. J. Q. B. N. S. 169, an insecure wall left standing on premises where there had been a fire seems to be regarded as a part of the works of a party who took a contract for the reinstatement of the building destroyed. The case was decided against the plaintiff on the ground that there was no knowledge, actual or constructive, of the conditions. Compare *Booker* v. *Higgs* (1887) 3 Times L. R. 618, where a wall fell on the servant of a person who, as incident to certain work on the premises, was making a hole through it.

It has been held in Ontario that a railway used by contractors engaged in constructing an extension of the line is a part of their plant while the work is going on. *Rombough* v. *Balch* (1900) 27 Ont. App. Rep. 32.

the subjoined note, which are not distinguishable on this ground, and are directly opposed to the conclusion arrived at. The conflict of authority thus disclosed can now be adjusted in England only by a decision of the court of appeal.[13]

In Massachusetts the servant's right to maintain an action under such circumstances has been uniformly denied.[14]

c. Instrumentalities not yet brought into use, or disused.—The

[13] In one case it was held that no action lay for an injury caused by the negligence of a coservant in throwing rubbish down a lift-well of a building under construction, through which, by means of ladders, the workmen were obliged to get access to the upper floors, this result not being affected by the fact that the master had not taken precautions to prevent such accident by warning the workmen to cease throwing things down, when it became necessary to use the well as a passage for the workmen. *Pegram* v. *Dixon* (1886) 55 L. J. Q. B. N. S. 447, 51 J. P. 198, Reversing 2 Times L. R. 603.

In another, a contractor was held not to be liable for maintaining an unusually large well-hole in the staircase of a building under construction, through which a brick fell on the plaintiff from an upper story. *Conway* v. *Clemence* (1885; Q. B. D.) 2 Times L. R. 80.

In another, a contractor for the brickwork of an unfinished house was held not liable for injuries caused by the collapse of a staircase erected shortly before by another contractor as the permanent staircase of the house, as he was entitled to rely on the sufficiency of the structure without examination. *McInulty* v. *Primrose* (1897) 24 Sc. Sess. Cas. 4th series, 442.

[14] It is held that contractors by setting a servant to work on the premises of a third person where there are movable steps leading into a cellar, going down which the servant was injured, cannot be said to adopt the steps as a way used in their business. *Regan* v. *Donoran* (1893) 159 Mass. 1, 33 N. E. 702 (injury was caused by the steps falling).

A servant of a contractor engaged in grading the land of a third person cannot recover on the theory that the liability of a bank of earth to fall, when undermined, unless it is properly shored up, is a "defect" within the statute, the descriptive words being applicable to "ways, etc., of a permanent character, such as are connected with or used in an employer's business." *Lynch* v. *Allyn* (1893) 160 Mass. 248, 35 N. E. 550.

A building in process of construction is not "ways, works, or machinery connected with or used in the business" of a subcontractor helping to build it, so as to render a hole cut in the floor by another subcontractor a defect in "ways, works, and machinery." *Beique* v. *Hosmer* (1897) 169 Mass. 541, 48 N. E. 338.

A plumber is not liable to an employee injured by the fall of ladders and stagings leading from one floor to another of a building in process of construction, where he neither constructed, managed, nor controlled such ladders and stagings. *Adey* v. *Tucker* (1901) 179 Mass. 190, 60 N. E. 484.

In *Lynch* v. *Allyn* (1893) 160 Mass. 248, 35 N. E. 550, the court remarked that there is a conflict between *Brannigan* v. *Robinson* [1892] 1 Q. B. 344, 61 L. J. Q. B. N. S. 202, 66 L. T. N. S. 647, 56 J. P. 328, and *Howe* v. *Finch* (1886) L. R. 17 Q. B. Div. 187, 34 Week. Rep. 593, 51 J. P. 276. But this is not necessarily so. It is quite possible, without any inconsistency, to take the view that a wall is a part of the works of the person who has it under his control for the purpose of erecting it, and at the same time not a portion of the works of the person who intends to use it in his business when it is completed. It would be going too far to say that an instrumentality can never be a part of the works of two separate employers at the same time, but the mere statement of the situation presented by cases of this type shows that the user by the owner of the structure and the user by the contractor for its erection are successive, and mutually exclusive. It is, therefore, possible, to say the least, that the legal quality of the structure may be different according as regard be had to the servants of the owner or to the servants of the contractor.

words of the statute are declared to be applicable only to ways, etc., which are "existing and completed," and not to those which are partly finished, and not yet used for the purposes of the employer's business.[15] On the analogy of the case which established this doctrine it was subsequently held by the King's bench division that no action lies for an injury caused by a defect in a machine which had at the time of the accident been discarded, as unfit for use, and was then being removed from the premises.[16] This decision, however, was reversed by the court of appeal on the ground that there was evidence from which it was warrantable for a judge sitting as a jury to draw the inference that the machine was connected with the defendant's business when the accident occurred.[17] It is manifest that this ruling throws considerable doubt upon the correctness of many of the cases cited in the last two subsections.

670. What constitutes a defect.—Wherever an instrumentality is "not in a proper condition for the purpose for which it was applied," there is a "defect" in its condition within the meaning of the act.[1] If the whole arrangement of a machine is defective for the purpose for which it is applied, there is a defect so as to bring it within the act, although each part may be sufficient.[2] It follows, therefore, that,

[15] *Howe* v. *Finch* (1886) L. R. 17 Q. B. Div. 187, 34 Week. Rep. 593, 51 J. P. 276 (where a wall in course of erection fell on a plumber in the defendant's employ).

[16] *Thompson* v. *City Glass Bottle Co.* [1901] 2 K. B. 483, 17 Times L. R. 594 (a portion of the machine fell on the plaintiff).

[17] *Thompson* v. *City Glass Bottle Co.* [1902] 1 K. B. 233, [1901] Weekly Notes, 228.

[1] Lord Coleridge in *Heske* v. *Samuelson* (1883) L. R. 12 Q. B. Div. 30, 53 L. J. Q. B. N. S. 45, 49 L. T. N. S. 474 (approved in *Cripps* v. *Judge* [1884; C. A.] L. R. 13 Q. B. Div. 583, 53 L. J. Q. B. N. S. 517, 51 L. T. N. S. 182, 33 Week. Rep. 35, 49 J. P. 100).

Lindley, L. J., in *Yarmouth* v. *France* (1887) L. R. 19 Q. B. Div. 647, said: "I take 'defect' to include anything which renders the plant, etc., unfit for the use for which it is intended, when used in a reasonable way and with reasonable care."

The word "defect" implies an imperfect, a deficiency in something essential to the proper use of the apparatus for the purpose for which it is to be used. *Hamilton* v. *Grousbeck* (1890) 19 Ont. Rep. 73.

Compare also the passage from the majority opinion in *Walsh* v. *Whiteley* (1888; C. A.) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, as quoted in § 672 note 1, *infra*.

"A defect in the condition of the way, or works, or machinery, or plant . . . means, I should be inclined to say, such a state of things that the power and quality of the subject to which the word 'condition' is applied are for the time being altered in such a manner as to interfere with their use. For instance, if the way is made to be muddy by water, or if it is made slippery by ice, in either of these cases I should say that the way itself is not defective, but the condition of the way, by reason of the water which is incorporated with it, or from its being in a freezing state, is affected." Per Stephen, J., in *McGiffin* v. *Palmer's Shipbuilding & Iron Co.* (1882) L. R. 10 Q. B. Div. 5, 52 L. J. Q. B. N. S. 25, 47 L. T. N. S. 346, 31 Week. Rep. 118, 47 J. P. 70.

[2] *Cripps* v. *Judge* (1884; C. A.) L. R. 13 Q. B. Div. 583, 53 L. J. Q. B. N. S. 517, 51 L. T. N. S. 182, 33 Week. Rep. 35, 49 J. P. 100, per Brett, M. R.

whenever there is such unsuitableness for the work intended to be done and actually done, the liability contemplated by the statute arises, although the appliance is perfect of its kind and in good repair and suitable for other kinds of work. In such a case the employer is in fault because he has furnished appliances for a use for which they are unsuitable and in effect in so ordering and carrying on his work that, without fault on the part of an ordinary workman, the natural consequences will be that the appliance will be used for purposes for which it is unsuitable.[3]

A defect importing negligence on the master's part may properly be found to exist where the appliance in question was so constructed or arranged that it was likely to cause undue hazard to a person exercising that degree of care which might be expected, whether regard be had to the special circumstances under which the appliance was to be put into operation,[4] or to the age, skill, and experience of the particular employee who was to operate it.[5]

The fact that the instrumentality which caused the injury was less safe than one which was used by a large proportion, or by the majority, of other employers in the same business, is probably regarded by all courts as an element which entitles the servant to go to the jury on the

The words "defect in the arrangement" (used only in the acts of Ontario, Manitoba, and British Columbia) mean the element of danger arising from the position and collocation of machinery in itself perfectly sound and well fitted for the purpose for which it is to be used. *McCloherty* v. *Gale Mfg. Co.* (1892) 19 Ont. App. Rep. 117, per Osler, J. A. (p. 121).

In one case it was intimated, but not definitely determined, that appliances may be defective in respect to adaptability, as well as for inherent flaws. *Louisville & N. R. Co.* v. *Jones* (1901) 130 Ala. 456, 30 So. 586.

[3] *Geloneck* v. *Dean Steam Pump Co.* (1896) 165 Mass. 202, 43 N. E. 85.

Whether an appliance was properly constructed in reference to the use for which it was intended is usually a question for the jury. *Prendible* v. *Connecticut River Mfg. Co.* (1893) 160 Mass. 131, 35 N. E. 675.

[4] A sliding door intended to be closed in case of fire is defective unless it can be manipulated with reasonable safety by persons who would naturally be acting as hurriedly as would be the case under such circumstances. *Johnson* v. *Mitchell* (1885; Sc. Sess. Cas.) 22 Sc. L. R. 698.

[5] This seems to be the actual scope which should be ascribed to the decision in *Morgan* v. *Hutchins* (1890; C. A.) 59 L. J. Q. B. N. S. 197, 38 Week. Rep. 412, in order to prevent its clashing with *Walsh* v. *Whiteley* (1888; C. A.) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, § 672, note 1, *infra*, to which, according to the statement of the court, there was no intention of running counter. A child was held entitled to maintain an action for an injury caused by uncovered machinery. The broad ground was taken that the statute applies where a machine is "defective with regard to the safety of the workmen," even though it is effective for the purpose for which it is used. The master of the rolls, who, since the decision in *Walsh* v. *Whiteley*, had been created Lord Esher said: "The argument in the present case is that there is no defect in machinery if the machine in question is in itself a proper one for the work it is to perform. It must be carried to this length, that if the machine contains a secret defect which causes danger to the workman, but which does not affect the purposes for which it is to be used, then this is not a defect within the meaning of the act. Now, this leather-pressing

question whether it was defective.[6] (As to the effect of evidence that the employer had satisfied the standard fixed by common usage, see § 672, *infra*.)

In Ontario it is held that the effect of the provisions in the factories acts, by which the failure to take certain specified precautions is made a penal offense, is that, although an injury due to noncompliance with one of these provisions does not constitute a cause of action under the statute itself, such noncompliance is evidence which it is competent to consider as tending to show negligence on the defendant's part, in an action brought under the workmen's compensation act.[7] Considering the extreme improbability that any jury will absolve an employer who has been guilty of a breach of the statute, it is manifest that, for practical purposes, the consequence of such a rule is to place ser-

machine cannot be worked without workmen; without labor it is useless as a machine. Surely this fact of itself is something that has to do with the condition of the machine. If its condition be such that the workman cannot do his part with safety, is that, or is it not, a defect in the condition of a machine the working of which is a necessary performance? It seems to me that unless we hold the defect complained of here to be one within the subsection in question, the act might as well have never been passed."

[6] As, where a common round stick without any holes in it was furnished to be used as a lever for tipping a large ladel of molten metal, the evidence being that it was not safe, and that another kind of device was customary in large foundries like that of the defendant. *Flaherty* v. *Norwood Engineering Co.* (1898) 172 Mass. 134, 51 N. E. 463.

Whether a piece of iron piping is a proper material to use as a buffer to protect the head of a bolt which is being driven is a question for the jury, where the evidence is that for several years copper hammers have been made for such work, and that piping is the least desirable of the metals used, because it is so brittle that chips are apt to fly off from it and injure the person holding it. *Littlefield* v. *Edward P. Ellis Co.* (1900) 177 Mass. 151, 58 N. E. 692.

A railroad company operating passenger and freight trains on a dummy line having regular stations and section foremen and traversing a large section of country is under the same duties as are obligatory on other lines in respect to its employees as to providing locks for its switches, and adopting and using other appliances and safeguards which are in use and deemed necessary by well-regulated railroads of the ordinary character. *Birmingham R. & Electric Co.* v. *Baylor* (1893) 101 Ala. 488, 13 So. 793. Following *Birmingham R. & Electric Co.* v. *Allen* (1892) 99 Ala. 359, 20 L. R. A. 457, 13 So. 8.

In an action for injuries caused by the falling of a derrick, evidence that, if it had been fitted with a wire rope or iron rod to hold the guy plate and goose neck down, it would not have fallen, and that such an appliance was in common use, is admissible. *McMahon* v. *McHale* (1899) 174 Mass. 320, 54 N. E. 854.

[7] *O'Connor* v. *Hamilton Bridge Co.* (1894) 25 Ont. Rep. 12, Affirmed in 21 Ont. App. Rep. 596, 24 Can. S. C. 598; *Thompson* v. *Wright* (1892) 22 Ont. Rep. 127; *Rodgers* v. *Hamilton Cotton Co.* (1893) 23 Ont. Rep. 425; *McCloherty* v. *Gale Mfg. Co.* (1892) 19 Ont. App. Rep. 117; *Godwin* v. *Newcombe* (1901; C. A.) 1 Ont. L. Rep. 525. In all these cases the propriety of declining to interfere with the verdicts of juries based on the theory that the maintenance of unguarded machinery is negligence was recognized.

In *Hamilton* v. *Grocsbeck* (1889) 19 Ont. Rep. 76, the lower court seems to have been of opinion that an unguarded saw was not a defect. If it was intended to lay this down as a matter of law, the doctrine is clearly contrary to that of the decisions just cited. The court of appeal ([1891] 18 Ont. App. 437) declined to consider whether the want of a guard was or was not a defect.

vants in a position not materially different from that which they would hold if the theory had been adopted that damages may be recovered by anyone injured by the violation of a penal act. The doctrine thus adopted is, moreover, inconsistent, as is shown in § 799, note 2, *post*, with that which was applied in a recent decision by the English court of appeal.

The statute is equally applicable, [illegible] the defect was in the original construction of the machine, [illegible]e from its not being kept up to the obligatory standard of safety.[8] The fact that an appliance comes up to the legal standard of safety when it is in its normal condition will not excuse the master if that condition has been so changed as to render it unsafe, and the change is due to the act of an agent who is intrusted with the duty of seeing that it is in proper condition.[9]

In a leading English case Lord Watson remarked that he saw "no reason to doubt that an arrangement of machinery and tackle which, although reasonably safe for those engaged in working it, is nevertheless dangerous to workmen employed in another department of the business, constitutes a defect in the condition of the works within the meaning of the subsection."[10]

A servant who is a mere licensee or trespasser in respect to the locality where he received the injury complained of cannot, it is manifest, recover damages, even though the conditions which caused the injury may have constituted a defect as to other employees.[11] Compare § 626, *b*, *ante*. A double reason for his inability to sue will, of course, exist where the servant's presence at the spot where he was injured was not merely unauthorized, but negligent as well.[12]

[8] See the passage quoted from the majority opinion in *Walsh* v. *Whiteley* (1888; C. A.) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, § 672, note 1, *infra*.

In *Heske* v. *Samuelson* (1883) L. R. 12 Q. B. Div. 30, 53 L. J. Q. B. N. S. 45, 49 L. T. N. S. 474, Stephen, J., in commenting on the theory of the county judge that a defect arising from the original construction of a machine was not a defect in the condition of the machinery, said: "The argument for the defendants comes to this, that, if the employer has a machine, one part of which is weaker than it ought to be, there is a defect in its condition; but if the whole machine is too weak for the purpose for which it is applied there is no such defect. Could it be said that if a windlass, fit only for raising a bucket, is used to draw up a number of men, that there is no defect in the condition of the machinery? The condition of the machine must be a condition with relation to the purpose for which it is applied."

[9] *Tate* v. *Latham* [1897; C. A.] 1 Q. B. 502, 66 L. J. Q. B. N. S. 349, 75 L. T. N. S. 694, 45 Week. Rep. 400.

[10] *Smith* v. *Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392.

[11] As, where a servant who left a dockyard by a path which was not the regular exit, and which the servants were merely permitted to use, fell into a pit *Pritchard* v. *Lang* (1889; Q. B. D.) 5 Times L. R. 639, following *Bolch* v. *Smith* (1862) 7 Hurlst. & N. 736, 31 L. J. Exch. N. S. 201, 8 Jur. N. S. 197, 10 Week. Rep. 387, as to the general principle.

[12] An unguarded elevator opening is

671. Specific examples of defects.—*a. Defects in the condition of the ways.*—This phrase embraces only those inherent imperfections which render the ways themselves less fit for the use for which they are intended.[1] See § 670, *supra*. That the master is not liable for casual obstructions arising from the use of his ways, see § 672, *infra*.

b. Defects in the condition of the works.—Very few decisions specifically referable to this rather vague term are found in the reports, except the cases discussed in § 669, *b*, *supra*, in which the liability of masters for the condition of the premises of another person upon which they have contracted to do something is in question.[2] See also the

not a "defect in the condition of the way," as regards a workman required to pass, through a passage 12 feet wide, well lighted, and with which he is well acquainted, where it is upon the opposite side of the passage from that on which such workman should pass, and he turns out of his way to look at repairs in progress upon the elevator. *Headford* v. *McClary Mfg. Co.* (1894) 21 Ont. App. Rep. 164, Affirmed (1895) 24 Can. S. C. 291.

[1] Plaintiff's servants injured by the following defects have been held entitled to go to the jury:

A loose plank extending over a hole at a place which the servant has to pass, and so laid as to tip up when he steps on it. *Bromley Cavendish Spinning Co.* (1886; C. A.) 2 Times L. R. 881.

The unsafe adjustment of a plank in a temporary staging across which materials are to be carried. *Giles* v. *Thames Ironworks & Shipbuilding Co.* (1885; Q. B. D.) 1 Times L. R. 469.

A plank 8 inches wide and 30 feet from the ground, furnished as a means for a servant to reach and repair a defective steam pipe. *United States Rolling-Stock Co.* v. *Weir* (1892) 96 Ala. 396, 11 So. 436 (complaint averring insufficiency, not demurrable).

A plank of insufficient strength to sustain the weight of the men who have to walk along it. *Caldwell* v. *Mills* (1893) 24 Ont. Rep. 462.

A defective track on a railway. *Coughlan* v. *Cambridge* (1896) 166 Mass. 268, 44 N. E. 218.

A defective railway switch. *Birmingham R. & Electric R. Co.* v. *Allen* (1892) 99 Ala. 359, 20 L. R. A. 457, 13 So. 8.

An open ditch across the track along which the plaintiff had to pull a car. *Gustafsen* v. *Washburn & M. Mfg. Co.* (1891) 153 Mass. 468, 27 N. E. 179.

An unprotected aperture in a staircase which the workman has to use in the course of his employment. *Wood* v. *Dorrall* (1886; Q. B. D.) 2 Times L. R. 550.

The narrowing of the space between the wall of a passageway in a mine, and cars passing therein, so as to cause the cars to pass dangerously near to the wall. *McNamara* v. *Logan* (1893) 100 Ala. 187, 14 So. 175.

An overhead bridge on a railway, so low as to endanger trainmen on the roofs of cars. *Louisville & N. R. Co.* v. *Banks* (1894) 104 Ala. 508, 16 So. 547.

The roof of an adit in a mine so defectively timbered as to allow a large stone to fall on a miner. *McMullen* v. *Newhouse Coal Co.* (1896) 23 Sc. Sess. Cas. 4th series, 759.

A rock on the roof in a tunnel, which is so loose that it may fall at any moment. *Tutwiler Coal, Coke & I. Co.* v. *Ensley* (1901) 129 Ala. 336, 30 So. 600.

The master's liability is a question for the jury where the evidence is conflicting as to whether a gudgeon pin used to fasten the arms of a derrick to a mast was large enough for safety. *Richmond & D. R. Co.* v. *Weems* (1892) 97 Ala. 270, 12 So. 186.

[2] In *Thomas* v. *Quartermaine* (1886) L. R. 17 Q. B. Div. 417 (1887; C. A.) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 346, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, a boiling vat and a cooling vat were placed in the same room in the defendant's brewery. A passage only 3 feet wide in one part ran between them, the rim of the cooling vat rising 16 inches above the passage. Underneath the barley vat was a board which the plaintiff had occasion to use. To draw it out he had to give it a jer' and it came away so suddenly that h. fell back into the cooling vat.

remark of Lord Watson, quoted in the last section. For some cases in which the term occurs in conjunction with others descriptive of various kinds of instrumentalities, see § 668, *a*, *supra*.

c. Defects in the condition of the machinery.—The cases cited below indicate sufficiently the kind of abnormal conditions which may properly be found by a jury to fall within this description.[3]

d. Defects in the condition of the plant.—As the term "plant" carries the very extensive meaning explained in § 668, subs. *c*, *supra*, the cases involving it cover a great variety of appliances. Some

In the divisional court, Wills, J., said that he could see no evidence of any defect. But in the court of appeal it was considered that the finding of the trial judge sitting as a jury, that there was a defect in the condition of the works, must be allowed to stand, as there was some evidence to support his conclusion. (See pp. 687 and 703 of the report.)

A roof which proved too weak to support the snow which was allowed to accumulate on it seems to be treated in a Massachusetts case as a defect in the "works;" but the point actually decided was merely that an allegation of defective conditions was sustained by proof that the weight of snow was one of the causes of the fall. *Dolan* v. *Alley* (1891) 153 Mass. 380, 26 N. E. 989.

The failure to furnish suitable appliances to fasten the stones of a coping was held to be proof of defective condition, in *Gibson* v. *Sullivan* (1895) 164 Mass. 557, 42 N. E. 110 (stones fell on plaintiff).

[3] Defects in a locomotive, which produce sudden, unnecessary movements of the cars. *Highland Ave. & Belt R. Co.* v. *Miller* (1898) 120 Ala. 535, 24 So. 955.

Defective pressure causing a hydraulic crane to work erratically. *Bacon* v. *Daces* (1887; Q. B. D.) 3 Times L. R. 557.

A band which is constantly slipping off a shaft, thus creating a necessity for a frequent readjustment. *Baxter* v. *Wyman* (1888; Q. B. D.) 4 Times L. R. 255.

A belt which is liable to slip off of a pulley. *Ellis* v. *Pierce* (1898) 172 Mass. 220, 51 N. E. 974.

Defective appliances for controlling the speed of a push car which collided with the plaintiff, knocking him down a high trestle. *Central R. Co.* v. *Lamb* (1899) 124 Ala. 172, 26 So. 969.

A part of a machine in a paper mill, so constructed that the rags, etc., which are fed to it, are apt to catch, the result being a frequently recurring necessity to remove them. *Paley* v. *Garnett* (1885) L. R. 16 Q. B. Div. 52, 34 Week. Rep. 295, 50 J. P. 469.

The absence of a guard to a circular saw provided by the owner of a saw mill, but improperly removed by the sawyer for his own purposes. *Tate* v. *Latham* (1897; C. A.) 1 Q. B. 502, 66 L. J. Q. B. N. S. 349, 75 L. T. N. S. 694, 45 Week. Rep. 400.

The want of a fence to protect employees from moving machinery. *Wallace* v. *Cutler Paper Mills Co.* (1892) 19 Sc. Sess. Cas. 4th series, 915 (denying that this result was affected by the fact that the danger was a palpable one).

A loom in which the shuttles are neither so fixed as not to be constantly flying out, nor protected by proper guards. *Smith* v. *Harrison* (1889; Q. B. D.) 5 Times L. R. 406.

Unguarded machinery which is operated by children. *Morgan* v. *Hutchins* (1890; C. A.) 59 L. J. Q. B. N. S. 197, 38 Week. Rep. 412.

Unfenced machinery in a jurisdiction where a penalty is imposed by a factories act for not having machinery guarded may properly be found to import negligence. See § 670, note 2, *supra*. In the most recent case in which this doctrine was applied it was held that the absence of a guard is a defect, if the machinery is thereby rendered dangerous to the workmen using it, even if the machinery is in itself well constructed and suitable for the purpose for which it was designed. *Godwin* v. *Newcombe* (1901; C. A.) 1 Ont. L. Rep. 525.

Evidence that an injury received by a weaver in a cotton mill while he was assisting an inexperienced hand, in consequence of the shuttle flying out of the

of them might presumably be referred to the instrumentalities discussed in the preceding sections.[4]

672. Conditions not amounting to defects.—The mere fact that a machine is dangerous to manipulate, unless the servant takes certain precautions which any intelligent man would see to be appropriate under the circumstances, will not warrant a finding that the machine is defective within the meaning of the act. There can be no recovery

loom, was caused by a bolt breaking when the shuttle came in contact v it, is fit to go to the jury upon the qu stion of negligence. *Canadian Coloured Cotton Mills* v. *Talbot* (1897) 27 Can. S. C. 198.

At the trial of an action against a railroad corporation for the death of an employee, caused by the falling upon him of a locomotive which had been placed on a truck in the repair shop, it is competent for the jury to find that, although the iron was sound where the wheel of the truck broke, yc by reason of its long use and the inc. ase in the weight of engines, the truck had become unsuitable for the use to which it was put, and that, if the wheel had been of proper strength, it would have withstood the strain caused by meeting the obstruction on the rail. *Dunn* v. *New York, N. H. & H. R. Co.* (1898) 171 Mass. 417, 50 N. E. 1031.

[4]The following defects have been held to come under the head of "defects in plant:"

Th want of ventilation for the hold of a coal ship, the result being that gas accumulated and exploded when the hatches were removed and the men engaged to unload the coal entered the hold with their lanterns. *Carter* v. *Clarke* (1896; Q. B. D.) 14 Times L. R. 172, 78 L. T. N. S. 76.

A horse intended for a particular kind of work, and so vicious as to be unfit for that work. *Yarmouth* v. *France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283.

A vicious horse. *Fraser* v. *Hood* (1887) 15 Sc. Sess. Cas. 4th series, 178.

A horse that is constantly falling. *Haston* v. *Edinburgh Tramway Co.* (1887) 14 Sc. Sess. Cas. 4th series, 621.

The lack of some means either to prevent loose bodies from falling upon men working below, or to protect those men from any of the bodies which may fall. *Heske* v. *Samuelson* (1883) L. R. 12 Q. B. Div. 30, 53 L. J. Q. B. N. S. 45, 49 L. T. N. S. 474 (piece of coal fell from a lift, the sides of which were not fenced, on to an unroofed platform).

A ladder which, by the direction of the defendant, is used to support a scaffold, and, not being strong enough for the purpose, breaks under the weight of a servant. *Cripps* v. *Judge* (188) L. R. 13 Q. B Div. 583, 53 L. J. Q. B. N. S. 517, 51 L. T. N. S. 182, 33 Week. Rep. 35, 49 J. P. 100.

A bolt so weakened by constant strains that it breaks. *Iricin* v. *Dennystoun* (1885; Ct. of Sess.) 22 Sc. L. R. 379.

A sliding door to be used in case of fire, without any provision for protecting the hands of an employee from being crushed when it is pulled to. *Johnson* v. *Mitchell* (1885; Sc. Sess. Cas.) 22 Sc. L. R. 698.

An inflammable brattice cloth allowed to stand in a place where sparks frequently fall on it. *Thomas* v. *Great Western Colliery Co.* (1894; C. A.) 10 Times L. R. 244.

Car buffers of different heights, overlapping in coupling so as to afford no protection to the person making the coupling. *Bond* v. *Toronto R. Co.* (1895) 22 Ont. App. Rep. 78. Affirmed (without opinion) in (1895) 24 Can. S. C. 715 (construing the phrase "defect in the arrangement of the plant," which occurs in the Ontario act).

A switch not provided with a lock, nor securely guarded in any other way. *Rombough* v. *Balch* (1900) 27 Ont. App. Rep. 32.

Insufficient number of scrapers supplied for cleaning out a brick pressing machine. *Race* v. *Harrison* (1893; C. A.) 10 Times L. R. 92, per Kay, L. J.

The failure to supply a boy with proper materials for the cleaning of machinery. *Thompson* v. *Wright* (1892) 22 Ont. Rep. 127.

The inadequate manning of cars which are "kicked" on to a side track, the result being that their speed cannot be controlled and they come into collision

unless the defect is one which implies negligence on the part of the master, or the agents for whose defaults he is answerable.[1]

with other cars. *Louisville & N. R. Co. v. Davis* (1890) 91 Ala. 487, 9 So. 552.

[1] In *Walsh* v. *Whiteley* (1888; C. A.) 1. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 588, 36 Week. Rep. 870, 53 J. P. 38, the trial judge left it to the jury to say whether there was a defect in the condition of the machine where there was evidence that the accident would not have happened if the disc of the wheel of a carding machine had been solid, and instructed them that, to be defective, a machine must be such as a reasonable, careful, experienced man, reasonably careful of the safety of his workmen, would not use. The jury found that there was a defect, but the court of appeal held that the evidence did not warrant this conclusion. The following passage shows the position taken by the majority of the court (Lindley and Lopes, L.J.J.): "To determine the meaning of the words 'defect in the condition of the machinery,' we must look, not only at § 1, subs. 1, but also at § 2, subs. 1. Reading these sections and subsections together, we think there must be a defect implying negligence in the employer. The negligence of the employer appears to be a necessary element without which the workman is not to be entitled to any compensation or remedy. It must be a defect in the condition of the machine, having regard to the use to which it is to be applied, or to the mode in which it is to be used. It may be a defect either in the original construction of the machine, or a defect arising from its not being kept up to the mark; but it is essential that there should be evidence of negligence of the employer or some person in his service intrusted with the duty of seeing that the machine is in proper condition. It must be a defect in the original construction or subsequent condition of the machine, rendering it unfit for the purposes to which it is applied when used with reasonable care and caution, and a defect arising from the negligence of the employer. What evidence is there of this? Is there any evidence of the machine being defective even in the abstract? It was perfect in all respects. It was not impaired by use. It had been properly kept up to the mark. The only suggestion is that the wheel which might have been solid had holes in it, and that, if the wheel had been solid, the plaintiff could not have put his thumb where he did, and the accident would not have happened. It is also suggested that the wheel was too close to the table and that, had the wheel and table been further apart the accident would not have happened. There was, however, no evidence worth mentioning of improper construction in this respect. But the plaintiff had used the same kind of machine for thirteen years, and had sustained no injury. It is to our minds clear that he would have suffered no injury on the present occasion if he had used proper care and caution. In these circumstances we can see no evidence of any defect in the condition of the machine, even apart from negligence of the employer. It may be that a solid wheel would have been safer, but it would be placing an intolerable burden on employers to hold that they are to adopt every fresh improvement in machinery. We do not believe that such was the intention of the legislature; nor do we think it was intended to relieve workmen from the exercise of that care and caution without which most machines is dangerous. But, in our opinion, the defect in the condition of the machinery must be such as to show negligence on the part of the employer. It seems to us that in this case there is not a particle of evidence of any defect arising from the negligence of the employer. It was a machine generally used, used by the plaintiff for thirteen years without any complaint or mischief arising, perfect and unimpaired, and never thought by the plaintiff himself to be unsafe. It is said there is evidence of the machine being dangerous. So are most machines, so is even an ordinary shar knife, unless used with care, but that does not make it defective in its condition, nor does it imply negligence in the employer if an accident happens." Q. B. D. 371, 377.

The following passage from the dissenting opinion of Lord Esher, shows the theory adopted by that eminent judge: "Remembering that this is a statute passed to extend the liability of the employer in favor of workmen and for their greater safety, I do not think that, in considering what is a defective machine, we can confine that consideration to the question of the purpose for

Accordingly, under the statute as at common law (see § 35, *ante*), an employer is not bound to provide the very best machinery that can possibly be invented. It is enough if he provides that which is reasonably sufficient for the purpose.[2]

which it is used. The defect contemplated by the act is not, in my opinion, a defect with reference to the purpose for which the machine is employed, but a defect with reference to the safety of the workmen using it; and that defect may be either in the original construction of the machine or in the use to which the machine is put. Upon the findings of the jury and the true construction of the enactment, I am of the opinion that the case is brought within the statute."

The general language of the decision is somewhat qualified by *Morgan* v. *Hutchins* (1890; C. A.) 59 L. J. Q. B. N. S. 197, 38 Week. Rep. 412. (See § 670, note 6, *ante*.) There Lord Esher, referring to the earlier case, made the following remarks: "I think it was assumed by the whole court that, if the machine were dangerous to a workman without any fault of his own, it came within the act. The only doubt that existed in the minds of two of the members of the court was whether the defect had arisen from the negligence of the employer."

The general rule has been enunciated, that machinery is not defective which is fit and proper for the purpose for which it is designed, and there is a reasonable mode, known to the injured servant, in which he could have operated it. *Yeoman* v. *Dublin Distillery Co.* (1893) 32 L. R. Ir. 309.

Recovery has been denied in a case where it was apparent that the only danger to which the plaintiff was subjected arose from the fact that the machine in question was not stopped by him before he attempted to do the work on which he was engaged when the accident occurred. *Sutton* v. *Stead* (1887; Q. B. D.) 3 Times L. R. 499.

[2] *Robins* v. *Cubitt* (1881) 46 L. T. N. S. 535, per Lopes, J.

Want of reasonable care is not established by evidence which merely shows that a particular safety catch of a different pattern from that on the defendant's elevator had been used ten years before by others. *Black* v. *Ontario Wheel Co.* (1890) 19 Ont. Rep. 578.

The rule, "An employer is not bound to provide against every possible danger, or to supply in all cases the safest and most approved appliances," was applied in *Mitchell* v. *Patullo* (1885) 23 Sc. L. R. 207. There the folding doors of a shed on a farm flapped in a horse's face, so that he backed a wagon, and crushed the plaintiff. Held, that the farmer was not in fault for having failed to provide sliding doors.

A defect in apparatus for hoisting ice is not shown by the fact that a gin wheel was hung so low that the employee's hand was drawn into it and injured by failure to stop the rope soon enough, where it does not appear that it could have been hung any higher in the building, and proper arrangements were made for stopping the rope if the engineer had observed it. *Carbury* v. *Downing* (1891) 154 Mass. 248, 28 N. E. 162. There the plaintiff did not suggest that the means employed to stop the engine were not sufficient, or that any other should have been provided, but contended that the means for indicating to the engineer the time for stopping the engine, *viz.*, a mark upon the rope, were not sufficient. It was held that the jury could not properly have found that this was an insecure mode of indicating to the engineer when the ice arrived at the top of the run, and that the engine ought to have been inside the building, where the engineer could see the ice and the upper gin wheel, and decide in that way when the engine should be stopped.

A servant cannot recover, as for a "defect," where he is injured by the fall of a bar which was used for fastening flap-doors in a floor, and which, instead of being secured by a chain or otherwise, so as to prevent its falling, was left loose. *Pooley* v. *Hicks* (1889) 5 Times L. R. 353.

A drawbar on the car of another railway company, which is of a different height from those on the defendant's own cars, is not a defect. *Ellsbury* v. *New York, N. H. & H. R. Co.* (1899) 172 Mass. 130, 70 Am. St. Rep. 248, 51 N. E. 415.

It is not, as matter of law, the duty of persons operating coal mines to cut a manway, different and separate from the slope through which coal is brought to the surface, for the ingress

Culpability is negatived by proof that the instrumentalities furnished were the same in character and quality as those commonly used under similar circumstances by persons carrying on the same business as the defendant.[3] Compare § 44, *ante*. But in order to be conclusive

and egress of their employees. *Whatley* v. *Zonida Coal Co.* (1899) 122 Ala. 118, 26 So. 124.

A covered bridge on a railway, which is high enough to give sufficient space for a brakeman to walk in safety along the center line of roof of a car, is not defective. *Schlaff* v. *Louisville & N. R. Co.* (1893) 100 Ala. 377, 14 So. 105.

A conductor on a street railway assumes the risks arising from the possibility of an occasional jolt of the car, and cannot recover if he is thrown off by such a movement, while he is on the bumper, engaged in replacing the trolley on the wire. *McCauley* v. *Springfield Street R. Co.* (1897) 169 Mass. 301, 47 N. E. 1006.

Structures placed so close to a railway track that trainmen are in danger of coming into collision with them do not constitute a defect. *Dacey* v. *New York, N. H. & H. R. Co.* (1897) 168 Mass. 479, 47 N. E. 418.

[3] An open hook without a catch, to which a bucket is attached for raising and lowering loads, cannot be held to be a defect, where the plaintiff's evidence is that such a hook was always used in work of a similar kind, and no proof is given of the occurrence of any previous accident. *Claxton* v. *Mowlem* (1888; C. A.) 4 Times L. R. 756.

The failure of an ironmaster to fence in about 10 feet of the lower end of a shaft through which ore was raised to a furnace gangway will not render him liable for injuries to a workman struck by a piece of the ore which fell through the opening, if it is shown that it was usual in the trade to leave so much of these shafts unfenced. *Murray* v. *Merry* (1890) 17 Sc. Sess. Cas. 4th series, 815.

No negligence can be inferred where a scaffold alleged to be defective was the ordinary kind of scaffold used by masons, and as strong as they are usually made. *Thompson* v. *Dick* (1892) 19 Sc. Sess. Cas. 4th series, 804.

A trap door without a railing, such as is commonly maintained in factories is not a "defect." *Moore* v. *Ross* (1890) 17 Sc. Sess. Cas. 4th series, 796.

A projecting set screw in a shaft, being a common device for the purpose for which it is used, is not of itself a defect. *Donahue* v. *Washburn & M. Mfg. Co.* (1897) 169 Mass. 374, 48 N. E. 842; *Demers* v. *Marshall* (1899) 172 Mass. 548, 52 N. E. 1066, (1901) 59 N. E. 454; *Ford* v. *Mt. Tom Sulphite Pulp Co.* (1899) 172 Mass. 544, 52 N. E. 1065. In the last case recovery was denied though the screw had been placed on the shaft after the servant entered the employment.

Nor is a key-way with sharp edges in a shaft a defect. *Connelly* v. *Hamilton Woolen Co.* (1895) 163 Mass. 151, 39 N. E. 787.

An engineer employed in fitting up the boilers in a steamer in course of construction cannot recover for injuries caused by falling into an open manhole, while threading his way between decks in a dim light, on the theory that the master was bound to protect the manhole. *Forsyth* v. *Ramage* (1880) 18 Sc. Sess. Cas. 4th series, 21. In a later case the court explained that this decision was based upon the ground that the risk in question was an ordinary one incidental to the work undertaken, and disclaimed the intention of laying down any such general rule as that a workman on a ship in course of construction cannot recover for injuries due to the dangers of the place of work. *Jamieson* v. *Russell* (1892) 19 Sc. Sess. Cas. 4th series, 898, where the representative of an employee killed by falling into an open tank was allowed to recover for the reason that the tank was usually covered and lighted, and that neither of these precautions had been observed on the occasion when the accident occurred.

A workman injured through the slipping of some planks out of the loop in a hempen rope by means of which they are being lowered to the bottom of a trench cannot recover on the ground that a wire rope should have been used, where it appears that hempen ropes were ordinarily used for such a purpose. *Pack* v. *Hayward* (1889; Q. B. D.) 5 Times L. R. 233.

In the case of a machine of a simple character the plaintiff is not entitled to go to trial merely upon averment that the machine was dangerous and that it was usual to fence such machines. *Cam-*

in the master's favor, as a matter of law, the usage appealed to must be, in a reasonable sense, a general one. Evidence which merely goes to show that he conformed to the practice of a few well-regulated concerns of the same description as his own will not justify a court in pronouncing him to be free from culpability.[4] Compare § 53, *ante*. On the other hand, if usage is the controlling factor in the case, a jury will not be permitted to find him guilty of negligence where it is apparent that there is no uniform usage in regard to the subject-matter.[5]

As regards the effect thus ascribed to the general usage of employers, it is needless to remind the reader that, in common-law actions, many courts apply the doctrine that evidence of conformity to such usage is a circumstance which merely tends to show that the defendant exercised reasonable care, and not one which is conclusive in his favor. See § 50, *ante*.[6]

The statute is not construed so as to make him an insurer of his servants' safety to such an extent that he is bound to have his machinery so constructed and arranged as to provide for the contingency that one of the men whose duty it is to attend to it may, by negligently absenting himself from his post, cause it to operate in such a manner as to injure another servant.[7]

ron v. *Walker* (1898) 25 Sc. Sess. Cas. 4th series, 409, following *Milligan* v. *Muir* (1891) 19 Sc. Sess. Cas. 4th series, 18.

As to unfenced machinery, see also § 671, subs. c, *supra*, and the majority opinion in *Walsh* v. *Whiteley* (1888; C. A.) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, as quoted in note 1.

[4] *Louisville & N. R. Co.* v. *Jones* (1901) 130 Ala. 456, 30 So. 586 (charge held erroneous, which proposed as a standard test the custom of eight railway companies to use ratchet jackscrews for holding up the body of a derailed car); *Richmond & D. R. Co.* v. *Weems* (1892) 97 Ala. 270, 12 So. 186 (charge held erroneous which assumed the usage of five railway companies to be a decisive test).

[5] Failure to provide a temporary scaffold or platform around a "bleeder" used for the escape of gas above an iron furnace, on which the master mechanic could stand to repair the bleeder, does not constitute a defect in the ways, etc., where such scaffold was sometimes used in furnaces, but repairs were also made by means of a ladder. *Birmingham Furnace & Mfg. Co.* v. *Gross* (1892) 97 Ala. 220, 12 So. 36.

[6] This doctrine is thus set forth in a somewhat extreme form by Lord Esher in his dissenting opinion in a case already cited: "If there was a defect in the machine so as to make it dangerous to workmen using it, it would be no answer to say that, though the master used a machine that was dangerous to his workmen, no one up to that time had invented a better one, and that it was the best machine theretofore manufactured. The true question seems to me to be whether the machine is dangerous, and whether a careful consideration would show it to be dangerous to the workman using it. I am prepared to say that, if a careful consideration would show a master that the machine was dangerous to the workman using it, even although that machine could not be improved upon, it is negligence on the part of the master to use for his profit a machine which is dangerous to his workmen, and, if he does use it, he can only do so upon the terms of being liable to pay compensation to the workman if he is thereby injured." *Walsh* v. *Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38.

[7] *Robins* v. *Cubitt* (1881) 46 L. T. N. S. 535.

An accident attributable to what is merely a condition of the materials on which the employees were working, and necessarily incident to the business in which they were engaged, does not constitute a cause of action.[8]

An appliance is not defective simply because an accident results from its being subjected to an unexpectedly severe strain.[9]

673. Defective system; employer liable for.—Under the various employers' liability acts, as is also the case at common law (see chapter xv., *ante*), the master is "no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery, than for injuries caused by a defect in the machinery itself." In other words, "a master is responsible, in point of law, not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used."[1]

[8] *Welch* v. *Grace* (1897) 167 Mass. 590, 46 N. E. 387, where the court rejected the contention that the death of an employee, due to subsequent explosion of a misspent blast which, owing to the character of the rock in which it had been placed, failed to explode in the first instance, should be deemed to be caused by a defect in the "ways, works, or machinery" of the employer.

The slippery condition of a ladder at the bottom of a shaft in a coal mine is not a "defect." *O'Neill* v. *Wilson* (1858) 20 Sc. Sess. Cas. 2d series, 427.

[9] As, where a scaffold swings so violently, after a gutter which is being wrenched from the side of a building comes off with unexpected ease, that the servant engaged in the work is thrown down. *McLean* v. *Cole* (1899) 175 Mass. 5, 55 N. E. 458.

[1] Lord Watson in *Smith* v. *Baker* (1891) A. C. 325 (p. 353), 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392, where a verdict was allowed to stand which found negligence in the system, where the plaintiff was injured by the fall of a stone from a crane which worked over his head intermittently, while he was engaged in drilling, and was thus prevented from being on his guard to avoid danger when, in the course of the work, the stones lifted by the crane were swung round over his head.

The absence in hoisting machinery of a sufficient safeguard against such a probable occurrence as a slip in the management of the machinery is a defect in the system. *Stanton* v. *Scrutton* (1893: Q. B. D.) 9 Times L. R. 236, 62 L. J. Q. B. N. S. 405, 5 Reports, 244.

A master cannot be held liable as for a defective system, where the evidence is that the plaintiff, a boy, was injured by the sudden starting of a brick press while he was cleaning out the under part with his hands during a temporary stoppage of the machinery, but it is also shown that he had been warned not to use his hands for this purpose. *Race* v. *Harrison* (1893) 9 Times L. R. 567, 10 Times L. R. 92.

One who has contracted to take down a building which has been gutted by fire cannot be held to have adopted an improper method of doing the work, where he arranges to remove one of the walls piecemeal by means of a scaffold constructed alongside the wall of the adjacent house. Hence, a workman injured by the fall of the former wall against the latter cannot recover on the theory that the omission to shore the wall to be demolished was negligence, inasmuch as the process of shoring would have been fully as dangerous as that of erecting a scaffold. *McManus* v. *Greenwood* (1885: Q. B. D.) 52 L. T. Journ. 160. The court of appeal reversed the judgment of the divisional court, (1886) 2 Times L. R. 603. But the question whether the method of demolition adopted was defective was not discussed, the reversal being put upon the ground that defendant, although he knew that there was imminent danger of the collapse of the wall, and that the workmen were ignorant of the conditions, did not give them any warning.

A servant injured by an explosion of gunpowder is not entitled to go to the jury on the question whether the system of work was defective, where the com-

In many instances, it will be observed, the adoption of a defective system virtually resolves itself into negligence in the exercise of superintendence. Under such circumstances a default of this kind may be referred either to the category which is covered by this provision of the act, or to that which is discussed in the next subtitle.

674. "Not discovered or remedied, owing to the negligence," etc.—*a. Generally.*—The qualifying declaration in this statute, by which liability is excluded unless negligence can be predicated of the failure to discover and remedy the defect which caused the injury, merely embodies, so far as the employer himself is concerned, the common-law doctrine that negligence cannot be imputed to a person who is not shown to have had actual or constructive knowledge of the abnormally dangerous conditions from which the injury resulted. See chapter x., *ante*.[1] The imposition of liability for the defaults of the class of

plaint merely alleges that the powder was stored in a magazine five minutes' distance from the work, in small barrels; that, when it was desired to fire a charge, a barrel was carried from the store and opened at the place of work; and that while the plaintiff was firing a charge a gust of wind carried a piece of fuse to a barrel from which powder had been taken, thus causing the powder to explode and injure him. Such allegations indicate rather the occurrence of an accident through the carelessness of the servant himself in not covering the barrel while the charge was being fired. *Mulligan* v. *M'Alpine* (1888) 15 Sc. Sess. 4th series, 789.

. ver may be found liable on the f a negligent arrangement of . where he places a steam crank in such a position that live cinders from the boiler furnace may fall at a place where workmen are putting in blasts of gunpowder, and fails to provide some means for intercepting those cinders. *Grant* v. *Drysdale* (1883) 10 Sc. Sess. Cas. 4th series, 1159.

This principle was, strangely enough, quite lost sight of in a case which recently came before the Ontario court of appeal. *Sim* v. *Dominion Fish Co.* [1901] 2 O . L. Rep. 69. There it was correctly .ded that the plaintiff was entitled to recover at common law upon a special finding that the master had made no provision for the inspection of appliances like that which caused the injury. But in the course of his opinion Chief Justice Armour took occasion to observe that, if the right of recovery had depended upon the employers' liability act, it would have been necessary to send the case back to another jury to determine whether some employee superior to the plaintiff was aware that the appliances were defective. It is manifest that this theory as to the effect of the verdict is erroneous. The declaration of the jury that the defendant had made no proper provision for the inspection of the appliances in question was clearly tantamount to a declaration that his system was defective in this regard. The finding, therefore, was expressive of a fact which implied personal negligence on the part of the master himself, and it was wholly unnecessary to ascertain whether the particular defect which caused the injury was known to a superior employee.

[1] The converse proposition which is implied in this doctrine *viz.*, that a master is culpably negligent if he permits the continuance of abnormally dangerous conditions which, by the exercise of due care, he might have ascertained—suggests a reason for doubting the correctness of the decision of the Ontario court of appeal, which is criticised on another ground in the preceding section. *Sim* v. *Dominion Fish Co.* [1901] 2 Ont. L. Rep. 69. It seems not unreasonable to say that, for the purposes of sustaining the judgment, a court of review would have been warranted in construing the finding of the jury, that the defendant had made no provision for a proper inspection, as being equivalent to a declaration by the jury that the defect in question would have been discovered if such an inspection had been made. This would be tantamount to

agents designated by this clause may be regarded as being, for practical purposes, a legislative adoption of that doctrine of non-delegable duties which has been evolved, independently of statutes, in most of the American states. See chapter XXXI., *ante*.

b. "*Not discovered.*"—Whether the gravamen of the servant's complaint be the default of the master himself or of his agents in failing to discover a defect, the existence or absence of culpability is tested by considerations of precisely the same kind as those which are applied in common-law actions. The servant cannot succeed in his action where neither the employer himself nor his representative within the meaning of this subsection had knowledge, actual or constructive, of the existence of the defect which caused the injury,[2] nor where there was no reason to apprehend the particular casualty which occurred.[3]

On the other hand, the servant is entitled to recover if the master himself, or an employee who was discharging the functions indicated by the cases which are cited in subdivision *d* of this section, might by the exercise of proper care have discovered the defect in question.[4]

saying that the master ought to have known of the defect, and was therefore as culpable as if he had actually known of it and failed to remedy it. If this view be correct, the finding virtually attributed personal negligence to the master, and there was clearly no necessity to obtain the opinion of the jury upon the question whether the defect was known to a superior employee.

[2] *Groves* v. *Fuller* (1888; Q. B. D.) 4 Times L. R. 474 (plaintiff nonsuited); *Walsh* v. *Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38; *Morgan* v. *Hutchins* (1890) 59 L. J. Q. B. N. S. 197, 38 Week. Rep. 412; *Griffiths* v. *London & St. K. Docks Co.* (1884) L. R. 13 Q. B. Div. 259, 53 L. J. Q. B. N. S. 504, 51 L. T. N. S. 533, 33 Week. Rep. 35, 49 J. P. 100, per Fry, L. J., followed in *Rudd* v. *Bell* (1887) 13 Ont. Rep. 47; *Black* v. *Ontario Wheel Co.* (1890) 19 Ont. Rep. 578; *Louisville & N. R. Co.* v. *Campbell* (1893) 97 Ala. 147, 12 So. 574; *Coffee* v. *New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128; *Wilson* v. *Louisville & N. R. Co.* (1887) 85 Ala. 269, 4 So. 701.

The mere fact that a stick which broke while being used as a lever was old and had been long in use will not justify a finding that the employer ought to have known the stick to be defective. *Allen* v. *G. W. & F. Smith Iron Co.* (1894) 160 Mass. 557, 36 N. E. 581.

Under the original Massachusetts act the common-law rule established by *Mackin* v. *Boston & A. R. Co.* (1885) 135 Mass. 201, 46 Am. Rep. 456, that a railway company was not liable for the negligence of its car inspectors, was declared not to have been changed in regard to foreign cars received merely for forwarding. *Thyng* v. *Fitchburg R. Co.* (1892) 156 Mass. 13, 32 Am. St. Rep. 425, 30 N. E. 169. Compare also *Coffee* v. *New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128. But this decision is no longer a correct statement of the law since the passage of the amendatory act of 1893, chap. 359, declaring that the mere fact of a car being in possession of a railroad company makes it a part of its "ways, works, or machinery." See § 656, *supra*.

[3] *Booker* v. *Higgs* (1887; Q. B. D.) 3 Times L. R. 618. Recovery denied for lack of positive evidence on this point in a case where a laborer was injured by the fall of a bank of earth which he has been ordered by the foreman to excavate by entering a hole in a wall against which the earth lay.

[4] *Walsh* v. *Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. P. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38.

Evidence that the defect might have been discovered if the instrumentality had been examined by a skilled person will justify a verdict for the servant. *Thomas* v. *Great Western Colliery*

The mere fact that no accident has happened for several years does not prove that the master ought not to have known there was danger. "Long immunity from accident does not prove absence of carelessness. It may only prove long-continued habitual negligence."[5]

In determining the question whether the instrumentality ought to have been inspected by the defendant or his agents, the fact that it was furnished by a competent contractor, or that an express statement as to its condition had been made by such a contractor, under circumstances in which it was apparently justifiable to rely upon his opinion, is in England deemed to be conclusive against the inference of negligence.[6]

c. "*Not remedied.*"—A remedy of a "defect in the condition of the machinery" does not mean putting the machinery in perfect condition for working purposes, but the removal of the source of danger to employees, which may be done by a temporary device, as well as by permanent repairs.[7]

Co. (1894; C. A.) 10 Times L. R. 244. *Fraser* v. *Fraser* (1882) 9 Sc. Sess. Cas. 4th series, 896 (rope broke).

A judgment for the plaintiff will not be disturbed where he was injured by the breaking of a bolt not shown to have any latent defect, and the evidence was that, although it had been subjected to usage which tended to diminish its strength, its strength had not been tested, as it should have been, with reasonable frequency. *Irwin* v. *Dennystown* (1885; Sc. Sess. Cas.) 22 Sc. L. R. 379.

The fact that the machinery which caused the accident was changed after it occurred is admissible as evidence that the master knew the machinery to be defective. *Dodd* v. *Dunton* (1890) 16 Viet. L. Rep. (L.) 531.

Evidence that defects in a truck had existed for several weeks prior to the accident is relevant on the question of negligence. *Kansas City, M. & B. R. Co.* v. *Webb* (1892) 97 Ala. 157, 11 So. 888. (See, generally, § 132, *ante*.)

A finding that a foreman should have seen that a plank which gave way was cross-grained and knotty, and consequently unsafe to walk upon in the position in which it was placed, will not be disturbed. *Calcxell* v. *Mills* (1893) 24 Ont. Rep. 462.

Where employees were injured by the falling of a derrick, evidence that it was set up so as to allow a vertical play of the goose neck and guy plate of 4 inches, and that the usual play of such parts in similar derricks was but ¼ of an inch, is competent to show that, by the exercise of ordinary care, the employers could have ascertained that it needed better adjustment for safety. *McMahon* v. *McHale* (1899) 174 Mass. 320, 54 N. E. 854.

[5] *Thomas* v. *Great Western Colliery Co.* (1894; C. A.) 10 Times L. R. 244, reversing decision of divisional court.

[6] A master is not liable for injuries caused by the fall of a staging which only the day before had been erected by a contractor. He is not, under such circumstances, bound to inspect the staging himself or to employ anyone specially to inspect it. *Kiddle* v. *Lovett* (1885) L. R. 16 Q. B. Div. 605, 34 Week. Rep. 518, per Denman, J. (sitting without a jury). The master had paid a sum of money to the servant, and was suing the contractor to recover the amount. It was held that he could not maintain the action.

No negligence is proved where a foreman, relying upon the assurance of a contractor engaged in reinstating a building which had been partially destroyed by fire, that one of the walls had been safely shored up, sends his subordinates back to work near it, after having withdrawn them when he noticed the unsafe condition of the gable. *Moore* v. *Gimson* (1889; Q. B. D.) 5 Times L. R. 177, 58 L. J. Q. B. N. S. 169.

[7] *Willey* v. *Boston Electric Light Co.* (1897) 168 Mass. 40, 37 L. R. A. 723, 46 N. E. 395. Defendant had argued

The failure to stop a machine which is not working properly is a failure to "remedy" its defects.[8]

Negligence cannot be inferred where a defect came to the knowledge of the master or superior so short a time before the accident that there was not sufficient time to remedy it.[9]

When the danger is not constantly present, but recurs at intervals, the defect may be cured by giving the workmen timely warning of its approach.[10]

The master cannot avail himself of the defense that the defect or obstruction by which an employee was injured was due to the act of a stranger, where it was not remedied or removed within a reasonable time after notice.[11]

d. "Person intrusted with the duty," etc.—To bring an employee within this description there should be evidence showing that he was charged with the specific duty of keeping the defective instrumentality in proper condition.[12] But it is not necessary to show that he was discharging the functions of a superintendent.[13]

that it was not liable because the defect could not have been permanently remedied before the accident.

[8] *Bacon* v. *Dawes* (1887; Q. B. D.) 3 Times L. R. 557.

[9] *Seaboard Mfg. Co.* v. *Woodson* (1891) 94 Ala. 143, 10 So. 87.

[10] *Smith* v. *Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392. Lord Watson said (p. 354) "The employer may, in such cases, protect himself either by removing the source of danger, or by making provision for due notice being given. Should he adopt the latter course, he will still be exposed to liability if injury results from failure to give warning through the negligence of himself or of his superintendent."

[11] *Highland Ave. & Belt R. Co.* v. *Walters* (1890) 91 Ala. 435, 8 So. 357.

[12] The employer has been held liable for the negligence of the following agents:

An assistant road master whose duty it is to inspect cars and have them run upon the repair track when they are found to require repairs. *Louisville & N. R. Co.* v. *Davis* (1890) 91 Ala. 487, 8 So. 552.

A supervisor and section foreman in a case where there was a defect in a switch. *Kansas City, M. & B. R. Co.* v. *Webb* (1892) 97 Ala. 157, 11 So. 888; *Alabama G. S. R. Co* v. *Davis* (1898) 119 Ala. 572, 24 So. 862.

A lineman sent out to search for and remedy a defective insulation on an electric wire. *Willey* v. *Boston Electric Light Co.* (1897) 168 Mass. 40, 37 L. R. A. 723, 46 N. E. 395.

A carpenter who understands and looks after machinery, although subject to the orders of a superintendent who is also a salesman. *Copithorne* v. *Hardy* (1899) 173 Mass. 400, 53 N. E. 915.

An employee in charge of the stables of a street car company, one of whose horses was in an unfit condition to be worked. *Huston* v. *Edinburgh Tramway Co.* (1887) 14 Sc. Sess. Cas. 4th series, 621.

A "fireman" of a mine whose duty it is to inspect the workings before the miners go to work, and report as to the state of the ventilation. *Corker* v. *Worsley Coal Co.* (1885; Q. B. D.) 1 Times L. R. 515.

In *Canadian Colored Cotton Mills* v. *Talbot* (1897) 27 Can. S. C. 198, it was held that evidence showing that an employee called a "loom-fixer," whose duty it was to examine a loom, after being notified that something was wrong with it, had failed to make an examination, justified submitting the case to the jury.

[13] *Copithorne* v. *Hardy* (1899) 173 Mass. 400, 53 N. E. 915, where the master was held liable for the negligence of one who attended, under the superintendent's orders, to the adjustment of machinery.

The negligence of a superior employee not charged with that duty, who attempts, at the request of a servant who is using an appliance, to remedy a defect therein, is not imputed to the master.[14] Nor is the clause applicable to an employee whose duty it is, under a rule of his master, to examine for his own security the appliances which he uses.[15] Still less is the master liable for the negligence of a mere laborer working under or with others, even though it may be a part of his duty at some particular moment in the progress of the work to look after and attend to certain instrumentalities.[16]

Negligence on the part of the employer in respect to providing machinery, or seeing that it is in proper condition, cannot be predicated from the fact that fellow servants of the injured person used an appliance, without any authority, for a purpose for which it was neither suited nor furnished.[17]

675. Abnormal conditions resulting from the use of the machines: how far regarded as defects.— Injuries resulting from these abnormal conditions which, in all kinds of industrial work, are temporarily created by the user of the appliances furnished by the master, are not considered to be caused by "defects" within the meaning of these statutes. "The absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks which arise from short-lived causes."[1] Especially

[14] *Thomas* v. *Bellamy* (1900) 126 Ala. 253, 28 So. 707. Compare § 661, note 6, *supra*.

[15] *Memphis & C. R. Co.* v. *Graham* (1891) 91 Ala. 545, 10 So. 283 (conductor and brakeman denied to be "persons intrusted," etc.).

[16] *O'Connor* v. *Neal* (1891) 153 Mass. 281, 26 N. E. 857, where the court refused to hold the master liable for the negligence of a painter's assistant, who aid[ed] his principal in moving from place to place the planks and barrels from which a temporary scaffold was constructed, and adjusted one of the barrels so carelessly that the scaffold collapsed.

[17] *Louisville & N. R. Co.* v. *Jones* (1901) 130 Ala. 456, 30 So. 586.

[1] *Whittaker* v. *Bent* (1897) 167 Mass. 588, 46 N. E. 121, denying recovery for an injury resulting from the temporary dampness of moulds used in an iron foundry, which can be ascertained only at the moment when they are set up, the reason assigned being that the moulds were small and numerous, the danger transitory, and any further inspection than that of employees setting them up impracticable.

The absence of stanchions on the sides of a trolley is not a "defect," where the placing of such stanchions is the duty of the servants who put on the load. *Corcoran* v. *East Surrey Ironworks Co.* (1888; Q. B. D.) 5 Times L. R. 103, 58 L. J. Q. B. N. S. 115.

The liability of a bank of earth which an employer is engaged in leveling for the purpose of grading the land of a third person, and upon which laborers are at work, to fall when undermined, if not properly shored up, is not a "defect in the ways," etc. *Lynch* v. *Ulyn* (1893) 160 Mass. 248, 35 N. E. 550.

A defect in the "ways" is not predicable, unless there is some alteration in the permanent condition of the way itself. Obstacles lying on or near the way, which do not in any degree alter the fitness for the purpose for which it is generally employed, and cannot be said to be incorporated with it, are not within the purview of this provision. *McGiffin* v. *Palmers Shipbuilding & Iron Co.* (1882) L. R. 10 Q. B. Div. 5, 52 L. J. Q. B. N. S. 25, 47 L. T. N. S. 346, 31 Week. Rep. 118, 47 J. P. 70, denying recovery where a car on which

is this rule applicable when the abnormal conditions would not have existed if the plaintiff himself had done his duty.[2] 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.[3]

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 employee in charge of it.[4] *A fortiori*, where such a structural

a workman was conveying heavy iron balls struck against a piece of a substance used for lining the furnaces, which had been negligently placed projecting into the roadway on which the car ran, the result being that one of the balls fell on him.

The words "ways, works, and machinery" do not cover a pile of lumber in the yard of a lumber dealer. *Campbell* v. *Dearborn* (1900) 175 Mass. 183, 55 N. E. 1042.

To the same effect see the following cases, where the abnormal conditions were of the nature mentioned in the memorandum of the facts appended to the citations. *Willetts* v. *Watt* (C. A.) [1892] 2 Q. B. 92, 61 L. J. Q. B. N. S. 540 (temporary removal of the cover of a catch pit lying in the line of a path along which servants had to pass in the course of their duties); *May* v. *Whittier Mach. Co.* (1891) 154 Mass. 29, 27 N. E. 768 (employee stumbled over some small pieces of wood which had been piled against the back of a planing machine near which he had to pass, and was hurt by his hand coming in contact with the machine); *Kansas City, M. & B. R. Co.* v. *Burton* (1892) 97 Ala. 240, 12 So. 88 (car left standing on a railway track), overruling on this point *Highland Ave. & Belt R. Co.* v. *Walters* (1890) 91 Ala. 435, 8 So. 357; *Louisville & N. R. Co.* v. *Bouldin* (1895) 110 Ala. 185, 20 So. 325 (oil box standing near the track, which came in contact with plaintiff's foot while he was standing on the pilot of an engine, and threw him off); *Carroll* v. *Willcutt* (1895) 163 Mass. 221, 39 N. E. 1016 (presence of a ledge stone on a scaffolding).

Both on the principle applied in these cases, and also on the ground that the accident was an unexpected one, it has been held that a master could not be held liable under the statute for an injury due to a railway tie with a projecting spike in it, which had been taken up with a view to repairing it, and placed by the side of the 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 series, 1039.

Whether the proximate cause of the injury was the negligence of a fellow servant in regard to the mer[illegible] of appliances of the work is pr[illegible] question for the jury. *Knight* v. [illegible]*erman Wheel Co.* (1899) 174 Mass. 455, 54 N. E. 890.

[2] A verdict for the plaintiff should be set aside, where his own evidence shows that, if the machine had been properly attended to by himself, the accident would not have happened. *Kay* v. *Briggs* (1889; Q. B. D.) 5 Times L. R. 233.

An employer is not liable for the death of an employee 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 employee was himself intrusted 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.

[3] *Willetts* v. *Watt* (C. A.) [1892] 2 Q. B. 92, 61 L. J. Q. B. N. S. 540.

[4] See *Tate* v. *Latham* (C. A.) [1897] 1 Q. B. 502, 66 L. J. Q. B. N. S. 349, 75 L. T. N. S. 694, holding the absence of the guard of a saw 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."

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.[5] Moreover, it would seem that conditions which, in the first instance, are merely temporary in their nature, will, if they are allowed to become permanent, be assimilated, for the purposes of these statutes, to defects inherent in the substance of the instrumentalities themselves.[6]

When the master keeps a readily accessible stock of simple appliances, he is not bound under the statute, any more than at common law, to see that a servant asks for a new one when that which he has been using is worn out.[7]

The decisions just cited suggest that the temporary or permanent nature of the defect is not the true differentiating factor in this class of cases, and that the essential questions are rather (1) whether the abnormal conditions were mere incidents in the progress of the work, or structural; and (2), supposing them to be of the latter description, whether they were brought about by the act or volition of the employee who was in charge of the instrumentality to which the injury was due.

Willetts v. *Watt* (1892) 2 Q. B. 92. In the report in 61 L. J. Q. B. N. S. 510, the phrase used is "somewhat chronic." It was pointed out in the more recent of these cases by Bruce, J. (divisional court), that this theory of the Lord Justice 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 catch pit 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.

[5] *Copithorne* v. *Hardy* (1899) 173 Mass. 30, 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).

[6] This seems to be the rationale of a Scotch case in which it has been held that a manhole at the side of a railway in a mine, so obstructed with rubbish that a miner is unable to use it as a refuge when cars are approaching is a "defect in the ways." *Ferris* v. *Cowdenbeath* (1897) 24 Sc. Sess. Cas. 4th series, 615.

[7] There can be no recovery for the death of an employee, caused by the breaking of a wooden lever by which a fellow workman was helping to raise a heavy iron door on its hinges, causing the door to swing down and strike an iron lever held by deceased, driving it into his abdomen, in the absence of any evidence that the broken stick was defective, or, if so, that the defect could have been discovered. *Allen* v. *G. W. & F. Smith Iron Co.* (1891) 160 Mass. 557, 36 N. E. 581. The court said: "The whole matter was in the hands of the deceased. He was the person in immediate charge of the furnace. If a new stick was needed, it was his business to know it. The primary duty rested on him; not on the superior officer. Again, if a new stick had been needed, it could have been obtained of the carpenter by the deceased at any time. The defendant kept a stock of lumber of the proper size on hand, and the deceased only had to ask for what he wanted. If such a stick can be said to be part of the works or machinery, the defendant's duty to the deceased did not require it to see that he called for a proper one. It was enough that it had proper ones within convenient reach."

One of a number of chains furnished for use as required is regarded, when it is applied to the purpose for which it

676. Defects in temporary appliances constructed by the servants themselves not deemed to be chargeable to the employer.—A special application of the principle exemplified in the preceding section is the doctrine enforced in several American cases, that there can be no recovery under this provision of the statute, where the injury was the direct result of the negligent manner in which the servants themselves constructed a temporary appliance from adequate and suitable materials furnished by the master.[1] This rule is the counterpart of the doctrine which, in common-law actions, prevents recovery under similar circumstances (see chapter XXX., subtitle C, *ante*), and is subject to the same qualification as that doctrine, *viz.*, that it does not protect the master, if the defective appliance was one which he was

was designed, as a permanent instrumentality, and not one of those small things which go through a rapid course of wearing out and replacement, as to which the rule is that it may be left to the judgment of the workmen when one of them is to be discarded. The making of a link for such a chain, therefore, is not one of those merely transitory adjustments which the master is under no personal obligation to see carefully performed. *Haskell* v. *Cape Ann Anchor Works* (1901) 178 Mass. 485, 59 N. E. 1113.

[1] The action has been held not maintainable where the cause of the injury was one of the following appliances:

Two ladders selected by employees from a supply furnished by the employer, and fastened together for use in painting a building. *McKay* v. *Hand* (1897) 168 Mass. 270, 47 N. E. 104. The court said: "From the description of the ladder which broke, it is difficult to see from the evidence that the defendant was negligent in keeping it among his lot of ladders and in permitting it to be used; and if the sole negligence was that the ladders were fastened together and improperly placed against the house, that was the fault of the plaintiff and his fellow workman, and it was known to and appreciated by the plaintiff at the time. A ladder may be a sound light ladder of sufficient strength to be used by itself, but not suitable to be made the butt of two ladders fastened together."

A temporary staging put up for the purpose of erecting a building. *Burns* v. *Washburn* (1894) 160 Mass. 457, 36 N. E. 199.

A temporary staging put up by workmen themselves who are slating a roof. *Reynolds* v. *Barnard* (1897) 168 Mass. 226, 46 N. E. 703.

A temporary staging used by painters in painting the walls of a building. *Adasken* v. *Gilbert* (1896) 165 Mass. 443, 43 N. E. 199.

The master cannot be held liable as for a defect, where a scaffold falls, owing to the fact that a barrel by which it was supported was placed upon some rubbish of an accidental or temporary character, on the floor of the room where the plaintiff was at work. *O'Connor* v. *Veal* (1891) 153 Mass. 281, 26 N. E. 857.

The employers' liability for injuries sustained by the giving way of a part of a staging is not established where the evidence does not tend to show that they furnished the staging as a completed structure, or that they assumed to exercise any control or supervision as to how it should be built or kept or adapted for work, or that they failed to furnish a sufficient quantity of suitable materials, or that they employed incompetent workmen, but does show that the staging in use in the building had been in the care of the workmen themselves for several months. *Brady* v. *Norcross* (1899) 172 Mass. 331, 52 N. E. 528.

The gravamen of a declaration showing that the plaintiff, a journeyman painter, was injured owing to the negligence of another painter in failing to fasten properly his end of the hanging scaffold on which they were working, is the negligence of a fellow servant in handling or using an appliance, and therefore no cause of action under the statute is alleged. *Ashley* v. *Hart* (1888) 147 Mass. 573, 1 L. R. A. 353, 18 N. E. 416.

bound to furnish in a com[illegible]ted condition.[2] From the case cited it would appear that the servant has the burden of proving the existence of such an obligation, whenever the appliance was one which was of an essentially temporary description, and was intended to be used only for the particular piece of work then in progress.

Another possible qualification of the rule is that the master might be held responsible if the temporary appliance was one constructed by a superintending employee, unless it should be held that proof of negligence on the part of such employee would not sustain an allegation of injury caused by a "defect," and that, under the circumstances supposed, the complaint must be based on the words of the provision in the following subsection of the act. In the absence of any direct authority on the point, all that can be said is that, in any case where it may be uncertain whether the master can be held liable simply on the ground of the existence of a defect, it would be well to insert an alternative count averring negligence in the exercise of superintendence.

677. Duty of servant to report defects.—*a. Statutory and common-law doctrines compared.*— In a case decided a few years after the passage of the English act, it was laid down by Smith, J., that the defense which is based upon the fact that the servant failed to communicate his knowledge of the defect to the employer or his representative is a new one, given by the statute.[1] According to Lord Watson, also, the provision now under discussion puts the employer in a more favorable position than that which he occupied under the common law.[2] The view of that distinguished judge has been adopted by the supreme court of Canada.[3] A similar doctrine seems to prevail in Alabama.[4]

[1] See *Brady* v. *Norcross* (1899) 172 Mass. 331, 52 N. E. 528.

[2] *Weblin* v. *Ballard* (1886) L. R. 17 Q. B. Div. 122, 55 L. J. Q. B. N. S. 395, 54 L. T. N. S. 532, 34 Week. Rep. 455, 50 J. P. 597.

[3] See *Smith* v. *Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392, where, in the course of his comments on the clause, he remarked: "I think the object and effect of the enactment is to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favor of the employer."

[1] *Webster* v. *Pabst* (1892) 21 Can. S. C. 580. It is perhaps not amiss to introduce here a few remarks as to the singularly unsatisfactory character of the expositions of principles in this case, more particularly when it is considered with reference to the special findings which are set out in the record. The answers of the jury to three of the questions propounded by the trial judge were to this effect: (1) That the plaintiff had complained of the defect to the person who appeared to be the proper person to receive a complaint; (2) that the defendant did not know of the defect; (3) that the member of the defendant firm who was himself acting as manager ought to have been cognizant of the defect.

In view of the first of these findings it is not apparent why the effect of the failure of the servant to notify the mas-

But with all deference to these authorities, it seems open to doubt whether the theory thus propounded is correct. There is, it is true, no English decision which in terms lays down the rule that a servant who learns of a defect is bound to communicate his knowledge to his master, and that his failure to give such information constitutes a breach of a specific duty which of itself is enough to prevent his recovering for any injury which he may thereafter receive, owing to the existence of the defect. But the reason for the lack of direct authority on the point is sufficiently obvious. In all the cases decided under common-law doctrines up to the time when Lord Watson delivered this opinion, the circumstances were necessarily such as to bring them within the scope of the principle by virtue of which the servant's action was absolutely barred whenever it was shown that he went on working with a full appreciation of a risk resulting from the master's negligence. The natural result was that, although the failure of the servant to report or complain of a defect was mentioned in some of

ter of the defect should have been regarded as a material question in the case. There is no intimation that the evidence was insufficient to warrant the conclusion arrived at by the jury, nor that the notification was inadequate to charge the master with knowledge, for the reason that it was made to a mere fellow servant. So far as the report shows, it may have been made to the manager of the concern, who, as was stated in the third finding, was one of the partners in the defendant firm. But, even if we assume that the first finding could not be treated as an element in the case for some reason, evidential or doctrinal, which is not disclosed, there still remains the difficulty that the jury also declared that this managing partner "ought to have been cognizant" of the defect. That this finding was, so far as defendant's liability was concerned, equivalent to the first finding, is indisputable, both on principle and authority. See *Mellors* v. *Shaw* (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, 9 Week. Rep. 748, where Blackburn, J., remarked, during the argument of counsel, that an allegation that an instrumentality was known by the defendant to be in an unsafe condition is established by proof that he "ought to have known" that it was in that condition. Other English cases which declare or assume that liability on the master's part is negatived by his ignorance of the defect only where it appears that such ignorance was excusable are *Wecus* v. *Mathieson* (1864) 4 Macq. H. L. Cas. 215; *Feltham* v. *England* (1866) L. R. 2 Q. B. 33, 36 L. J. Q. B. N. S. 14, 15 Week. Rep. 151, 7 Best & S. 676; *Paterson* v. *Wallace* (1854) 1 Macq. H. L. Cas. 748; *Roberts* v. *Smith* (1857) 2 Hurlst. & N. 213, 26 L. J. Exch. N. S. 319, 3 Jur. N. S. 469; *Webb* v. *Rennie* (1865) 4 Fost. & F. 608. For the American decisions to the same effect see § 125, *ante*. In view of this doctrine the finding in question manifestly puts the master in the same position as if notice of the defect had actually been given by the servant, and rendered it a mere matter of supererogation to inquire whether or not he was relieved from liability by the servant's failure to give notice. The defendant firm was plainly answerable on the simple ground that one of its members had been personally negligent in not remedying a defect of which he had constructive knowledge. See *Mellors* v. *Shaw* (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, 9 Week. Rep. 748; *Ashworth* v. *Stanwix* (1861) 3 El. & El. 701, 30 L. J. Q. B. N. S. 183, 7 Jur. N. S. 467, 4 L. T. N. S. 85.

Thus far we have been discussing the case on the assumption that the court, in deciding that a judgment for the plaintiff should not be set aside for the mere reason that the defendant "had no notice" of the defect, used the phrase in the sense of "had received no notification from the servant." This is the construction put upon the decision in the

the cases,[5] this fact was never treated as a material element in the case, the master's defense being regarded as complete without any reference to the question whether the servant had communicated his knowledge. In none of these cases was the evidential significance of the servant's silence considered in any other point of view than as a circumstance tending to show his acquiescence in the conditions,—that is to say, as a circumstance corroborating a presumption, already absolute, that the risks in question had been accepted. Such being the state of the authorities, the mere fact that the existence of a duty on the servant's part to notify his master of a defect was never affirmed cannot fairly be adduced as a ground for denying that there was such a duty. When subjected to the test of general principles, the correctness of Lord Watson's theory seems to be equally disputable. It is impossible to adopt it without accepting the conclusion, that, if a jury has in a common-law action found that the servant was guilty of contributory negligence in failing to give notice of the defect which caused his injury, and it is clear that the verdict was based on the hypothesis that there was a legal duty incumbent on the servant to give the notice, a court of review would be constrained to set the verdict aside. Such a proposition seems too preposterous to entertain. The extreme improbability of such a verdict's even being rendered may be readily conceded; but this practical consideration is immaterial in a discussion of the abstract point of law which is involved.

The general effect of the American decisions in this connection is

reporter's headnote, and the reliance placed by Strong, J., upon the passage from Lord Watson's opinion, where this is undoubtedly the import of the words, shows that the court intended, at all events, to assert the doctrine that the servant did not forfeit his right of action by not giving notice of a defect which was known to him. But it may be desirable to advert, in passing, to the ambiguity of phrase "had no notice," which, so far as the words themselves are concerned, may also be taken to mean "had no actual knowledge." The significance of this fact when considered with reference to the substance of the findings above referred to is obvious. Such a construction of the phrase would render Mr. Justice Strong's remarks applicable to the second of those findings, and upon this circumstance, taken in connection with the further circumstance, already commented upon, that the findings as to the complaint made by the servant, and the master's possession of constructive knowledge of the defect were not deemed to be conclusive in the servant's favor a plausible argument might be based, that the court also intended to stand sponsor for the doctrine that it is the existence or absence of actual knowledge that determines whether the master is or is not liable. Such a doctrine, as is very plainly shown by the English cases cited above, would be erroneous. But the inquiry is not worth pursuing in the present connection. We have merely drawn attention to the point as being one of the obscure aspects of a case which, to say the very least, is neither a model of lucid statement nor a favorable exemplification of the manner in which a court of review should deal with the special findings of a jury in actions of this sort.

[4] See *Mobile & B. R. Co.* v. *Holborn* (1887) 84 Ala. 133, 4 So. 146.

[5] For example, *Skipp* v. *Eastern Counties R. Co.* (1853) 9 Exch. 223, 3 C. L. Rep. 185, 23 L. J. Exch. N. S. 23.

inconclusive for the same reason as that which has been adverted to in commenting on the English cases. The failure to report a defect is usually treated merely as a cumulative ground for denying the servant's right of recovery, and not as the breach of a specific duty.[6]

Inasmuch as a servant frequently finds himself relegated to his common-law rights owing to his failure to give due notice that the injury was sustained, or to bring the action within the statutory period, the true doctrine on this subject is still a question of more than theoretical interest in England and her colonies, where it has not yet been determined how far the doctrine enunciated in *Smith* v. *Baker*[7] may, when the question arises, be held to have modified, in common-law cases, the theory of the older decisions, that the servant's acceptance of a risk is to be inferred, as matter of law, from his continuance of work with a knowledge of its existence. See § 280, *ante*. In Massachusetts it seems to be immaterial, in this point of view, whether the action is brought at common law or under the statute, as the English doctrine that the servant's assumption of risks is a question for the jury where the statute is relied upon has been definitely repudiated in recent decisions.[8]

b. Position of a servant who fails to report a defect.—In an action brought under a statute which merely declares that the servant cannot recover unless he reports the defect, it is clear that, if he fails to make the report, and goes on working without knowing that the master is aware of the defect, he cannot recover for any injuries which he may thereafter receive by reason of its existence.[9] The doctrine laid down

[6] See, for example, the language used in *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Hough* v. *Texas & P. R. Co.* (1879) 100 U. S. 213, 224, 25 L. ed. 612, 617; *McQueen* v. *Central Branch Union P. R. Co.* (1883) 30 Kan. 691, 1 Pac. 139; *Pollich* v. *Sellers* (1890) 42 La. Ann. 623, 7 So. 786.

[7] [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392. It is significant that in this case Lord Watson was prepared to hold that, apart from the act of 1880, the plaintiff's remedy was not necessarily taken away by the mere fact that, in the knowledge of the risk and after remonstrance, he continued to work.

[8] *O'Maley* v. *South Boston Gaslight Co.* (1893) 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119; *Davis* v. *Forbes* (1898) 171 Mass. 548, 47 L. R. A. 170, 51 N. E. 20. See § 376, *ante*.

[9] *Mobile & B. R. Co.* v. *Holborn* (1887) 84 Ala. 133, 4 So. 146 (where the defense given by this clause was described as a special one given by the statute); *Thomas* v. *Bellamy* (1900) 126 Ala. 253, 28 So. 707.

In *Columbus & W. R. Co.* v. *Bradford* (1888) 86 Ala. 574, 6 So. 90, the effect of the Alabama act was thus explained: "The existing law was supposed to fall short of the attainment of justice, in that, and only in that, no action was allowed for the negligence of a certain class of persons. The statutory purpose was to charge the master for the negligence of this class of persons in his employment, in the same manner, under like conditions, and to the same extent as he was before charged for his own negligence, or that of superior employees. In the effectuation of this purpose, it became necessary to go further than a mere declaration of liability for the negligence of the fellow servants of

in *Smith* v. *Baker*,[10] is presumably not applicable under such circumstances, though the writer is not aware of any case in which the point has been discussed. In Ontario and British Columbia the position of the servant is more favorable, the legislature having expressly enacted that the servant is not debarred from recovery merely by reason of his having continued to work with knowledge of the risk. In view of the extreme unlikelihood that any jury will, even in a case of this description, pronounce the risk to have been assumed by the plaintiff, it will be apparent that the practical effect of this provision is to render almost nugatory the protection afforded to the master by the clause which makes it the duty of the servant to give notice.

By the express words of the statutes a servant is not bound to give information of a defect where he knows that it has already been discovered to the master.[11]

c. Position of a servant who has reported a defect.—The rights of action acquired by a servant who duly reports a defect in compliance with the statute, and then goes on working, depend largely upon the significance attributed the maxim, *Volenti non fit injuria*. A full discussion of the meaning and effect of this maxim will be found in chapter XXI., *ante;* but it is necessary to state in the present connection the result of the decisions, in so far as they have a direct bearing upon the provision now under review.

In an oft-cited case Lord Esher expressed the opinion that the effect of this provision was that the servant was always entitled to recover if he gave information of the defect.[12] Bowen, L. J., did not refer specifically to this point, but the theory upon which he and Fry, L. J., proceeded in giving judgment against the plaintiff, *viz.*, that the maxim was, under the circumstances, a bar to the action, necessarily implies a disapproval of the doctrine that the right of recovery became absolute as soon as the servant had made a complaint to the proper person.

In another case decided in the same year Lord Esher remarked that

the plaintiff, and to guard against a construction of that declaration which would give to the employees redress for the fault of their coemployees, to which they would not have been entitled for that of the employer, or of a superior servant of the common master. To this end—to preserve to the master the same defense against the negligence of his servant as he had against the consequences of his own carelessness—the legislature declared that he should not be liable if the complaining employee knew of the defect or negligence which caused the injury, and, not being aware that the fact was already known to the master, or some person superior in authority, failed to communicate his knowledge to the employer or superior employee."

[10] [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392.

[11] *Truman* v. *Rudolph* (1895) 22 Ont. App. Rep. 250.

[12] *Thomas* v. *Quartermaine* (1887) L. R. 18 Q. B. Div. 685 (p. 689), 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516.

it was very difficult to give a sensible construction to the provision, and enunciated a view somewhat different from that intimated in the earlier case, holding the meaning of the words to be that, if the servant did give notice, and the defect was not remedied, he might recover unless he was brought clearly within the maxim.[13] The plaintiff's action was held by the majority of the court to be maintainable, and the fact that Fry, L. J., who had concurred with the views of Bowen, L. J., in *Thomas* v. *Quartermaine*, agreed in the judgment and that he did not give any intimation that his views had undergone a change since the earlier case was decided, shows that he did not intend to go to the length of holding that the servant had done everything that was required to give him an indefeasible right of action when he had given notice of the defect. The subsequent decision of the House of Lords in *Smith* v. *Baker*[14] also falls short of the extreme theory suggested by Lord Esher in *Thomas* v. *Quartermaine*, as it simply decides that the servant does not forfeit his right of action merely because he goes on working after remonstrating against the manner in which the master's appliances are used.[15]

In Alabama it has been held that, in order to fulfil his statutory duty as to the reporting of a defect a servant must notify either the master himself or the employee who has specific function it is to see that the instrumentality in question is in proper condition. It is not sufficient to notify a superior employee who is not intrusted with that function.[16] The rule is possibly more favorable to the servant in Ontario, though the point has not been directly raised in any case that has come to the writer's notice.[17]

[13] *Yarmouth* v. *France* (1887) L. R. 19 Q. B. Div. 647 (p. 656), 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281.

[14] [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392.

[15] The testimony on the record was that one of the plaintiff's fellow workers had, in his hearing, complained to the foreman of the danger of slinging stones over their heads with the crane, and that he himself had told the crane driver that this was not safe. But in the various opinions delivered, these facts were referred to merely as evidence tending to show that the servant was fully aware of the risks he was running. The question whether the servant, by giving notice of the abnormal danger, acquires an absolute right to recover damages for such injuries as he may thereafter sustain from the existence of those conditions, was not discussed.

[16] *Thomas* v. *Bellamy* (1900) 126 Ala. 253, 28 So. 707.

[17] In *Sim* v. *Dominion Fish Co.* (1901) 2 Ont. L. Rep. 69, Armour, C. J. O., said that if the servant's right of action had depended on the statute it would have been necessary to send the case to a jury in order to determine whether a superior employee knew of the defect,—a remark which may perhaps be construed as an intimation that a notification to any superior employee would have been sufficient.

D. Liability for the negligence of employees exercising superintendence.

678. Introductory.—The provision of the employers' liability acts which will be discussed in this subtitle is that which gives a servant the right to recover damages for an injury caused "by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him, while in the exercise of such superintendence." On referring to the text of these statutes in subtitle A, *supra,* it will be found that these words constitute § 1, subs. 2, of the original English act, and also of the acts in force in Newfoundland, New South Wales, Victoria, Queensland, South Australia, New Zealand, and Alabama, and § 3, subs. 2 of the acts of Ontario, British Columbia and Manitoba.

A clause of the same tenor is found in the acts of Massachusetts, New York, and Colorado, an action being declared to be maintainable for an injury caused "by reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence." By Mass. Stat. 1894, chap. 499, § 1, the following words were added to this clause; "or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer." The recently enacted New York act also embraces this provision.

The Indiana act, which in other respects follows the English one very closely, contains no provision expressly relating to superintending employees.

By § 8 of the English and Newfoundland acts it is declared that the expression, "person who has superintendence intrusted to him," means "a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor." The corresponding provision in the acts of Ontario, British Columbia, and Manitoba is § 2, subs. 1, and runs as follows: "'Superintendence' shall be construed as meaning such general superintendence over workmen as is exercised by a foreman, or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labor." There is no supplementary definition clause in the acts of Alabama, Massachusetts, New York, and Colorado, but the effect of the main provision in the two latter acts is evidently to give the servant a right of recovery for the negligence of agents performing functions not materially different from those

contemplated by the framers of other statutes. See further §§ 680-685, *infra*, as to the persons who are deemed to be "exercising superintendence" within the meaning of each section of the statutes.

679. Conditions precedent to recovery; generally.— In order to recover under the provisions declaring employers to be liable for the defaults of servants exercising superintendence the plaintiff must establish these facts:

(1) That the servant was a "superintendent" within the meaning of the acts. (2) That the act which was the immediate cause of the injury was negligent. (3) That the act was done in the exercise of the controlling functions of the superintendent.

These evidential prerequisites to the maintenance of the action will be discussed seriatim in the following sections.

680. What employees are superintendents under the English, New York, Massachusetts, and Colorado acts.—*a. General remarks.*— The phraseology employed to define the class of persons for whose negligence the master is responsible is, it will be observed, not quite the same in these statutes. They all define a "superintendent" as an employee whose "sole or principal duty is that of superintendence." But the Massachusetts, New York, and Colorado acts omit the words which specifically exclude liability for the negligence of an employee who is "ordinarily engaged in manual labour." This complementary clause seems to possess little, if any, real significance, and to be, for practical purposes nothing but the negative expression of a conception which is adequately defined by that which precedes it. In view of the usual system upon which industrial establishments are conducted, it may be regarded as a necessary implication that an employee whose principal duty is that of superintendence is never "ordinarily engaged in manual labour." And the converse of this proposition also holds.

b. Employees held to be vice principals.—That the negligent employee was "exercising superintendence" within the [illegible] these statutes is obviously a warrantable deduction for a jury, whenever the evidence indicates that the authority wielded by him was sufficiently extensive to place him in the category of common-law vice principals as that term was understood in England before the judgment of the House of Lords in *Wilson* v. *Merry*,[1] abrogated the doctrine that masters are liable for the negligence of managing agents, and as it is still understood in all, or nearly all, the American states which stand outside the list of those in which the doctrine obtains that any superior

[1] (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30.

servant represents the master in so far as he may be performing the function of giving orders.[2] The applicability of these provisions to all employees who are intrusted with the full control of the whole of an establishment, or one considerable department thereof, has never, it is believed, been disputed, and is taken for granted in several of the cases in which the actual questions discussed were whether the act which caused the injury was negligent, and, if so, whether the negligence was in the exercise of superintendence or in the performance of some other function.[3] See §§ 686 688, *infra*.

As regards the lower grades of employees, 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 employee was exercising superintendence, if the evidence tends to show 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.[4] In such cases the inference that the descriptive words of the statute are applicable is sometimes corroborated by specific testimony which tends to show that the superior servant did not work, and was not expected to work, with his hands.[5] 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. Compare § 688, *infra*.

[1] A complete review of the cases showing the position of the courts of England, the colonies, and the United States with respect to the representative character of controlling employers will be found in chapter XXVIII., *ante*.

[2] Testimony showing 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 show whether or not he was acting as superintendent. *McCabe* v. *Shields* (1900) 175 Mass. 438, 56 N. E. 699.

[3] 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* (1885) C. A.) 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 & N. E. R. Co.* (1894) 160 Mass. 573, 36 N. E. 588.

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.* (1893) 159 Mass. 532, 34 N. E. 1070, Distinguishing *Shepard* v. *Boston & M. R. Co.* (1893) 158 Mass. 174, 33 N. E. 508, where it was laid down in unqualified terms that a section foreman is not a person intrusted 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.

A stable foreman was assumed to be a superintendent, in *Yarmouth* v. *France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281.

[4] See, for example, *McPhee* v. *Scully* (1895) 163 Mass. 216, 39 N. E. 1007,

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 employee did a certain amount of manual labor in connection with the work which he supervised. That fact is not conclusive upon the question whether his principal duty was that of superintendence.[6] See also § 688, *infra*.

The fact that a foreman is paid higher wages than the ordinary laborers is a circumstance to be considered in connection with other

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.

[6] "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 labor." Smith, J., in *Kellard* v. *Rooke* (1887) L. R. 19 Q. B. Div. 585, 588.

See also *Crowley* v. *Cutting* (1896) 165 Mass. 436, 43 N. E. 197 (superintendent of quarry sometimes helped to attach the dogs by means of which heavy stones were hoisted); *Reynolds* v. *Barnard* (1897) 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 employee denominated a "walking superintendent or foreman" 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* (1887: C. A.) 51 J. P. 519, Affirming (1886: Q. B. D.) 3 Times L. R. 777.

In *Prendible* v. *Connecticut River Mfg. Co.* (1893) 160 Mass. 131, 35 N. E. 675, 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. *Gibbeneck* v. *Dean Steam Pump Co.* (1896) 165 Mass. 202, 43 N. E. 85.

The testimony of an employee that it took most of his time telling the other employees 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) 171 Mass. 162, 50 N. E. 525.

evidence upon the question whether his sole or principal duty is that of superintendence.[7]

c. Employees 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 employee a superintendent within the statute. This provision, in other words, is not construed as being declaratory of the "superior servant" doctrine, which prevails, under the common law, in some jurisdictions. See chapter XXVIII., subtitle D., *ante*. This conception of the meaning of the statute is doubtless warranted by the fact that cases of the mere exercise of control have been provided for by the succeeding subsection of the statute. But it seems to be fairly open to question whether some of the decisions cited below have not construed the facts with undue rigor to the plaintiff's disadvantage. The result of the view thus taken is that the master is not responsible for the negligence of an employee who habitually participates in the work done by his subordinates, and whose authority over them is limited to giving directions in respect to that work.[8]

[7] *O'Brien* v. *Look* (1898) 171 Mass. 36, 50 N. E. 458, where the servant was allowed to recover upon evidence showing 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.

[8] It has been held that no action can be maintained for the negligence of the following employees:

A workman who was being assisted by another in the simple operation of unloading a cart. *Allmarch* v. *Walker* (1885; Q. B. D.) 78 L. T. Journ. 391.

A man ordinarily engaged in manual labor, although he in fact superintended his fellow workmen as a "ganger" or "gang foreman." *Hall* v. *North Eastern R. Co.* (1885; Q. B. D.) 1 Times L. R. 359 (new trial ordered to determine whether an employee in charge of a body of men engaged in loading cars was a superintendent or ordinarily engaged in manual labor).

A foreman who worked "at getting out lumber and piling it up, and in operating saws." *O'Brien* v. *Rideout* (1894) 161 Mass. 170, 36 N. E. 792 (plaintiff was a common laborer put to work at a saw).

One employed as a common painter, receiving the same pay and doing the same work as the other men on the job. *Adasken* v. *Gilbert* (1896) 165 Mass. 443, 43 N. E. 199.

The testimony of the foreman of gang of slaters, called by the employer, that he worked with his hands nine tenths of the time, is not conclusive as to that fact as bearing upon the question whether the witness's principal duty was that of superintendence, but presents a question for the jury, although the fact, if proved, takes the case out of the statute. *Reynolds* v. *Barnard* (1897) 168 Mass. 226, 46 N. E. 703.

Evidence that a person employed by another as superintendent of the blasting of a ledge of rock by means of dynamite exploded in drill holes by electricity worked with his own hands in attending to the fire under the steam boiler, in sharpening all the tools used by the workmen, in charging the drill holes and in clearing them out, and in other acts of manual labor, which occupied the most of his time, will not warrant a finding that his "principal duty is that of superintendence." *O'Neil* v. *O'Leary* (1895) 164 Mass. 387, 41 N. E. 662.

In *Cushman* v. *Chase* (1892) 156 Mass. 342, 31 N. E. 4, the delinquent employee was the engineer of the engine by means of which a hoisting apparatus, used for transferring a ship's cargo to a lighter, was operated. His station was on the lighter, and the hold

681. — under the Alabama act.— As the master is by this act made liable for the negligence of employees who have "any superintendence intrusted to them," and these very general words are not qualified by any limiting or explanatory expressions, the inference would seem to be that the legislature intended to create a larger class of vice principals than that which is constituted by the acts commented upon in the last section. But how much wider the responsibility of the master really is cannot be determined with any degree of precision from the decisions, as they stand. The only case in which it seems impossible to avoid the conclusion that the result would have been different if the action had been brought under the acts just mentioned is one in which it was held that a railroad company must answer for injuries to a brakeman resulting from the negligence of an engineer in running the engine.[1] Under those acts, of course, an action may be maintained for such an injury, if the declaration is based on the subsection expressly declaring engineers to be vice principals. But in view of the decisions cited in the last section, by which the master's liability for the negligence of an employee operating a piece of machinery is de-

of the vessel was out of his sight. There were four men in the hold whose work was to collect the bundles of laths into heaps, around which they put a rope. When the fall was lowered the hook was attached to the rope, and a signal given to the stageman, who signaled to the engineer to raise or lower as the work in the hold required. The engineer employed the men in the first instance, and set them at work. He went into the hold on several occasions, for a few moments at a time, and showed them how to adjust the rope around the bundles of laths. He discharged and employed men. The unloading of the vessel took two or three days, and the men were paid by the defendant in person, who was there several times for a little while on each occasion. The engineer did no manual labor, except the running of the engine. "Upon the facts," said the court, "it might be competent to find that the engineer was to some extent a superintendent. The employment and discharge of workmen, setting them at work, and showing them how to do work, are acts consistent with superintendency. But these acts in connection with the evidence that his station was on the lighter, and his work there the continuous labor of running the engine in accordance with orders transmitted to him from others, show that neither his sole nor principal duty was that of superintendence."

A finding that a direction given as to the disposal of goods was an act of superintendence is not warranted, where the injured servant testifies that the delinquent used to give orders to some twelve or thirteen persons in the room where the goods were, but subsequently qualifies this statement by saying "When anybody gave what I call orders with respect to the load or weight, it was to tell where the load was to go, and that was all there was of it." *Sullivan* v. *Thorndike Co.* (1899) 175 Mass. 41, 55 N. E. 472 (holding an instruction to be correct by which the jury were told that, if the delinquent had the right to say to the plaintiff, "Take these goods upstairs," and it was the duty of the injured servant to obey this direction that would be a superintendence; but that, if the delinquent merely pointed out where the goods were to go, that would not be a superintendence).

In an English case it was laid down by Smith, J., *arguendo*, that a "ganger, the foreman of a gang of laborers, who is working with his hands all the day is not a vice principal." *Kellard* v. *Rooke* (1887) L. R. 19 Q. B. Div. 585, 588.

[1] *Louisville & N. R. Co.* v. *Mothershed* (1893) 97 Ala. 261, 12 So. 714.

nied (see note 8), it is difficult to draw any other inference than that this ruling indicates a real difference between the scope of the Alabama and of the other acts. It must be admitted, however, that the real scope of this case, considered as one which illustrates an application of a general principle, and not as one which was determined with reference to the special facts involved, is rendered quite obscure by two later cases. In one of these an operator of a steam crane was treated as the representative of the master in respect to controlling its movements.[2] In another, recovery was refused for an injury received by a mechanic engaged in repairing a stationary engine, owing to the negligence of the engineer in starting the engine while the work was going on.[3] As will be seen when we recur to the second of these cases, in a later section (688), the essential and ultimate ground upon which the decision proceeded was that the negligent act, being a manual one, was not done in the exercise of superintendence. This element, however, though it was not specifically referred to, was clearly present in the other cases, and cannot legitimately be adduced as a differentiating factor. To obtain a ground upon which these cases can be reconciled, it seems necessary to have recourse to the theory relied upon in a still later decision, that, as to certain operations, a locomotive engineer exercises both control and superintendence, while as to others he exercises merely control, and that a railway company is liable only for negligence in respect to operations of the former description.[4] But this is a refinement of doctrine for which it seems difficult to find a warrant in the ordinary meanings of the words thus opposed to each other. Superintendence cannot, it is submitted, be exercised without at the same time exercising control.[5]

[1] *Anniston Pipe Works* v. *Dickey* (1890) 93 Ala. 418, 9 So. 720.

[2] *Dantzler* v. *De Bardeleben Coal & I. Co.* (1893) 101 Ala. 309, 22 L. R. A. 361, 14 So. 10. The court said: "Whether . . . there may possibly be a case of superintendency purely of machinery, or not, it is most clear to us that Gould's position involved no such case, dissociated from consideration of the fact that he had a helper, whose duties are shown in the evidence. Whether he had any superintendence intrusted to him, in view of this consideration, is a question not necessary to be decided in this case. If any such superintendency existed in that connection, it was not a general superintendency over the helper and the machines, not a general power of having the machines operated as he directed by the hand of the helper, but only a special superintendence to direct the helper to assist him, Gould, in the manual labor of operating them."

[3] *Culver* v. *Alabama Midland R. Co.* (1895) 108 Ala. 330, 18 So. 827, holding, in an action by a fireman, that it was error to direct a verdict for the defendant, where the injury was caused by the negligence of a railway engineer in not seeing that the coal on the tender was loaded properly by the gang assigned to the work.

[4] *Chicago, R. I. & P. R. Co.* v. *Ross* (1897) 112 Fed. 851, 50 C. C. A. 615, 56 L. R. A. 203.

[5] The definition of the word "superintend," in the Century Dictionary, is "to direct the cause and oversee the details of (some work, etc.); regulate with authority; manage."

In the other decisions in this state, the conclusion arrived at is not affected by the omission of the qualifying words inserted in the English, Massachusetts, Colorado, and New York acts. Employers have been held to be answerable for the defaults of all superior servants, whatever their rank, who are invested with discretionary powers as respects the choice of the means by which the particular work in hand shall be executed."

682. — under the Canadian and Australian acts.— The precise significance of the express declaration in the Ontario, British Columbia, and Manitoba acts that the master is responsible, whether the person exercising superintendence is or is not ordinarily engaged in manual labor (see § 678, *supra*), has not yet been determined. But the words preceding the clause certainly contemplate something different from that informal superintendence which is often exercised by one member of a gang of men who are sent, without any regularly appointed foreman, to do some particular piece of work.[1]

The Australian acts employ virtually the same phraseology, and must therefore receive the same construction, as the English act.

683. Employees controlling machinery; status of.— The superintendence contemplated by the statutes is that which is exercised over other

[a] Actions have been held maintainable where the negligent persons were the following employees:

The superintendent of a mine. *Drennen* v. *Smith* (1896) 115 Ala. 390, 22 So. 442; *Bessemer Land & Improv. Co.* v. *Campbell* (1898) 121 Ala. 50, 77 Am. St. Rep. 17, 25 So. 793.

The superintendent of an iron company's business. *Woodward Iron Co.* v. *Andrews* (1896) 114 Ala. 243, 21 So. 440.

A yardmaster, superior to all other railroad employees present, who peremptorily takes the place of the engineer and is running an engine at the time a car is derailed, or is present directing and controlling the engineer. *Louisville & N. R. Co.* v. *Mothershed* (1893) 97 Ala. 261, 12 So. 714.

A yardmaster while engaged in making up trains. *Kansas City, M. & B. R. Co.* v. *Burton* (1893) 97 Ala. 240, 12 So. 98; *Louisville & N. R. Co.* v. *Bouldin* (1898) 121 Ala. 197, 25 So. 903. First appeal (1895) 110 Ala. 185, 20 So. 325; *Highland Ave & Belt R. Co.* v. *Dusenberry* (1893) 98 Ala. 239, 13 So. 308; *Richmond & D. R. Co.* v. *Hammond* (1890) 93 Ala. 181, 9 So. 577; *Alabama Mineral R. Co.* v. *Jones* (1896) 114 Ala. 519, 62 Am. St. Rep. 124, 21 So. 507.

A conductor. *Alabama Midland R. Co.* v. *McDonald* (1895) 112 Ala. 216, 20 So. 472; *Georgia P. R. Co.* v. *Propst* (1887) 83 Ala. 518, 3 So. 764.

The superintendent of a pile driver. *Southern R. Co.* v. *Shields* (1898) 121 Ala. 460, 77 Am. St. Rep. 66, 25 So. 811.

A superintendent or foreman employed by a street railway company. *North Birmingham Street R. Co.* v. *Wright* (1901) 130 Ala. 419, 30 So. 360.

The superintendent of a manufacturing company. *Decatur Car Wheel & Mfg. Co.* v. *Mehaffey* (1901) 128 Ala. 242, 29 So. 646.

The superintendent of a wrecking crew. *Louisville & N. R. Co.* v. *Jones* (1901) 130 Ala. 456, 30 So. 586.

[1] The fact that one of a small gang of workmen possessed more experience than the rest, and took upon himself to give directions as to the manner of executing a general order of their regular foreman with regard to a certain piece of work, is not of itself sufficient to show that he was exercising superintendence. *Garland* v. *Toronto* (1896) 23 Ont. App. Rep. 238. Reversing (1895) 27 Ont. Rep. 154. Compare the cases cited under § 680, subd. c, *supra*.

men, not over inanimate appliances.[1] So far as regards most of the jurisdictions, therefore, with which we are now concerned, it is clearly settled that a master cannot be held liable, as for negligence in the exercise of superintendence, where the culpable person was an employee whose duty was essentially the operation of a piece of machinery, though in so doing he necessarily exercised some control over other employees who were affected by its movements.[2] The Alabama decisions which point, in some measure at least, to a different theory, are discussed in § 681, *supra*. Still less is the master liable where the negligent employee merely controlled the movements of machinery, in the sense that it was his duty to inform the employee actually operating it at what precise moment it was to be started or stopped.[3]

An employee whose usual work is merely to operate a machine is not made a vice principal by the fact that it is his duty, when the machine gets out of order, to notify the employee who does the repairs to put it in order.[4]

684. Master liable though injured servant was not under the control of the negligent employee.— The mere fact that the "superintendence" was not exercised over the person hurt will not prevent him from recovering.[1]

Kansas City, M. & B. R. Co. v. *Burton* (1893) 97 Ala. 240, 12 So. 88. See further, as to this case, § 737, *infra*.

[2] *Farnham* v. *New Bank Coal Co.* (1896) 23 Sc. Sess. Cas. 4th series, 722 (denying recovery where the negligence was that of the engineer of a hoisting cage in a mine).

A person in charge of the lever by which a steam hammer is worked, and whose duty it is to raise or let fall the hammer at the word of command, is not "superintendent." *Hannon* v. *Hudson* (——) 7 W. N. (New So. Wales) 105.

See also § 680, note 8, *supra*, where two other cases to the same effect are cited.

[3] No superintendence is exercised by a workman whose duty it is to guide by means of a guy rope the beam of a crane used for lowering sacks of wheat into a ship's hold, and to give direction when the chain-tail is to be lowered or hoisted. *Shaffers* v. *General Steam Nav. Co.* (1883) L. R. 10 Q. B. Div. 356, 52 L. J. Q. B. N. S. 260, 48 L. T. N. S. 228, 31 Week. Rep. 656, 47 J. P. 327.

Nor by a brakeman engaged in loading a barge, whose duty is to give signals to the drawer of the crane when to raise and lower the bucket. *Claxton* v. *Hoadley* (1888; C. A.) 4 Times L. R. 756.

[4] *Roseback* v. *Etna Mills* (1893) 158 Mass. 379, 33 N. E. 577.

[1] *Ray* v. *Wallis* (1887; C. A.) 51 J. P. 519. It has been held by Donovan, J., in a nisi prius case, that the statute is applicable wherever there is a common master, though the injured servant is employed in a department distinct from that controlled by the negligent servant. *Kearney* v. *Nicholls* (1880) 76 L. T. Journ. 63 (machinist killed owing to negligence of person superintending structural alterations on a mill).

In *Kansas City M. & B. R. Co.* v. *Burton* (1893) 97 Ala. 240, 12 So. 88, the court reasoned thus: "We are unable to agree with counsel that 'the superintendence which comes within the contemplation of the statute shall be a superintendence over the person who complains of the negligence of the person intrusted with it.' The remedy for negligence of superior in the control of inferior employees whereby injury results to the latter is given by subsec. 3. Under subsec. 2, it is manifest, we think, the liability of the defendant is in no sense dependent upon the relations existing in the service between the negli-

685. Deputy superintendents; liability for negligence of.— In two of the reported cases the servant's right to recover for the negligence of an employee who was temporarily acting as foreman was denied on the ground that the evidence did not warrant a finding that his service principal duty was that of superintendence.[1] These decisions are unsatisfactory in this respect, that they do not deal with the question which is obviously involved in the facts in evidence, *viz.*, whether the spirit, if not the letter, of the statutes does not require the conclusion that any employee exercising superintendence for a definite period, as the deputy of the person regularly discharging that function, should be regarded as a representative of the master. On general principles, of course the master could not be held liable unless the delegation of superintendence was authorized, but, assuming this point to be settled in the plaintiff's favor, it is submitted that, in cases of this type, the inquiry is concerned solely with the relations of the parties during the period of deputed superintendence, and that, as to that period, the deputy may justifiably be said to be exercising duties of superintendence, whatever may be his functions at other times.

So far as Massachusetts is concerned, this is now the law by virtue of the clauses added in 1891 to the original statute. See § 6, *supra*.[2]

gent and the injured person. If the former has superintendence intrusted to him, and is negligent in the exercise of it to the injury of any 'servant or employee in the service or business of the master,' whatever be the relation *inter se* of the servants, the master is made liable therefor by the very terms of the statute. If a yard master charged with the duty of keeping the tracks clear should negligently obstruct a track, and in consequence the president of the company should be injured in the service of the employer, the corporation, it cannot be doubted that the latter would have to respond in damages."

[1] *Kellard* v. *Rooke* (1887) L. R. 19 Q. B. Div. 585, (1888) L. R. 21 Q. B. Div. 367, 4 Times L. R. 709, 57 L. J. Q. B. N. S. 599, 36 Week. Rep. 875, 52 J. P. 820. There the theory upon which the court proceeded was that the very fact of the negligent person being merely a temporary superintendent acting as such during the absence of the defendant, who usually directed the work, showed conclusively that he was ordinarily engaged in manual labor.

In *Dowd* v. *Boston & A. R. Co.* (1894) 162 Mass. 185, 38 N. E. 440, the evidence was that under the general superintendent there was a foreman who hired men and exercised superintendence more or less, in the superintendent's absence of that part of the work where the negligent employee was engaged, and that the negligent employee received orders from the superintendent or this foreman in regard to his own work and that of the men working with him, and gave these men directions about the work in the absence of the superintendent. The negligent employee was doing the same kind of work and receiving the same wages as his fellow laborers.

[2] Under this amendment a master has been held liable for the negligence of an employee in a small foundry who, when his master was not present, directed the men as to their work, but also participated in that work himself. *McCabe* v. *Shields* (1900) 175 Mass. 138, 56 N. E. 899.

Where the defendant's general superintendent intrusted to a subordinate the duty of supervising the work of lowering a heavy shaft, and did not take charge of the work himself, and was not present when the injury was received, the jury is warranted in finding that the employee who directed the work, acting as superintendent with the au

686. Necessity of proving that the injurious act was negligent.— In cases where it is established or conceded that the person whose act or omission was the immediate cause of the injury complained of was a "superintendent" within the meaning of the statutes, and that such an act or omission was one pertaining to the exercise of superintendence, the plaintiff will still fail in his action unless he can show that the act or omission constituted a breach of duty. In the subjoined note are collected a number of rulings upon the simple question whether there was or was not negligence. Other cases involving similar groups of facts, but actually turning upon the question whether the employee alleged to be the defendant's representative was exercising superintendence, are cited in the following sections.[1]

In order to hold an employer for positive acts of negligence on the

thority and consent of the defendant and in the absence of the defendant's superintendent. *Knight* v. *Overman Wheel Co*, (1899) 174 Mass. 455, 54 N. E. 890.

[1] (a) *Master not exempt from liability as matter of law.*— A superintendent may properly be found negligent in absenting himself from the place of work, and delegating his duties to another, when operations of peculiar difficulty and danger are to be carried out. *Cook* v. *Stark* (1886) 14 Sc. Sess. Cas. 4th series, 1.

Where the evidence leaves it uncertain whether it was the duty of the superintendent of a mine to stop or continue the running of a suction fan when a fire is discovered in the mine, and also how much time elapsed after the fire began before he learned where it was, and whether or not he acted promptly, and there is also testimony tending to show that the fan was stopped once and then started again, it is for the jury to say whether the superintendent was reasonably careful in seeing that the fan was not started again, even if it was properly stopped in the first instance, although a large number of people were congregated round the mouth of the mine, and it is not clear who started the fan for the second time. *Dreamon* v. *Smith* (1895) 115 Ala. 396, 22 So. 112.

The question as to whether an injury to an employee from the explosion of dynamite in a conduit was due to the negligence of the superintendent of the contractor while exercising superintendence is for the jury upon evidence that the latter knew on the Saturday before the accident that a hole loaded with dynamite had not been fired, and that on Monday following he directed the plaintiff to drill a new hole which pointed towards the loaded hole, and the explosion resulted from contact with the dynamite in drilling the new hole. *Dean* v. *Smith* (1897) 168 Mass. 569, 48 N. E. 619.

The question as to whether a superintendent was guilty of negligence, while exercising superintendence, in directing dynamite to be put into a hole while the rock was heated by a recent explosion, is for the jury upon evidence that, under such circumstances, an explosion was likely or liable to occur, and the explosion which followed and caused the death of the deceased was the result of such direction. *Green* v. *Smith* (1897) 168 Mass. 485, 48 N. E. 621.

Cotton waste in a chimney belonging to defendant company caught fire, and its superintendent sent a man up the chimney to put it out; and in doing so the man threw down two planks which were burning, which act the superintendent approved. Afterwards a second fire broke out, and the superintendent ordered plaintiff's husband and other to assist in putting it out, and the same man was sent up the chimney and threw down a burning plank, as at the former fires, and just as it was thrown, without warning, plaintiff's husband stepped inside the chimney and was instantly killed by the plank. Held that the fact that the employee who was sent up the chimney failed to give deceased warning of the danger from planks being thrown down did not necessarily show negligence of a fellow servant, since the jury might have found that the fellow servant did all that he should have done, and that it was the

part of his superintendent, if these facts relate to a matter in regard to which the employer has no duty to perform, it should be made clear.

duty of the superintendent to give de-ceased warning. *Cote* v. *Lawrence Mfg. Co.* (1901) 178 Mass. 295, 59 N. E. 656.

Where the complaint alleges negligence on the part of defendant's superintendent, or one exercising superintendence, it is proper to admit evidence of statements to defendant's foreman, and in his presence, of the dangerous character of the trench and the need of bracing. *Bartolomeo* v. *McKnight* (1901) 178 Mass. 242, 59 N. E. 801.

The fact that it suited the convenience of the consignee of the cargo of a car left standing in dangerous proximity to an adjacent track to unload it at that place will not relieve the railway company from liability for the negligence of the yard master in leaving it in that position, the consequence being that a switchman on the adjacent track was injured by collision with the car. *Kansas City, M. & B. R. Co.* v. *Burton* (1895) 97 Ala. 240, 12 So. 88.

Allowing an oil box in a railway yard to be so near the track as to catch the foot of a switchman, casually allowed to slightly protrude beyond the end of the footboard of an engine on which he is riding, is negligence in the person whose duty it is to keep the tracks in the yard free from obstructions. *Louisville & N. R. Co.* v. *Bouldin* (1898) 121 Ala. 197, 25 So. 903, Reiterating opinion expressed in first appeal in (1895) 110 Ala. 185, 20 So. 325.

The question as to negligence by a superintendent in failing to take any precaution to protect an employee while in an elevator well picking up paper is for the jury, whether the superintendent did or did not promise to look out for him, where the circumstances warrant an inference that he knew that such employee or some other employee would have to go into the well. *Scullane* v. *Kellogg* (1897) 169 Mass. 544, 48 N. E. 622.

An employer is answerable for the negligence of a superintendent in stationing a laborer underneath a large overhanging rock which was known to be likely to fall. *Collins* v. *Greenfield* (1898) 172 Mass. 78, 51 N. E. 454.

(b) *Cases in which negligence cannot be inferred.*— Negligence in regard to the piling of planks, some of which fell on plaintiff, cannot be inferred simply from the fact that the foreman had directed him to lower the stack, especially where he and his witness admit that they did not observe anything unsafe in the appearance of the stack. *Connell* v. *Surrey Dock Co.* (1887; Q. B. D.) 3 Times L. R. 630.

A servant injured by the falling of bales of hay in a shed cannot recover on the ground of negligence of the superintendent, in the absence of evidence that he had anything to do with piling the hay, or that he appointed the particular place at which the servant was to work at the time of the injury, or that he knew or ought to have known that the hay was liable to fall. *Fitzgerald* v. *Boston & A. R. Co.* (1892) 156 Mass. 293, 31 N. E. 7.

The mere fact that a ledge stone is left two or three days on a staging used in the construction of a building, projecting to such an extent that it is liable to fall if it is hit or the staging jarred, does not show that the foreman was negligent in exercising superintendence, where he had no occasion to visit that part of the work while the stone was there, and did not have actual knowledge that it was there, and the amount the stone projected could not be seen from below. *Carroll* v. *Willcutt* (1895) 163 Mass. 221, 39 N. E. 1016.

Where the evidence shows that while plaintiff was working in an elevator well, with a lighted lantern between his feet, shoveling a ground product of bone, rock, and slaughter-house refuse defendant's superintendent started some machinery, which caused a current of air to carry the dust from such product to the flame of plaintiff's lantern, causing an explosion which injured plaintiff, he cannot recover where it does not also appear that such superintendent knew, or ought to have known, that the dust was inflammable, or that it was a matter of common knowledge that it was inflammable. *O'Reilly* v. *Bowker Fertilizer Co.* (1899) 174 Mass. 202, 54 N. E. 534.

Negligence cannot be predicated of the act of a foreman in failing to examine personally a shaky wall which he had requested a contractor,—an expert at such matters,—to shore up. *Moore* v. *Gibson* (1889; Q. B. D.) 5 Times L. R. 177, 58 L. J. Q. B. N. S. 169.

A foreman has no reason to expect that an employee will, without any an-

ly to appear that the employer has undertaken to do by his superintendent that which he was not called upon to do. An act done volun-

thority remove a stay from a scaffold erected in the course of building operations, and cannot be held liable for failing to discover such removal, and to see that other employees suffer no injury from the dangerous conditions thus created. *Kelly* v. *Davidson* (1900) 31 Ont. Rep. 524.

An averment that defendant's foreman did not keep closed a trap door by which goods were raised and lowered between two floors of a laundry does not show negligence on his part. *Moore* v. *Ross* (1890) 17 Sc. Sess. Cas. 4th series, 796.

An employee who, while rolling a cotton bale, was struck by another bale thrown down from a pile by a fellow servant, cannot recover for the injury sustained, although the defendant's superintendent previously told the fellow servant to "throw down cotton." Such a direction is construed, in respect to the master's liability, as being merely an order to throw the cotton in a proper way and in a proper place. *Gonin* v. *Wampanoag Mills* (1898) 172 Mass. 222, 51 N. E. 1078.

The foreman of a switching gang in a railroad yard, whose duty it is to direct on which track a train shall be put while it is being made, is not negligent as to an employee engaged in making up a train at one end of the yard, in failing to give special warning or notice as to cars at the other end of the yard on the same track, where the custom of the yard to switch cars in at both ends of the siding on the same track is well known. *Caron* v. *Boston & A. R. Co.* (1895) 164 Mass. 523, 42 N. E. 112.

An operator of a steam crane is not chargeable with reckless indifference to consequences, in swinging back the crane in the usual manner, because of the presence of other employees in the way, when he knows that such employees are aware of the operation and are instructed to get out of the way of the crane, and they have always previously done so. *Anniston Pipe Works* v. *Dickey* (1890) 93 Ala. 418, 9 So. 720.

There is no obligation on the part of the general superintendent of a building to oversee every detail of the work. Hence his employer cannot be held liable on the theory that he was negligent in omitting to instruct masons accustomed to build their own scaffolds as to the way in which the work should be done, or to be present when any particular scaffold was being erected. *Burns* v. *Washburn* (1894) 160 Mass. 457, 36 N. E. 109.

The master is not responsible for the death of a workman killed, while hoisting planks to an upper story, by the fall through a hole in the floor of a heavy truck which a fellow workman was using, with the roller upwards, to land the planks, but which he had neglected to block, though means for so doing were very simple and always at hand. *O'Keefe* v. *Bromell* (1892) 156 Mass. 131, 30 N. E. 479. The court said: "When placed upon the floor with the roller down, the instrument could be easily moved about with a load resting upon a plank. When placed with the plank down, the instrument was intended to remain stationary, and beams or planks could then be moved by resting them upon the roller and moving them while so supported. The truck was in use by the latter method when the accident occurred. It was a movable tool, designed and adapted for various uses, and in different places about the building. It was complete and in good order, and only dangerous, as any heavy object is dangerous, if carelessly allowed to fall from above upon a person below. When used for certain purposes, for which it was, among others, designed, it would have a tendency to be displaced by the motion of the articles put upon it, to facilitate the motion of which its roller was designed and adapted to be used while the truck was stationary. If so used at the edge of an open well, it might fall into the well: to prevent this, it could be fastened to the floor on which it rested, or blocked with a cleat. But when used as a vehicle on which to transport articles by its own motion, fastening or blocking would wholly prevent its use. The absence, therefore, of any appliance for blocking or fastening, did not make it a defective tool or machine. Like a barrow, an inclined plane, a roller, a screw, or blocking timber, and many other utensils used in building, it was to be often moved about, and the means of avoiding danger in its use varied constantly with its situation and the work. It was a common and well-known tool, and the duty of using it in a safe man

tarily by the superintendent in that field, without the direction or approval of the employer, would not be an act of superintendence.[2]

687. Acts constituting negligence in the exercise of superintendence. — An analysis of the decisions shows that negligence in the exercise of superintendence is deemed to have been committed if the superintendent has been guilty of any of the various breaches of duty specified below. The authorities are arranged under headings designed to facilitate comparison with chapter XXIX., *ante*, in which the official acts of common-law vice principals are classified. It will be observed that the acts there reviewed cover practically the same range of incidents as those which import liability under this subsection of the statutes.[1]

ner was the duty of the ordinary workmen who handled and used it, rather than a duty of the employer or a duty of superintendence. The means of blocking or fastening it when necessary were of the simplest, and always at hand, being only nails and bits of wood suitable for cleats. It was not the duty of the employer, but of the ordinary workmen, to see that they were used. The omission to use them was not negligence of a superintendent, or want of superintendence, but mere negligence of fellow workmen in the use of a familiar, simple, and complete tool well adapted to the work for which it was then in use, and for other work."

A superintendent in charge of the running of trains over a single track of a double-track road during a snow blockade, who ordered a west-bound train to proceed to a certain station on the east-bound track, was not negligent in failing to direct the switchman at such station to open the switch leading from the east-bound to the west-bound track, or so to set the signals as to indicate that it was closed, notwithstanding that a snow plow was on the east-bound track a short distance west of the switch, as he might assume that the switch would be rightly set, or, if not, that the signal would indicate that fact to the trainmen. *Fairman* v. *Boston & L. R. Co.* (1897) 169 Mass. 170, 47 N. E. 613.

It has been laid down that the mere fact that a foreman sees a workman doing a piece of work in an unusual manner, and does not interfere, is not a ground for holding the master liable for the consequences of what the workman does. *Milligan* v. *Muir* (1891) 19 Sc. Sess. Cas. 4th series, 18. But this statement cannot be accepted without some qualification as it may clearly be a duty pertaining to superintendency to see that an improper method of doing work is corrected. See next section.

[2] *Shea* v. *Wellington* (1895) 163 Mass. 370, 40 N. E. 173, holding that an employee in a quarry could not recover from the owner for the negligence of the superintendent in failing to tell him of a defective exploder given him by such superintendent for use, the reason assigned being that, no duty could be predicated to inspect the exploders, as they had been purchased from a reputable manufacturer.

[1] (a) *The adoption of an improper method of doing the work in hand.* — The master's liability is for the jury under the following circumstances: Where a staging fell under the injured servant in consequence of the superintendent having ordered a whole cartload of wood to be put on the staging, the usual custom being to put only half a load of wood on it at one time. *Prendible* v. *Connecticut River Mfg. Co.* (1893) 160 Mass. 131, 35 N. E. 675.

Where the superintendent of a pile driving gang directed one of the gang to stop a car on which the pile driver was placed, by laying a crowbar on the tracks in front of the car while it was being drawn down a slight incline, a distance of about 5 feet, by attaching a rope to a heavy pile and setting the pile driver in operation, instead of moving the car to the proper place by means of crowbars, which was the customary mode *Southern R. Co.* v. *Shields* (1898) 121 Ala. 460, 77 Am. St. Rep. 66, 25 So. 811.

Where a foreman failed to have a bank which was being undermined properly shored up. *Lynch* v. *Allyn* (1893) 160 Mass. 248, 35 N. E. 550.

When the alleged act or omission was one which prima facie indicates a breach of the duty of a mere servant, the plaintiff cannot, in

Where a foreman of a quarry undertook to have an unusually large stone hoisted without drilling holes in it so that it might be more securely held by the points of the dogs. *Crowley* v. *Cutting* (1896) 165 Mass. 436, 43 N. E. 197.

Where a superintendent failed to give proper instructions as to the method of putting into the shears a heavy gate which was to be cut up preparatory to being melted. *Madden* v. *Hamilton Iron Forging Co.* (1889) 18 Ont. Rep. 55.

Where a superintendent who was experienced in transporting timbers upon a gear of a given make, and knew that the road over which it was to be carried was rough and uneven, loaded a timber with its narrow sides at the top and bottom and directed the employees to get on and hold it down. *Gagnon* v. *Seaconnet Mills* (1896) 165 Mass. 221, 43 N. E. 82.

Where an engineer allowed or directed coal to be loaded in the tender of his engine in such a manner as to be dangerous to his fireman. *Culver* v. *Alabama Midland R. Co.* (1895) 108 Ala. 330, 18 So. 827.

Where the superintendent of a quarry instructs a laborer to unload an unexploded hole, and stands by him for several minutes while he is undertaking to do the work with an iron scraper. *Grimaldi* v. *Lane* (1901) 177 Mass. 565, 59 N. E. 451.

If a superintendent knew, or had reason to know, that there was danger of the caving of a trench, and had no materials for bracing it, and no power to procure them, it was negligence to allow the digging to go on before the necessary materials were procured. For such negligence of a superintendent, the principal is answerable, and cannot escape liability by showing that it was by his own act, and not by the fault of the superintendent, that suitable materials were wanting. *Connolly* v. *Waltham* (1892) 156 Mass. 368, 31 N. E. 302.

The risk that the plaintiff's employer —a quarryman—or his superintendent, will negligently attempt to remove a charge of gunpowder by drilling into a hole that has been charged, before ascertaining that the charge has exploded, is not one of the risks of his employment which the plaintiff assumes. *Malcolm* v. *Fuller* (1890) 152 Mass. 160 25 N. E. 83, distinguishing common-law rule as exemplified by *Keaney* v. *Shaw* (1882) 133 Mass. 501.

In an action for injuries occasioned by the falling upon plaintiff of a large iron pump which, loaded upon a truck, he with others was moving from one part of the defendant's works to another, evidence as to other appliances which were at hand, and other methods which might have been used to move the pump, is admissible upon the question whether the defendant's superintendent was at fault in causing it to be moved as he did. *Gilonecki* v. *Dean Steam Pump Co.* (1896) 165 Mass. 202, 43 N. E. 85.

In *Knight* v. *Overman Wheel Co.* (1899) 171 Mass. 155, 54 N. E. 890, a heavy shaft which was being lowered slipped in the hitch of the chain fall by which it was lowered, and struck the plaintiff. It was held that it could not be said, as a matter of law, that there was no negligence of an employee for whose acts the master was responsible, inasmuch as there was evidence from which it might be inferred that the superintendent failed to see that the shaft was evenly balanced on each side of the chain fall by which it was supported, and that, although the hitch which proved defective had been made by one of the workmen, the superintendent had afterwards seen it and made no objection to it, and was thus guilty of a breach of duty in not seeing that everything was right.

In *Bessemer Land & Improv. Co.* v. *Campbell* (1898) 121 Ala. 50, 25 So. 793, the plaintiff's decedent was suffocated in a mine in which a fire had broken out. It was held that the owners might properly be held liable on the theory, first, that it was the duty of the superintendent of a mine in which a fire started, while employees were in the mine, to telegraph for and have appliances for flooding the mine sent by express, if the lives of the employees could not properly be saved by any other method, and, secondly, that the fact of the superintendent's having consulted the operatives as to the expediency of bratticing up the mine, and that in their opinion it was the best thing to be done, did not relieve the operator of the mine from liability for the death of an employee resulting from such action where

any event, recover under this provision of the statute, unless he show that the person answerable for the conditions complained of was a

another course, by which his life could have been saved, should have been pursued in the exercise of due care and diligence. Third, that the proprietor of the mine should not be relieved from liability for the death of the employee on the ground that, because of the supersensitiveness of the superintendent's nerves, he failed to use proper means to save the employee's life.

(5) *The giving of improper directions with respect to particular details of the work.*—A foreman may be guilty of negligence in giving an order to hoist a pile while the fall is caught on the checking guard. *McPhee* v. *Scully* (1895) 163 Mass. 216, 39 N. E. 1007.

An order to clean machinery in motion may be found to be a negligent one. *Yarley* v. *Osborn* (1894; Q. B. D.) 10 Times L. R. 388.

Evidence that the superintendent of a street railway company gave an order to the motorman of a derailed car, which placed him in a dangerous position if a car should come forward on the other track, and that while the motorman was in this position he gave an order to the motorman of a car on the other track standing 6 or 8 feet from the end of the derailed car to come ahead,—is sufficient to warrant a finding that the superintendent was guilty of negligence contributing to the injuries of the motorman, who was caught between the guard rails of the two cars. *O'Brien* v. *West End Street R. Co.* (1899) 173 Mass. 105, 53 N. E. 149.

A complaint is not demurrable which alleges that a section hand was killed through the negligence of his foreman in charge of hand cars, in permitting such cars to be run at a rapid and reckless rate of speed in such close and reckless proximity to each other that they collided. *Highland Ave. & Belt R. Co.* v. *Dusenberry* (1893) 98 Ala. 239, 13 So. 308.

A section foreman is not, as matter of law, free from negligence in giving a signal for two hand cars moving close together rapidly over a trestle of a river bridge to check their speed at the same time, where a section hand on the rear car, understanding the signal properly, applies the brake in the customary way, but the rear car is not stopped before a collision with the front car. *Alabama Mineral R. Co.* v. *Jones* (1896) 114 Ala. 519, 62 Am. St. Rep. 121, 21 So. 507, holding that an instruction based on the theory that the act of the section hand absolves the defendant from responsibility is properly refused. On the second appeal of this case (121 Ala. 113, 25 So. 814), it was held that the giving of the signals simultaneously was not negligence, as a matter of law.

For the purposes of legal liability it is clear that the following defaults in respect to the direction of work must be placed on the same footing as specific orders:

Allowing a subordinate to do something which ought not to have been done. *Bessemer Land & Improv. Co.* v. *Campbell* (1898) 121 Ala. 50, 25 So. 79. (where the fan in a mine which was on fire was stopped by one of the servants. See further, as to this case, subd. (a) *supra*.

The omission to give an order which should have been given. *Crowley* v. *Cutting* (1896) 165 Mass. 436, 43 N. E. 197 (where the foreman of a quarry did not see that holes were drilled for the dogs which were to hold an unusually heavy stone while it was being hoisted).

The failure to countermand an order when due care requires that it should not be executed. *Caragnaro* v. *Clark* (1898) 171 Mass. 359, 50 N. E. 542 (where the superintendent saw that an employee, not being aware that an order was given, was about to place himself in such a position that the execution of the order would imperil his safety).

The right of recovery under this head is of course conditional upon proof that the order was within the scope of the superintendent's authority. See an unreported and somewhat peculiar case mentioned in Ruegg on Employers' Liability Act, 5th ed. p. 34, where, in an action alleging negligence, the evidence was that a master stevedore's foreman, not being satisfied with the way a laborer was doing his work in the hold of a ship, said to a man near him: "Get hold of a block of wood and chuck it down on his —— head." The order was obeyed, and the laborer's skull was fractured. A divisional court held that there could be no recovery.

(c) *Failure to furnish proper appliances.*—A judgment awarding damages to a boy injured while cleaning out a brick-pressing machine with his hands

should not be set aside, where the evidence tended to show that "scrapers" for doing this work were not furnished in sufficient number by the foreman. *Race* v. *Harrison* (1893; C. A.) 10 Times L. R. 92, Reversing (1893) 9 Times L. R. 567.

A sufficient cause of action is stated by an averment that a person to whom the defendant had intrusted superintendence "negligently caused or allowed the use of means or appliances in or about attempting to get said car on said rails, which would likely cause or allow said car to fall," and by an averment that such a person negligently "caused or allowed the attempt to get said car upon said rails without proper appliances." *Louisville & N. R. Co.* v. *Jones* (1901) 130 Ala. 456, 30 So. 586. In that case, where the negligence complained of was that of the superintendent in charge of such work in using jack screws to support the car which was being lifted, it was also held that an instruction which predicated nonculpability if jack screws were suitable appliances to use, and thus took from the jury the question of whether there was negligent superintendence in omitting the use of supports in addition to the jack screws, was erroneous, and properly refused.

The fact that a stable foreman knew of the unfitness of a horse, and nevertheless took no steps to prevent it from being used, tends to show negligence on his part. *Yarmouth* v. *France* (1887) 19 Q. B. D. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283.

Where one of the counts alleges that the defective condition of a brake "was not remedied or discovered, owing to the negligence of the defendant, or of some person in his employ intrusted with and exercising superintendence, or whose sole or principal duty was superintendence," it is error to exclude testimony going to show that no inspection was made of a foreign car which came from a certain line. Such evidence, if it is offered merely for the purpose of showing a single omission of duty, is incompetent for the reason that the car inspectors are the fellow servants of the trainmen. But it has a tendency to show under what rules, instructions, and superintendence the inspectors were acting, and that these were insufficient to provide proper inspection. *Coffee* v. *New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128.

(d) *Employing servants not competent for the work to be done.*—The foreman employed on a pile driver may be guilty of negligence in allowing a workman apparently drunk to handle a fall liable to become caught on the choking guard which holds the driving hammer in place, while another workman is engaged in swinging the pile to its place. *McPhee* v. *Scully* (1895) 163 Mass. 216, 39 N. E. 1007.

Since a general manager exercises superintendence in choosing incompetent workmen, the master is liable for an injury caused by their incompetence, whether the manager was present or not while the work was being done. *Behm* v. *McDougall* (1892) 14 Australian Law Times (Victoria) 47.

(e) *Allowing abnormally dangerous conditions to exist in the place of work.*—Negligence may properly be found on the principle of *res ipsa loquitur* (see opinion of Kay, L. J.), where a manager of a colliery allowed an inflammable brattice cloth to stand within 2 feet of a winding engine having a wooden brake, which, as he must have known, frequently emitted sparks. *Thomas* v. *Great Western Colliery Co.* (1894; C. A.) 10 Times L. R. 244, Reversing judgment of Divisional Court.

For one having superintendence of railway tracks and cars in a railway yard to direct or allow a car to be placed too near another track, or, upon its being there without his fault, to suffer it to remain, is negligence while in the exercise of his superintendence. *Kansas City, M. & B. R. Co.* v. *Burton* (1893) 97 Ala. 240, 12 So. 88.

In *McCauley* v. *Norcross* (1892) 155 Mass. 584, 30 N. E. 461, the evidence was that 3½ feet from an open hole in a floor a few iron beams were placed; that they had been there for two or three days, and that the defendant's superintendent, being on crutches, and walking about the floor upon which the beams were placed, in order to pass between a pile of planks and these beams, pushed one of the beams with his foot so that it swung around on the other beams and fell down through the hole [illegible] to the plaintiff. The court said: "Upon these facts, the jury might find that the iron beams were negligently so placed and left that one of them would be liable, from a slight inadvertent push of the foot of a passerby, to fall through the hole. Being left in this condition for two or three days, the jury might infer a lack of due and proper superintendence. Allowing such things to be negli-

gently left for so long a time in a position where they were likely or liable to be toppled over, and one of them to fall through the hole in the floor, would warrant a finding of negligence on the part of the superintendent in exercising superintendence."

(f) *Failure to give instructions under circumstances which indicate the propriety of doing so.*—Evidence warranting the inference that there was, under the circumstances, an obligation to give the plaintiff instructions regarding the manner in which his work ought to be done, and that his injury was caused by his foreman's failure to give those instructions, is sufficient to sustain a verdict in his favor. *Race* v. *Harcison* (1893; C. A.) 10 Times L. R. 92, Reversing 9 Times L. R. 567. See also *Madden* v. *Hamilton Iron Forging Co.* (1889) 18 Ont. Rep. 55, cited in subd. (*a*), *supra*.

(g) *Failure to warn a servant as to the existence of an abnormal danger.*—The failure to notify the second of two relays of workmen engaged in replacing a marine engine, that the crank shaft had been disconnected during the first shift, the result being that the shaft swung round and crushed one of the men in the second relay, is negligence in the exercise of superintendence. *Aitken* v. *Newport Slipway Dry Docks Co.* (1887; Q. B. D.) 3 Times L. R. 527.

A workman who is struck by a bundle of iron which is being unloaded from a ship, in consequence of his foreman's omitting to warn him to stand out of the way, is entitled to recover on the ground that the negligence was committed in the exercise of superintendence. *Wright* v. *Wallis* (1885; C. A.) 3 Times L. R. 779. Lord Esher said: "An argument has been addressed to the court which amounts to this,—that if you order a man to stand in a certain place, and then throw something at him, and injure him, the injury is not caused by his conforming to the order, but solely by the subsequent act. If these refinements are to be introduced into real life, real life cannot go on as it does. The order to stand there, and the throwing down of the iron, were all part of the same occurrence."

A section man engaged upon a railroad track does not take the risk that a foreman stationed to give him warning of the approach of trains will be negligent in the discharge of that duty. *Davis* v. *New York, N. H. & H. R. Co.* (1893) 159 Mass. 532, 34 N. E. 1070.

A dock company is liable for injuries received owing to the negligence of a foreman in not informing the plaintiff that a piece of the machinery which he was employed to repair had been so loosened that there was a risk of it falling. *Aitken* v. *Newport Slipway Dry Docks Co.* (1887; Q. B. D.) 3 Times L. R. 527.

A charge that the risk of a heavy shaft slipping out of the hitch of the chain fall by which it was being lowered was a transitory risk, of which defendant was not required to notify a servant who was struck by it, is properly refused. The risk is not one incident to, and ordinarily to be expected to occur in, the prosecution of the work in which deceased was engaged. *Knight* v. *Overman Wheel Co.* (1899) 171 Mass. 55, 54 N. E. 891.

The facts in evidence may sometimes suggest the existence of this duty as an alternative obligation which ought to be discharged in the event of the servant's environment not being made as safe as it would have been if some other duty had been adequately performed. If an inexperienced workman, while engaged in undermining a bank of earth, is injured by the falling of the bank upon him during the temporary absence of his employer's superintendent, whose duty it is to watch the bank and to warn him of the danger of its falling, it is a question for the jury whether it was not negligence in the superintendent to allow the plaintiff to work under the bank without shoring up the top of it, or stationing someone to give warning. *Lund* v. *Tyng* (1893) 160 Mass. 248, 35 N. E. 550.

A superintendent of a street railway was not bound to anticipate that the engineer of a dummy engine hauling a material train on the road just before its conversion into a trolley line would hear a noise of rattling and knocking rods underneath his seat in the cab, or that, if he did hear such a noise, he would protrude his person so far out of the window as to be struck by a trolley pole 2 feet distant, one of several which had just been erected; since, if the disorder was slight and immaterial, looking at it was unnecessary, while if it was serious and material, looking at it would not remedy it, and in either case the most natural thing for the engineer to do would be to stop his engine, alight and examine it from the ground. The superintendent therefore was not guilty of negligence in failing to warn the en

foreman or superintendent.[2] Whether proof of that fact will enable him to maintain the action depends upon the principles discussed in the following section. On the other hand, if the evidence tends to show that the accident was caused by a breach of what the jury may properly find to be a duty pertaining to superintendence, and one of the counts of the declaration is based upon the words of the subsection, the master is not entitled to a ruling that, as there was no evidence of the negligence of the defendant, the plaintiff cannot recover under this count.[3]

688. Acts done by superintendents while participating in the work; liability of master for.— The intention of the legislature that the master shall be answerable for the negligence of superintending employees only when it is committed in the exercise of superintendence is somewhat less explicitly stated in the statutes of Massachusetts, New York, and Colorado than in those of England, Alabama, and the British colonies. But it is well settled that, under the former statutes, no less than under the latter, the fact that a person is engaged in superintendence does not make his employer liable for every act which he does while so engaged.[1] On the other hand, all the courts are

ance as to the position of the posts. *North Birmingham Street R. Co.* v. *Wright* (1901) 130 Ala. 419, 30 So. 360.

(h) *The violation of rules promulgated by the master.*—In so far as specific rules define the course to be pursued in regard to matters pertaining to the duty of superintendence, it is clearly not open to dispute that their violation may properly be found to be negligence for which the master is responsible. Hence, a verdict against a railway company will not be disturbed where the injury was due to the omission of a foreman of track repairers in a yard to set a lookout to warn them of the approach of trains, such duty being imposed on him by the company's rules. *Duthie* v. *Caledonian R. Co.* (1898) 24 Sc. Sess. Cas. 4th series, 934, 35 Sc. L. R. 726.

Nor where the injury resulted from a collision between a hand car and a work train, caused by the failure of a section foreman to give the signals required by the rules of the road. *Richmond & D. R. Co.* v. *Hammond* (1890) 93 Ala. 181, 9 So. 577.

Nor where the evidence is that in violation of a rule that the engineer should slow up, and, if necessary, stop his engine before reaching a switch, to ascertain whether it is properly set, the person running the engine pushed the cars over the switch at a rapid rate when the switch was improperly set, and caused a derailment and the injury complained of. *Louisville & N. R. Co.* v. *Hotheshed* (1893) 97 Ala. 261, 12 So. 711.

It would seem, however, that if the injurious act was one which, under the principles developed in the next section, would not be considered as having been done in the exercise of superintendence, the mere fact that the act constituted a breach of some rule ought not to affect the master with responsibility. But no case has been found in which this precise situation was presented.

[2] *Trimble* v. *Whitin Mach. Works* (1898) 172 Mass. 150, 51 N. E. 463 (want of gang plank caused injury to a workman helping to place a machine in a car).

An unqualified direction to find for the plaintiff if certain dynamite which exploded had been "carelessly left buried by the defendant, or its servants or agents in the discharge of their duty," is erroneous. *Sheffield* v. *Harris* (1893) 101 Ala. 564, 14 So. 357.

[3] *Lynch* v. *Allyn* (1893) 160 Mass. 248, 35 N. E. 550.

[1] *Joseph* v. *George C. Whitney Co.* (1900) 177 Mass. 176, per Holmes, J. See also the cases cited in the following notes.

agreed that the action is not barred simply by proof that the default of the superintendent was committed while he was assisting the plaintiff in manual labor.[2] A collation of the authorities, however, discloses considerable divergence of opinion as to the theory upon which the boundary line is to be drawn between the acts for which the master is and is not responsible.

Some cases present little or no difficulty. Thus, there is clearly no ground upon which the master can be held liable for a merely manual act done by an employee whose characteristic functions are not those of a superintendent at all.[3] Compare § 680, subd. *c*, *supra*. Again it is obvious that, wherever the duties of an employee are susceptible of a definite segregation into two specific classes, so that it is possible to say that the duties in one class are those of a superintendent, while the duties in the other class are those of a mere servant who is engaged in manual labor or discharging some function which is characteristic of, and customarily intrusted to, subordinate workmen, the exercise of superintendence cannot, without doing violence to the express ends of the statute, be predicated as to what is done in performing the latter class of duties.[4] The position taken is that, "when a person is em-

[2] *Kansas City, M. & B. R. Co.* v. *Burton* (1893) 97 Ala. 240, 12 So. 88; *Ray* v. *Wallis* (1887; C. A.) 51 J. P. 519, Affirming (1886) 3 Times L. R. 777; and the cases cited in note (6), *infra*.

[3] The starting of a table used for the transfer of cars in a street-car barn by a car shifter whose duty was to get cars ready for the conductors and motormen was not an act of superintendency as to a conductor who was injured by the table. *Whelton* v. *West End Street R. Co.* (1899) 172 Mass. 555, 52 N. E. 1072.

[4] In *Kellard* v. *Rooke* (1887) L. R. 10 Q. B. Div. 585, where an employee alleged to have been intrusted with superintendency habitually engaged in the manual labor of hauling and throwing bales of wool into a ship's hold, and the injury was caused by one of these bales falling upon the plaintiff, it was held that, assuming this to be the situation, it could not be said to come to anything more than this,—that an employee who was a superintendent for some purposes, and who was also an ordinary working man engaged in the work in which the plaintiff was likewise engaged, was guilty of negligence whereby his fellow workman was injured, and that the negligence, having been committed whilst he was in the exercise of the manual labor in which he was engaged, was not in the exercise of superintendence.

In *Cashman* v. *Chase* (1892) 156 Mass. 342, 31 N. E. 4, where it was held that the act of an engineer of a hoisting apparatus in improperly raising the fall when ordered to lower it was not an act of superintendence, for the reason that in operating the engine he was doing the work of a laborer, acting upon the directions of others, and not directing them, the court said: "The negligence for which the statute makes the employer liable is that of a person 'intrusted with and exercising superintendence.' The employer is not answerable for the negligence of a person intrusted with superintendence, who at the time, and in doing the act complained of, is not exercising superintendence, but is engaged in mere manual labor,—the duty of a common workman. The law recognizes that the employee may have two duties; that he may be a superintendent for some purpose, and also an ordinary workman; and that if negligent in the latter capacity the employer is not answerable. . . . Unless the act itself [illegible]nce of direction or of oversight, tend[illegible] to control others and to vary their [illegible]ction or action because of his direction, it cannot fairly be said to be one in the doing of which the person

ployed to work with his hands, as well as to exercise superintendence . . . the line must be drawn somewhere between what are acts of superintendence and what are acts of manual labor, or all that he does must be regarded as superintendence or as manual labor, which manifestly would be unjust." [5]

intrusted with superintendence is in the exercise of superintendence. For the negligence of such a person in doing the mere work of an ordinary workman, in which there is no exercise of superintendence, the employer is not made responsible by the statute."

In *Flynn* v. *Boston Electric Light Co.* (1898) 171 Mass. 395, 50 N. E. 937, a verdict for the defendant was sustained where the foreman of a gang of linemen used to labor as an ordinary workman, and caused the injury while he was helping to pull back an electric wire which caught the branch of a tree which the plaintiff was cutting, and broke it off, allowing him to fall.

Negligence in the exercise of superintendence intrusted to an employee is not predicable in the case of an engineer whose duty it is personally to operate an engine, although he usually has a helper, where the evidence is that, in the absence of the helper, by the negligence of the engineer in starting the engine, or in failing to prevent a third person from starting it, a person engaged in repairing the engine was killed. *Dantzler* v. *De Bardeleben Coal & I. Co.* (1893) 101 Ala. 309, 22 L. R. A. 361, 14 So. 10. The court said: "It being his duty personally to perform—not merely direct—this labor, and his right only to have the other man help him to perform it, his relation to the machinery being primarily that of a laborer, it cannot be said that he was in the exercise of any superintendence while he was discharging this primal duty of a manual laborer. His superintendence, if any he had, extended only to his actual direction of the helper, and ceased whenever he did any act in person and in the line of his duty as the engineer in charge of these machines. . . . The evidence in this case is without conflict to the effect that when the engine moved or was set in motion Gould's helper was not even on the premises, and that, if the engine was started by Gould, it was the direct negligent act of a manual laborer, not in any sense done in the exercise of superintendence, conceding that at any time superintendence was intrusted to him. This leaves the case outside of subsec. 2 of § 2590 (of the Code). The death of McKay, on this hypothesis, was not caused by the negligence of a person to whom superintendence was intrusted, 'while in the exercise of such superintendence.' On the other hand, had the jury concluded that Gould did not start the engine, but that it was set in motion by some third person in consequence of his failure to prevent outside interference, the result must have been the same. On this hypothesis Gould was a mere watchman, for whose negligence the company was not responsible to his fellow servant. McKay. Roberts & W. Liability of Employers for Injuries to Workmen, 260. In no possible aspect of the evidence was the plaintiff entitled to recover. The affirmative charge for defendant was properly given."

The negligence of a conductor of a freight train while engaged in unloading freight, causing an injury to a brakeman assisting him, is that of a fellow servant. *Louisville, N. A. & C. R. Co.* v. *Southwick* (1896) 16 Ind. App. 186, 44 N. E. 263.

A foreman is a fellow servant with the employees under him, where both are engaged in throwing rails upon a car. *Louisville, N. A. & C. R. Co.* v. *Isom* (1894) 10 Ind. App. 691, 38 N. E. 423.

Riou v. *Rockport Granite Co.* (1898) 171 Mass. 162, 50 N. E. 525. There it was held that the act of an employee in a quarry whose principal duty was that of superintendent, in placing a can of powder preparatory to blasting where it was hit by a swinging tag rope attached to a derrick, was not an act of superintendence. The court said: "If the work of blasting was in some sense in the nature of superintendence, the mere act of fetching and putting down a can of powder preparatory to blasting could hardly be described as an act of superintendence, or as anything more than an act of manual labor on the part of Labelle. There was nothing in it involving any control over or direction to or oversight of any other workman, or requiring any skill, or distinguishing it from any other act of manual labor."

But the solution of that class of cases in which the injury is due to the negligence of a superintendent in regard to a manual act casually done for the purpose of expediting the work is less easy.

The conception underlying some of the decisions is that these incidental digressions into the functions of a mere servant do not carry him outside the scope of his duties of superintendency. This doctrine has the merit of avoiding the logical incongruity involved in the hypothesis that the judicial effect of the same physical event may be different according as it resulted from the personal negligence of the superintendent himself, or the negligence of a subordinate in carrying out his orders.[6]

Another conception is that a superintendent who, during however brief a period, engages in manual labor, is prima facie deemed to have abdicated his functions of superintendence, and to be acting *ad hoc vicem* in the capacity of a mere workman.[7] An extreme application

[6] In *Osborne* v. *Jackson* (1883) L. R. 11 Q. B. Div. 619, 48 L. T. N. S. 842, recovery was allowed where the injury was caused by the negligence of a foreman in handling a plank, the other end of which was held by the plaintiff. The foreman took the plank, and, in effect, directed the plaintiff to take it when he could not do so safely, and thus thrust on him a duty he could not safely perform. The court said: "If Thomas [the foreman] had directed another to do what he did himself, he would surely have been negligent in the exercise of superintendence." Denman, J., distinguished *Shaffers* v. *General Steam Nav. Co.* (1883) L. R. 10 Q. B. Div. 356, 52 L. J. Q. B. N. S. 260, 48 L. T. N. S. 228, 31 Week. Rep. 556, 47 J. P. 327, on the ground that the negligent person there had two duties, and was not negligent in his duty of superintendence so as to cause the accident, while in the case before him the foreman was generally superintending the work on which the plaintiff was employed.

It has also been laid down by the English court of appeal that the mere fact that a superintendent undertakes to do some manual work himself does not preclude the inference that, while doing such work, he is exercising superintendence. *Kay* v. *Wallis* (1887; C. A.) 51 J. P. 519 (walking foreman of a stevedore pushed some planks which he had given orders to lower, and knocked plaintiff off a platform).

The act of a foreman of stevedores who, by way of pushing on the work, takes hold of a case which is being lowered into the hold of a ship, and impatiently "casts" it over to one side, the result being that it falls and injures a servant, is done by him as superintendent, and not as a mere servant temporarily engaging in manual labor. *Donnelly* v. *Spencer* (1898) 1 Sc. Sess. Cas. 5th series, 1109, 36 Sc. L. R. 876. In this case it was suggested that a foreman is not to be regarded as having exchanged his functions of superintendent for those of a mere servant engaged in manual labor, unless he engages in such labor some "appreciable length of time."

A conductor undertaking to make a coupling between two cars, which, if not made properly, will affect the safety of a brakeman who has been ordered to make a coupling between two other cars, is apparently assumed to be acting as a superintendent in. *Alabama Midland R. Co.* v. *McDonald* (1905) 142 Ala. 216, 20 So. 472. But the decision was put upon the ground that no negligence was established.

[7] It is not an act of superintendence to push a heavy beam with the foot so that it falls through a hole in the floor. *McCauley* v. *Norcross* (1892) 155 Mass. 584, 30 N. E. 464.

The act of a person whose principal duty was that of superintendence, in permitting himself or another laborer to be in the neighborhood of a third laborer with a crowbar in his hands, can not be found to be negligent superintendence merely because the event showed

of this doctrine is found in a case which seems to embody the principle that an act which is deemed to have been done as a mere servant, for the reason that it is manual, communicates its quality, as an act of that character, to acts incidentally connected with it, which would otherwise have been regarded as pertaining to superintendence.' The conclusion thus arrived at, though in a sense logical, seems to ignore the essential rationale of the theory of differentiation which the court professes to be applying. It is submitted that, if the mere doing of a manual act implies *ad hanc vicem* a temporary devestiture of the functions of superintendence, the discharge of one of those functions, even when it is intimately associated with the manual act in question, should be regarded as involving *pro tanto* the resumption of these functions. Under any other theory, it is clear, the master will enjoy all the advantages, and be subject to none of the drawbacks, of the doctrine that the applicability of the statute is to be tested solely by the character of the functions in regard to which negligence is alleged.

The severe doctrine adopted in the cases just cited is qualified to the extent of allowing the servant to recover when the manual act in question was so connected with a plan or order coming from him in

that it was possible to harm the latter employee by negligently handling or dropping the bar. *Fleming* v. *Elston* (1898) 171 Mass. 187, 50 N. E. 531.

A street railway company is not liable for injuries to a servant due to negligence of the superintendent of its paint shop, where at the time of the injury the superintendent was acting as motorman. *Brittain* v. *West End Street R. Co.* (1897) 168 Mass. 10, 46 N. E. 111.

In *Whittaker* v. *Bent* (1897) 167 Mass. 588, 46 N. E. 121, it was held that a superintendent of an iron foundry does not exercise superintendence in setting up molds and inspecting them with reference to their condition as to dampness, or in assuring an employee that they are all right, where such acts are mere matters of detail and of recurring necessity. According to the plaintiff's testimony he asked the superintendent if the molds were all right, and received the answer, "Yes, go ahead, Bob." It was argued that, assuming the superintendent not to have acted as such in setting up the mold, he did exercise superintendence in what he said to the plaintiff, according to a distinction pointed out in *Kalleck* v. *Deering* (1894) 161 Mass. 469, 470, 42 Am. St. Rep. 421, 37 N. E. 450. But the court said: "We think that the answer, 'Yes, go ahead,' was not the direction of a superior, but merely the assurance, in a customary colloquial form, of the fellow workman who had inspected the mold that all was safe. A doubt might be raised as to the effect of a previous statement by the plaintiff to it the foreman gave him a ladle of iron to pour, which looks at first like a direction to do what the foreman ought to have known to be dangerous. But it appears from the context that it means only that the foreman that morning was doing the manual work of filling the ladles, and handed one to the plaintiff. It was part of the plaintiff's regular business to pour."

In a later case it was laid down that "the employer is not made answerable by the statute for acts of superintendence negligently performed in his service by an ordinary workman, or by one who is both workman and superintendent, in making declarations which may be interpreted either as orders of a superintendent or as assurances of a fellow workman, if in fact they are merely such assurances." *Carapezzo* v. *Clark* (1898) 171 Mass. 367, 50 N. E. 542.

the exercise of his authority as to show that the plan was ill conceived or the order negligent.[9] But this qualification is not construed as involving the conclusion that every act done by a superintendent, even to help in carrying out an order which he himself has given, should be regarded as part of his superintendency.[10] *A fortiori* is the master not liable where the act of the superintendent has no proper connection with his duties. "The question whether the connection is close enough is," as has been observed by Chief Justice Holmes, "one of degree, and naturally different people will draw the line at different points."[11]

[9] *Joseph* v. *George C. Whitney Co.* (1900) 177 Mass. 176, 58 N. E. 639, per Holmes, Ch. J. The authority for this proposition, cited by the learned judge, was *Gilson* v. *Look* (1898) 171 Mass. 36, 50 N. E. 458, where it was held that the manual labor of a superintendent who directed the method of lowering the fore and after into its socket, in unwinding a rope from the drumhead, cannot be separated from his duty as superintendent, so as to relieve the master from liability for injury to a servant, resulting from the superintendent's negligence in unwinding the rope when it was in a wet condition.

In *McCabe* v. *Shields* (1900) 175 Mass. 438, 56 N. E. 699, the acting superintendent in a foundry directed the plaintiff to use a mold for a casting, in which he had made a perforation with a rusty piece of iron. The evidence tended to show that, when the molten iron came in contact with the rust in the mold left there by the iron used in perforating it, it caused an explosion resulting in plaintiff's injury. It was held that the superintendent in placing the dangerous mold in plaintiff's hands, and directing him to use it, acted as a superintendent, but whether the act of perforation itself was one of superintendence was not decided.

In *Malcolm* v. *Fuller* (1890) 152 Mass. 160, 25 N. E. 83, it was held that, as a foreman of a quarry was exercising superintendence in determining, after the firing of a blast, that the tamping should be cleared out of a drill-hole by drilling, a servant injured by an explosion while the work was being done might recover, regardless of the fact that the superintendent himself struck the drill.

In *Crowley* v. *Cutting* (1896) 165 Mass. 436, 43 N. E. 197, where a stone which was being hoisted slipped out of the dogs which held it, for the reason that no holes had been drilled to receive them, a verdict for a servant injured by the fall of the stone was upheld, although the superintendent adjusted one of the dogs himself.

In *Ray* v. *Wallis* (1887: C. A.) 5 T. L. R. 519, the court mentioned, as an additional reason for holding the defendant liable, the fact that the manual work was connected with an order previously given, but the decision was independent of this factor.

[10] *Joseph* v. *George C. Whitney Co.* (1900) 177 Mass. 176, 58 N. E. 639.

[11] *Joseph* v. *George C. Whitney Co.* (1900) 177 Mass. 176, 58 N. E. 639. There the plaintiff was at work on an embossing machine which was not running, and had his hands between its jaws, when another workman called the superintendent, who leaned over between plaintiff's machine and another to give directions to the second workman, and accidentally touched the shipper, thereby starting plaintiff's machine, and causing the injury. Held, that plaintiff could not recover. "The precise place," it was said in the opinion of the court, "in which Meyer, the superintendent, should be while giving his directions, the way in which he should stand or sit, and his care in managing his body in the place he selected, were too much the accident of his independent personality, and too remote from the act of giving the orders, for us to charge the defendant with the consequences of his neglect in that regard. The matter may be stated in a different form. If the motion of Meyer which caused the injury be regarded as part of an act of superintendence, the fact that he was superintending was in no way a necessary element in producing the injury. But we are of opinion that by a true construction of the statute the superintendence must contribute as

The cases cited in this section should be compared with the common-law decisions reviewed in §§ 544–547, *ante*.

E. Liability for injuries caused by the negligence of a person to whose orders the injured servant was bound to conform.

689. Introductory.— In section 1, subs. 3, of the English act, it is provided that a servant shall have a right of action against his employer, whenever injury is caused to a workman "by reason of the negligence of any person in the service of the employer, to whose orders or directions the workman, at the time of the injury, was bound to conform, and did conform, where such injury resulted from his having so conformed." This provision is inserted verbatim in the Canadian and Australian Acts. The statutes of Alabama and Indiana include a clause of essentially the same purport, but no provision of this tenor is found in those of Massachusetts, New York, or Colorado.

This subsection may be regarded as being, broadly speaking, declaratory of the "superior servant doctrine" (see chapter XXVIII., subtitle D, *ante*), which, as we have had occasion to remark in § 680, subd. c, *supra*, is not embodied in the preceding subsection of the act. The decisions based upon that doctrine, however, have not, so far as appears, influenced the courts to any extent in their construction of this provision. The specific language used by the legislatures has alone been considered on ascertaining the extent of the master's statutory liability, and it is therefore merely from the standpoint of comparative jurisprudence that the decisions which apply the doctrine in question are of any interest or utility in the present connection.

690. Conditions precedent to recovery.— The establishment of the following propositions is an essential prerequisite to the maintenance of an action under this provision:

such, and that when, as here, it had nothing to do with the injury *qua* superintendence, the case is not within the act."

Even if a superintendent traveling on a street car as a passenger is a superintendent to the extent of having his eye on the way in which the car is managed, his superintendence, as such, does not contribute to an injury received by the conductor through striking against a tree close to the track in consequence of his having to step round the superintendent while he is standing on the running board. *Hall* v. *Wakefield & S. Street R. Co.* (1901) 178 Mass. 98, 59 N. E. 668.

On the other hand, it has been held that a jury is justified in finding that a superintendent in general control of the entire work of digging a new [illegible] was engaged in an act of superintendence in walking along the bank, and in stopping to look down at the work, in the course of which he precipitated a fall of the bank. *McCoy* v. *Westborough* (1899) 172 Mass. 504, 52 N. E. 1064. See also *McCauley* v. *Norcross* (1892) 155 Mass. 584, 30 N. E. 464, the facts of which are stated under § 687, note 1, subd. (f), *supra*.

(1) That the directing employee was invested by the master with authority to give orders which the injured employee was bound to obey.

(2) That the particular order given was one within the scope of the authority thus conferred on the directing employee.

(3) That the act of the injured employee which led to his receiving the injury was done in compliance with an order actually or impliedly given.

(4) That there was a casual connection between the giving of the order and the injury received.

(5) That the directing employee was wanting in due care either with respect to the order itself or with respect to some duty in the performance of which he represented the master.

These constituents of the plaintiff's right of action will be discussed in the following sections.

691. To what superior servants the subsection is applicable.—As the fact that the injury resulted from conformity to an order is the sole prerequisite to recovery under this provision, it would seem to be applicable to any employee who is authorized to give an order in respect to the subject-matter, whether he is or is not a superintendent or foreman, as that term is commonly understood. And on the whole this is the effect of the decisions on which the question has been directly raised, though, in reference to the facts involved, it can scarcely be said that they are entirely consistent.[1]

[1] Recovery has been allowed for the negligence of the following employees:

A carman under whose directions the plaintiff was unloading a van. *Millward* v. *Midland R. Co.* (1884) L. R. 14 Q. B. Div. 68, 54 L. J. Q. B. N. S. 202, 52 L. T. N. S. 255, 33 Week. Rep. 366, 49 J. P. 453.

An employee who was sent with a small gang of men to construct an elevator, and who was the only person on the premises authorized to give orders about the work. *Wild* v. *Waygood* [1892: C. A.] 1 Q. B. 783, 61 L. J. Q. B. N. S. 391, 66 L. T. N. S. 309, 40 Week. Rep. 501, 56 J. P. 389.

A machineman in a foundry who directed the workmen as to what they were to do, although he could not discharge them, and could only enforce his directions by an appeal to the foreman of the works. *Dolan* v. *Anderson* (1885) 12 Sc. Sess. Cas. 4th series, 804, 22 Sc. L. R. 529.

A complaint is not demurrable which in effect alleges that the injury was due to the negligence of the employer in appointing an incompetent person to superintend a work requiring such special skill as the pulling down of a building. *Flynn* v. *McGhee* (1891) 18 Sc. Sess. Cas. 4th series, 555.

But in *Hooper* v. *Holme* (1897) 13 Times L. R. 6, Affirming 12 Times L. R. 537, the defendant was held not to be liable for the negligence of a mere foreman of a small gang consisting of two masons and two mason's labourers, told off to do some repairs on a railway viaduct. In the division Court this decision was put by Mathews, J., upon the ground that, to make an employer liable there must be someone who had authority to give orders. That is, who had a mandate from the employer. It may be that the decision in the court of appeal was really intended to rest upon the hypothesis that there was, as a matter of fact, no "mandate" from the employer. Or the theory of the ruling may be, in part at least, that there was no proof of any order influencing the per-

Under any theory it is clear that the master cannot be held liable for the negligence of an employee who has not been authorized, either expressly or by implication, to give orders in respect to the subject-matter.[2]

This section is applicable only to employees who are intrusted with the function of giving directions which are orders in the legitimate and ordinary acceptation of that term. An employee who merely tells another that the time has arrived for setting in motion a machine which they are both engaged in operating is not a representative of the master.[3]

off's action. See § 691, *infra*, where the case is referred to. Unless these special reasons be regarded as the rationale of the conclusion arrived at, the effect of the decision, when taken in connection with that in *Wild* v. *Waygood* [1892] A. C. 1 Q. B. 783, 61 L. J. Q. B. N. S. 301, 66 L. T. N. S. 309, 40 Week. Rep. 501, 56 J. P. 389, seems to amount to little more than this—that the employee who is thus, in a sense, placed in charge of a small gang of this description, is presumed not to be one of those to which this provision of the statute is applicable, but that this presumption may be rebutted by showing that, as a matter of fact, he was authorized to give orders. It would appear, however, that there is really some difference of opinion among English judges in regard to the applicability of this section of the statute to such employees, for we find Smith, J., remarking *obiter*, in an earlier case, that the master is not liable for the negligence of "a mere foreman of a gang of laborers." *Kellard* v. *Rooke* (1887) L. R. 19 Q. B. Div. 585, 588. Hawkins, J., expressed no definite opinion in that case; nor did the justices of appeal (L. R. 21 Q. B. Div. 367, 57 L. J. Q. B. N. S. 599, 36 Week. Rep. 875, 52 J. P. 820).

In an action for injuries resulting in plaintiff's death an instruction that if the jury found that the decedent, while in the defendant's employ, was directed by the conductor in charge of defendant's train to set the brake on a car, it was intestate's duty to obey such direction, using due caution, is not erroneous, where the evidence clearly showed that intestate was under the conductor in charge of the train and subject to his orders at the time. *Hunt* v. *Conner* (1901) 26 Ind. App. 41, 59 N. E. 50.

A., where a fellow workman directed the plaintiff to take a load of iron stanchions on a trolley with the sides un- protected *Corcoran* v. *East Surrey Ironworks Co.* (1888) Q. B. D. 5 Times L. R. 103, 58 L. J. Q. B. N. S. 115.

In *Brown* v. *Furness* (1896) 23 Sc. Sess. Cas. 4th series, 892, the judges doubted whether a workman who calls other servants to his assistance and directs them as to the loading of a heavy piece of machinery onto a truck is within this section; but this seems to be, beyond all question, a case in which there was no mandate from the employer.

The conductor of a railroad freight train has a right to employ a person to perform the necessary duties of a brakeman or trainman suddenly becoming ill or otherwise unable to fill his place; and a person receiving personal injuries while so temporarily employed will be treated as an employee of the company in an action for damages for such injuries; but not if plaintiff was merely a bystander, and ordered by the conductor to connect the coupling, but was under no obligation or agreement to obey the order. *Georgia P. R. Co.* v. *Propst* (1887) 83 Ala. 518, 3 So. 761, where it was held that a night watchman about a station, who had voluntarily taken passage on a freight train to a place where he took his meals, could not recover for injuries received in complying with the conductor's order or request to couple two cars.

This case was followed in a later one, where it was held that a mere direction by a conductor to turn a switch, given to an occasional employee of the company, who boarded the train of his own accord, while off duty, did not render the company liable to an injury sustained by such employee while complying with the direction. *Hubbard* v. *Highland Ave. & Belt R. Co.* (1890) 90 Ala. 64, 8 So. 41.

In *Howard* v. *Bryant* (1888) 58 L. T. Q. B. N. S. 179, 16 L. T. N. S.

Where both the complainant and the negligent employee occupied positions which implied the possession of a power to control other employees, the master's liability must, of course, be determined with reference to the question, whether, as a matter of fact, the complainant was subject to the directions of the negligent employee.[4]

Whether the defendant can be held liable under this provision for the negligence of an intermediate employer depends upon whether that employer is an independent contractor or a person who, with his workmen, has entered into the service of the defendant and is subject to his control.[5]

692. Temporary substitutes for regular foremen, status of.—It seems to be laid down as an unqualified principle in an Indiana case that, in the absence of specific evidence of authority to appoint a substitute, a court will presume that a superintendent or foreman exceeds his powers in temporarily delegating his functions of control to one of his subordinates, and that for this reason a workman who is injured by conforming to the orders of the delegate cannot recover damages from the master.[1] This doctrine seems to be a much more dubious application of the maxim, *Delegatus non potest delegare*, than the decisions which deny the servants' right to recover for injuries caused by the defaults of a temporary superintendent. See § 685, *supra*. The only condition precedent to recovery under this provision of the statutes is that the plaintiff shall have been bound to conform to the orders of the negligent fellow employee. The essential question, therefore, in such cases seems to be, not whether the delegation of powers was authorized, but whether employers, as a class, would accept, as a valid excuse for disobedience to the orders of the substituted foreman, the plea that he was not a legally appointed deputy. If this question

152, 53 J. P. 359, 5 Times L. R. 136. Lord Coleridge said: "I do not think that such a communication as this as to starting a machine, from one workman to another, is an order or direction within the meaning of the words of the subsection, which are more applicable in my view to a man in a superior position, and do not apply to fellow workmen, who are not in the least in a position of superiority to each other, or amenable even to the suggestions of one another." Compare the common-law decisions to the effect that employees whose functions are to give signals are not performing a non-delegable duty. See § 607, *ante*.

[4] A man charged with the operation of the furnaces in a foundry cannot properly be held a person to whose orders a master mechanic is bound to conform where the evidence is that each is supreme and of equal degree in his peculiar department. *Birmingham Furnace & Mfg. Co.* v. *Gross* (1892) 97 Ala. 220, 12 So. 36.

[5] A mine owner has been held answerable for the negligence of the employer of "bulty" men, i. e., men who joined together to get out coal at so much a ton, the evidence showing that the defendant had the right to discharge such employees. *Brown* v. *Butterley Coal Co.* (1885; Q. B. D.) 2 Times L. R. 159, 53 L. T. N. S. 964, 50 J. P. 230.

[1] *Hodges* v. *Standard Wheel Co.* (1899) 152 Ind. 680, 52 N. E. 391, 54 N. E. 383.

must, as seems inevitable, be answered in the negative, the theory of the court in this case is clearly erroneous, for the proposition that disobedience to such orders will, in the large majority of cases at least, draw down upon a servant the displeasure of the employer, and even expose him to imminent risk of dismissal, may reasonably be said to involve the proposition that conformity to the orders is obligatory upon him. It is true that, if a servant was really justified in disobeying an order of a deputy foreman, the master would not be justified in dismissing him because the order was disobeyed, and it may therefore be urged that the law cannot test the existence or absence of a duty with reference to any other assumption than that the master will act as he ought to act in the premises. To this reasoning there is, it may be conceded, no direct answer, but its effect would seem to be adequately countervailed by the practical consideration that it is neither fair to the servants themselves, nor conducive to the interests of the master, to lay down a rule which would impose upon subordinates the duty of inquiring, in each particular instance of the appointment of a deputy by a foreman, whether or not the appointment has actually been authorized by the master. Such a rule is open to the very same objections as those which have been deemed conclusive against the theory that a master is exempt from responsibility if the order to which the plaintiff conformed was one which the directing employee was expressly forbidden to give. See next section. The most rational principle, it is submitted, which can be laid down for the solution of such cases is that subordinates are entitled to regard themselves as being bound to comply with an order of an employee temporarily acting as foreman, unless the delegation of authority has, to their knowledge, been expressly prohibited by the master, or the order which they are required to execute is manifestly beyond the scope even of the authority conferred upon the regular foreman himself.

693. To what orders a servant is bound to conform.—(See also the preceding section, *ad finem*, and § 695, *infra*.) All the powers which are reasonably incidental to the exercise of his general power are deemed to have been impliedly conferred upon a supervising employee.[1]

Where injury is caused to a workman by reason of his conforming to a negligent order of an employee whose orders he was bound to obey, the master is liable, although the order was to do something ex-

[1] If the coupling of cars in a certain way will save time, a conductor is authorized to direct them to be coupled in that way. *Grand Trunk R. Co.* v. *Beemer* (1894) 23 Can. S. C. 422, per King, J. This point was not noticed by the other members of the court, nor by the lower courts ([1893] 23 Ont. Reps. 136 [1893] 20 Ont. App. Rep. 528).

pressly forbidden by the employer's rules.[2] But an exception to the application of a familiar principle of the law of agency to actions brought under the statute is admitted to exist wherever the forbidden order was one which the plaintiff knew to be outside the scope of the authority of the directing employee.[3]

694. When a servant is deemed to have acted under orders.—To entitle an injured servant to maintain an action it is not necessary to prove that an order was given by means of words. An order within the meaning of the statutes may be implied from circumstances, and it is primarily a question for the jury whether it shall be so implied.[1] Among the circumstances which may justifiably furnish a basis for the inference that the plaintiff was acting under orders is the customary course of proceeding on previous occasions when similar work was to be done.[2]

[2] *Morley* v. *Osborn* (1894: Q. B. D.) 10 Times L. R. 388, where Cave, J., said: "The legislature did not intend to leave it to the workman to go into the question whether the order given was right, if it was an order he was bound to obey, but intended that in every case in which a superior had given an order which an inferior would be bound to obey, the master would be liable for the consequences."

[3] In *Bunker* v. *Midland R. Co.* (1883) 47 L. T. N. S. 476, 31 Week. Rep. 231, the plaintiff, a van guard in the service of the defendants, was at the time of the accident under the age of fifteen, and was aware that there was a rule of the company that no van guard under the age of fifteen was ever to drive a van. The defendant's foreman ordered him, the plaintiff, to drive a van load of fish to market, and said he would be paid extra money for so doing. The boy did drive the van, and in consequence was thrown down from his seat and seriously injured. Held, that he was properly nonsuited, on the ground that, as he was not obliged to obey the order so given, the foreman was not a person to whose orders in regard to the subject matter he was bound to conform, and that the true cause of the accident was his own contributory negligence.

[1] *Millward* v. *Midland R. Co.* (1884) L. R. 14 Q. B. Div. 68, 54 L. J. Q. B. N. S. 202, 52 L. T. N. S. 255, 33 Week. Rep. 366, 49 J. P. 453, per Day, J. (p. 70).

According to Rigby, L. J., in *Reynolds* v. *Holloway* (1898) 14 Times L. R. 351, one, at least, of the grounds of the decision in *Hooper* v. *Holme* (1897) 13 Times L. R. 6, where the plaintiff was injured while mixing cement in a place where he was liable to be struck by passing trains, was that an order could not be implied from the fact that the foreman of the gang was himself doing similar work in an equally dangerous place. See further as to this case § 691 note 1, *supra*.

An express order to go between an engine and a car to uncouple them will be implied from a special order to uncouple at a time and under circumstances when it was necessary to go between them to conform to the special order. *Toledo & O. R. Co.* v. *Goode* (1891) 94 Ala. 199, 10 So. 145.

[2] *Millward* v. *Midland R. Co.* (1884) L. R. 14 Q. B. Div. 68, 54 L. J. Q. B. N. S. 202, 52 L. T. N. S. 255, 33 Week. Rep. 366, 49 J. P. 453. There the plaintiff was not expressly ordered to do the work in the manner which resulted in injury to him, but he testified that he did it in that manner without orders because he had done so on previous occasions, and that his superior saw what he was doing and made no objection. The contention of defendant's counsel that the act did not apply because no direct order was given at the time the injury was received did not prevail. Day, J., said: "Surely the order need not be by express words. The jury might think that an order was implied from the circumstances." Mathew, J., said: "The plaintiff was doing what, according to his evidence, it was the ordinary course for him to do—unloading similar goods. Is it necessary

Where the injury resulted from the adoption of some particular method of doing the work assigned to the plaintiff, the master is responsible if that method was specifically designated by the superior servant in giving his order.[3] In the absence of specific directions, a general direction is deemed to authorize the doing of a thing in the manner reasonably proper for doing it.[4]

A servant is deemed to have been injured by conforming to an order, where, in carrying out a general direction, he uses the means which, to a person possessing his limited knowledge of the conditions, it might seem reasonable to adopt under the circumstances, though an expert would have adopted a different method.[5]

695. Necessity of establishing a causal connection between the order and the injury.—To entitle a plaintiff to recover under this provision he must, in fact, have conformed to the order of the negligent coemployee in respect to the particular act which he was doing at the time when he was injured.[1] Hence, an action in which the plaintiff seeks to recover on the theory that he was injured by conforming to an order to take up the position which he occupied at the time of the accident is not maintainable, where the only possible inferences from the evidence are either that no such order was given at all or that the order actually given was to stand away from that position;[2] nor where the

in order that the subsection may apply, that an order should be verbally given to a man to do what it is the ordinary course of his duty to do every day in the week?"

This case was followed in *Cox* v. *Hamilton Sewer Pipe Co.* (1887) 14 Ont. Rep. 300, where it was laid down that recovery is not dependent upon proof of the giving of a specific order at the time of the accident, general prior orders being sufficient.

A verdict for the plaintiff will not be disturbed where the evidence was that he lost his hand while taking some stuff out of a mixing machine while it was in motion, and that his foreman had taught him to do this, and it was the usual method of doing the work. *Holloway* v. *Greenwich Inlaid Linoleum Co.* (1898; C. A.) 14 Times L. R. 291.

[1] *Weegar* v. *Grand Trunk R. Co.* (1893) 23 Ont. Rep. 436. Affirmed in (1893) 20 Ont. App. Rep. 528 (no opinion) (1894) 23 Can. S. C. 422 (conductor told a brakeman to arrange the coupling apparatus in a certain way for the purpose of coupling an engine to a car, and then signaled for the engine to back up before he had accomplished whether or not the coupling had been completed).

In a case where there is evidence going to show that the accident was caused by that form of negligence which consists in ordering one man to do work which cannot be safely done unless two are assigned to it, it is a misdirection to tell the jury that there was a "special" order within the act, and a verdict for the defendant rendered after such a charge will be set aside. *Barber* v. *Burt* (1894; Q. B. D.) 10 Times L. R. 383.

[2] King, J., in *Grand Trunk R. Co.* v. *Weegar* (1894) 23 Can. S. C. 422. This point was not noticed in the Ontario court of appeal or divisional court.

[3] *Hamilton Bridge Co.* v. *O'Connor* (1895) 24 Can. S. C. 598. Affirming (1892) 21 Ont. App. Rep. 536. (1894) 25 Ont. Rep. 12.

[4] *Hodges* v. *Standard Wheel Co.* (1899) 152 Ind. 680, 52 N. E. 391, 54 N. E. 383.

[5] *Kellard* v. *Rooke* (1888) L. R. 21 Q. B. Div. 367, 57 L. J. Q. B. N. S. 599, 36 Week. Rep. 875, 52 J. P. 820 (plaintiff struck by a bale, while standing under the hatchway of a ship).

superior servant, although he had authority to direct the plaintiff to perform the duty which brought him to the place where he was injured, had no authority to send him to that place rather than to any other.[3]

It is not enough to prove that there was negligence in a servant of the defendant which caused the injury, nor that that negligence was the negligence of the person to whose orders the plaintiff was bound to conform. It must be proved that the injury arose, not alone from the negligence of such a person, but also from his having conformed

[3] One employed to work at a machine in a shed, who is subject to directions from a carpenter as to what work he shall do, but in no other respect, who while working overtime in the evening is injured by the negligence of the carpenter, who was stacking timber in the shed, in which it was not safe for them both to work at the same time, cannot recover against the employer. *Snowden* v. *Baynes* (1890) L. R. 24 Q. B. Div. 568, Affirmed in (1890) L. R. 25 Q. B. Div. 163. In the divisional court, Wills, J., argued thus: "It seems to us that there is no connection between his doing that piece of work rather than any other, and the accident. Sellick [the carpenter] had no authority to send him to any other place to work, or to exercise any discretion, or give any orders as to where he should to go to do the work. Whatever work Sellick had told him to do, he would have been in the same place, so that it was in no sense the exercise by Sellick of an authority vested in him and exercised by him that brought the plaintiff into what ultimately proved to be a place of danger. We think the order which is contemplated by this subsection must be one which is really that of the person in the position of Sellick, and which is the direct offspring of some choice or exercise of judgment and will on his part; if not, it is not his order at all. Sellick had authority to say, 'You shall do this bit of work or that bit of work,' but not 'You shall do it at this place or that place.' The choice of place rested with someone else. So far as the evidence goes upon this point, the shed in question was the plaintiff's regular place of work, and it has not been suggested that either he had any choice, or Sellick any control, in respect of the place where the work should be done. . . . We think it right, however, to point out that, besides the broad distinction we have already dealt with, there is one obvious difference (whether affecting the right of action or not), between a case in which the circumstances of danger are brought about by the performance on the part of the person injured of acts the direct result of obedience to an order then and there given, and which then expose him to immediate risk if the person giving the order be careless, and a case in which obedience to the order is accompanied by no circumstance of present risk from the negligence of the person giving the order, and in which if the mere fact that obedience to the order involves the presence of the workman in a spot where he is afterwards endangered by the act of the person giving the order is sufficient to give a right of action, the liability may flow from an order given a week or a month before the accident happened. In such a case it is obvious that such an order might amount to very little more than the mere selection of a particular workman to be employed upon a particular job, and it is difficult to suppose that such a case could be within the act." In the court of appeal Lord Esher thus tersely stated his view: "Unless the plaintiff can show that Sellick had authority to tell him where he was to work and at what time, he cannot succeed in his action. I cannot see any evidence of such an authority. The evidence shows that the only authority of Sellick was to tell the plaintiff what work he was to do. There is no evidence that Sellick had any authority to tell the plaintiff to work overtime, or that under his agreement with the defendant the plaintiff was bound to work overtime if Sellick told him to do so. There is, therefore, no evidence of any order given to the plaintiff by Sellick which led to the accident." Fry, L. J., based his judgment on the ground that "the accident arose from the plaintiff's working overtime by his own voluntary act."

to the order.[4] If the only negligence charged is that which inheres in the order itself, the two ingredients of the right of action thus specified will, in the nature of the case, be merged in the single question, whether the injury was the consequence, in a legal sense, of the servant's obedience to the order. This question is one partly of fact and partly of law and is determined by the same tests as those ordinarily employed for the solution of similar problems.[5] See chapter XLII., *post*.

But if the alleged breach of duty was in respect to something done or omitted after the servant had complied with an order which was not an improper one considering the circumstances under which it was given, the analysis of the causation is less simple. In a case involving this situation, it has been held by the English court of appeal that the servant is not required to prove that the injury resulted from his conformity to orders, as its *causa causans*, but merely that such conformity was the *causa sine qua non* of the injury. That this doctrine is subject to some limitation, and that it does not render the master liable for all subsequent delinquencies of the directing employee, is apparent from the opinions of the lord justices. But neither this nor any other reported decision indicates with any clearness the principle upon which the line is to be drawn between the acts for which the master is or is not responsible.[6]

[4] *Wild* v. *Waygood* (1892) 1 Q. B. 783, 61 L. J. Q. B. N. S. 391, 66 L. T. N. S. 309, 40 Week. Rep. 501, 56 J. P. 389, per Lord Herschell. In the same case Lindley, J., expressed his views as follows: "Negligence must be proved. But something more must be proved, and when you come to examine the section you must prove this much more,—that the negligence was that of a person in the employ of the defendant, to whose orders the plaintiff was bound to conform; and, secondly, that the injury to the plaintiff resulted from his having conformed to those orders. The whole, I think, comes to this,—that the injury must be the result of negligence of the person giving those orders and of the plaintiff conforming to those orders. It will not do to prove one of these things only: the injury must be the result of the two, and if the two are so connected together as to cause the injury, then it appears to me that the case comes within this section."

[5] The order of a foreman to be quick is not the "cause" of an injury received by a workman through stumbling over some loose bricks, and falling under a car, where the expression was not used in such a manner as to imply that extraordinary diligence was to be used, but merely in the ordinary sense of a direction to proceed with his work. *Wetton* v. *Connah's Quay Alkali Co.* (1898) Q. B. D.) 33 Week. Rep. 216.

See also *Harris* v. *Tinn* (1889) Q. B. D.) 5 Times L. R. 221, the facts of which are stated in the following section.

Where an injury was received by a brakeman in consequence of a fellow brakeman's having given to another brakeman a wrong signal, which was finally transmitted to the engineer by the conductor, it was held that the cause of the injury was the negligence of the first brakeman who gave the signal, and that there could be no recovery under this provision of the statute. *Grand Rapids & I. R. Co.* v. *Pettit* (1901) 27 Ind. App. 129, 60 N. E. 1009.

[6] In the case referred to (*Wild* v. *Waygood* [1892; C. A.] 1 Q. B. 783, 61 L. J. Q. B. N. S. 391, 66 L. T. N. S. 309, 40 Week. Rep. 501, 56 J. P. 389), the plaintiff was held entitled to recover for an injury resulting from the negligence of his foreman in starting an ele-

In Alabama the view is taken that the injured servant cannot recover unless the superior servant was negligent in giving the direc-

vator, while he was standing, in compliance with the foreman's directions, on a plank extending across the elevator shaft. Lord Herschell said: "Now, in this case it appears to me,—and I do not propose to lay down any general rule upon the subject,—that it is quite clear the injury did result from the plaintiff having conformed to an order, when he was told to go to a place which was, and must have been known to be, a dangerous place, if the person who told him to go there was guilty of negligence. That person having been guilty of negligence, created the danger, and caused the injury, it seems to me the case is within the very terms of the act. It is not necessary to endeavor in the present case to determine or lay down any general rule as to the construction of this section, beyond this,—that I am quite clear it is not limited to an injury arising from an order, which order is negligent in itself. That is one contention put before us. I think the words in the act of Parliament are conclusive against any such construction. It would be limiting it far beyond what the words either require or will admit of. That is all I lay down as regards the construction of the section, beyond this,—that I do not think it essential to show that the conformity to the order was what has been called the *causa causans* of the injury. The negligence must be proved, and if you prove the negligence, then it is sufficient if, in addition to proving that, you also prove that the injury resulted, not from the negligence alone, but from the negligence and the conforming to the order." Kay, L. J., discussing the three possible constructions that might be put on the section said: "The first point that has been urged before us is that it only means an injury from conforming to a negligent order—the negligence being in the order itself. The second is that it means anything that may occur while conforming to an order; and the third is that it means only such direct or indirect results as are closely connected with the order that has been given. I think the first construction argued for is inadmissible. The section clearly shows that it is not confined to an injury caused by a negligent order, but that it must be caused by the negligence of the person giving the order, and must result from conforming to the order given. I do not think that it would be the proper construction of that subsection; I think it would be much too narrow to say that it refers merely to negligence in giving the order. Then I think the second construction would also be much too wide. To say that it includes every case of negligence after an order has been given which the workman was bound to conform to at the time would make it extend to a case where the order was a general order to assist the person who gave it in certain work, and which might be given days or weeks before; and the accident might result from the negligent act of that person while the workman was assisting him. I am not prepared at present to say that the construction of the subsection is so wide as that. It seems to me the third construction is the most reasonable construction of the section—that it relates to negligence which has an intimate connection with the conforming of the workman to an order given him at the time of the injury, and to which he was conforming at the time of the injury. . . . The negligence was really a combination of those two things. If the workman had not been on the plank, there would have been no negligence in pulling the string. It was because the workman was then at the moment, conforming to the order given to him by Duplea, that the pulling of the string by Duplea was an act of negligence. Therefore, the injury may be said to have resulted from conforming to the order, the act being done to Duplea whilst the workman was conforming to his order."

This decision overrules *Howard* v. *Bennett* (1888; Q. B. D.) 58 L. J. Q. B. N. S. 129, 60 L. T. N. S. 152, 53 J. P. 359, 5 Times L. R. 136, in so far as it was based on the proposition that conformity to orders was not the cause of an injury which resulted from the premature starting of a machine, while the plaintiff's hands were in a dangerous position, in which he had placed them while in the act of complying with the order. In criticising the theory of Lord Coleridge in the earlier case, that the injury resulted, not from the directions, but from the machine being set off too soon and at too great a speed, Lord Herschell said: "I most respectfully express my dissent from the ve-

tions which were conformed to.[7] That this construction of the words of the statute is opposed to the weight of authority is apparent from the decisions already cited. The case in which it was adopted antedates *Wild* v. *Waygood* (see note 1, *supra*), and it may be questioned whether a different theory would not have commended itself to the court if the arguments upon which that decision was based had been before it.

In one Indiana case the court proceeded upon the principle that an injury due to negligence of the superior servant, which was committed subsequently to the giving of the order, did not constitute a cause for action, the reason assigned being that under such circumstances the injury did not result from conforming to his orders, but from the subsequent act or omission.[8] But this doctrine has been qualified by later decisions. One of these permits recovery where the direct cause of the injury was something done or omitted by the plaintiff's fellow servants in compliance with a second order.[9] In another the action

of the lord chief justice there indicated. Of course, it may be that the person who started the machine was not a person to whose orders the plaintiff was bound to conform; but supposing the plaintiff was bound to conform, and that the person to whose orders he was bound to conform in working a machine tells him to put his hand in a certain part of the machine and then negligently starts it while the man's hand is there, I own I cannot agree that in that case the injury which is caused by the negligent starting of the machine in such circumstances is not an injury which results from conforming to the order given. The order given was to put his hand in a certain part of the machine, which is a part where his hand will be in immediate danger if the machine is started; and, his hand being there, the negligence consists in starting the machine whilst his hand is there. Under such circumstances as those, there seems to me the most immediate and intimate connection that one can conceive between the negligence which caused the injury and the conforming to the order, because it is in truth one element of the negligence that he was conforming to the order at the time. Therefore, with great respect to the learned chief justice, I am unable to concur in the view that the conformity with the order must be in that sense the *causa causans* of the injury." But the denial of the right to recover in the earlier case was probably justifiable on the other ground assigned, *viz.*, that the negligent employee was not a person to whose orders the plaintiff was bound to conform, within the meaning of the statute. See § 691, *supra*.

It is an error to take the case from the jury, where the evidence is that the plaintiff, while at work in the sweat box of a sewer pipe company and engaged in placing clay in the press, was injured by the act of the employee in charge of the press in causing the plunger to come down before the plaintiff had given the word. *Cox* v. *Hamilton Sewer Pipe Co.* (1887) 14 Ont. Rep. 300, adopting the general principle that the servant may recover without showing that the order was a negligent one.

[7] This is one of the four prerequisites to the maintenance of the action mentioned in *Mobile & O. R. Co.* v. *George* (1891) 91 Ala. 199, 10 So. 145.

It has been held, on the ground that it was perfectly proper to order the plaintiff to cut down a tree in which another had lodged, that the failure of the superior servant to inform the subordinate when it had become unsafe for him to further chop on the tree did not authorize a recovery from the employer. *Postal Telegraph Cable Co.* v. *Halsey* (1896) 115 Ala. 193, 22 So. 851.

[8] *Hodges* v. *Standard Wheel Co.* (1899) 152 Ind. 680, 52 N. E. 391, 54 N. E. 383.

[9] In *Louisville, N. A. & C. R. Co.* v. *Wagner* (1899) 153 Ind. 120, 53 N. E. 927, the plaintiff assumed a dangerous position in obedience to his foreman's

was held maintainable where the injury was due to the negligence of a superintendent in bringing a naked lantern close to a place where gas was escaping, and where the plaintiff was working by his orders. The court of appeals declined to accept the contention that the statutory provision was not applicable for the reason that the injury occurred long after the order had been given and obeyed, and as a result of the negligent handling of the lantern.[10] If the supreme court should ultimately adopt the doctrine of this last case, the law in this state will, it seems, be virtually the same as it is in England, and the *Hodges Case* (see note 8, *supra*), which, strange to say, is not referred to in the later opinions, would be discredited.

It is clear that, under any theory of the effect of this provision, no action can be maintained where the evidence indicates that the efficient cause of the injury was a mere accident,[11] or an act of negligence committed, while the plaintiff was executing a proper order, by a coemployee to whose directions he was not subject.[12]

696. Necessity of showing negligence on the part of the superior servant.—As pointed out in the preceding section, the negligence for which the master is required to answer under this provision of the statutes may be either in regard to the order to which the plaintiff conformed, or in regard to some subsequent act or omission of the directing employee. In either case the question is simply as to what would have been the conduct of a prudent person under the given circumstances.[1]

orders, and was injured in consequence of his fellow workmen obeying the foreman's orders to let loose a truck. The court said: "The order to loose the truck was the proximate cause of plaintiff's injury. And it was both directing the plaintiff into a dangerous situation, that he was thus bound to enter, and then ordering the truck turned loose upon him without warning, that constitutes the actionable wrong."

[10] *Indianapolis Gas Co.* v. *Shumack* (1899) 23 Ind. App. 87, 54 N. E. 414.

[11] *Harris* v. *Tinn* (1889; Q. B. D.) 5 Times L. R. 221; *McManus* v. *Hay* (1882) 9 Sc. Sess. Cas. 4th series, 425.

[12] *Elliott* v. *Tempest* (1888; Q. B. D.) 5 Times L. R. 154.

A railroad company is not liable where a brakeman, who assumed a position between cars separated from each other, for the purpose of coupling them, after the conductor should have made a coupling between the first car and the cars attached to the engine, is injured by reason of the failure of the conductor to make the first coupling, as he had stated he would do, if that failure was not due to negligence or recklessness but to the speed at which the engine came back against the first car. *Alabama Midland R. Co.* v. *McDonald* (1896) 112 Ala. 216, 20 So. 472. The court said that an action possibly lay for the negligence of the engineer under subs. 4 of the act. See following subtitle.

[1] *(a) Negligence in regard to the order itself.*—In the absence of something in the context to qualify the statement, it is a misdirection to tell the jury that, if they were of opinion that the delinquent superintendent thought the conditions were such as to render it safe to give the order in question, he would not be guilty of negligence. The real test is: What would a sensible man have done under the circumstances? *Nash* v. *Dinsmore S. S. Co.* (1891; C. A.) 7 Times L. R. 597.

In *Hooper* v. *Holme* (1896; C. A.) 12 Times L. R. 6, Affirming 12 Times L. R.

Construing the subsequent provision of the Indiana act, which corresponds to section 1, subs. 5, of the English act, the supreme court of that state has held that, as it merely particularizes other and different classes of employees for whose negligence the master is to be responsible, the scope of the subsection now under review is in no way limited by the restrictive phrase which, in the Indiana act, declares the recovery of the plaintiff to be conditional upon proof that the negligent per

537, it was assumed that putting a laborer to work on a railway viaduct without setting a look-out to warn him as to the approach of trains was negligence.

A verdict for the plaintiff will not be disturbed where the evidence is that the servant was a "ganger" who knew nothing about pulling down houses; that he was ordered by his foreman to save a certain partition; that while engaged in this work the joists supporting the ceiling came down with the roof and killed him; and that the foreman had not examined the joists to see how they were fixed. *Reynolds* v. *Holloway* (1898; C. A.) 14 Times L. R. 551.

No negligence is established by evidence showing merely that the foreman ordered the plaintiff to go into a hole which had been broken through a wall for the purpose of excavating a cellar, and that, while he was picking at the wall above him, it gave way and allowed the earth behind it to fall on him. *Baker* v. *Higgs* (1887; Q. B. D.) 3 Times L. R. 618.

The mere fact that the plaintiff's foreman had ordered him to lower a stack of planks before the time when it fell on him will not justify the inference that it was top-heavy at the time the order was given, and that its condition was known to the foreman, especially when the plaintiff and his witness admitted that they had observed nothing unsafe in the stack. *Connell* v. *Sutcen Shipway Commercial Dry Dock Co.* (1887; Q. B. D.) 3 Times L. R. 630.

The plaintiff obeyed an order to insert a bar of iron under a flat piece of iron on which a roll of iron was laid, and lift the roll so as to get it into a furnace lengthwise. While it was being lifted, it fell off the piece of iron on which it lay, in consequence of its not being properly scotched, and, striking the bar, threw the plaintiff backwards. Held, that the mere fact that the roll of iron fell was not sufficient evidence of negligence to submit to the jury, and that, for aught that appeared, the accident might have occurred owing to the manner in which the lifting was done by himself and his coworkers. *Harris* v. *Tins* (1889; Q. B. D.) 5 Times L. R. 221.

A foreman of one set of artisans working on a building is not negligent in sending them, without making an inspection, to work on a scaffold, built by a competent mechanic for the use of another set. *Kettlecell* v. *Paterson* (1886) 24 Sc. L. R. 85.

The plaintiff, who operated a machine in defendant's factory, was ordered by the superintendent to start the machine. The superintendent had reason to know that plaintiff might understand the order as a command to see if the machine was all right, by resuming work. She so understood it, and was justified in such understanding. While starting the machine, in the exercise of due care, plaintiff's hand was thrown from its usual place by the unusual shaking of the machine and injured. Held, that under the circumstances, the order of the superintendent was negligent, and plaintiff might recover. *Eaves* v. *Atlantic Novelty Mfg. Co.* (1900) 176 Mass. 369, 57 N. E. 669.

To prescribe an improper method of unloading heavy articles from a vehicle is negligence. *Hilcard* v. *Midland R. Co.* (1884) L. R. 14 Q. B. Div. 68, 51 L. J. Q. B. N. S. 202, 52 L. T. N. S. 255, 33 Week. Rep. 366, 19 J. P. 453 (iron window frames were left standing unsecured on a van).

No negligence is predicable of the omission of a foreman to instruct a boy sent to perform hazardous work, where he understands how to do that work and what danger it involves. *Worthington* v. *Goforth* (1899) 121 Ala. 656, 26 So. 551. For another illustrative decision, see *Martin* v. *Connah's Quay Alkali Co.* (1885; Q. B. D.) 33 Week. Rep. 216, referred to in the preceding section, note 5.

In an action by a switchman for damages for injuries sustained by being thrown from a car by the sudden jerk

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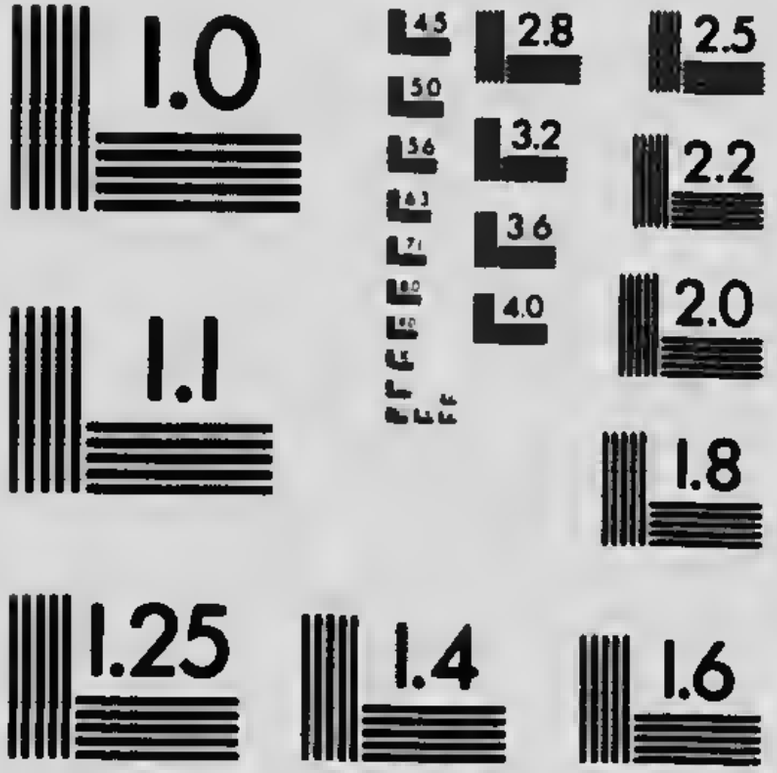

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son was "performing a duty of the corporation."[2] As this subsection declares in the most general terms that the master is to be liable for the "negligence" of any employee of the class designated, there would seem to be no room for the controversy which has arisen with respect to the construction of the subsection dealing with superintendence, *viz.*, whether the manual acts of a superior servant are among those for which the master is responsible. See § 688, *supra*. The few authorities which bear upon the subject are of a negative complexion; but the implication in favor of the workman's right to recover for an injury caused by such an action is as strong as it can be without a direct ruling on the point. In *Wild* v. *Waygood* (see § 695, *supra*), the point that the action could not be maintained because of the character of the negligent act was one so obviously suggested by evidence, that, if it had been considered an open one, it would almost certainly have been adverted to by one or other of the eminent judges and counsel who took part in the discussion of the facts. In one Indiana case the action was held not to be maintainable, where the evidence showed the infliction of an injury through the negligence of the plaintiff's superior in handling a heavy piece of machinery.[3] The true rationale of this decision, however, is not the character of the act constituting the negligence, but the theory that there was no causal connection between the order and the injury. See § 695, note 8, *supra*. In a still later case in the court of appeals of the same state, the

ing or checking of the car, alleged to have been caused by the negligence of the switching crew foreman or the engineer of the switch engine, an instruction that, "although the jury may believe from the evidence that said car was suddenly stopped, and that the speed of said car was suddenly checked, and that said car was otherwise jarred at the time plaintiff was injured, yet they must find for the defendant unless they further believe from the evidence that said sudden stopping of said car, or the sudden checking of said car, caused an unusual shaking or jarring of said car," correctly states the law, and should be given at the request of defendant. *Louisville & N. R. Co.* v. *Smith* (1901) 129 Ala. 553, 30 So. 571.

(*b*) *Negligence in regard to subsequent acts or omissions.*—See *Wild* v. *Waygood* [1892] 1 Q. B. 783, 61 L. J. Q. B. N. S. 391, 66 L. T. N. S. 309, 40 Week. Rep. 501, 56 J. P. 389, as stated in the preceding section, and also the cases referred to in § 697, *infra*.

[2] In *Louisville, N. A. & C. R. Co.* v. *Wagner* (1899) 153 Ind. 120, 53 N. E. 927, the court said: "Both subdivisions are equally parts of the same section and relate to the same subject-matter. Each subdivision specifies different employees, but in common they distinguish employees of a superior rank,—employees clothed with responsibility and authority of the employer,—and both must be governed by the same rules of interpretation. The section must be construed as a whole."

The fact that the injury was caused by the foreman's negligently approaching with a naked light a place where gas was escaping will not prevent a servant from recovering under section 1, subs. 2, although such an act is not in the performance of a duty of the corporation under subs. 4. *Indianapolis Gas Co.* v. *Shumack* (1899) 23 Ind. App. 87, 54 N. E. 414.

Hodges v. *Standard Wheel Co.* (1899) 153 Ind. 680, 52 N. E. 391, 54 N. E. 383. One of the grounds of the decision, *viz.*, that the directing employee was a duly appointed delegate, has been already noticed. See § 692, *supra*.

negligence was again in respect to a manual act, but it was not suggested that this was a sufficient reason for refusing to allow the action to be maintained.

F. Liability for injuries caused by acts or omissions done or made in obedience to rules.

698. Introductory.— In section 1, subs. 4, of the English act it is provided that a servant shall have a right of action against his employer, whenever he is injured "by reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf." This clause has been inserted in the statutes of Alabama and Indiana, and in those of the English colonies; but it is not found in those of Massachusetts, New York, or Colorado.

The effect of this provision, as a whole, is indicated by the following passage from the opinion of Fry, L. J., in an English case: "There are four questions which must be asked, every one of which must be answered in the affirmative before the plaintiff can substantiate his case. The first question is this: Was there personal injury caused by the plaintiff? The second is, Was there injury caused by reason of an act or omission of any employee of the defendant? The third question is, Was the act or omission done or made in obedience either to a rule or a by-law of the employer, or to particular instructions given by a delegate of the employer? Why Parliament so framed the section it may be a little difficult to understand; why the particular instructions of the employer should not be referred to, but only the rules or by-laws of the employer and the instructions of a delegate of the employer, is not, on the surface, very easy to see. No doubt the legislature had some good reason for so enacting. The fourth question is whether the injury resulted from some impropriety or defect in the rules, by-laws, or instructions. It must not only be the result of impropriety or defect in the rules, by-laws, or instructions, but it must be an act or omission done or made in obedience to them, or one of them."[1]

699. Necessity of proving negligence in respect to the rules, etc., or to particular instructions.— By section 2, subs. 2, of the English act, and the corresponding provisions of the colonial acts, it is expressly declared that the workman shall not be entitled to compensation "un-

[1] *Indianapolis C. Co.* v. *Shumack* (1899) 23 Ind. App. 87, 54 N. E. 414. [1] *Whatley* v. *Holloway* (1899; Q. B. D.) 62 L. T. N. S. 639, 54 J. P. 645

less the injury resulted from some impropriety or defect in the rule, by-laws, or instructions."[1] This proviso is not inserted in the American statutes; but it is clear, both on principle and authority, that this noninsertion cannot be construed as having the effect of overruling the general rule that proof of negligence in respect to the subject-matter is a condition precedent to recovery in actions against the employer. The intention of the legislatures is assumed to be that no liability can be predicated, unless the defendant is shown to have been culpable either in promulgating the rule in question, or in failing to promulgate a rule to meet the requirements of the case.[2]

700. "In obedience to the rules."— The effect of these words is to

[1] A jury is justified in finding an impropriety, etc., where a man is placed in charge of an engine, and at the same time employed in other operations which may involve risk to life or limb. *Whatley* v. *Holloway* (1890; Q. B. D.) 62 L. T. N. S. 639, 54 J. P. 645, per Fry, L. J.

[2] In *Dixon* v. *Western U. Teleg. Co.* (1895) 68 Fed. 630, it was insisted by plaintiff's counsel that this clause in the Indiana statute gives a right of action to an employee who has, without his fault, sustained an injury, arising from the performance of any service rendered in obedience to the rules, etc., without regard to the question of negligence or want of care of the corporation or its foreman. His argument was that the subsection was to be construed as if the employer had been declared liable where the injury "resulted from the act or omission of the person injured or any other person, done or made, etc." Discussing the contention, the court said: "The phrase 'where such injury resulted from the act or omission of any person' is broad enough to embrace the injured person. The expression 'any person,' in its usual and ordinary sense, is inclusive and embraces every employee. This clause of the statute is not free from ambiguity. While the language employed is capable of a construction as broad as is contended for, it will not be given such construction, if to do so would lead to absurd or unjust consequences. . . . The construction contended for would make every corporation, except municipal, an insurer of the safety of its employees from injury in all cases where they were injured without their fault, while acting in obedience to the rules or instructions of their employer. It would subject the industries of the state to hazards and burdens of new and dangerous proportions. Its mischiefs would prove far-reaching, and its injustice would be great. No corporation could safely conduct its business if it were required to become an absolute insurer of the safety of its employees. No principles of justice or sound policy can be invoked in support of a construction which would condemn the employer to compensate an employee for an injury for which the employer was in no wise in fault. The statute is susceptible of a construction which does no violence to the language employed, and which will protect the just rights of the employee, and at the same time hold the employer to respond in damages for injuries resulting from its fault or negligence, or from the fault or negligence of any person delegated with authority to represent it. The true construction of the clause requires the words 'any person' to be limited so as not to include the person injured. Thus construed, the clause would read: 'Where such injury resulted from the act or omission of any person (except the person injured) done or made: (1) In obedience to any rule, regulation, or by-law of such corporation; or (2) in obedience to the particular instruction given by any person delegated with the authority of the corporation in that behalf.' This construction makes the statute harmonious, and gives effect to every word and member of it. Under this construction, the effect of this clause is to prevent the corporation from setting up the defense that the injury to the plaintiff was caused by the act or omission of a coemployee, when such coemployee was acting in obedience to the rules, regulations, or by-laws of the corporation, or in obedience to the particular instructions given by any person delegated with the authority of

relieve the master from liability wherever the rules, etc., were not in themselves improper or defective, and the actual cause of the injury was the imprudent manner in which a coservant of the plaintiff carried them out.[1]

That an injury was "caused by reason of an act or omission" of a coemployee, "done or made in obedience to particular instructions, etc.," cannot be held where it appears that the plaintiff, while engaged in carrying out his directions, not improper in themselves, was injured by a subsequent breach of duty on the part of the directing employee.[2]

701. "Delegated with the authority of the employer."—The employees to whom these words are considered to be applicable are persons occupying the position of managers, whom the employer deputes in his stead to do or to abstain from doing what he would do or abstain from doing in the premises.[1]

G. Liability for Negligence of Certain Specified Railway Employees.

702. Generally.—The English employers' liability act of 1880, and

the corporation in that behalf. In my opinion this clause of the statute ought to receive no broader construction."

[1] Where it is the duty of an employee to draw away the wood which has been cut by a saw and also to attend to the engine which operates the saw, a jury is not justified in finding that the employer's instructions not to neglect the engine required him to abandon his other duty without giving notice to a workman who fed the wood to the saw. *Whatley* v. *Holloway* (1890; Q. B. D.) 62 L. T. N. S. 639, 6 Times L. R. 160. Affirmed in (C. A.) 6 Times L. R. 353. Mathew, J., pointed out that what was done by the delinquent employee was not done in obedience to the instructions, but in consequence of disobedience to them.

An averment that the plaintiff was injured by a fellow servant's disobedience to a rule of the master will not enable him to recover under this clause, since its effect is to make the master liable in precisely the opposite case, viz., where the act or omission of the fellow servant is done in obedience to the master's rules. *Laughran* v. *Brewer* (1896) 113 Ala. 509, 21 So. 415.

In *Baltimore & O. S. W. R. Co.* v. *Little* (1897) 149 Ind. 167, 48 N. E. 862, also, the contention that the true construction of this provision is that if any duty is enjoined by rule, etc., upon a servant, and the duty is omitted, the corporation is liable for resulting injury, was rejected. The court said: "If this was the proper construction of the specification, there would be little requirement for other provisions of the act than those of the third subdivision, since it would strike down the fellow servant rule in its entirety wherever the act or omission is in the line of duty. It would make the corporation liable for the act or omission of a servant, whether negligent or not, and whether the duty negligently performed or negligently omitted may have been enjoined by the general rules, etc., of the corporation, or is in obedience to particular instructions from one 'delegated with authority in that behalf.' Such was not the intention of the legislature."

[2] *Postal Cable Teleg. Co.* v. *Hulsey* (1896) 115 Ala. 193, 22 So. 854 (complaint held demurrable which showed that the plaintiff would not have been hurt if his foreman had notified him when it was no longer safe to remain in the neighborhood of a tree which he had been ordered to chop down). This case, under another of its aspects, is noticed in § 695, note 7, *supra*.

[1] *Claxton* v. *Mowlem* (1888; C. A.) 4 Times L. R. 756.

all the colonial and American statutes which are modeled upon similar lines, contain provisions for the especial benefit of railway servants. But on referring to the text of the statutes in subtitle A, *supra*, it will be seen that there is some diversity in the language employed by the various legislatures.

It will be observed that the virtual effect of these provisions is to abolish the master's immunity for railway accidents in all, or nearly all, instances in which the injury was caused by the negligence of subordinate agents engaged in directing the movements of the rolling stock. Taken in connection with the preceding subsections, they supplement a railway servant's right of action in such a manner that the act, as a whole, may be regarded as being, for practical purposes, the equivalent, so far as such servants are concerned, of the statutes of those American states in which the doctrine of coservice is declared to be no defense in cases where the injury was caused by the negligence in the operation of a railway.[1]

The language used in these clauses of the acts which enable a servant to recover for an injury received while he was conforming to the orders of a superior (see subtitle E, *supra*) does not, in any degree limit the liability imposed upon the employer by the provisions discussed in the present subtitle.[2]

703. Persons having "the charge or control of signal points."— The only English case in which these words have been discussed discloses so much diversity of opinion as to their import that the decision, except as a determination that there is no right of action for the negligence of the particular employee who caused the injury, is not of much service as a precedent.[3]

[1] Iowa, Kansas, Minnesota. See chapter XXXIX, *post*.

[2] *Indianapolis Union R. Co.* v. *Houlihan* (1904) 157 Ind. 494, 54 L. R. A. 787, 60 N. E. 943.

[3] *Gibbs* v. *Great Western R. Co.* (1884; C. A.) L. R. 12 Q. B. Div. 208, 53 L. J. Q. B. N. S. 543, 50 L. T. N. S. 7, 32 Week. Rep. 329, 48 J. P. 230. Affirming (1883) L. R. 11 Q. B. Div. 22, 48 L. T. N. S. 640, 31 Week. Rep. 722. There it was held that the defendant could not be held responsible where the evidence showed that it was the duty of one Fisher, the employee whose act was the immediate cause of the injury, to clean, oil, and adjust the points and wires of a locking apparatus at various places along a portion of the line, and to do slight repairs; that for these purposes he was, with several other men, subject to the orders of an inspector in the same department, who was responsible for the proper condition of the points and locking gear, which were moved and worked by men in the signal boxes; and that Fisher, having taken the cover off some points and locking gear in order to oil them, negligently left it projecting over the metals of the line, and so injured a fellow workman.

In the divisional court, Mathew, J., said: "I find a difficulty in ascertaining what was precisely meant by the general language used in subs. 5, but upon the best interpretation I can give, I think the legislature had in contemplation the negligence of some person having charge or control of the points for the purposes of traffic and of movement. As Fisher did not answer that description, but was merely employed to

The Alabama and Massachusetts cases, so far as they go, seem to make the railway company liable for the negligence of all employees who for any space of time, however short, have the power to adjust a switch for the purpose of traffic.[2] Negatively, therefore, these cases are authority against the theory propounded in the English case by Brett, M. R., that the statute contemplates a "general charge." Further doubt is thrown upon the correctness of that theory, if we consider the context of the provision. The most natural construction of the words describing the other employees who are declared to be vice principals in respect to particular functions is that the legislature had in view the employees who actually operate the instrumentalities specified. If this conception be the true one, it is clear that the maxim, *Noscitur a sociis*, furnishes a strong reason against limiting the application of the phrase now under discussion to employees who have a general charge of points. Upon the whole, therefore, it is sub

oil, clean, and adjust that which was moved by some other thing in the charge and control of some other person. I am of opinion that there was no evidence to bring the case within the provisions of subs. 5." Field, J., doubted whether the words "charge or control" are intended to mean different things.

In the court of appeal, Brett, M. R., expressed his views as follows: "I cannot think that there is any color for saying he had the control of the points, and the only question is whether he is a person who had the charge of them within the meaning of the statute. I think that to be such a person he should be one who has the general charge of the points, and not one who merely has the charge of them at some particular moment. Now what evidence is there that Fisher was a person who had such general charge? It is true that he himself said he had the charge, but to act upon such evidence would be to make him the judge of the law and not the witness of facts. The plaintiffs were bound to show by evidence what were the duties of this man, when it would be for the court to say whether, having such duties, he was a person who had the charge of the points as intended by the statute. Fisher himself, when cross-examined, said what his duties were. 'My duties are,' he said, 'to clean and oil the locking bars and apparatus. I had several places to go to; I worked under Inspector Saunders.' The meaning of working under Saunders is that Saunders might order him at any moment to go to such and such a place and oil the bars and apparatus there, or told to go to the place he had intended to go to for the purpose of oiling the bars. The evidence which was given showed, I think, that Fisher was only a little above a laborer, that he had to do menial work on what he was told to look to, and that he was not a person who had the charge of those things upon which he had to do such work under such circumstances." Bowen, L. J., thought it was "sufficient to say that Fisher was only, at the most, employed to do certain work on and in respect of the points, under the order of somebody else."

Engineers and conductors provided with keys to a switch, with the duty of opening and fastening which no one is especially charged, for the purpose of using the spur track attached to enable trains to pass each other, are in charge of the switch *ad hanc vicem*. *Birmingham R. & Electric Co.* v. *Baylor* (1893) 101 Ala. 488, 13 So. 793.

A railroad company is liable for negligence of a tower man, whose duty it was to move switches by levers in a tower on signals from the men on the tracks below, in throwing a different switch than that directed by a signal, an approaching train being thus caused to run on a wrong track, and collide with a switchman who gave the signal. *Welch* v. *New York, N. H. & H. R. Co.* (1900) 176 Mass. 393, 57 N. E. 668. The court declined to hold that the fact that the negligent employee received di

mitted that the nonliability of the employer in the *Gibbs Case* (see note 1, *supra*) may be more properly referred to the theory announced by Mathew, J., *viz.*, that the statutes are intended to cover only cases in which the control of the points is exercised in regulating the movements of cars.[3]

704. Person in "charge or control of a locomotive engine."—*a. What is an engine under the statute.*—The word "engine" is construed as meaning a "machine used to move trains."[1] An engine of an essentially stationary type is not brought within the purview of the statute by the fact that, together with the machinery operated by it, it is mounted upon a truck, and its power can be applied so as to move that truck along a set of rails to some other part of the employer's premises.[2]

b. What employees are deemed to be in "charge or control" of engines.—It is not disputed that this description is applicable to the

rections from the other servants took him out of the category of vice principals.

See also *Coughlan* v. *Cambridge* (1896) 166 Mass. 268, 44 N. E. 218.

[2] In Indiana it has been held that an employee in charge of a switch is not a person "who has charge of any signal, telegraph office, switch yard," since the section is to be read as punctuated, and no comma is to be inserted between "switch" and "yard." *Baltimore & O. S. W. R. Co.* v. *Little* (1897) 149 Ind. 667, 48 N. E. 862. These particular words occur only in the statute of that state, and their construction is, therefore, not at present a matter of practical interest in any other jurisdiction. But the writer ventures, in passing, to express his strong doubt whether this rule is correct. In the first place the expression is not in common use. The only authority cited by the court is 5 Rapalje & Mack's Digest of Railway Law, p. 60, where one of the divisions of subjects is entitled "Switch Yards." The expression is also found, though not very frequently, in the reports. See, for example, *Hurst* v. *Kansas City, P. & G. R. Co.* (1901) 163 Mo. 309, 85 Am. St. Rep. 539, 63 S. W. 695; *Illinois C. R. Co.* v. *Cozby* (1898) 174 Ill. 109, 50 N. E. 1011; *Fay* v. *Chicago, St. P. M. & O. R. Co.* (1898) 72 Minn. 192, 15 N. W. 15; *Williams* v. *Louisville & N. R. Co.* (1901) 23 Ky. L. Rep. 1124, 64 S. W. 738; *Walker* v. *Atlanta & W. P. R. Co.* (1898) 103 Ga. 820, 30 S. E. 503. But it is omitted in the Century, Standard, and the other dictionaries to which the writer has access. It seems very improbable that an expression which, as this omission indicates, is far from being a familar one, should have been used in a statute of this character. But the most fatal objection to the theory of the court is that, in all the acts of a tenor similar to that of Indiana, "switches" are specifically mentioned, and that it is therefore more likely that the Indiana legislators intended to add "yards" to the list of the specified parts of the plant, than that they intended to omit one which is expressly mentioned in the other acts, and substitute another word which, as this very decision shows, is construed as absolving a railway company from liability for a class of accidents which are peculiarly [illegible] and in which the victim is peculiarly helpless.

[1] *Murphy* v. *Wilson* (1883) 52 L. J. Q. B. N. S. 524, 48 L. T. N. S. 788, 47 J. P. 565, 48 J. P. 24.

A person in charge of a stationary engine operating a tramway on a mining slope is not in "charge of an engine" on a "track of a railway," and is therefore merely a fellow servant with the engineer of a pump engine located in the mine. *Whatley* v. *Zenida Coal Co.* (1898) 122 Ala. 118, 26 So. 124 (demurrer sustained to count alleging negligence of such an engineer).

[2] *Murphy* v. *Wilson* (1883) 52 L. J. Q. B. N. S. 524, 48 L. T. N. S. 788, 47 J. P. 565, 48 J. P. 24 (truck supporting a steam-crane ran over plaintiff's hand while he was grasping a rail to steady himself in pulling at a stone).

employees who actually operate the locomotive engines which move trains. It is a question of fact who was in charge of an engine at any particular time,[3] and whether the act alleged as the cause of the injury amounted to a breach of a duty imposed on the person answering this description.[4]

[3] *Louisville & N. R. Co.* v. *Richardson* (1893) 100 Ala. 232, 14 So. 209.

An engineer who is in the employment of a railway company, and in charge of an engine which is at the time running upon the company's tracks, is *prima facie* in the discharge of his duties as engineer, and in a complaint based on this subsection it is not necessary to aver that the engineer was in the discharge of the duties imposed by his employment, when the injury was inflicted. *Woodward Iron Co.* v. *Herndon* (1896) 114 Ala. 191, 21 So. 430.

A complaint is good, where it states that the engineer, while in the service of the company in charge of a locomotive, negligently injured the plaintiff, at a time when both were acting in the line of duty as employees of the company. *Pittsburgh, C. C. & St. L. R. Co.* v. *Montgomery* (1898) 152 Ind. 1, 71 Am. St. Rep. 301, 49 N. E. 582.

[4] Evidence that a trackman was run down by a train and that the engineer did not whistle, as the rules required him to do when passing trackmen, is sufficient to require the submission of the question of the master's negligence to the jury. *Barker* v. *London & N. W. R. Co.* (1891) 8 Times L. R. 31.

The blowing of a whistle by the engineer of a railroad train 50 yards or more before reaching a place where the track is obscured by dense smoke for 250 or 300 yards is not, as matter of law, a sufficient exercise of care as to other employees who may be coming on the track in a hand car from the opposite direction. *Woodward Iron Co.* v. *Herndon* (1896) 114 Ala. 191, 21 So. 430.

For an engineer to run a railway train at a rapid rate of speed at a place where the statute does not regulate and prescribe the rate is not negligence *per se*. Whether or not such running is negligence, so as to render the company liable for the death of a brakeman who fell from the top of the train, depends upon the particular conditions and circumstances. *Perdue* v. *Louisville & N. R. Co.* (1893) 100 Ala. 535, 14 So. 366.

Evidence that the plaintiff, a switchman, was struck, while walking close to a track, by an engine which was moving at an excessive rate of speed and without sounding the bell, will justify a verdict against the company. *Canada Southern R. Co.* v. *Jackson* (1890) 17 Can. S. C. 316.

It is not error to admit in evidence a rule from a railroad company's book of rules providing that "a lamp swung across the track is the signal to stop," where the issue involved is whether the engineer was negligent in failing to perceive upon the track an employee who had fallen down and became unconscious by reason of sickness. *Helton* v. *Alabama Midland R. Co.* (1893) 97 Ala. 275, 12 So. 276.

In an action brought in Kentucky for injuries received in Alabama, recovery may be had for the killing of a railroad employee by the negligence of those in charge of a locomotive, although the negligence was neither "gross" nor "wilful," as it must be to make the action sustainable in the former state. *Louisville & N. R. Co.* v. *Graham* (1896) 98 Ky. 688, 34 S. W. 229.

A railroad engineer is not negligent towards a switchman on a switch engine, so as to charge the company with liability for injuries to the latter, in running by an oil box, near the track, but far enough away to permit the engine to pass safely, unless he knows or has reason to believe that the switchman is in such a position that he may be injured in passing such box. *Louisville & N. R. Co.* v. *Bouldin* (1895) 110 Ala. 185, 20 So. 325.

An engineer who propels a train with such force and violence against standing cars as to injure a brakeman attempting to make a coupling between such cars and another car on the other side thereof is guilty of negligence, although he may not have known that the brakeman was between the cars. *Alabama Midland R. Co.* v. *McDonald* (1895) 112 Ala. 216, 20 So. 472.

Whether a "running" or "flying" switch is or is not to be regarded as negligence *per se*, a railway company can not successfully assail the propriety of a verdict which finds that it is not negligence to switch cars at a speed of

705. Person having "charge or control of a train."— *a. What constitutes a train, generally.* —The view of the supreme court of Massachusetts is that the word "train" was used by the legislature in the ordinary sense which it bore at the time when the employers' liability act was passed in that state, and that this subsection is therefore only applicable where the train is one which is operated by steam.[1] In the case cited it was held that an action could not be maintained for an injury caused by the management of a street railway car operated by electricity in the usual manner. This doctrine seems to the present writer to be of very dubious correctness, in so far as it is based on the theory that a train must be propelled by steam to be within the meaning of the statute. In some respects the peculiar dangers to which railway employees are exposed from moving cars are essentially the same, whether the motive power be steam or electricity, and an injury of the kind which was denied to be actionable is, therefore, within the spirit, if not the letter, of the statute. And once it is conceded that the statute covers trains operated by electricity, the further result would

or 16 miles an hour onto a repair track. *Louisville & N. R. Co.* v. *Davis* (1890) 91 Ala. 487, 8 So. 552.

Compare *Devin* v. *Boston & A. R. Co.* (1893) 159 Mass. 348, 34 N. E. 539, where one of the alternative theories suggested by the evidence was that cars had been "kicked" at too great a speed by the engineer, and the case was held to be one for the jury.

The conduct of an engineer in applying the air brake and bringing the train to a sudden stop without giving any signal or warning does not necessarily constitute actionable negligence on the part of the company as to an employee injured by being thrown off from a flat car by such stoppage. *Cooper* v. *Wabash R. Co.* (1894) 11 Ind. App. 211, 38 N. E. 823.

No recovery can be had for the death of a fireman caused by an explosion due to the want of sufficient water in the boiler, where the evidence is that, although the company held the driver responsible as regards the engine, it was the fireman's duty to attend to the water supply. *Brunell* v. *Canadian P. R. Co.* (1888) 15 Ont. Rep. 375.

A railroad employee may recover for injuries caused by sudden unnecessary movements of cars, due to the negligence of the engineer in the handling of a train. *Highland Ave. & Belt R. Co.* v. *Wilbur* (1898) 120 Ala. 535, 24 So. 955.

A complaint in an action by a telegraph operator, which charges that in attempting to cross a railway track at a time when his duties required him to do so, he was struck by a train moving 20 miles per hour, which gave no warning of its approach; that he was unable to see its approach, on account of high weeds; and that the engineer of the train knew of his duty to cross the track at the time,—charges actionable negligence, though the statutory duty of the engineer to whistle and ring his bell on approaching a crossing and to stop his engine might not be applicable. *Indianapolis Union R. Co.* v. *Hoalahan* (1901) 157 Ind. 494, 54 L. R. A. 787, 60 N. E. 43.

[1] *Fallon* v. *West End Street R. Co.* (1898) 171 Mass. 249, 50 N. E. 536. The court qualified its opinion by suggesting that "possibly a railroad, where the motive power has been changed in part or altogether from steam to electricity, or some other mechanical agency, but which retains in other respects the characteristics of a steam railroad, would come within the purview of the act."

In this connection it may be remarked that in Alabama it has been held that an electric railroad is within the purview of a statute applicable to steam railroads. *Louisville & N. R. Co.* v. *Anchors* (1896) 114 Ala. 492, 62 Am. St. Rep. 116, 22 So. 279.

appear to follow, that it can make no difference, as regards the master's liability, whether the motive power is transmitted by wire from some central point or generated or stored in an engine traveling with the train. This view receives some support from an English case which embodies the principle, that, if the other elements of a "train" are present, the employer is liable for injuries caused by its being carelessly transferred from one point to another, whether the motive power be fixed or movable.[2] In the course of his opinion Cave, J., emphasized the fact that the danger of putting cars in motion without proper warning is equally great, however they are moved, and upon whatever part of the line.

b. How many cars constitute a train. In a recent case Lord Halsbury doubted very much whether the applicability of the word "train" depends upon "the number of carriages or the number of vehicles going upon wheels which the locomotive was taking along the railway." He thought the legislature intended a "very wide scope" to be given to the language used, and that, "speaking in a general way, the legislature meant that a locomotive engine by itself, or anything that was drawn along a railway, or was in course of being drawn along a railway by that locomotive engine" should be included in the word.[3] The actual extent of the decision cited is that several temporarily detached cars constitute a "train," but, as there is nothing in the opinions of the other law lords to indicate that they were inclined to put a less liberal construction upon the statute than the lord chancellor, his theory of its meaning may perhaps be regarded as the one judicially accepted in England.

In a Massachusetts case involving facts closely analogous to those under review by the House of Lords, a similar conclusion was arrived at, the statutory word being held applicable to a number of cars coupled together, forming one connected whole and moving from one point to another upon a railroad, in the ordinary course of its traffic under an impetus imparted to them by a locomotive which shortly before the accident had been detached.[4] That this court is prepared to accept, if it has not already accepted, a construction of the statute not less favorable to the servant than that adopted by Lord Halsbury, is also inferable from two other decisions holding that a locomotive

[2] *Cox* v. *Great Western R. Co.* (1882) L. R. 9 Q. B. Div. 106, 30 Week. Rep. 816, 47 J. P. 116, where the jury were held to be warranted in finding that an employee whose duty it is to apply the hydraulic power by which a capstan is made to haul freight cars coupled together is "a person in charge of a train upon a railway."

[3] *McCord* v. *Cammell* [1896] H. L. E.] A. C. 57, 65 L. J. Q. B. N. S. 202, 73 L. T. N. S. 634, 60 J. P. 180.

[4] *Curran* v. *Boston & A. R. Co.* (1895) 164 Mass. 523, 42 N. E. 112.

and a single car connected together and run upon a railroad constitute a "train."[5]

c. What employees are deemed to have "charge or control" of a train; conductors.—A conductor is the employee to whom the statutory description is most obviously applicable, and it is not disputed that a railway company is prima facie responsible for his negligence.[6] This presumption may be rebutted by showing that, at the time the injury was received, he was not, as a matter of fact, in control of the train in question. It cannot be said, as a matter of law, that a conductor is not in charge of a train during a temporary absence therefrom.[7] Nor can any cessation of his controlling functions be predicated from the mere fact that the portion of the train which caused the injury had been detached from the engine and the other cars at the time when plaintiff was hurt.[8]

The conductor of a switch engine which is drawing several cars under his direction may properly be found to be, for the time being, in charge of a train consisting of the engine and cars.[9] But such a con-

[5] *Dacey* v. *Old Colony R. Co.* (1891) 153 Mass. 112, 26 N. E. 437. Followed in *Shea* v. *New York, N. H. & H. R. Co.* (1899) 173 Mass. 177, 53 N. E. 396.

[6] In *Chicago & E. I. R. Co.* v. *Richards* (1901) 28 Ind. App. 46, 61 N. E. 18, it was held that a complaint was not demurrable, which alleged in substance that a brakeman, while climbing up to the top of a car, was struck by another car which had been negligently left by the conductor of another train on an adjoining side track at a place where the two tracks were only 5 feet apart, and, owing to the transverse slope on which the side track was laid, the stationary car leaned over towards the other track.

[7] *Donahoe* v. *Old Colony R. Co.* (1891) 153 Mass. 356, 26 N. E. 867. There the conductor left his train at a certain station and allowed it to proceed to the next station without him. A brakeman had occasion to make a coupling while the conductor was still absent from his post, and was injured by a defective drawbar, of the condition of which the conductor had failed to notify him. It was held that the jury was justified in finding that the conductor was in charge of the train when the injury was received, since nothing was done that was contrary to his orders, or not reasonably to be expected. It was also contended, without success, that the omission of the conductor to warn the plaintiff with regard to the defective drawbar was not negligent, for the reason that the movements of the train and the coupling and uncoupling of cars were wholly under his direction, and that a brakeman was not expected to uncouple cars without his orders. The court said, that when the conductor left the train and permitted it to proceed without him, it might properly be interred by a jury that he expected and permitted such things to be done as were necessary in the management of the train until he should rejoin it, without a specific order from himself for each particular act; and, if so, the omission in question might properly be found to have been negligence on his part.

[8] *Devine* v. *Boston & A. R. Co.* (1893) 159 Mass. 348, 34 N. E. 539. There two cars which had been "kicked" ran against a post at the end of a stub switch. It was held that, on the evidence, the jury might properly find that the conductor was the person who gave the stop motion for the cars, and that taking into account the speed at which they were moving, he was negligent in not giving the motion sooner than he did.

[9] *Dacey* v. *Old Colony R. Co.* (1891) 153 Mass. 112, 26 N. E. 437. There it was held that, in view of the use to which a freight yard is put in making up trains and receiving cars from incoming trains, and the danger attendant on moving cars and making up trains in the nighttime, when a car is

ductor is not deemed to be in charge of a train when he merely has to make up. His duties are ended as soon as the cars are connected so as to compose a train, and he never has charge of those cars as a train.[10]

d. Employees other than conductors. It has been laid down by the supreme court of Massachusetts that by the words, "'any person . . . who has the charge or control' of a train' is meant a person who, for the time being at least, has immediate authority to direct the movements and management of the train as a whole, and of the men engaged upon it."[11] A railway company, therefore, is responsible for the negligence either of an engineer or of a brakeman, if, as a matter of fact, either of them was in charge of the train.[12] But the mere fact that a brakeman has been put in such a position that for the moment he physically controls and directs its movements under the eye of his superior does not of itself constitute him a person who has charge of or control of the train.[13]

standing so near the point where tracks come together, that the space between it and the adjoining track is unusually narrow, a court cannot say, as a matter of law, that it was not a negligent act to leave the car in such a position.

[9] In *Thyng* v. *Fitchburg R. Co.* (1892) 156 Mass. 13, 32 Am. St. Rep. 425, 30 N. E. 169, the court said: "The statute, in referring to a 'signal, switch, locomotive engine, or train,' seems chiefly to contemplate the danger from a locomotive engine or train as a moving body, and to provide against the negligence of those who, either wholly or in part, control its movements. The charge or control is of that whose character is rapid and forceful motion. It refers to the train or locomotive engine as a whole, and not to the individual parts which make up the train or engine. The statute might have been made to include those who have charge of the construction of the engine or cars or who inspect them. Neglect of their duties would be likely to cause an accident to the train while in motion. But the legislature in this part of the statute has gone no further than to include those whose duties relate to the charge of a locomotive engine or the train when complete."

In another case it was doubted whether a switching foreman who merely designated the track on which is to be shunted a part of the cars of a train which is controlled by a conductor could be said to have had "charge or control" of the train. *Caron* v. *Boston & A. R. Co.* (1895) 164 Mass. 523, 42 N. E. 112. In view of the earlier decision, it is hard to see why the court should have felt any doubt on this point.

[10] *Caron* v. *Boston & A. R. Co.* (1895) 164 Mass. 523, 42 N. E. 112.

[11] *Shea* v. *New York, N. H. & H. R. Co.* (1899) 173 Mass. 177, 53 N. E. 396, holding it warrantable to find negligence, where the evidence was that the engine with a car attached was pushed while the plaintiff was in the car, and a brakeman was standing on the front platform, against other cars with such force as to break the platforms of the cars and throw the employee from his seat.

The engineer of a railroad train must be regarded as the person in charge, for the purpose of giving signals or slackening speed at the approach of danger, although for most purposes the conductor has control of the train. *Davis* v. *New York, N. H. & H. R. Co.* (1893) 159 Mass. 532, 34 N. E. 1070. Followed in *Fairman* v. *Boston & A. R. Co.* (1897) 169 Mass. 170, 47 N. E. 613.

See also *Baltimore & O. S. W. R. Co.* v. *Peterson* (1901) 156 Ind. 364, 59 N. E. 1044, where it was held proper to refuse an instruction that, if the persons in charge of a train were fellow servants of the injured person, or track repairer, he could not recover.

[12] *Caron* v. *Boston & A. R. Co.* (1895) 164 Mass. 523, 42 N. E. 112, where it was denied that the statute was applica

The English doctrine would seem to be virtually the same as that established by the Massachusetts decisions, the House of Lords having held that the case was for the jury where some detached cars were left by the engineer on a steep gradient, and, being inadequately blocked, ran away and struck the plaintiff.[14] The members of the court were unanimous in declaring that the action could be maintained upon the theory that the engine driver was in charge of the train when it stopped at the point where the runaway cars were left, and that he did not cease to be in charge of it because some of the carriages were uncoupled from one another and from the engine, in order that they might be separately dealt with in operations all directed to one end, namely, the discharging of the freight.[15] It was also considered that there was another and independent ground which rendered it proper

ble to a brakeman whose duty it was to take charge of a train of cars which was being shunted onto a siding under the supervision of the conductor. The court said: "If 'control' is one thing and 'charge' is another, then, inasmuch as to some extent every brakeman upon a train would have 'control' of it, every employee injured by an accident resulting from the carelessness of a brakeman would have a right of action against the corporation which employed him, and the defense of common employment as to brakemen would be done away with, even though the brakeman might be acting under an immediate superior. The statute is to be fairly construed, and, while it removes the defense of common employment in some cases, it does not extinguish it altogether, and we do not think that the legislature intended that it should be abolished in all cases where injuries were sustained by the carelessness of a brakeman. If it had, it would have used language more truly descriptive of a brakeman's usual occupation than the words, 'any person in the service of the employer who has the charge or control of any . . . train upon a railroad.' It is the charge or control of which the statute speaks, and not a charge or control, and it is the charge or control of the train as a connected whole which is meant . . . *Thyng* v. *Fitchburg R. Co.* (1891) 156 Mass. 13, 32 Am. St. Rep. 425, 30 N. E. 169."

[14] *McCord* v. *Cammell* [1896] A. C. 57, 65 L. J. Q. B. N. S. 202, 73 L. T. N. S. 634, 60 J. P. 180.

[15] The following passage from Lord Herschell's opinion (p. 66) sufficiently indicates the reasoning upon which this conclusion was based: "When he removed, or before he removed, the engine from the train, unless he wanted the rest of the train to follow, or was content that it should follow, it was absolutely essential that something should be done to detach that part of the train, and to make it stationary, while the rest of the train went on. That was a dealing with the train under his charge; and it seems to me that it was his duty to take care that all that was necessary for the operation with which he was concerned, namely, conveying these carriages severally and successively to the place where their contents were to be discharged, was done. It was not necessarily his duty to do it himself. If that duty had been left to some other servant of the company, and if he had every reason to believe that the duty was being properly performed, then it might well be that there could not be said to be negligence on his part,—he would have discharged the obligation resting upon him by seeing that the work was being done by the person whose duty it was, in that sense, to do it. But in the present case there is evidence that he knew the method which was being employed to sprag the wheels; there is evidence that he knew that it was a method which on previous occasions had proved ineffectual: there was the evidence of witnesses who were called before the jury that the use of this slag at all was an improper method,—that the proper method was to use wood. Under these circumstances it seems to me impossible, when once the conclusion is arrived at that he was in charge of the train, to say there was no evidence of negligence upon his part."

Lord Watson took the ground that the

to send the case to the jury, *viz.*, that the evidence adduced in behalf of the plaintiff went to show that the foreman was negligent in regard to the blocking of the cars after they had been detached. The words "any person having charge or control of the train" did not, it was said, necessarily point to one person who was in charge of the whole train. Different duties in connection with different parts of the train might be assigned to different persons, and, in that case, each and all of those persons were charged with the conduct of the train; and if any one of them was negligent in his own department, that would constitute negligence, bringing the case within the terms of the subsection.[16] This case also lays down the doctrine that the question, who was in charge of a train, is to be determined, as between two or more employees, by considering what duty was violated by the act which caused the injury.

The statutory words are applicable only to cases in which the control exercised over the train is direct. They do not render a railway company liable for the negligence of an employee who has control of a switch, or of a station agent who merely transmits orders to the man in charge of a train.[17]

disengaging of the cars from the engine and securing them in order that they might remain stationary until the engine returned to take them up, was an act done in the conduct of the train with which that engine started, and that, if that act was negligently done (which was a matter for the jury to determine), the plaintiff was entitled to recover if the person guilty of negligence had at the time "charge or control of the train."

Lord Davey agreed in thinking that the engine driver was "in charge of the train," and remained "in charge of the train" till the duties with which he was entrusted were fully completed; he considered it a strange thing to say that, when the engine driver who was thus in charge of the train left three fourths of it in an exposed and dangerous position, and it turned out that insufficient precautions had been taken to secure the safety of that portion which was so left behind, there was no evidence to go to the jury of negligence on the part of the "person in charge of the train."

[16] At p. 66 of the Law Reports the following passage is found in the opinion of Lord Watson: — "It is plain that Hopper was the person who insufficiently secotched the wagon which ran down the incline and killed the deceased; but it may be that, although he was the direct cause of the accident, the engine driver was also negligent in his duty, if he was charged with that duty. And I think, if that view were taken, he knew quite well the kind of sprag that was being used, and had reason to know that, although for some purposes sufficient, the use of it was attended with danger. On the other hand, if the duty of spragging was properly delegated to Hopper, he was, to that extent, in charge of the train, and was negligent. But on whichever of these alternatives negligence be found, whether it be fixed on the engine driver or upon the fireman, I think it follows that such person is also fixed in the position of the 'person having control of the train.' It has been suggested by one of the learned judges in the court of appeal that, the duty having been committed to a great many persons, any one of whom might have performed it, therefore the person actually performing it was not 'in charge.' To my mind these considerations are very immaterial. I think the statute points directly to the person having 'the charge or control of the train' as being that person who, at the time when the negligent act is committed, has the duty cast upon him of performing that act with reasonable care."

[17] *Fairman* v. *Boston & A. R. Co.* (1897) 169 Mass. 170, 47 N. E. 613.

706. Person having "charge or control of a car."— It is held that the word "car," which is found only in the Alabama act, is not confined to those cars which are intended to be hauled by locomotives, but is applicable to hand cars also.[1] The question whether an employee actually had charge or control of such a car can very rarely cause any doubt, and, as a matter of fact, the only points discussed, apart from those of mere pleading, have been whether an employee conceded to be in charge of a car was negligent in handling it.[2]

706a. Person having "charge of a signal."— These words, which occur in the Indiana statute, are applicable to a brakeman who is sent out to set torpedoes as a stop signal for an approaching train.[1]

707. On a "railway" or "railroad."—In England it has been held that the word "railway" is used in its popular sense, *viz.*, as meaning a way upon which trains pass by means of rails, and is not confined to railways belonging to those companies which are subject to the provisions of the railway regulation acts. Accordingly, this subsection applies to a temporary railway laid down by a contractor for the purpose of the construction of works.[1] A similar conclusion has been arrived at in Massachusetts, where a servant has been allowed to recover for

See also *Devine* v. *Boston & A. R. Co.* (1893) 159 Mass. 348, 34 N. E. 539, where the company's nonliability for the negligence of a switchman seems to be assumed in the opinion.

[1] *Kansas City, M. & B. R. Co.* v. *Crocker* (1892) 95 Ala. 412, 11 So. 262.

[2] The inference of negligence has been held to be "sure and certain," where a foreman in charge of a hand car, with knowledge that the operators are at times in the habit of turning loose the lever on a down grade and standing without support, suddenly applies the brakes on such a grade without notice to the operators and without looking to see whether they are holding to the lever. *Kansas City, M. & B. R. Co.* v. *Crocker* (1891) 95 Ala. 412, 11 So. 262.

The foreman of a hand car is, as matter of law, guilty of negligence in entering at full speed a place on the track obscured by dense smoke, without sending a flagman ahead to ascertain if any train is on the track, in accordance with a custom regulating the running of hand cars through smoke. *Woodward Iron Co.* v. *Andrews* (1896) 114 Ala. 343, 21 So. 440.

A railway company is liable for an injury received by a laborer on a railroad in jumping from a hand car to avoid a collision occasioned by the failure of a foreman to give signals required by the rules of the road. *Richmond & D. R. Co.* v. *Hammond* (1896) 93 Ala. 181, 9 So. 577.

A jury is properly directed to find for the plaintiff if they find from the evidence that a foreman ran two cars close together at a high rate of speed on a trestle; that, without warning to the men on the rear car, he signaled to those on the front car to slacken speed; that one of the employees on the rear car seeing the signal, applied the brake on that car so suddenly that the lever was jerked out of the hands of the plaintiff's decedent, and that when the cars came into collision immediately afterwards he was thrown to the ground. The facts thus set forth show negligence on the foreman's part and exclude the hypothesis of contributory negligence. *Jones* v. *Alabama Mineral R. Co.* (1894) 107 Ala. 400, 18 So. 30, Second Appeal (1896) 114 Ala. 519, 62 Am. St. Rep. 121, 21 So. 507.

[1] *Coxen* v. *Ray* (1901) 47 C. C. A. 352, 108 Fed. 320 (signals not set in the manner required by the rules).

[1] *Doughty* v. *Firbank* (1883) L. R. 10 Q. B. Div. 358, 52 L. J. Q. B. N. S. 480, 48 L. T. N. S. 530, 48 J. P. 55 (driver injured by a collision).

an injury received on a short railway track intended for temporary use by a city in transporting gravel.[2] A dummy railroad has been held to be within the Alabama act.[3]

The location of the rails is not material, so long as the injury was caused by a moving engine or car. Thus, cars are on a "railway" while they are being moved on the lines in a freight shed with a view to their being loaded or unloaded.[4] On the other hand, an engineer is not in charge of an engine "on a railroad" while it is stalled in a roundhouse for repairs.[5]

It has never been directly decided that the English employers' liability act is inapplicable to street railways. But that such a doctrine will be applied would seem to be not improbable, in view of the fact that it has been expressly declared that a tramway does not come within the purview of a statute relating to the taxation of railways.[6] It may be conceded that the distinction thus drawn between "railways" and "tramways" is not without plausibility in a country where the words are habitually differentiated, both in everyday conversation and in legislation.[7] But in the United States common usage, so far as it has any bearing upon the question, is an element which militates against, rather than supports, the theory that the terms "railway" and "railroad" do not comprehend those lines which are constructed along streets and highways. These words are constantly employed in a generic and very comprehensive sense, the word "tramway" being very rarely used.[8] It may be observed, however, that the Texas and Minnesota acts which define the liability of railway companies to their employees have been held not to be applicable to street-railway companies. See § 749, *post*.

[2] *Coughlin* v. *Cambridge* (1896) 166 Mass. 268, 44 N. E. 218.

[3] *Birmingham R. & Electric Co.* v. *Baylor* (1893) 101 Ala. 488, 13 So. 795.

[4] *Cox* v. *Great Western R. Co.* (1882) L. R. 9 Q. B. Div. 106, 30 Week. Rep. 816, 47 J. P. 116.

[5] *Perry* v. *Old Colony R. Co.* (1895) 164 Mass. 296, 41 N. E. 289 (machinist making repairs was injured by the engineer's blowing down the engine into the ashpit in which the machinist was).

[6] *Swansea Improvements & Tramways Co.* v. *Swansea Urban Sanitary Authority* [1892] 1 Q. B. 357, 61 L. J. M. C. N. S. 124, 66 L. T. N. S. 119, 40 Week. Rep. 283, 56 J. P. 248. In the course of his opinion, Wills, J., remarked that "tramways are something essentially different from railways" and that "no ordinary person has any difficulty in distinguishing between the two."

[7] See the tramways act 1870 (33 & 34 Vict. chap. 78), and the notice of accidents act 1894 (57 & 58 Vict. chap. 28). In the latter of these the schedule specifies separately "railway, tramroad, and tramway."

[8] The fact that the decision in the Alabama case cited in § 704, note 1, *supra*, was put upon the consideration that the stationary engine in question was not "on a railway," and not upon the ground that the tramway was not a "railway," may possibly be regarded as indicating that neither court nor counsel deemed the latter theory to be sustainable. But it would, of course, be unwarrantable to lay much stress upon a negative argument of this character. This circumstance furnishes another reason for doubting the correctness of the Massachusetts decision cited in § 705, note 1, *supra*. But the strongest

II. Service of notice on the employer.

708. Notice a condition precedent to the maintenance of an actio under the statute.—Nearly all the acts with which we are now co cerned provide that the employer shall be served before the expiratio of a specified period with notice that the employee in question has su tained an injury.[1] Compliance with the statutory requirement is condition precedent to the plaintiff's right to avail himself of th remedial rights conferred by the legislature. This rule the cour have construed strictly, for the reason that the manifest object of in serting the provisions as to notice was to insure that the master shoul have a sufficient opportunity to prepare his case. See § 712, subd. a *infra*. No action can be maintained where the notice is not serve until after the writ is made, although it was left at the defendant' house on the day the writ is dated.[2]

It has also been held that the provision in the English (§ 4) an colonial acts, by which it is declared that the want of notice shall be n bar to the maintenance of the action if the trial judge shall be of opin ion that there was a reasonable excuse for such want of notice, applie only where due notice has not been given, and not where no notice a all has been given. It does not empower the trial judge to proceed with the case on the ground that the writ and declaration gave the de fendant notice, and that he had also actual notice because his manage saw the accident or saw the plaintiff immediately after the accident.

argument against the propriety of a construction of the act which would have the effect of excluding street railways from its purview is to be found in the consideration mentioned in the section just referred to, that some, at least, of the risks which servants encounter while working on such railways, are similar in kind to those which are incurred by the employees of steam railways of the ordinary type. In view of this fact, it is submitted that the former class of servants should not be deprived of the benefits of remedial legislation which may, without any unreasonable straining of its terms, be made to comprehend them.

Another case bearing on the subject discussed in the foregoing remarks will be found in § 722, note 2, *infra*.

[1] England, Newfoundland, and Australian Colonies, § 1; Ontario, §§ 9, 13; British Columbia, § 9; Manitoba, § 7; Alabama Code, § 2590; Massachusetts, § 3; Colorado, § 2; New York, § 2.

The Manitoba act of 1893, as at first passed, contained the same provision with regard to notice as that of Ontario from which it was copied. But by 58 and 59 Vict. chap. 48, § 2, the original act was amended by providing simply that the action could be brought at any time within two years after the occurrence of the accident. In this Province therefore, the requirement as to notice has been abrogated altogether. Soon after the passage of this amendment it was held not to have any such retrospective operation as would extend the time for bringing in a case, where the injury had been received before the amending act had been passed. *Dixon* v. *Winnipeg Electric Street R. Co.* (1897) 11 Manitoba L. Rep. 528.

The Acts of Alabama and Indiana contain no provision as to notice.

[2] *Veginan* v. *Morse* (1893) 160 Mass. 143, 35 N. E. 451.

[3] *Thompson* v. *Southern R. Co.* (1894) 15 New So. Wales L. R. (L.) 162. On a subsequent hearing of the case (15 L. R. [L.] 166) it was further held that,

709. Notice not essential to recovery if facts constitute a cause of action at common law.—As these statutes do not deprive an injured servant of his common-law rights of action, it follows that, if the circumstances alleged are such as will enable him to sue either at common law or under the statutes, he cannot be thrown out of court by proof that he has not complied with the statutory requirement as to notice, unless he insists on relying upon the statute alone.[1] But an action at common law cannot be converted into one under the statute simply because it has been discovered that the notice required by the statute had been given within the prescribed period by a former agent of the plaintiff, who had died before the common-law action was instituted.[2]

If the servant is relegated to his common-law rights alone, by reason of the fact that the proper statutory notice was not given, his ability to recover will depend upon the doctrines applied in the jurisdiction where the cause of action arose.[3]

710. Notice must be given in writing.—That the notice is not valid unless it is given in writing was held, in a case decided the year after the English act came into force, to be a necessary inference from the provisions (§ 7) that notice of the injury shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date, and shall be served on the employer, and may be served by delivery or by post.[1] "In the second of the two cases cited, it was contended that an adequate notice might be made out from a reference to a document other than that which had been relied upon as satisfying the statutory requirements, but which had been found to be insufficient. Lord Coleridge thought that the question thus raised should be answered in a sense unfavorable to the servant. Brett, L. J., and Holker, L. J., declined to express a definite opinion, but they seem—especially the former—to have been strongly inclined to adopt the contrary view. All the members of the

where an application of the plaintiff to proceed notwithstanding that he gave no notice, has been refused, he cannot turn round fifteen months after the accident and make another application to proceed, on the ground that a letter sent by his attorney after the expiration of the statutory period constituted a valid notice under the circumstances.

[1] *Ryalls* v. *Mechanics' Mills* (1889) 150 Mass. 190, 5 L. R. A. 667, 22 N. E. 766.

[2] *Clark* v. *Adam* (1885) 12 Sc. Sess. Cas. 4th series, 1092.

[3] In a Canadian case where the servant failed to satisfy the statutory requirements, it was held that the action could not be maintained, as the jury had found that there was no defect in the machinery, nor in the system used in operating it. *Dixon* v. *Winnipeg Electric Street R. Co.* (1[illegible]) 11 Manitoba L. Rep. 528.

[1] *Royle* v. *Jenkins* (1[illegible]) L. R. 8 Q. B. Div. 116, 51 L. J. Q. B. N. S. 112, 30 Week. Rep. 324; *Keen* v. *Millwall Dock Co.* (1882; C. A.) L. R. 8 Q. B. Div. 482, 51 L. J. Q. B. N. S. 277, 30 Week. Rep. 503, 46 J. P. 435, 46 L. T. N. S. 472, note 2, *infra*.

court were agreed in holding that, whether such a reference was or was not permissible, a notice otherwise defective could not be eked out by a reference to a verbal statement previously made by the injured servant to an agent of the master. It was accordingly held that there was no notice in compliance with the act where a workman, on the day he had been injured, made a verbal report of such injury to his employer's inspector, who took down the details in writing and sent them to the employer's superintendent, and the workman's solicitor afterwards wrote a letter to the employer, stating that he was instructed by such workman to apply for compensation for injuries received on the employer's premises, and ending with the words, "particulars of which have already been communicated to your superintendent."[2]

The acts of Massachusetts and Colorado expressly provide that the notice shall be in writing. The requirement in the former act, that the notice is to be "signed by the person injured, or someone in his behalf," is satisfied by a notice signed by a firm of attorneys, as attorneys for the injured employee. In the absence of direct evidence to the contrary it will be presumed that they were authorized to sign it.

711. Service of the notice.—*a. Service on corporations.*—Where the defendant is a corporation, the notice may be served on its general superintendent at the place where suit is brought, or, during his ab-

[2] *Keen* v. *Millwall Dock Co.* (1882: C. A.) L. R. 8 Q. B. Div. 482, 51 L. J. Q. B. N. S. 277, 30 Week. Rep. 503, 46 J. P. 435, 46 L. T. N. S. 472. As regards the point left undetermined in this case, Lord Coleridge based his opinion on the words of the act which, as he considered, "described the notice as one and single, containing in it the incidents which the statute has required it to contain as a condition precedent to maintaining the action." The following passage from the opinion of Brett, L. J., shows that arguments of no small weight may be adduced for the other doctrine. "It seems, therefore, to me that a notice might be available even if it should be defective in any of the matters required to be stated, as, for instance, if it did not in terms name the day when the injury was sustained, but showed it by reference; so, also, if it did not describe the cause of the injury with sufficient particularity, but still did not describe it so as to mislead. I agree that, as a general rule, the notice must be given in one notice, but I am not prepared to say that it would be fatal if it were contained in more than one notice. Suppose, for example, a person in his letter written on one day should describe fully the injury he had sustained, but should leave out his address, and he should the next day send a letter stating that, 'in the letter I wrote yesterday I omitted to give you my address, and I now give it.' If both these letters were written in time, and both served on the employer, I am not prepared to say that the last might not be taken to incorporate the first, and therefore, though not an accurate, but an informal, notice, it might be considered a notice within the meaning of the statute. If in the present case the letter of Mr. Bradley had referred to a written report, and to the date and particulars there given of the injury, I should not at this stage have said that there had not been a notice within the act, but should have desired a rule in order that the matter might be more fully discussed."

[3] *Dolan* v. *Alley* (1891) 153 Mass. 380, 26 N. E. 989 (construing amendment added by Mass. Stat. 1888, chap. 155).

ence, on any of the subordinate officials in his office. Anyone who appears to be such an official is a proper person to receive the notice.[1]

b. Service through the postoffice.—A notice is not given as the statute requires, unless it is actually received, or, if sent through the postoffice, should have been received in the ordinary course of delivery, within the period limited.[2] Service under the English act is sufficient where the letter giving the notice actually reaches the master, though it is not registered. The provision as to registration merely means that, when that formality is gone through, the burden of proving that the letter never reached its destination is thrown upon the master.[3]

It would seem that, if an agent sends the notice, he must register the letter containing it, or run the risk of being called to account by his principal, if the latter suffers damage from its not being registered.[4]

c. Service in case of death.—Where suit is brought under section 2 of the Massachusetts act, the notice may be given by the widow.[5] The amendment added to that act by Laws 1888, chap. 155, provides for the service of notice, in case of the death of the injured person, by his executor or administrator.[6] The construction placed upon this provision is that, where the action is brought under section 2 of the act, the widow may give the notice, the position taken being that, as the action there specified is not maintainable by the executor or administrator, it cannot be implied that one or other should be appointed merely for the purpose of giving the notice.[7]

d. Excuses for failing to serve the notice.—Under the English and colonial statutes the want of notice is not fatal to the right of action if there was a "reasonable excuse" for the failure to serve it. Want

[1] *Shea* v. *New York, N. H. & H. R. Co.* (1899) 173 Mass. 177, 53 N. E. 395.

A notice of an injury to a brakeman, given to a freight agent or to the attorney of the company by which he was employed, which had made no objection to the receipt of like notices for five years, is a sufficient compliance with the statute. *De Forge* v. *New York, N. H. & H. R. Co.* (1901) 178 Mass. 59, 86 Am. St. Rep. 464, 59 N. E. 669.

[2] *M'Donagh* v. *MacLellan* (1886) 13 Sc. Sess. Cas. 4th series, 1000 (action held not maintainable under the English act, where the notice was sent at such a time that it was impossible for it to reach the master until after the expiration of the six weeks specified in that act).

[3] *M'Goran* v. *Tancred* (1886) 13 Sc. Sess. Cas. 4th series, 1033.

[4] In Ruegg on Employers' Liability Act, p. 66, an unreported case is mentioned, in which a solicitor who had omitted to give notice by registered letter was sued by his client for negligence, and had to pay a considerable sum as damages and costs.

[5] *Gustafsen* v. *Washburn & M. Mfg. Co.* (1891) 153 Mass. 468, 27 N. E. 179.

[6] See *Daly* v. *New Jersey Steel & I. Co.* (1891) 155 Mass. 1, 29 N. E. 507; *Jones* v. *Boston & A. R. Co.* (1892) 157 Mass. 51, 31 N. E. 727.

[7] *Gustafsen* v. *Washburn & M. Mfg. Co.* (1891) 153 Mass. 468, 27 N. E. 179.

of notice has been excused on the ground that the widow of the deceased man was in an advanced state of pregnancy, and so excited in mind that the doctor ordered that she should not be consulted on the subject[8] on the ground that the plaintiff had been a long time in the hospital, and was not in a fit state to proceed with the action;[9] and on the ground that negotiations for a settlement between the widow of the injured employee and the employer were commenced within six weeks after the accident, and letters of administration were not granted to her till nearly eight months after the accident.[10]

On the other hand, it is clear that the plaintiff's ignorance of the fact that it was necessary to give the notice does not constitute a reasonable excuse within the meaning of the proviso.[11] It has been held in Scotland that no action can be maintained, although the party bringing the suit alleges that he was an old man and illiterate, and that it was not known whether the deceased would survive and bring suit himself.[12] This ruling is certainly a harsh one, even if the servant's injury was so severe that there was merely a chance of his recovery.

In another Scotch case where the action was brought by the widow of the employee, her forgetfulness, caused by the grief of mind which she had felt since the accident, was held not to be a reasonable excuse for omitting to send a notice.[13] Considering the remedial character of the act, this decision also seems to be scarcely commendable. It is submitted that in construing this provision a court should not refuse to recognize the fact that violent grief sometimes produces a temporary incapacity to attend to the ordinary affairs of life.

The amendment to the Massachusetts act (Laws of 1888, chap. 155, § 1) declares that employees are excused from giving notice within the thirty days prescribed in the original statute, whenever from "physical or mental incapacity" it is impossible for them to give the notice within that time. Whether an employee is entitled to claim the benefit of this provision is a question of fact to be determined according to the evidence introduced.[14]

[8] *Brownley* v. *Oldham*, an unreported case cited in Ruegg on Employers' Liability Act, 3d ed. p. 60.

[9] *Miller* v. *Dalgety* (1884: New So. Wales) 1 W. N. 164, 2 W. N. 17.

[10] *Bulman* v. *Robertson* (1887: New So. Wales) 4 W. N. 131.

[11] *Ex parte Hannan* (1897) 18 New South Wales, L. R. (L.) 422.

[12] *M'Fadyen* v. *Dalmellington Iron Co.* (1897) 24 Sc. Sess. Cas. 4th series, 327 (son of plaintiff died a fortnight after accident, and notice was three days too late)

[13] *Connolly* v. *Youngs Paraffin Light & Mineral Oil Co.* (1894) 22 Sc. Sess. Cas. 4th series, 80.

[14] In a recent case, where the servant had died from the effects of the injury, the widow of the decedent testified that he was in bed almost two months after the accident; that during most of this

712. Sufficiency of the particulars contained in the notice.—*a. Generally.*—A writing set up as a notice will not be construed with technical strictness, but its contents should at all events show that it is intended as the basis of a claim against the defendant, and that the information is given on behalf of the person who brings the suit.[1] Any notice is sufficient which contains such particulars as will give the employer substantial notice of what has occurred, and thus put him in a position to make such inquiries as will enable him to come to trial prepared to meet the plaintiff's case.[2]

A plaintiff is not bound to ascertain and inform the defendant of all the causes to which the defect which occasioned the injury is attributed. The notice satisfies the statute if it states a cause which actually existed under such circumstances as would render the defendant responsible.[3] The mere fact that a notice alleges different causes for the injury does not render it defective, if each of those causes is adequately stated.[4] The provision that the plaintiff shall state the "cause of the injury" is not to be construed as a requirement that he shall state the "cause of action."[5] Nor will a notice be declared insufficient merely for the reason that, as the evidence adduced at the trial shows, the proximate cause of the injury was not stated

time he knew her and talked to her, and that a good deal of the time he was conscious and knew what he was doing. The decedent's son also testified that he saw his father almost every day after the accident, and that he was conscious nearly all the time. It was held that there was no valid excuse for the failure to serve the notice. *Ledwidge* v. *Hathaway* (1898) 170 Mass. 348, 49 N. E. 656.

An instruction with reference to this provision, which stated that an employee was not excused unless he was both "mentally and physically disabled," has been held correct. *Cogan* v. *Burnham* (1900) 175 Mass. 391, 56 N. E. 585. But *quære*, considering that the disjunctive "or" is used in the statute.

[1] *Driscoll* v. *Fall River* (1895) 163 Mass. 105, 39 N. E. 1003.

[2] *Clarkson* v. *Musgrave* (1882) L. R. 9 Q. B. Div. 386, 51 L. J. Q. B. N. S. 525, 31 Week. Rep. 47; *Previsi* v. *Gatti* (1888; Q. B. D.) 58 L. T. N. S. 769, 4 Times L. R. 487.

A letter from plaintiff's solicitors stating that they had been instructed to commence an action without delay, and describing the injury, was held sufficient in *Cox* v. *Hamilton Sewer Pipe Co.* (1887) 14 Ont. Rep. 300.

A notice that, at the time and place named, the servant was instantly killed by the falling of a derrick upon him, on account of its being improperly fastened, sufficiently states the cause of injury. *Brick* v. *Bosworth* (1894) 162 Mass. 331, 39 N. E. 36.

A notice to a railroad company that a brakeman on a certain day was injured on the railroad, within "one hundred yards northerly" of a station named, by being caught between a car and a locomotive engine "by reason of a broken drawbar" upon the car, which permitted the tender of the engine to run up against the end of the car and crush his leg, is sufficient notice of the time, place, and cause of the injury. *Donahoe* v. *Old Colony R. Co.* (1891) 153 Mass. 356, 26 N. E. 868.

Dolan v. *Hoy* (1891) 153 Mass. 380, 26 N. E. 989.

[3] *Coughlan* v. *Cambridge* (1896) 166 Mass. 268, 44 N. E. 218.

[5] *Clarkson* v. *Musgrave* (1882) L. R. 9 Q. B. Div. 386, 51 L. J. Q. B. N. S. 525, 31 Week. Rep. 47, per Field, J. (p. 390).

with legal precision.[6] Still less will it be necessary to set forth what is called in one of the cases the "cause of the cause" of the injury.[7]

In the English and colonial acts, the intention of the legislature that the sufficiency of the notice shall be ascertained in accordance with extremely liberal canons of construction is unmistakably indicated by the provision that the statement shall be made in "ordinary language." This phrase is assumed to have reference to the fact that these acts were passed for the special benefit of persons in a humble sphere of life, and not possessed of much knowledge. The claimant "is to use his own untutored language."[8]

The words just mentioned are not inserted in the American acts, but there is nothing in the reports to indicate that its absence has been regarded as a reason for applying a stricter rule of construction than that adopted by the English courts.

b. Inaccuracies which do not invalidate a notice. — The language of the provisions by which it is secured that a plaintiff shall not be put out of court simply because his notice was inaccurate in some particulars is, it will be observed, not quite the same in all the statutes. By those of England and of the colonies the validity of the notice is made to depend upon the question whether the defendant was prejudiced by the inaccuracies complained of, and it is expressly declared that this question is to be determined by the trial judge. In those of Massachusetts and Colorado there is merely a categorical statement that certain specified inaccuracies shall not invalidate the notice, unless they were intended and actually did mislead the defendant; and in the absence of any designation of the tribunal which is to determine this question, the inference has necessarily been drawn that, like other

[6] *Clarkson* v. *Musgrave* (1882) L. R. 9 Q. B. Div. 386, 51 L. J. Q. B. N. S. 525, 31 Week. Rep. 47, where a notice was held sufficient which stated that the plaintiff, a child, was injured in consequence of the defendant's negligence in leaving a certain hoist in their warehouse unprotected, whereby the plaintiff had her foot caught in the casement of the said hoist, although the evidence showed that the accident was proximately caused by the negligence of the plaintiff's mistress in allowing her to go into the hoist by herself.

[7] In an action for an injury to an employee by the falling of a bank of earth owing to the negligence of the employer's superintendent, a notice to the employer, setting forth the cause of the injury to be "the falling of a bank of earth," is sufficient, although not referring to the superintendent or his conduct. *Lynch* v. *Allen* (1893) 160 Mass. 248, 35 N. E. 550.

[8] Cave, J., in *Stone* v. *Hyde* (1882) L. R. 9 Q. B. Div. 76, 51 L. J. Q. B. N. S. 452, 46 L. T. N. S. 421, 30 Week. Rep. 816, 46 J. P. 788. In the same case Mathew, J., remarked, "When we consider that the object of the legislature in passing this act was to confer a benefit on the working classes, I think it would be unreasonable and unjust, and contrary to the spirit and intention of the act, to require these notices to be framed with all the particularity of a statement of claim.

Compare the statement of Field, J., in *Clarkson* v. *Musgrave* (1882) L. R. 9 Q. B. Div. 386, 51 L. J. Q. B. N. S. 525, 31 Week. Rep. 47, that "The statute was intended for the use of unlearned persons, for whom it was meant to provide a cheap and speedy remedy."

questions of fact, it is primarily for the jury. But the practical results of each of these provisions appear to be virtually identical, when measured by the circumstances disclosed in cases where the actions have been allowed to proceed.

If the validity of the notice has been declared, either expressly by a specific finding, or impliedly by a verdict for the plaintiff, a judgment in his favor will not be set aside, unless the conclusion thus reached was manifestly unwarrantable.[3]

There seems to be only one reported decision bearing upon the question how far a court of review will go in overriding the action of a trial judge who has denied recovery for the reason that the notice was

[3] A letter from the plaintiff's solicitor which merely gave the date of the injury, and stated that the plaintiff was and had for some time past been under treatment at a hospital "for injury to his leg," has been held to be a valid notice. *Stone* v. *Hyde* (1882) L. R. 9 Q. B. Div. 76, 51 L. J. Q. B. N. S. 452, 46 L. T. N. S. 421, 30 Week. Rep. 816, 46 J. P. 788.

In *Carter* v. *Drysdale* (1883) L. R. 12 Q. B. Div. 91, 53 L. J. Q. B. N. S. 557, 32 Week. Rep. 171, a finding that the defendant was not prejudiced was declared to be warrantable, where the notice itself omitted the date of the injury but the plaintiff's solicitor had sent a letter in which that particular was stated. Lord Coleridge remarked that he did not see how, under these circumstances, any other conclusion was possible than that no prejudice was shown.

In *Hearn* v. *Phillips* (1885; Q. B. D.) 1 Times L. R. 475, the plaintiff, having been injured while in the employ of one "G. F. Van Camp," had served notice on "E. Van Camp," who carried on business at the same place. The county court judge found that the notice had been duly served, and having amended the inaccuracy in the initials, allowed the trial to proceed, holding that the employer was not thereby prejudiced in his defense. Held, that a judgment in the plaintiff's favor ought not to be set aside.

The omission of the plaintiff's name and address, and a wrong date, are defects which are not fatal to the validity of the notice, if the trial judge can still say that, as a matter of fact, the defendant was not prejudiced in his defense by these inaccuracies, and that they were not for the purpose of misleading. *Previsi* v. *Gatti* (1888; Q. B. D.) 58 L. T. N. S. 762, 4 Times L. R. 187, Distinguishing *Keen* v. *Millwall Dock Co.* (1882) L. R. 8 Q. B. Div. 482, 51 L. J. Q. B. N. S. 277, 30 Week. Rep. 503, 46 J. P. 135, 46 L. T. N. S. 472, on the ground that the absence of prejudice to the defendant was not a factor in that case, nor made the subject of any argument, the plaintiff being held to have been rightly nonsuited simply for the reason that the notice was insufficient.

The following letter from the wife of the injured servant is sufficiently specific: "I find I will need some more money, and will you please oblige me with ten shillings. It is now five weeks since Adam got his accident. His jaw is so badly smashed that he will never be the same man again. Adam has been advised to get damages from you." *Thompson* v. *Robertson* (1884) 12 Sc. Sess. Cas. 4th series, 121.

A jury is justified in finding that there was no intention to mislead, and that in fact the defendant was not misled, by a notice of the death of an employee, stating that deceased was killed by a stone being precipitated against him from defendant's derrick as a result of the negligence of defendant or of some person for whose negligence he was liable, and that the notice was therefore sufficient although the negligence was in failing to warn him of the raising of the stone. *Beauregard* v. *Webb Granite & Constr. Co.* (1893) 160 Mass. 201, 35 N. E. 555.

In Scotland, where the issues are adjusted by a different court from that which tries the case, the question whether the excuse for not sending the notice was reasonable may be decided by the former court, or in its discretion postponed for the decision of the trial court. *Trail* v. *Kilman* (1887) 15 Sc. Sess. Cas. 4th series 4.

insufficient to satisfy the statute, and the rationale of that decision is somewhat obscure.[10]

I. Death of Employer or Injured Employee; How the Right of Action is Affected by.

713. Scope of this subtitle.— It is not proposed in this subtitle to do more than state the result of the cases which have been decided with express relation to one or other of the acts now under discussion. For a more complete collection of cases dealing with the effect of death upon the right of action for personal injuries, the reader must consult the general treatises on the subject.[1]

714. Death of employer; effect of.—In England it has been held that the maxim, *Actio personalis cum persona moritur*, which operates as a bar to an action at common law against the executors of the culpable party also precludes recovery in an action brought by a servant under the statute.[1] The same doctrine would doubtless be applied in any American or colonial jurisdiction, unless it is otherwise provided by the act itself, as is the case in Ontario (§ 11), and in British Columbia (§ 15).

715. Death of plaintiff; pending action abated by.—If a plaintiff dies after an action under the statute is commenced, but before judgment, the action already commenced abates. The death may give a right of action under the damage act, but this is a different action and must be prosecuted separately.[1]

716. Suits by executors or administrators.—Nearly all the statutes now under consideration expressly provide that the right of action given by them may be enforced by the "personal representatives" of a servant who dies as a result of the injury in suit.[1]

[10] In *Beckett* v. *Manchester* (1888; Q. B. D.) 52 J. P. 346, a nonsuit was set aside on the ground that the want of a name and address is not fatal to the notice, if the defendants are not taken by surprise in consequence of the defect. So far as the position of the court can be understood from the very meager report of the case, absence of prejudice seems to have been viewed as a legal inference from the mere fact that the defendant came into court. But, in view of the decisions cited above, this seems not to be maintainable as an unqualified proposition. The report probably omits to mention the factor which was really regarded as decisive.

[1] In Roberts & Wallace, Liability of Employers, pp. 380 *et seq.*, will be found an excellent summary of the English cases. A full review of the English decisions under Lord Campbell's act is given in Beven's Employers' Liability, 2d ed. pp. 84 *et seq.*, and chap. VI. of the same author's work on Negligence, (Vol. I, p. 208.) See also Rnegg on Employers' Liability Act, p. 125. In Shearm. & Redf. Neg. §§ 124 *et seq.*, the American decisions are collected.

[1] *Gillett* v. *Fairbank* (1887; Q. B. D.) 3 Times L. R. 618.

[1] *McCarthy* v. *Jacob*, an unreported decision of the English court of appeal mentioned in Rnegg on Employers' Liability Act, p. 121, note (n).

[1] England, Newfoundland and Aus-

By Mass. Pub. Stat. chap. 112, § 212, as amended by Stat. 1883, chap. 243, a right of action is given to an administrator in any case where the intestate could have sued, but recovery is not allowed for the negligence of a fellow servant. In a later case than the one cited in note 4, *infra*, it was argued that the combined effect of this provision and of § 2 of the employers' liability act (see *infra*) was to give an action to the administrator, free from the defense arising out of the relation of fellow servants, in a case where death had resulted without conscious suffering, and where there is no widow nor dependent next of kin. But this contention did not prevail.[2]

Under the Alabama Code, it has been held not to be necessary to aver in the complaint that the injured servant left any heirs at law surviving him, though the damages recovered are to be distributed according to the statute of distribution.[3]

In most of the statutes no special provision is made for a suit by a widow as distinguished from other personal representatives; but in Massachusetts, section 2 of the act gives a widow or dependent next of kin the right to sue in the special case where the employee is instantly killed or dies without conscious suffering. Under this provision the right of recovery exists only under such circumstances as would have created a liability in favor of the employee if he had survived.[4] The effect of sections 1 and 2 of the act is, therefore, simply this—that, if death is not instantaneous, and there is conscious suffering, the action must be brought by the person injured, or his executor or administrator, while, if there is instantaneous death, or death not

tralian Colonies, § 1; Ontario, § 3, subs. 5; British Columbia, § 15; Alabama Code, § 2591; Massachusetts, § 1, subs. 3, §§ 2, 3; Colorado, § 1, subs. 3; New York, § 1.

[2] *Clark* v. *New York, P. & N. R. Co.* (1893) 160 Mass. 39, 35 N. E. 104. Some remarks on the inaptness of the phraseology used in § 3 will be found at the end of the opinion of the court.

[3] *Columbus & W. R. Co.* v. *Bradford* (1888) 86 Ala. 574, 6 So. 90.

[4] In *Ducy* v. *Old Colony R. Co.* (1891) 153 Mass. 112, 26 N. E. 437, the court said: "The provisions of this section would be inconsistent with those of the statute of 1883, chap. 243 (see note 2, *supra*), if that were held to include cases where the deceased might have maintained an action under the employers' liability act if death had not resulted. It could not have been intended that, where an employee is instantly killed or dies without conscious suffering, the widow or next of kin shall have a right of action for the death under the employers' liability act, and that the administrator also, by virtue of the same statute, shall be enabled to maintain an action for the death which could not otherwise be maintained under the statute of 1883. We are of opinion that the statute of 1887, chap. 270, cannot be invoked to relieve a case brought under the statute of 1883, chap. 243, from the defense that the injury was caused by the negligence of a fellow servant. Section 2 of the first mentioned statute, which gives a remedy to the widow or next of kin, instead of to the administrator, where death results without conscious suffering, must be held to be exclusive as to the cases of death where the aid of the statute is invoked."

preceded by conscious suffering, the action must be brought by the widow or next of kin.[5]

The phraseology of the various acts as to suits by personal representatives differs considerably; but presumably the doctrine laid down in Massachusetts is universally applicable, *viz.*, that there is only one cause of action under them. Hence they do not give the administrator of an employee a right of action against an employer for causing the employee's death, in addition to the right as legal representative to recover damages accruing to the intestate in his lifetime.[6]

The phraseology of the damage act which happens to be in force in the particular jurisdiction where the injury occurs determines what parties shall be deemed "personal representatives" for the purposes of the employers' liability act in that jurisdiction. If the damage act provides that the action must be brought by the executors or administrators of the deceased person, the wife of a servant who has been killed in the course of his employment cannot bring a suit in her own name under an employers' liability act.[7]

It has been decided with reference to the employers' liability act

[5] *Gustafson* v. *Washburn & M. Mfg. Co.* (1891) 153 Mass. 468, 27 N. E. 179. If the deceased left a brother and a sister, and the latter alone was dependent on him, the action should be brought in her name alone. *Daly* v. *New Jersey Steel & I. Co.* (1891) 155 Mass. 1, 29 N. E. 507.

To be "dependent" within the meaning of the statute, the next of kin need not be one of the class of persons whom the deceased was legally bound to support. Dependence, if proved as a fact, is sufficient. *Hodnett* v. *Boston & L. R. Co.* (1892) 156 Mass. 86, 30 N. E. 224. Compare the decisions with regard to the English workmen's compensation act of 1897, in § 787, *post*.

Whether the deceased died without "conscious suffering" is a question primarily for the jury. See *Maher* v. *Boston & L. R. Co.* (1893) 158 Mass. 36, 32 N. E. 956; and *Mears* v. *Boston & W. R. Co.* (1895) 163 Mass. 150, 39 N. E. 997, for cases involving evidence deemed to be sufficient to justify the inference of death without such suffering.

[6] *Ramsdell* v. *New York & N. E. R. Co.* (1890) 151 Mass. 245, 7 L. R. A. 154, 23 N. E. 1103. After quoting the provision in question, the court said: "This plainly authorizes an executor or administrator to proceed in the right of his testator or intestate, and recover all damages which the deceased person suffered to the time of his death. It does not purport to make the death a substantive cause of action. It gives only the right of compensation and remedies and it gives them to the employee, or to his legal representative in case of his death. It implies that his representatives are merely to succeed to his rights and remedies. But the law recognizes no 'right of compensation' for the death of a person, and gives to a deceased person no remedies founded on his death." These considerations are of general applicability and therefore independent of the following additional argument by which the court went on to fortify its position: "If this clause (§ 1, subs. 3) gave a right of action for the death of an employee as an extension to his representatives of a right which under one or two statutes belongs to the representatives of others who are not employees, it would necessarily include the right where death is instantaneous. But manifestly that was not intended. The next section of the statute (2) deals expressly with such cases in a different way. It is quite apparent that clause 3 of § 1 gives the legal representatives of a deceased employee merely a right to recover the damages to which he was entitled at the time of his death."

[7] *Pearson* v. *Canadian P. R. Co.* (1898) 12 Manitoba L. Rep. 112.

of Colorado that the provision which relates to suits by personal representatives cannot be construed as having abrogated by implication the right of action which is given to those representatives by the damage act of that state.[8]

J. Persons entitled to sue under the acts.

717. General remarks.—The cases which turn upon the question whether the injured person is entitled to maintain an action under these statutes against the party whom he seeks to hold responsible fall into three categories:

(1) Those in which the right of action is made to depend upon principles applicable to statutory and common-law actions alike.

(2) Those in which the right depends entirely upon the specific terms of the acts themselves.

(3) Those in which the right depends upon the answer to the question, how far common-law principles are affected by these or other acts which modify the relations between masters and servants.

718. Servants temporarily under the control of the defendant.—Whether the plaintiff, although regularly working for another person, was, at the time of the accident, under the control of the defendant in such a sense as to be an employee *ad hanc vicem*, and therefore entitled to hold the defendant accountable under the statute, is determined by tests similar to those which are applied in actions at common law.[1] The predicament thus indicated is discussed at length in vol. III.

[8] *Colorado Mill. & Elevator Co.* v. *Mitchell* (1899) 26 Colo. 284, 58 Pac. 28, Affirming (1898) 12 Colo. App. 277, 55 Pac. 736.

[1] One sent by a firm of contractors to assist their workman in constructing an elevator which they have contracted to erect in a building, whose wages the owners have promised to pay, may properly be found to be a servant of such owners. *Wild* v. *Waygood* [1892] 1 Q. B. 783, 61 L. J. Q. B. N. S. 391, 66 L. T. N. S. 309, 40 Week. Rep. 501, 56 J. P. 389. Lord Herschell, commenting on the contention that the plaintiff was not working under any contract with the defendants, and therefore was not a workman within the meaning of the act, and capable of suing under it, said: "The only effect of that objection, if it prevailed, would be this,—that there would be no question as to the defendant's liability; but the action should have been one brought at common law, and not brought under the employers' liability act. But I think that in this case there is evidence that the plaintiff was a workman employed by the defendants. Duplea had requested Horton's foreman that he should have furnished to him a man for the purpose of doing the work in connection with the lift. It was not work which Horton had to do, but work which the defendants had to do. There is evidence that Duplea needed and obtained assistance for the work he had to do, and his employers recognized it as being rendered on their behalf and asked to have an account sent in for the work the man had done, so that they might pay his wages during the time he was so engaged. It is enough to say that there was evidence which it was impossible to

719. Volunteers.—(Compare §§ 629–635, *ante.*) A mere volunteer as regards the service under performance is not entitled to the benefits of those acts.[1]

720. Persons who have permanently or temporarily ceased to be in the employment of the defendant.—(Compare §§ 624, 625, *ante.*) If the plaintiff, though he may at some previous time have worked for the defendant, was not actually in his service at the time when the injury was received, it is clear that he cannot sue under these statutes.

721. Independent contractors.—(See also § 723, subd. 2, *infra.*) These acts have no application to a man who is conducting his own business. Under such circumstances the fault, if any, is imputable to himself.[1]

721a. Servants of independent contractors.—Under the English, colonial, and Alabama statutes, which contain no special provision modifying the general rule of law on the subject, it is clear that the servants hired by a contractor or sub-contractor cannot sue the principal.

withdraw from the jury that the plaintiff was in the service of the defendants within the meaning of this act."

[1] *McCloherty* v. *Gale Mfg. Co.* (1892) 19 Ont. App. Rep. 117, where, however, the court refused to say that this doctrine barred recovery in the case of a female employee whose hair was caught in an uncovered revolving shaft, while she was on a bench endeavoring to open a window for ventilation purposes.

A brakeman who is traveling as a passenger on a train, and is not under the control of the conductor for the purpose of the performance of the duties characteristic of his position, cannot recover for injuries received in coupling a car in compliance with the directions of the conductor. Such a direction is entirely unauthorized, and fastens no liability on the company. *Georgia P. R. Co.* v. *Propst* (1887) 83 Ala. 518, 3 So. 764. There the court held demurrable a count which began thus: "When on a trip down defendant's said road, . . . plaintiff, being aboard defendant's train, . . . was then and there ordered by the conductor or foreman of said railway company, employed to manage or superintend the business affairs of said company on the aforesaid train, and whilst in the exercise of his superintendence, to couple a freight car to others attached." It was declared that there was nothing in this count which showed that the plaintiff was acting as brakeman, or had been requested to do so.

A servant who is injured while attempting to repair defective machinery cannot recover under these statutes, if work thus undertaken was outside the scope of his regular duties. *Wellman* v. *Merchants' Mfg. Co.* (1890) 150 Mass. 362, 5 L. R. A. 792, 23 N. E. 100.

[1] By the rules of a mine workmen, upon their discharge, were not entitled to receive their wages until they had returned their tools. A miner who was discharged on a Saturday, but had no opportunity to go down for his tools on that day, went down on Monday and was injured by an explosion of gas due to inadequate ventilation. Held, that at the time of the injury he was acting in the employment of the mine owner. *Cowler* v. *Moresby Coal Co.* (1885, Q. B. D.) 1 Times L. R. 575.

In *Lovell* v. *Charrington*, reported in the Law Times Newspaper, March, 1882 (see also Roberts & Wallace on Liability of Employers, 3d ed. p. 230), the plaintiff had been occasionally employed by the defendant as a trolleyman, but on the day in question, he arrived too late, and was told that he was out of employment for that day. While leaving the premises he was injured owing to a defect herein. Held, that he was not a "workman" within the statutory definition.

[1] *Bruce* v. *Barclay* (1890) 17 Sc. Sess. Cas. 4th series, 811.

employer unless there is evidence to show that the control which he exercised over them was the same in kind and degree as that exercised by a master.[1] Similarly, the servant of a subcontractor cannot recover in a suit against the principal contractor.[2]

Under the acts of Massachusetts, Ontario, and British Columbia, the principal employer is made liable to servants of contractors or subcontractors for defects in the condition of the ways furnished by him for the purpose of executing the work contracted for. Whether the instrumentality which caused the injury was one of those to which this provision applies is a question of fact in each instance.[3]

722. Railway servant.—It has been suggested that this term, which is employed in the English act for the purpose of designating one of the specific classes of persons to which the provisions are applicable, should be understood as referring only to servants engaged in the conduct and management of railways, and not as embracing servants hired to do work in connection with a collateral undertaking carried on by a railway company as an adjunct to its proper business of carriage by land,—*e. g.*, the keeping of a hotel, or the operation of a

[1] The miners who take service under the middlemen known in England as "butty" men are liable to dismissal by the principal employer, and are therefore regarded as his servants in such a sense as to be entitled to the benefits of the employers' liability act of 1880. *Brown* v. *Butterley Coal Co.* (1885) 53 L. T. N. S. 964, 50 J. P. 230.

See also *Milligan* v. *Muir* (1891) 19 Sc. Sess. Cas. 4th series, 870, where the general rule in the text was applied.

Whether the immediate employer of the plaintiff was an independent contractor or in the service of the defendant is a question for the jury, where the evidence is that such employer took work from the defendant; that he hired the plaintiff as well as other boys, and paid them their wages; that the plaintiff went to work when the company wanted him; and that the company repaired the machinery used, whenever it was out of order. *Masters* v. *Jones* (1894: Q. B. D.) 10 Times L. R. 403.

See also the cases cited in § 723, note 52, *infra*.

[2] *Nicolson* v. *MacAndrew* (1888) 15 Sc. Sess. Cas. 4th series, 854.

[3] A workman employed by a subcontractor to do work outside the mill cannot recover from the owner of the mill, where he passes through the mill to get a drink of water, and in returning goes out of his way to assist a mill hand and falls through an unguarded hole in the floor. *Finlay* v. *Miscampbell* (1890) 20 Ont. Rep. 29.

In *Toomey* v. *Donovan* (1893) 158 Mass. 232, 33 N. E. 396, the case was held to be for the jury, where the evidence was that the defendant had given to another person charge of a certain room in his factory under an agreement by which the defendant was to furnish the machinery and materials, and the contractor was to hire and pay the men; that the defendant was to pay for the repairs; that the contractor had the right to order the repairs to be made; that the defendant had the right to inspect the machines, and was often in the room; and that the injury was received owing to a defect in one of the machines by one of the men in the employ of the contractor. In this case the contractor was also the person intrusted by the defendant with the duty of seeing that the machine was in proper condition, under § 1, subs. 1, of the statute. It was held that the relation which he occupied as contractor would not relieve the defendant from liability for his negligence in the discharge of this duty.

line of steamboats.[1] Such a doctrine would limit the benefit of the acts in a manner analogous to the decisions under the acts of Iowa, Kansas and Minnesota, which, it is held, abolish the defense of *cosservice* only in cases where the injuries were received in the actual operation of a railway. But, so far as the writer knows, there has not been any judicial expression of opinion as to the point just raised.

In an English case referred to again in § 723, subd. h, *infra*, it was held that a driver of a tram car could not sue under the act, as being a workman engaged in "manual labor."[2] The possibility of his recovering as a "railway servant" was not discussed, and it seems to have been assumed both by the court and counsel that this description was not applicable to an employee of a street railway company. The reasons for adopting such a construction of the act are undoubtedly stronger in England than in the United States. See § 707, *supra*. But it remains to be seen whether, even in the former country, the courts will, when the point is directly raised, go to the length of holding that the benefits of a remedial statute must be denied to a class of employees who can only be excluded from its purview by dint of attaching a somewhat narrow and technical meaning to the word "railway."

In the Ontario, Manitoba, and British Columbia acts it is expressly declared that the term "railway servant" includes "tramway and street railway servant."

It has been held that an employee working on a railway controlled by the Canadian Dominion government may recover under the provisions of an employers' liability act passed by the legislature of the Province in which the injury was received.[3]

All persons in the employment of railway companies, whatever may be their rank, are within the purview of the act.[4]

723. Workmen.— By sec. 10 of the English act it is declared that the expression "workman" means "any person to whom the employers and workmen act of 1875 applies." The words of the act thus referred to, so far as they are material in this connection, are as follows:

"The expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a laborer, servant in husbandry,

[1] Roberts & Wallace on Liability of Employers, 3d ed. p. 231.

[2] *Cook* v. *North Metropolitan Tramways Co.* (1887) L. R. 18 Q. B. Div. 683, 56 L. J. Q. B. N. S. 309, 56 L. T. N. S. 448, 57 L. T. N. S. 476, 35 Week. Rep. 577, 51 J. P. 630.

[3] *Canada Southern R. Co.* v. *Jackson* (1890) 17 Can. S. C. 316.

[4] A superintendent drowned while engaged in investigating the condition of a well was held entitled to recover in *Pearson* v. *Canadian P. R. Co.* (1898) 12 Manitoba L. Rep. 112.

journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labor, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labor."

This section has been incorporated, with some important changes, in the colonial acts mentioned in §§ 660, 660a, *supra*.

The meaning of the words by which the various kinds of workmen are designated, and of the more general phrases with which the provision concludes, is to be ascertained not only from the decisions upon the employers' liability act itself, and the employers and workmen act to which it refers, but also from the cases in which other statutes which make use of a similar terminology have been construed.[1] Some common-law cases are also serviceable for purposes of definition.

a. Domestic or menial servant.—(See also subs. *b*, note 2, *infra*.)—According to a text-book of repute, domestic or menial servants are "those persons who e main duty is to do actual bodily work as servants for the personal comfort, convenience, or luxury of the master, his family, or his guests, and who, for this purpose, become part of the master's residential or quasi-residential establishment."[2]

Whether or not a servant is a domestic or menial servant is primarily a question of fact for the jury.[3]

In this connection, however, it is not amiss to recall the remark of Erle, J., that "it is a matter of common knowledge that words in one act of Parliament may have a meaning which they would not have in another." *Wilson* v. *Zulueta* (1849) 14 Q. B. 405, 19 L. J. Q. B. N. S. 49, 14 Jur. 366.

[2] Roberts & Wallace on Liability of Employers, 3d ed. p. 214. This definition was recently mentioned with marked approval by Collins, J., in *Pearce* v. *Lansdown* (1893) 62 L. J. Q. B. N. S. 441, 69 L. T. N. S. 316, 57 J. P. 760, where a potman in a public house was held to discharge duties which were substantially of a menial nature.

In actions where the question involved was whether the rule was applicable, that domestic servants are only entitled to a month's warning when the contract of hiring is termi it has been held that the phrase "menial servants" includes a huntsman hired to take charge of a pack of foxhounds (*Nicoll* v. *Greaves* [1861] 17 C. B. N. S. 27, 33 L. J. C. P. N. S. 209, 10 Jur. N. S. 919, 10 L. T. N. S. 531, 12 Week. Rep. 961); and a head gardener living in a cottage situated on his master's property (*Nairbin* v. *Elliott* [1835] 2 Comp. M. & R. 51, 1 Gale, 72, 5 Tyrw. 709, 4 L. J. Exch. N. S. 155); but not a governess (*Todd* v. *Kench* [1854] 8 Exch. 151, 22 L. J. C. P. N. S. 1, 17 Jur. 119); nor the boy keeper of a large hotel (*Dunbar* v. *Lamb* [1876] Ir. Rep. 10 C. L. 188); nor an employee who combines the functions of a steward and gardener (*Cooper* v. *Burke* [1861] 12 Ir. C. L. Rep. 194).

The statement of Ellis's one that the word "menial" is derived from *mania* (this class of servants being conceived of as *infra sanam*, also from the ante-Johnsonian period of philology, and is one of the many absurdities of that sort which are still allowed to disfigure legal treatises. The word is really derived, according to the best modern authorities, from the Saxon *maine*, *mesne*, that is, a household, or family. See Collins, L., in *Pearce* v. *Lansdowne*, *supra*, and Skeat's Etymological Dict., *sub voc.*

Pearce v. *Lansdown* (1893) 62 L. J. Q. B. N. S. 441, 69 L. T. N. S. 316, 57 J. P. 760, per Williams, J.

b. Laborer.—(See also note 9, *infra.*)—The generic word "laborer" denotes a man who digs and does other work of that kind with his hands.[4] In one sense every man who works or labors may be called a "laborer;" but the word, as used in the statute, has a more restricted meaning, being applicable only to a person whose work is essentially manual. It does not embrace an omnibus conductor,[5] nor the caretaker of goods seized under a fi. fa.,[6] nor a carpenter, nor a bailiff, nor the clerk of a parish.[7]

In one case it was remarked that artificers, handicraftsmen, miners, etc., do not necessarily or properly fall under the denomination of "laborers."[8] But this distinction is not material in the present connection.

The word "laborer" in the special provision of the stamp act by which agreements for the hire of a "laborer" are admissible in evidence, even if they are unstamped, is not confined to a mere hedger and ditcher.[9]

c. Servant in husbandry.—This description applies to a dairymaid, who, by her contract, is to assist in harvesting, if so required,[10] to a servant engaged by a farmer to act as "kitchen-woman and byre woman,"[11] to a wagoner,[12] and to a "man employed to dig the ground,"[13] but not to a person engaged by a farmer to weigh out the food for the cattle, to set the men to work, and in all things to carry out the orders given to him.[14]

"Servants in husbandry" are expressly excluded from the benefits of the Ontario, Manitoba, and British Columbia acts. See section 2, subs. 3.[15]

[4] Brett, M. R., in *Morgan* v. *London General Omnibus Co.* (1884) L. R. 13 Q. B. Div. 832, 53 L. J. Q. B. N. S. 352, 51 L. T. N. S. 213, 32 Week. Rep. 759, 48 J. P. 503.

[5] Day, J., in *Morgan* v. *London General Omnibus Co.* (1883) L. R. 12 Q. B. Div. 201, 50 L. T. N. S. 687, 32 Week. Rep. 416.

[6] *Branwell* v. *Penneck* (1827) 7 Barn. & C. 536, 1 Mann. & R. 409.

[7] Brett, M. R., in *Morgan* v. *London General Omnibus Co.* (1884) L. R. 13 Q. B. Div. 832, 53 L. J. Q. B. N. S. 352, 51 L. T. N. S. 213, 32 Week. Rep. 759, 48 J. P. 503.

[8] Lord Ellenborough in *Lowther* v. *Rodnor* (1806) 8 East 113 (p. 124).

[9] *Queen* v. *Wortley* (1851) 21 L. J. M. C. N. S. 11, 2 Den. C. C. 333, 15 Jur. 1137, 5 Cox. C. C. 382, Temp. & M. 636, holding that a man engaged to take charge of glebe land at a fixed salary and a third of the net profits was not a "menial servant," but a "laborer."

[10] *Ex parte Hughes* (1854) 23 L. J. M. C. N. S. 138, 18 Jur. 447, 2 Week. Rep. 465, 2 C. L. Rep. 1542.

[11] *Clarke* v. *M'Nought* (1845) Arkley (Sc.) 33.

[12] *Lilley* v. *Elwin* (1848) 11 Q. B. 742, 17 L. J. Q. B. N. S. 132, 12 Jur. 623.

[13] Brett, M. R., in *Morgan* v. *London General Omnibus Co.* (1884) L. R. 13 Q. B. Div. 832, 53 L. J. Q. B. N. S. 352, 51 L. T. N. S. 213, 32 Week. Rep. 759, 48 J. P. 503.

[14] *Davies* v. *Berwick* (1861) 3 El. & El. 549. Crompton, J., pointed out that his chief duty was to keep the general accounts belonging to the farm, and this fact indicated that his position was rather that of a steward than that of a "servant."

[15] Under this provision it is for the jury to say whether the plaintiff was a

The Massachusetts act also excludes "farm laborers."

d. Journeyman.—In a treatise of authority the following definition of the word "journeyman" is suggested: "One who, being neither a foreman nor an apprentice, and working not on his own account for the public, but under a master, works with his hands in an occupation of a constructive kind, requiring skilled knowledge, which skilled knowledge he possesses."[16] Etymologically considered, a "journeyman" is one who is employed by the day, but that is not the sense in which the term is ordinarily used, for, in most of the trades in which journeymen are employed,—as, for an instance, in the business of butchers, bakers, and tailors,—they are hired and paid by the week.[17]

e. Artificer.—(See also subs. *i*, notes 46, 49–51, *infra*.) An "artificer," according to Brett, M. R., is a "skilled workman"[18] The word has been held applicable to a framework knitter who manufactured stockings,[19] and to the stoker of a steamer.[20] It is not confined to occupations of which the essence is "manual labor," but embraces such workmen as a calico pattern-designer, engaged to serve for a term of years;[21] and the overseer of a printing office;[22] or the superintendent of looms in a factory, whose time is divided between the supervision and manual labor.[23]

f. Handicraftsman.—(See also subs. *i*, notes 46, 49, *infra*.) The meaning of the word "handicraftsman" is essentially the same as that of the word "artificer,"—that is to say, he is a "skilled workman."[24]

g. Miner.—By section 7, subs. 2, of the recent English workmen's

servant in husbandry and was engaged in the usual course of his work, when the evidence is that a farmer had not engaged him to do any particular kind of work, but that he was first put at mason work, and then at digging the drain which caved in and thus caused the injury complained of. *Reid* v. *Barnes* (1894) 25 Ont. Rep. 223.

[16] Roberts & Wallace on Liability of Employers, 3d ed. p. 221.

[17] *Morgan* v. *London General Omnibus Co.* (1883) L. R. 12 Q. B. Div. 201, 50 L. T. N. S. 687, 32 Week. Rep. 416, per Day, J., who remarked that the term would not be applied in common parlance to an omnibus conductor. In the same case in the court of appeal, as reported in (1884) 53 L. J. Q. B. N. S. 352, 51 L. T. N. S. 213, 32 Week. Rep. 759, 48 J. P. 503, Brett, M. R., said: "A 'journeyman' is a man who is working for a master, such as a carpenter." This passage is not in the Law Reports.

[18] *Morgan* v. *London General Omnibus Co.* (1884), as reported in 53 L. J. Q. B. N. S. 352, 51 L. T. N. S. 213, 32 Week. Rep. 759, 48 J. P. 503.

[19] *Hoorhouse* v. *Lee* (1864) 4 Fost. & F. 354 (truck act).

[20] *Wilson* v. *Zulueta* (1849) 14 Q. B. 405, 19 L. J. Q. B. N. S. 49, 14 Jur. 366 (stamp act).

[21] *Ex parte Ormrod* (1844) 1 Dowl. & L. 825, 1 New Sess. Cas. 38, 13 L. J. M. C. N. S. 73, 8 Jur. 495 (decision on 4 Geo. II., chap. 34, § 3).

[22] *Bishop* v. *Lettz* (1858) 1 Fost. & F. 401 (stamp act).

[23] *Leech* v. *Gartside* (1885) 71 L. T. N. S. 427, 1 Times L. R. 391 (held entitled to recover for an injury caused by defective machinery, though he was engaged in supervision when the accident occurred).

[24] Brett, M. R., in *Morgan* v. *London General Omnibus Co.* (1884), as reported in 53 L. J. Q. B. N. S. 352, 51 L. T. N. S. 213, 32 Week. Rep. 759, 48 J. P. 503.

A hairdresser is not a "handicraftsman" *Reg.* v. *Justices of Louth* (1900)

compensation act of 1897 the word "mine," as used therein, means a mine to which the coal mines regulation act of 1887, or the metalliferous mines regulation act of 1872, applies. In the absence of any express declaration in the employers and workmen act of 1875, it is reasonable to suppose that the same rule of construction thus indicated would be followed in determining whether a workman was a "miner" for the purposes of the employers' liability act.[25]

With respect to the distinction between "mines" and "quarries" it has been held that workers in underground quarries of slate are entitled to the protection provided for miners under the metalliferous mines act.[26] For some purposes it is clear that a surface quarry is not a "mine."[27] But the question whether a workman employed in such a quarry is or is not a "miner" is not material in the present connection. Quarrymen of all descriptions are at all events within the purview of the general clause, "otherwise engaged in manual labor."[28]

h. Persons "otherwise engaged in manual labor."—Conformably to a familiar principle of statutory construction, this general phrase is held to refer to labor *ejusdem generis* with the specific kinds previously mentioned.[29]

There is some difficulty in defining the line beyond which a person will fail to come within the definition of a "workman" as defined by

2 Ir. Rep. 714. As to this case, see also subs. *H, infra.*

By § 4 of the workshops regulation act 1867 (30 Vict. chap. 146, since repealed by 41 Vict. chap. 16, sch. pt. 6, it was declared that "handicraft" shall mean any manual labor exercised by way of trade or for purposes of gain, in or incidental to the making of any article, or part of an article, or in or incidental to the altering, repairing, ornamenting, finishing, or otherwise adapting for sale any article." This definition has been held to include an employee engaged in making straw plait, *Beadon* v. *Perrott* (1871) L. R. 6 Q. B. 718, 10 L. J. M. C. N. S. 200, 19 Week. Rep. 1144 (breach of act in employing a child under eight years of age).

[25] The word "workmen" in the employers' liability act of Victoria (Australia) is, by an express provision, not applicable to any person coming under div. 1, part 3, of the mines act of 1890.

[26] *See* v. *Evans* (1875) 23 Week. Rep. 739; *Jones* v. *Cwmamman Slate Co.* (1879) 41 L. T. N. S. 576, L. R. 5 Exch. div. 81, 49 L. J. Exch. N. S. 110, 28 Week. Rep. 377, 44 J. P. 168.

In a case where a horse was under construction it was held that the expression "mines" did not comprise "quarries," and it was said that a quarry is distinguished from a mine as being "a place upon or above or not under ground." Turner, L. J., in *Bell* v. *Watson* (1886) L. R. 1 Ch. 303, 35 L. J. Ch. N. S. 337, 12 Jur. N. S. 263, 14 L. T. N. S. 115, 14 Week. Rep. 470.

[27] *See Devonshire* v. *Rawlinson* (1861) 28 J. P. 72 (case under stat. 4 Geo. IV. chap. 34, § 3, in which a servant's wages were forfeited for absence from work).

Day, J., in *Morgan* v. *London General Omnibus Co.* (1883) L. R. 12 Q. B. Div. 201, 50 L. T. N. S. 687, 32 Week. Rep. 116. In the court of appeal (1884) 53 L. J. Q. B. N. S. 352, 51 L. T. N. S. 213, 32 Week. Rep. 759, 48 J. P. 503 Brett, M. R. said that this phrase meant "any person engaged in the same way as all the others are engaged, although they do not go by the same names."

To the same effect, see remarks of Smith, L. J., in *Cook* v. *North Metropolitan Tramways Co.* (1887) L. R. 18 Q. B. Div. 683, 56 L. J. Q. B. N. S. 209, 56 L. T. N. S. 448, 57 L. T. N. S. 470, 35 Week. Rep. 577, 51 J. P. 630.

this clause. In some cases the true conclusion will be indicated by the fact that the legislature has used the word "labor," not "work." Various occupations may be said to involve "manual work," and not manual labor.[40]

In other cases a "satisfactory distinction may be drawn between those whose labor is continuous and requires no application of thought, and those whose labor requires the application of a certain amount of thought and skill."[41] But the most generally serviceable test is furnished by the doctrine that the essential question to be answered in each instance is whether the duties performed by the servant were mainly mental or mainly physical, and that the act applies only where his duties belong to the latter category."[42] This doctrine involves the corollary that the mere use of the hands in matters incidental to a man's employment does not constitute him a manual laborer within the meaning of the act.[43] Following out this conception the courts have held that an action cannot be maintained under the act of 1880 "by a person employed by a firm of manufacturers "to assist the firm, as a practical working mechanic, in developing ideas they, the firm, might wish to carry out, and to himself originate and carry out ideas and inventions suitable to the business of such firm;"[44] nor by an omnibus conductor;"[45] nor by a driver of a tram car;[46] nor by a grocer's-

[40] *Cook* v. *North Metropolitan Tramways Co.* (1887) L. R. 18 Q. B. Div. 683, 56 L. J. Q. B. N. S. 309, 56 L. T. N. S. 448, 57 L. T. N. S. 156, 35 Week. Rep. 577, 51 J. P. 630, per Smith, J., who illustrates the distinction by reference to the case of a person engaged in telegraphing or in writing

A "hairdresser" has been held not to be a "workman" on the ground that although he is a "handicraftsman," he is not engaged in "manual labor." *Rex* v. *Justices of Louth* [1900] 2 Ir. Rep. 714.

[41] Grantham, J., in *Cook* v. *North Metropolitan Tramways Co.* (1887) L. R. 18 Q. B. Div. 683, 56 L. J. Q. B. N. S. 309, 56 L. T. N. S. 448, 57 L. T. N. S. 156, 35 Week. Rep. 577, 51 J. P. 630.

[42] Pollock, B., in *Hunt* v. *Great North-ern R. Co.* [1891] 1 Q. B. 601, 60 L. J. Q. B. N. S. 216, 64 L. T. N. S. 418, 55 J. P. 470.

[43] *Bound* v. *Lawrence* [1892] C. A.] 1 Q. B. 226, 61 L. J. M. C. N. S. 21, 65 L. T. N. S. 844, 40 Week. Rep. 1, 56 J. P. 118. (Reversing decision of Q. B. D.). "It is difficult," said Fry, L. J., "to imagine any work done by man so purely intellectual as to require no kind of work with the hands; and the converse is equally true, that there can hardly be work with the hands that requires no intellectual effort. If, then, the words 'manual labor' are to have the full significance which could be put on them, they would be extended to every kind of employment. That cannot be the true meaning of the statute, but some more confined interpretation must be arrived at. I agree that this must be done by looking to the nature of the substantial employment, and not to matters that are incidental and accessory."

[44] *Jackson* v. *Hill* (1881) L. R. 13 Q. B. Div. 618, 49 J. P. 118.

[45] *Morgan* v. *London General Omnibus Co.* (1884) C. A.) L. R. 13 Q. B. Div. 832, 53 L. J. Q. B. N. S. 372, 51 L. T. N. S. 213, 32 Week. Rep. 759, 48 J. P. 503, Affirming (1883) L. R. 12 Q. B. Div. 201, 50 L. T. N. S. 687, 32 Week. Rep. 116 (Disapproving *Wilson* v. *Glasgow Tramways Co.* [1881] 5 Sc. Sess. Ca. 4th series, 981, where it was held by Lords Moncrieff and Gifford, with some expression of doubt, that a tramway conductor was within the act). "A conductor," said Brett, M. R., "does not lift the passengers into and out of the omnibus. It is true that he may help to change the horses; but his real and sub-

assistant;[37] nor by a waiter at a restaurant;[38] nor by a skilled engineer in charge of the machinery of a ferryboat.[39] In line with these decisions is one to the effect that a guard of a goods train, whose main duty is to guard and conduct the train and marshal the cars, but who is also required to assist at times in coupling and uncoupling the cars and unloading, is not entitled to the benefits of the truck acts.[40]

On the other hand the phrase has been held to embrace a man in the service of a wharfinger, whose duties were to drive a horse and trolley and load and unload the trolley;[41] a man engaged as "potter, printer, overlooker, and mixer;"[42] and a stevedore working on a ship attached to a wharf.[43]

stantial business is to invite persons to enter the omnibus and to take and keep for his employers the money paid by the passengers as their fares; in fact, he earns the wages becoming due to him through the confidence reposed in his honesty."

[36] *Cook* v. *North Metropolitan Tramways Co.* (1887) L. R. 18 Q. B. Div. 683, 56 L. J. Q. B. N. S. 309, 56 L. T. N. S. 448, 57 L. T. N. S. 476, 35 Week. Rep. 577, 51 J. P. 630, 1 Times L. R. 523. "I cannot see," said Smith, J., "the distinction between driving and other occupations which involve no manual labor, though they do involve manual work. Had the legislature intended to include coachmen, they would have included them among the specific instances."

[37] In *Bound* v. *Lawrence* [1892; C. A.] 1 Q. B. 226, 61 L. J. M. C. N. S. 21, 65 L. T. N. S. 844, 40 Week. Rep. 1, 56 J. P. 118, Lord Esher, M. R., said: "It appears that the appellant was employed as a grocer's assistant in a shop, and his business was to take orders from the customers and to carry them out. In doing this he may have to show goods, and if the customers take away the goods he has to make up the parcels. In doing this he has to use his hands, and the question is whether that makes him a manual laborer. There can be no manual labor without the user of the hands; but it does not at all follow that every user of the hands is manual labor, so as to make the person who does it a manual laborer. Now, the principal part of the appellant's employment is selling to the customers across the counter. That is his substantial employment, and if he has to do other things which involve physical exertion, we must see whether that is not incidental to his real employment. In this case I cannot doubt that that is so. The findings of fact seem to me to negative the idea that the work described was any part of his real and substantial employment." Brett, M. R., also lays stress upon the fact that, in the occupation of the appellant, the knowledge and skill required in selling the goods to customers was more important than the manual work that he did, and that the latter was an incident of his employment.

[38] *Smithwhite* v. *Moore* (1898) 14 Times L. R. 461.

[39] *Frey* v. *Balcomb Steam Ferry Co.* (1886) 7 New So. Wales L. R. (L.) 147 (injured by the starting of the machinery while he was making some repairs).

[40] *Hunt* v. *Great Northern R. Co.* [1891; C. A.] 1 Q. B. 601, 60 L. J. Q. B. N. S. 246, 64 L. T. N. S. 338, 55 J. P. 470.

[41] In *Yarmouth* v. *France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, Lord Esher said (p. 651): "He is a man who drives a horse and trolley for a wharfinger. We must take into account what his ordinary duty was. He has to load and unload the trolley. That is manual labor. His duty may be compared to that of a lighterman who conducts a barge or lighter up and down the river. The driving the horse and the trolley and the navigating the lighter form the easiest part of the work; his real labor, that which tests his muscles and his sinews, is the loading and unloading of the trolley or the lighter."

[42] *Grainger* v. *Aynsley* (1880) L. R. 6 Q. B. Div. 182, 50 L. J. M. C. N. S. 48, 43 L. T. N. S. 608, 29 Week. Rep. 242, 45 J. P. 142.

[43] *Hallen* v. *King* (1896) 17 New So. Wales L. R. (L.) 13.

The mere fact that the employee, for the sake of speed and convenience, hired a certain number of assistants, whom he paid himself, will not take him out of the class of persons "engaged in manual labor."[44]

A person whose occupation is one of which the essence is manual labor is entitled to recover under the act if he is injured while performing a duty or work incidental to that occupation, even though the duty does not directly involve manual labor.[45]

i. "*Working . . . der a contract with an employer.*"—The contract of employment to which this phrase points is, as the subject-matter of the act indicates, one of service as distinguished from one which is entered into with an "independent contractor." Accordingly, although the work in which the employee was engaged, whose rights or liabilities are in question, may have been of such a character as to bring him prima facie within one of the descriptive terms used for the purpose of defining the word "workman," yet he cannot sue under the act, if it appears that his agreement merely bound him to produce certain specified results, and did not place him under his employer's control with respect to the means by which, or the manner in which, those results were to be attained.[46]

If his agreement is essentially one of this nature, he is not converted into a servant by participating in the manual labor by which the agreement is performed.[47] One of the ordinary characteristics of such agreement is that the contractor is free to perform his contract either in person or by deputy. In several cases, therefore, the existence or absence of an obligation on the part of the employee in question to do the stipulated work himself has been treated as the appro-

[44] *Granger* v. *Aynsley* (1880) L. R. 6 Q. B. Div. 182, 50 L. J. M. C. N. S. 48, 43 L. T. N. S. 608, 29 Week. Rep. 242, 45 J. P. 142.

[45] *Holland* v. *Stockton Coal Co.* (1898) 19 New So. Wales L. R. (L.) 109, where it was held error to nonsuit a plaintiff whose husband, a man ordinarily working as coal-hewer in a mine, was suffocated by gas, while engaged, as one of an exploring party, in locating the origin of the gas.

[46] *Sleeman* v. *Barrett* (1864) 2 Hurlst. & C. 934, 33 L. J. Exch. N. S. 153, 10 Jur. N. S. 476, 9 L. T. N. S. 834, 12 Week. Rep. 411, where it was held that the word did not include "butty colliers," i. e., men working in partnership, who contract for digging coal by the day, the ton, or the piece, according to the nature of the work, and employing others to assist them, for whose wages they are responsible.

See, however, *Bowers* v. *Lovekin* (1856) 25 L. J. Q. B. N. S. 371, 6 El. & Bl. 584, 2 Jur. N. S. 1187, cited in note 52, *infra*.

A person who contracts to weave certain pieces of silk goods for another at certain prices is not an "artificer or handicraft-man" or "other person" within Geo. IV., chap. 34, § 3. *Hardy* v. *Ryle* (1829) 9 Barn. & C. 603, 4 Mann. & R. 295, 7 L. J. M. C. 118.

[47] *Riley* v. *Warden* (1848) 2 Exch. 59, 18 L. J. Exch. N. S. 120; *Ingram* v. *Barnes* (1857) 7 El. & Bl. 115, 26 L. J. Q. B. N. S. 82, 3 Jur. N. S. 156. In both these cases the plaintiff was denied to be a "laborer" within the meaning of the truck acts.

priate criterion for determining whether he was entitled to the benefits or subject to the burdens of statutes regulating the contract of employment.[48]

If the agreement is essentially one for personal services, the employee is not removed into the category of "independent contractors" by the fact that he was left free to employ assistants and did employ them;[49] nor by the fact that he was to be paid by the piece,[50] or with

[48] In *Riley* v. *Warden* (1848) 2 Exch. 59, 18 L. J. Exch. N. S. 120, Parke, B., laid it down that a "labourer," within the meaning of the truck acts, is one who has entered into a contract to give his personal services and to receive payment in wages. See also to the same effect, *Weaver* v. *Floyd* (1852) 21 L. J. Q. B. N. S. 151, 16 Jur. 280; *Sharman* v. *Sanders* (1853) 13 C. B. 166, 22 L. J. C. P. N. S. 86, 3 Car. & K. 298, 17 Jur. N. S. 765.

Under these acts a laboring man who enters into a contract to make as many bricks as the contractee requires, such contractee supplying the materials and paying so much a thousand for the finished bricks, is not a workman, since there is no contract binding him to do the work personally. *Stuart* v. *Evans* (1883) 49 L. T. N. S. 138, 31 Week. Rep. 706.

In the employers' liability act of New South Wales, the intention of the legislature is indicated with more precision than in the English and Canadian statutes, as its provisions are expressly declared to be applicable to "those who enter into a contract of service or a contract personally to execute any work or labor." It has been held that a contract, to fall within this description, must be a contract to serve personally or to serve for some period, or to do some particular work, and that no action can be maintained by a man who, being the owner of two carts, went, when it suited him, to the brick-kiln of the defendant and conveyed bricks to different places on the defendant's premises, not being bound to do the work, but being entitled to receive a specified sum of money if he thought fit to do it. *Lobb* v. *Amos* (1886) 7 New South Wales L. R. (L.) 92.

See also *McElroy* v. *Australian Forge & Engineering Co.* (1899) 24 Vict. L. Rep. 353, where it was laid down that the employers and employees act of Victoria is not applicable to persons entering into a contract which can be performed by deputy.

[49] *Weaver* v. *Floyd* (1852) 21 L. J. Q. B. N. S. 151, 16 Jur. 280 (workman held to be "artificer"); *Bowers* v. *Loveless* (1856) 25 L. J. Q. B. N. S. 371, 6 El. & Bl. 584, 2 Jur. N. S. 1187 (see next note); *Lowther* v. *Radnor* (1806) 8 East, 113 (see next note); *Whitehead* v. *Armitage* (1861) 13 Week. Rep. 141; *Pillar* v. *Llanvi Coal & I. Co.* (1866) 35 L. J. C. P. N. S. 291, L. R. 4 C. P. 752, 20 L. T. N. S. 923, 17 Week. Rep. 112.

Iron riveters paid at a fixed price per ton, with liberty to employ other workmen of inferior skill to themselves, have been held to be "handicraftsmen" within the Stat. 4 Geo. IV., chap. 34, § 3. *Lawrence* v. *Todd* (1863) 32 L. J. M. C. N. S. 238, 14 C. B. N. S. 551, 10 Jur. N. S. 178, 8 L. T. N. S. 505, 11 Week. Rep. 835 (convicted for absence from work).

[50] In *Bowers* v. *Loveless* (1856) 25 L. J. Q. B. N. S. 371, 6 El. & Bl. 584, 2 Jur. N. S. 1187, "butty-men" were held to be entitled to the benefits of the truck acts. The evidence was that they bound themselves to do the work personally. Contrast *Sherman* v. *Barrett* (1864) 2 Hurlst. & C. 931, 33 L. J. Exch. N. S. 153, 10 Jur. N. S. 476, 9 L. T. N. S. 834, 12 Week. Rep. 411, cited in note 47, *supra*.

So also a working tailor engaged to make clothes, each garment to be paid for according to a price list, has been held to be an artificer within the masters and servants act, 4 Geo. IV. chap. 34, § 3. *Ex parte Gordon* (1855) 25 L. J. M. C. N. S. 12, 1 Jur. N. S. 983 (convicted for failure to finish a piece of work which he had begun).

One who digs a well at so much a rood has been held to be a "labourer" within the meaning of 2 Geo. II., chap. 19. *Lowther* v. *Radnor* (1806) 8 East 113.

See also *Lawrence* v. *Todd* (1863) 32 L. J. M. C. N. S. 238, 14 C. B. N. S. 551, 10 Jur. N. S. 178, 8 L. T. N. S. 505, 11 Week. Rep. 835, cited in last note.

reference to the amount of the sales of the article which he was manufacturing.[51]

The phrase in the employers and workmen act which is now under discussion cannot be construed as giving the servants of an independent contractor a right of action for personal injuries against the principal employer.[52]

724. Seamen.—Seamen were expressly excepted from the scope of the employers and workmen act of 1875. This provision, though repealed for other purposes by the merchant seamen act of 1880, was, for the purposes of definition, kept alive by section 11 of that act. Seamen are therefore still excluded in England from the advantages of the employers' liability act.[1]

If a plaintiff relies upon the theory that his functions were partly those of a seaman and partly what may be called nonmaritime, he

[51] A stuff presser or stuff finisher of Italian goods, working at weekly wages and a commission, besides superintending other servants, was held liable, as an "artificer," for an unlawful breach of contract under Stat. Geo. IV., chap. 31, § 3. *Whitehead* v. *Armitage* (1861) 13 Week. Rep. 114.

[52] One E. entered into a contract with the owners of a colliery to sink a shaft in their coal mine. By the contract, E. (who was therein called the "contractor") was to provide such sinkers, etc., as might be necessary for the execution of the work, and was to be paid a certain sum per fathom sunk. E. employed and paid the sinkers, he himself acting as "chargeman" in charge of the sinking operations. One of the sinkers, while engaged upon the work, was killed by a block of wood falling upon him. Held, that E. was an independent contractor, and that the deceased was not a "workman" who had "entered into or worked under a contract" with the colliery owners as his employers. Held, also, that the control given by the coal mines regulation act 1887, and by the special rules of the mine, to the manager over all persons in the mine, did not make E. and the sinkers employed by him "workmen" in the employment of the colliery owners. *Marrow* v. *Flinshy & B. M. Coal & Fire Brick Co.* [1898; C. A.] 2 Q. B. 588, 67 L. J. Q. B. N. S. 976.

The owners of a colliery entered into an agreement with a contractor by which the latter contracted to sink and wall a shaft in the colliery. One of the men employed upon the work by the contractor and paid by him was fatally injured by an explosion of gas in the mine. The deceased had, in common with all the men employed by the contractor, signed the "record book" kept by the colliery owners, by which, in consideration of being employed at the mine, he became bound to observe the regulations and conditions laid down for the safety of the mine and for the guidance of the persons employed there. Held, that the signature of the conditions by the deceased did not create a contract of service between himself and the colliery owners; that the deceased was therefore not a "workman" who had "entered into or worked under a contract" with the colliery owners as his employers. *Fitzpatrick* v. *Evans* [1901] 1 K. B. 756. Affirmed in [1902; C. A.] 1 K. B. 505.

[1] A bill introduced in 1893 to repeal the act of 1880, and, *inter alia*, to give seamen the benefit of the substituted enactment, failed to pass into law. See Kay, Shipmasters & Seamen, 2d ed. § 866.

In New South Wales it has been held that the phrase "otherwise engaged in manual labor" must be construed as being applicable only to persons *ejusdem generis* with those specifically mentioned, and that it only embraces persons working on land. *Hanson* v. *Australasian Steam Nav. Co.* (1881) 5 New So. Wales L. R. (L.) 117. But by the act of 56 Vict. No. 6, seamen are now entitled to sue under the statute.

cannot recover unless he proves expressly and distinctly that he actually had an employment separate from that of a seaman.[2]

The word "seaman" applies only to the crews of sea-going ships. An action will therefore lie for the death of the fireman of a canal boat who was drowned by its capsizing.[3] This rule has been altered to some extent by express enactment in some of the British colonies.

725. Servants working in government departments.— According to Mr. Beven (1 Neg. 873), the definition of "workman" in the employers and workmen act does not include Crown servants for the two reasons:

First, the rights of the Crown are not affected by any act in which the Crown is not specially named.[1]

Secondly, the Crown is not liable for torts committed by its servants.[2] This rule, as it would seem, still prevails in most of the British colonies; but it has been abrogated wholly or partially in some of them.[3]

K. Damages recoverable.

726. Damages recoverable where the injured servant is himself the plaintiff.—The provisions specifying the amount recoverable by an injured servant do not give a measure of damages, but merely fix a limit beyond which the jury cannot award compensation.[1] Within that limit the measure of damages is left to be determined upon the ordinary principles which regulate the assessment of the indemnity in actions for personal injuries.

[1] *Hanrahan* v. *Limerick S. S. Co.* (1886) Ir. L. R. 18 C. L. 135 (holding, on the ground that there was no such proof furnished, that a mate of a steamer could not recover for injuries received while he was superintending the loading of a cargo).

[2] *Oakes* v. *Monkland Iron Co.* (1884) 11 Sc. Sess. Cas. 4th series, 579.

[1] Bacon's Abr. title, Prerogative (E) 5. Hardcastle, Statutory Law, Craies' ed. pp. 401–424.

[2] *Sutton* v. *Johnstone* (1787) 1 T. R. 493; *Byron* v. *Denman* (1848) 2 Exch. 167; *Raleigh* v. *Goschen* [1898] 1 Ch. 73, 67 L. J. Ch. N. S. 59, 77 L. T. N. S. 429, 46 Week. Rep. 90.

[3] The New Zealand employers' liability act is expressly made applicable to Crown servants.

In Canada by virtue of the Dominion act (50 & 51 Vict. ch. 16) employees engaged on any "public work" can recover for the negligence of any officer or servant of the Crown if the circumstances were such that he could have recovered in an action against a private employer. *Queen* v. *Filion* (1895) 24 Can. S. C. 482. Following *Quebec* v. *Queen* (1894) 24 Can. S. C. 420, where it was laid down that the effect of the Dominion statute (50 & 51 Vict. chap. 16, § 16, par. (c)) was to confer upon the exchequer court, in all cases of claim against the government, arising out of the death of or injury to any person through the negligence of its servants on any railway or other public work of the Dominion, the same jurisdiction as is exercised in like cases by the ordinary courts over public companies. Apparently, this statute operates so as to give a government servant a right to take advantage of any employers' liability act which may be in force in the Province where the injury was received, if he was engaged on a railway or other public work.

[1] *Borlick* v. *Head* (1885) 34 Week.

Under the English and some of the colonial acts the maximum amount which can be awarded is a variable quantity, dependent upon the earning capacity of the supposed injured person.[2] The American acts simply declare that the damages shall not exceed a certain sum.

A mixture of these two methods is adopted in the Ontario and British Columbia acts, the servant having the privilege of recovering either a fixed sum or one computed on the basis of earnings, whichever may be the larger. The precise amount recoverable within the limit thus fixed is determined (except in so far as it may be affected by the special provisions in some of the acts respecting deductions) with reference to the principles which regulate the measure of damages in all actions for personal injuries. An extended discussion of the subject would therefore be out of place in this article.

Where the plaintiff is entitled to damages at common law, as well as under the statute, the amount of the indemnity recoverable is not restricted to the sum fixed by that act.[3]

727. Damages recoverable by the personal representatives of an injured servant.— The various clauses in these statutes by which a right of action is given to the representatives of a deceased servant have been treated as an expression of the intention of the legislatures that the provisions of the damage acts and the decisions in which they have been construed are to be regarded as controlling upon the questions of the assessment of damages in cases where death results from the accident in suit.

In England the right of action given to relatives of a deceased person by the earlier act is not a right given to them *quâ* relatives to recover damages as a *solatium* for the distress which may be occasioned to them by the death; nor is it a right transmitted to them by the deceased, to recover damages for the loss or for the personal pain and suffering which he endured. It is a right given to the parties named

Rep. 102, 53 L. T. N. S. 909, 50 J. P. 327.

[2] The plaintiff is entitled to prove as damages loss of wages in respect both of his employment with the defendants, and also in respect of certain overtime labor under another employer, where the total amount which he can thus recover is less than the amount he might have been awarded in respect of his estimated earnings for three years in the defendant's service. *Borlick* v. *Head* (1885) 34 Week. Rep. 102, 53 L. T. N. S. 909, 50 J. P. 327, 2 Times L. R. 103.

An apprentice cannot, under this section, be awarded more than the sum to which his wages at the time of the accident would amount in three years. The damages cannot be augmented by construing the word "earnings" as including the computed value of the tuition he was receiving. That word means money or things capable of being turned into money by accurate estimation. *Noel* v. *Redruth Foundry Co.* [1896] 1 Q. B. 453, 65 L. J. Q. B. N. S. 330, 74 L. T. N. S. 196, 44 Week. Rep. 407, 12 Times L. R. 248.

[3] *O'Connor* v. *Hamilton Bridge Co.* (1894) 25 Ont. Rep. 12.

in the statute, to recover damages for the death of their relative, when and only when, the death has caused such parties a pecuniary loss and to the extent only of such pecuniary loss.[1]

The colonial acts are expressed in the same terms and therefore construed in the same manner as that of England.[2]

In Alabama, Colorado, and Indiana, the measure of damages is limited to the pecuniary injury sustained by the persons to whose benefit the recovery inures. Exemplary or vindictive damages cannot be recovered, nor can anything be allowed on account of the pain and suffering of the deceased, the grief and distress of his family, or the loss of his society.[3]

In Massachusetts the representatives of the deceased servant may recover damages for all the damage accruing to him before death, including his mental and physical sufferings.[4]

L. Trial practice.

728. Scope of subtitle.— In this subtitle it is proposed merely to collect, under appropriate headings, the cases in which various points of pleading and procedure have been determined in actions brought under the statutes. It would be out of place to attempt, in the present connection, to develop fully the general rules which these cases illustrate. For a more complete discussion of the subjects touched upon, the reader is referred to the various treatises on trial practice.[5] Other illustrative cases are collected in chapter XLV., *post*.

729. Within what period the action must be brought.— In all the acts reviewed in this chapter, except those of Alabama and [illegible] there are express provisions of which the effect is that the servant's right to maintain the statutory suit is conditional upon being instituted within a specified period.

It has been held with regard to the English act that the time limit is absolute, and that a servant's action is barred even where his excuse

[1] Ruegg, Employers' Liability Act, pp. 131 *et seq.*, Citing *Gillard* v. *Lancashire & Y. R. Co.* (1848) 12 L. T. 356; *Pym* v. *Great Northern R. Co.* (1863) 4 Best & S. 396, 31 L. J. Q. B. N. S. 377, 10 Jur. N. S. 199, 11 Week. Rep. 922, and other cases.

[2] *Rombough* v. *Balch* (1900) 27 Ont. App. Rep. 32.

[3] *Louisville & N. R. Co.* v. *Orr* (1890) 91 Ala. 548, 8 So. 360; *James* v. *Richmond & D. R. Co.* (1890) 92 Ala. 231, 9 So. 335 (both cases under the employers' liability act); *Denver, S. P. & P. R. Co.* v. *Wilson* (1888) 12 Colo. 20, 20 Pac. 310; *Ohio & M. R. Co.* v. *Tindall* (1859) 13 Ind. 366, 74 Am. Dec. 259. See, generally, Sutherland, Damages, §§ 1263 *et seq.*; Shearm. & Redf. Neg. §§ 137, 466.

[4] See Shearm. & Redf. Neg. § 767*a*.

[5] So far as the English procedure is concerned, the works of Mr. Beven, Mr. Ruegg, and Messrs. Roberts & Wallace on employers' liability, will supply lawyers in other jurisdictions with all the information that they are likely to require.

tor not taking proceedings is that, between the time of giving notice of the injury and the expiration of the period within which the statute prescribes that the action must be brought, he was in a lunatic asylum, in consequence of the impairment of his faculties by the accident.[1] If this decision is good law it discloses a very shameful defect in the statute.

730. Service of summons; waiver of irregularity in.—An employee waives an irregularity in the service of the summons (in the case cited it was served several days too late) by appearing and cross-examining the plaintiff.[1]

731. Joinder of employer and negligent coemployee as parties defendant.— In an action brought under these statutes for an injury caused by the culpable act of any of the employees for whose negligence the employer is declared liable, that act obviously constitutes a breach both of a duty owed by the employer and of a duty owed by the employee himself. The injured person, therefore, may maintain an action against the employer and the delinquent employee jointly.[1]

732. Institution of distinct suits at common law and under these acts. —By the express terms of the English act (§ 6), a statutory action must, in the first instance, be commenced in a county court. But, as the common-law rights of a servant are not affected by the act, the institution of such an action will not debar him from bringing another action at common law, either in the county court or the high court. If actions are brought in different courts one will be stayed. If both are brought in a county court, they will be consolidated and tried together.[1]

733. Joinder of causes of action under the different provisions of these acts.— If the plaintiff intends to rely upon several distinct causes of action,—as, a breach of common-law duty, and the negligence of one or more of the persons for whom the employer is by these acts rendered responsible,—the facts must be alleged in separate counts.[1] A complaint is demurrable, if in one of the counts it sets forth two separate causes of action, one under each of two distinct provisions of one of these acts.[2] This rule, however, is subject to the qualification

[1] *Johnston* v. *Shaw* (1883) 21 Sc. L. R. 246.

[1] *Dunn* v. *Butler* (1885; Q. B. D.) 1 Times L. R. 476.

[1] *Charman* v. *Lake Erie & W. R. Co.* (1900) 105 Fed. 449 (removal of cause from the state to the Federal court was denied on this ground).

[1] See Beven, Employers' Liability, 2d ed. p. 198.

[1] *Highland Ave. & Belt R. Co.* v. *Dunseberry* (1891) 94 Ala. 413, 10 So. 274; *Highland Ave. & Belt R. Co.* v. *Miller* (1898) 120 Ala. 535, 24 So. 955; *Louisville & N. R. Co.* v. *Mothershead* (1893) 97 Ala. 261, 12 So. 714.

[2] *Clements* v. *Alabama G. S. R. Co.* (1899) 127 Ala. 166, 28 So. 643; *Highland Ave. & Belt R. Co.* v. *Dunseberry* (1891) 94 Ala. 413, 10 So. 274; *Rut*

that several distinct "defects" may be alleged in the same count,[3] and that, if the injury resulted from the concurrent operation of two or more of the particular kinds of negligence covered by separate subdivisions of the acts, there may be an averment to that effect in one count; the plaintiff then has the burden of establishing the several allegations of negligence.[4]

734. Joinder of causes of action under these acts and at common law — In England it has been customary to join common-law and statutory causes of action in the same suit, and in spite of one judicial intimation adverse to this rule of procedure, its propriety may, perhaps, be regarded as being now no longer open to controversy.[1]

In Scotland, also, this joinder is permitted.[2]

In Massachusetts the propriety of such a joinder has never, so far as the writer knows, been questioned, and a large number of cases might be cited in which the complainant has included counts setting forth claims both under the statute and at common law.[3] A similar remark is applicable to the Alabama course of practice.[4]

See also §§ 849, 850, *post*.

734a. Joinder of causes of action under these acts and other statutes — It has been held by the English court of appeal that the causes of action for the death of several employees in favor of their respective

mond & D. R. Co. v. *Weems* (1893) 97 Ala. 270, 12 So. 186; *Louisville & N. R. Co.* v. *Mothershed* (1893) 97 Ala. 261, 12 So. 714.

[3] *Alabama G. S. R. Co.* v. *Bailey* (1895) 112 Ala. 167, 20 So. 313.

[4] *Bridges* v. *Tennessee Coal Iron & R. Co.* (1895) 109 Ala. 287, 19 So. 495.

[1] In *Munday* v. *Thames Ironworks & Shipbuilding Co.* (1882) L. R. 10 Q. B. Div. 59, 52 L. J. Q. B. N. S. 119, 47 L. T. N. S. 351, Manisty, J., expressed a doubt whether a statutory action instituted in a county court and removed to a superior court could be consolidated with one instituted, prior to the removal, in the superior court. But this *dictum* is inconsistent with the case of *Larbey* v. *Greenwood* (reported only in the Times newspaper, July 23, 1885), where the action in the county court was removed in order that a common-law claim might be added to it. Mr. Ruegg, who refers to this decision (Employer's Liability Act, p. 141, note), states that the same course has been followed in other cases. See also *Marrow* v. *Flimby & B. M. Coal & Fire Brick Co.* (1898) 2 Q. B. 588, 67 L. J. Q. B. N. S. 976, 79 L. T. N. S. 397, where there was both a common-law and a statutory claim, and no objection to this joinder was raised.

For the general rule as to the joinder of alternative causes of action under the judicature act, see *Bagot* v. *East* (1877) L. R. 7 Ch. Div. 1, 47 L. J. Ch. N. S. 225, 37 L. T. N. S. 369, 26 Week. Rep. 66.

[2] *Morrison* v. *Baird* (1882) 10 Sc. Sess. Cas. 4th series, 271; *Goudie* v. *Paul* (1894) 22 Sc. Sess. Cas. 4th series, 1; *Duthie* v. *Caledonia R. Co.* (1898) 35 Sc. L. R. 726; *Murray* v. *Cunningham* (1890) 17 Sc. Sess. Cas. 4th series, 815; *McColl* v. *Eadie* (1891) 18 Sc. Sess. Cas. 4th series, 507.

[3] It will be sufficient to mention, as examples, the following: *Demers* v. *Marshall* (1899) 172 Mass. 548, 52 N. E. 1066; *Ford* v. *Mt. Tom Sulphite Pulp Co.* (1899) 172 Mass. 544, 48 L. R. A. 96, 52 N. E. 1065; *Hall* v. *Wakefield & S. Street R. Co.* (1901) 178 Mass. 98, 59 N. E. 668; *Hughes* v. *Malden & M. Gaslight Co.* (1897) 168 Mass. 395, 47 N. E. 125.

[4] For examples of the joinder of common-law and statutory counts, see *Clements* v. *Alabama G. S. R. Co.* (1899)

relatives, under Lord Campbell's act and the employers' liability act, are several, and cannot be joined in one action.[1] But such a joinder is now permitted under order 3, rule 1a of the county court rules, which was added in consequence of this decision.

735. Election between different counts.— It has not yet been definitely determined in Massachusetts, whether, in a case where the liability of the defendant is stated in several counts, some under the statute and some at common law, the plaintiff can be compelled to elect upon which counts he will go to the jury.[1] But probably an election cannot be compelled when the counts are all under the statute.[2]

736. Former recovery in action under another statute or at common law.—A plaintiff to whom compensation has been awarded under the English act of 1897, reviewed in chapter XL., *post*, cannot recover damages for the same injury under the employers' liability act of 1880.[1]

A judgment in favor of a defendant railway company in an action under the employers' liability act is a bar to a subsequent action against it at common law for the same injury, but not to an action under a statute which declares such companies to be liable under certain specified circumstances.[2]

737. Complaint.— In this section it is proposed to consider merely the formal requisites of the complaint. Its sufficiency, in so far as that depends upon the correctness of the rule of substantive law which it embodies, has necessarily been determined as an incident of the discussion of the various doctrinal points investigated in preceding subtitles of this chapter.

Some of the decisions to be cited possibly apply a stricter standard of technical correctness than would be deemed necessary in a portion of the jurisdictions in which the more liberal of the modern systems of pleading have been adopted. But even to practitioners who have

127 Ala. 166, 28 So. 643; *Louisville & N. R. Co.* v. *York* (1901) 128 Ala. 305, 30 So. 676.

Carter v. *Rigby* [1896; C. A.] 2 Q. B. 113, 65 L. J. Q. B. N. S. 537, 74 L. T. N. S. 744, a decision under the English county court rules, order 44, rule 18, in which the court followed *Smyth-waite* v. *Hannay* [1894] A. C. 494, 6 Reports, 299, 63 L. J. Q. B. N. S. 737, 71 L. T. N. S. 157, 43 Week. Rep. 113, a decision with regard to order 16, rule 1, of the supreme court rules.

[1] *Clare* v. *New York & N. E. R. Co.* (1898) 172 Mass. 211, 51 N. E. 1083, citing several cases.

[2] *Beauregard* v. *Webb Granite & Constr. Co.* (1893) 160 Mass. 201, 35 N. E. 555.

[1] *Campbell* v. *Caledonian R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 887.

[2] *Clare* v. *New York & N. E. R. Co.* (1898) 172 N. 211, 51 N. E. 1083.

to draw complaints with reference to those systems such decisions will afford some instruction and guidance.

a. Relation of employer and employed.—The relation of employer must exist, and must be set forth in the complaint, to enable the injured person to sue under these statutes.[1]

b. Necessity of alleging that negligence was committed by a statutory vice principal.—A complaint is demurrable unless the allegations show that the misconduct which is the basis of the claim was that of one of the particular employees for whose fault the employer is made responsible by the statutes.[2] A count which charges negligence, in the alternative, either to the master or his vice principal, must aver facts importing the master's liability both for his own and his vice principal's negligence.[3]

c. [illegible] and by such a vice principal while acting in the line of his

[1] *Nicholson* v. *MacAndrew* (1888) 15 Sc. Sess. Cas. 4th series, 854; *Sweeney* v. *Duncan* (1892) 19 Sc. Sess. Cas. 4th series, 870; *Coughlin* v. *Boston Tow-Boat Co.* (1890) 151 Mass. 92, 23 N. E. 721. In the last-cited case the court held that, upon a general demurrer not pointing out any specific defect, a complaint was good which alleged that the defendant was the owner of and had the management and control of a certain vessel on a certain day, that the plaintiff was then and there at work on said vessel as a laborer, shoveling coal and discharging the cargo, and that he was then and there in the employ of one W., a stevedore then doing the work of discharging the said cargo of said vessel.

[2] A count in an action for injuries caused by "defects" is bad, unless it contains an allegation of negligence either in the employer or someone intrusted, etc. *Davies* v. *Dyer* (1890) 11 New So. Wales L. R. (L.) 431.

Averments that a person named was in the employment of the defendant, that he had superintendence intrusted to him, that he was negligent while in the exercise of such superintendence, and that he was the defendant's superintendent,—clearly show that the superintendence which he had was intrusted to him by the defendant. *Bessemer Land & Improv Co.* v. *Campbell* (1898) 121 Ala. 50, 77 Am. St. Rep. 17, 25 So. 793.

In one Scotch case it was laid down that the complaint in an action for injuries caused by the negligence of an employee exercising superintendence must contain a distinct averment showing the duties discharged by the superior servant, and that he was not ordinarily engaged in manual labor. *Hood* v. *Ross* (1890) 17 Sc. Sess. Cas. 4th series, 796. But in a later one it was held that a complaint is not demurrable which shows that the negligent servant managed the defendant's estates while he was absent, although it does not aver in terms that he was not ordinarily engaged in manual labor. *Wood* v. *Price* (1893) 20 Sc. Sess. Cas. 4th series, 381.

Allegations that the injury occurred on the defendant's road on which it was at the time operating hand cars, and on one of defendant's hand cars, on which intestate, as an employee of defendant, was at the time engaged in the duties of his employment, and that one H. was the foreman in charge of said car, are sufficient to show that H. was at the time the foreman of the defendant. *Highland Ave. & Belt R. Co.* v. *Dasenberry* (1893) 98 Ala. 210, 13 So. 308.

A complaint alleging facts which show that the cause of the injury was the negligence of a fellow servant in respect to the details of the work is demurrable. *Ashley* v. *Hart* (1888) 147 Mass. 578, 1 L. R. A. 385, 18 N. E. 416.

For this reason a complaint by a section hand for injuries caused by being struck by a hand car, "being operated recklessly, wantonly, and with gross negligence by defendant or its agent at that time," is bad. *Central R. Co.* v. *Lamb* (1899) 124 Ala. 172, 26 So. 969. See also note 5, *infra*.

[3] *Louisville & N. R. Co.* v. *Boulden* (1895) 110 Ala. 185, 20 So. 325.

duty.—A specific allegation that a statutory vice principal was in the discharge of the duties imposed upon him by his employment, when the injury was inflicted, is not necessary.[4]

d. Sufficiency of the allegation of negligence. As regards the sufficiency of the complaint in respect to its statement of the breach of duty relied upon as a cause of action, the general rule is that it is good against a demurrer, when, and only when, it follows, either literally or substantially, the words of the particular provision with reference to which the allegations were framed.[5]

[4] This rule was laid down in a case where the court relied upon the consideration that an engineer who is in the employment of a railway company, and in charge of an engine which is at the time running upon the company's tracks, is prima facie in the discharge of his duties as engineer. *Woodward Iron Co.* v. *Herndon* (1896) 114 Ala. 191, 21 So. 430.

A complaint is good, where it states that the engineer, while in the service of the company, in charge of a locomotive, negligently injured the plaintiff, at a time when both were acting in the line of duty as employees of the company. *Pittsburgh, C. C. & St. L. R. Co.* v. *Montgomery* (1898) 152 Ind. 1, 71 Am. St. Rep. 301, 49 N. E. 582.

Injury caused by "defects in the ways," etc.—A complaint which states generally the facts, and alleges that they constitute a defect in the ways, etc., is not demurrable. *Louisville & N. R. Co.* v. *Pearson* (1893) 97 Ala. 211, 12 So. 176; *Willey* v. *Boston Electric Light Co.* (1897) 168 Mass. 10, 37 L. R. A. 723, 46 N. E. 395.

A complaint which alleges that the injury was caused by "defects, etc.," and concludes with "viz., the said hand car was out of plumb," and "was so improperly adjusted that it was likely to jump or be thrown from the track," has been held sufficiently specific, as against a demurrer, in its description of the defects. *Southern R. Co.* v. *Guyton* (1898) 122 Ala. 231, 25 So. 34.

It is not necessary to state the nature of the duties discharged by the person intrusted with the duty of seeing that the ways, etc., were in good condition. *Louisville & N. R. Co.* v. *Orr* (1891) 91 Ala. 602, 10 So. 167.

A complaint in an action to recover for an injury caused by defects in the ways, works, machinery, or plant of the defendant is demurrable, where it does not indicate by name or identify in some other way the appliance or appliances on the defective quality of which the plaintiff relies. *Louisville & N. R. Co.* v. *Jones* (1900) 130 Ala. 456, 30 So. 586. Or where the defect to which the alleged injury was due is not specified. *Whatley* v. *Zonida Coal Co.* (1898) 122 Ala. 118, 26 So. 124.

In *Mobile & O. R. Co.* v. *George* (1891) 94 Ala. 199, 10 So. 145, it was held that an averment that "defendant negligently used in its business a steam engine or locomotive which was out of order, so that it could not be stopped promptly," could not be regarded as equivalent of the statutory language. The court said: "The engine may have been negligently used in the business, and yet the defect complained of not have arisen from, or been discovered and remedied owing to, the negligence of defendant, or of some person intrusted with the duty of seeing that the works and machinery were in proper condition. The adverb 'negligently,' as employed in the count, qualifies the manner in which the engine was used, and, fairly construed, does not relate to the origin of the defect, or to the failure to discover and remedy it; and even when taken in connection with the subsequent averment that plaintiff was injured on account of 'the negligently defective condition of the engine' is not the equivalent of an averment that the defect arose from, or was not discovered and remedied owing to, the negligence of defendant, or of any person in its employment."

To the same effect see *Central R. Co.* v. *Lamb* (1899) 124 Ala. 172, 26 So. 969, where a complaint for injuries caused by being struck by a hand car which was not "properly fixed so as to control it," was held demurrable for the omission of the same allegation.

A declaration which first sets forth the manner in which the accident occurred, and then alleges that the "de

It is error to sustain a demurrer to a complaint the averments of which substantially follow the language of the statute, but it is error

fendant corporation by its servants and agents was negligent, and was guilty of a breach of duty towards the plaintiff," does not allege any defect. *Darvin* v. *Kitson Mach. Co.* (1893) 159 Mass. 17, 34 N. E. 89.

It has been held that a count of the complaint which alleges that there was a defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the defendant, in that the "appliances used by defendant in or about attempting to get said car upon said rails were not proper and sufficient for that purpose," is subject to demurrer. *Louisville & N. R. Co.* v. *Jones* (1900) 130 Ala. 456, 30 So. 586. The court took the position that, in order to escape condemnation by such an averment, the defendant would have to show that the things used were not only proper, but sufficient, to effect the purpose. But if they are proper to use as an auxiliary, the mere fact that they are insufficient to accomplish the whole undertaking does not show that they ought not to be used. Supposing there was such insufficiency, —it might imply negligence in the superintendent of the work,—but it did not charge the employer with negligence in furnishing the appliances.

The complaint should state that the "defect arose from, or had not been remedied owing to, the negligence of the employer, etc." *Mobile & O. R. Co.* v. *George* (1891) 94 Ala. 199, 10 So. 145; *Seaboard Mfg. Co.* v. *Woodson* (1891) 94 Ala. 143, 10 So. 87; *Birmingham R. & Electric Co.* v. *Baylor* (1895) 101 Ala. 488, 13 So. 793.

In one Alabama case it was held to be unnecessary to allege that a reasonable time within which to remedy the defect had elapsed when the accident occurred. *Conrad* v. *Gray* (1895) 109 Ala. 130, 19 So. 398. This ruling seems to be essentially inconsistent with an earlier decision, in which a complaint was held to be demurrable which merely alleges that the defect "was known to the superior officers of plaintiff and known to defendant." It is consistent with such an allegation that the defect may have become known so short a time before the accident that there was no opportunity to remedy it. *Seaboard Mfg. Co.* v. *Woodson* (1891) 94 Ala. 143, 10 So. 87.

In an action under the Alabama [illegible] the complaint alleged that the [illegible] and company failed to provide [illegible] pliances, and also that it omitted to keep them in repair, and the last clause was followed by the words "and knowingly allowed the same to remain out of repair." The court held that the word "knowingly" should be construed as applying only to the failure of the defendant to keep the appliances in repair, and that, as the allegation of failure to provide appliances rendered the complaint sufficient, and thus raised the question of the defendant's knowledge, it could be objected, on a verdict for the plaintiff, that, having unnecessarily alleged knowledge, he was bound to prove it. *Louisville & N. R. Co.* v. *Coulton* (1888) 86 Ala. 129, 5 So. 458. The argument here seems to [illegible] body a [illegible] of the *onus* of proof which [illegible] ry to the weight of authority, as indicated in § 674, subd. a, *supra*, as well as to the manifest sense of the phrase now under discussion.

Negligence of person intrusted with superintendence.—A general averment of the negligence of the person intrusted with superintendence is enough. An averment of specific negligence is not requisite. Thus, a complaint in an action for negligently causing the death of an employee in a mine, alleging that defendant's superintendent negligently failed to take due and proper precautions to prevent a fire which had started in the mine from causing the suffocation or asphyxiation and death of plaintiff's intestate,—sufficiently alleges the negligence of the superintendent. *Bessemer Land & Improv. Co.* v. *Campbell* (1898) 121 Ala. 50, 77 Am. St. [illegible] 25 So. 793.

A count in the complaint of a minor employee which avers that his employment was of a dangerous nature; that he was young and inexperienced, and mentally and physically immature; that these facts were well known to defendant's foreman who had control of the work in which plaintiff was employed, and of the car upon which plaintiff was riding in the discharge of his duties at the time of the injury complained of; and that defendant negligently failed, by itself, its said foreman, or anyone else, to give plaintiff any warning of the danger of his employment, or to instruct

without prejudice, if an amendment which specifies the particular facts relied upon as being indicative of negligence, but imposes no

him as to the safest method of discharging his duties,—states a good cause of action, when it is further averred that such negligence resulted in the injury of the plaintiff. *Alabama Mineral R. Co.* v. *Harcus* (1900) 128 Ala. 355, 30 So. 679.

A count in a complaint alleging that the defendant's superintendent, knowing that to give slack to the rope to which a certain bar of iron was attached would probably cause said bar to strike upon or against a scaffold on which the plaintiff's intestate was standing and cause the same to swing or oscillate, negligently ordered the persons in charge of the pulley by which said bar of iron was being hoisted to give slack to the rope, which they did, and because thereof said bar was thrown or struck against said scaffold, causing the same to swing, and by reason thereof caused plaintiff's intestate to fall off the scaffold to the ground, inflicting the injuries complained of, is sufficient and demurrable, since it is not averred therein that the order given was unnecessary, or that a reasonable and probable result of the swinging of the scaffold was to throw the deceased off, or that the superintendent had any knowledge that such would be the probable or reasonable result of the giving of said order. *Decatur Car Wheel & Mfg. Co.* v. *Mehaffey* (1900) 128 Ala. 242, 29 So. 646. In this case it was also held that where, in addition to the averments just set forth, it is also averred that the superintendent, well knowing at the time that the slacking of the rope would cause the iron to hit against the scaffold, and cause it to move and swing, and "thereby have a tendency to throw the plaintiff's intestate off of said scaffold," and thus endanger him, as there was no other person on the scaffold to assist in receiving the iron, etc., gave an order, and by reason thereof the iron struck the scaffold, causing it to swing, and the plaintiff to fall off, said count sufficiently states a cause of action.

In *Kansas City, M. & B. R. Co.* v. *Burton* (1893) 97 Ala. 240, 12 So. 88, the principle that the "superintendence" contemplated by these acts is that which is exercised over men, not over inanimate appliances (see § 683, *ante*), was held not to involve the consequence that a complaint was bad in which the allegation was, substantially, that some inorganic appliance was left, by the orders of a superior employee, in such a position as to endanger unduly servants engaged in the work assigned to the injured person. There an action was brought for an injury caused by a railway car which was left too close to the track adjacent to that on which it stood. The court said: "The superintendence averred has relation to more than the track of the defendant, and the car left dangerously close thereto. The averment is that the yard master, by whom we understand to be intended a person charged with the control of the tracks and cars in the yard of a railroad, was intrusted with superintendence in the placing and position of cars in the yard, and hence, necessarily and obviously the performance of his duties involved the movement of cars and, in consequence, the control and direction of men and appliances necessary to such movement as was requisite to place the cars in safe and proper positions. The essence of the averment, therefore, is that the yard master had intrusted to him superintendence of the men and appliances used in the placing of this particular car, and that whilst in the exercise of that superintendence, he negligently permitted and suffered the car to be placed so near to an adjacent track, with a passing train on which plaintiff was discharging his duties as switchman, as that it collided with the person of the plaintiff, and produced the injuries complained of."

For other examples of complaints in which negligence was affirmed or denied to be predicable as to the acts of superintendent, see also *Moore* v. *Gimson* (1890) 17 Sc. Sess. Cas. 4th series, 796 (§ 686, note 1, *supra*); *Highland Ave. & Belt R. Co.* v. *Dusenberry* (1893) 98 Ala. 239, 13 So. 308 (§ 687, note 2, *supra*).

Injury caused by negligence of person to whose orders the servant was bound to conform.—A complaint is sufficient to take the case to the jury, when it alleges in substance that the injury was caused by the negligence of the defendants, or of their foreman, specially averred to be a person to whose orders the injured servant was bound to conform, in causing such servant to work in a drain from 7 to 10 feet in depth, without sufficiently propping the sides, the result being that the sides collapsed

additional burden on the plaintiff, is filed, and a demurrer to it over ruled.[6]

A complaint alleging injuries from a defective system is sufficiently specific without a distinct averment to show how and in what manner this system was directly authorized by the defendant.[7]

In a treatise of high authority it is said to be necessary, under the English rules of practice, that, in every case, except where the negligence relied on is the employer's personal negligence alone, the particu-

and fell upon him. *M'Coll* v. *Eadie* (1891) 18 Sc. Sess. Cas. 4th series, 597.

A count in a complaint, which avers that plaintiff received the injury, while in the discharge of his duties as an employee of defendant, by reason of the negligence of the defendant's section boss, who ordered or permitted the car from which the plaintiff fell or was thrown, and by which plaintiff was run over, to be run at a dangerous and reckless rate of speed, thereby producing the injuries complained of, states a good cause of action. *Alabama Mineral R. Co.* v. *Marcus* (1900) 128 Ala. 355, 30 So. 679.

It is not necessary to specify the nature of the duties discharged by the person to whose orders the plaintiff was bound to conform. *Louisville & N. R. Co.* v. *Orr* (1891) 94 Ala. 602, 10 So. 167.

Nor is it necessary to state in what particulars respects the order given was negligent. *Mobile & O. R. Co.* v. *George* (1891) 94 Ala. 199, 10 So. 145.

A complaint which does not show that the plaintiff was bound to conform to the order in question, that the injury resulted from his having so conformed, and that the order was negligent, is demurrable. *Postal Telg. Cable Co.* v. *Pulsey* (1896) 115 Ala. 193, 22 So. 854.

Injury caused by obedience to rules, etc.—A count framed under the provision as to injuries caused by obedience to rules is bad unless it contains an allegation that the injury resulted from some impropriety or defect in the rules, etc. *Davies* v. *Dyer* (1890) 11 New So. Wales L. R. (L.) 431.

Injuries caused by negligence of various railway employees.—An averment in a count of a complaint in an action by a brakeman against a railroad company, that he was shaken or jolted from the car and his injuries were caused by the negligence of the engineer in allowing his car and engine to be suddenly and violently shocked, is a sufficient allegation of negligence. *Highland Ave. & Belt R. Co.* v. *Miller* (1898) 120 Ala. 535, 24 So. 955. In the same case it was held that the complaint in such an action need not aver that the shock or jerk which caused him to fall from the car was of more than usual violence or greater than was ordinarily incident to the starting and movement of cars, where in the first count it is charged to have been caused by reason of a defect in the engine, and in the third count by the negligence of the engineer.

In an action to recover for the negligence of a person "in charge of an engine," it has been held sufficient to aver that the injuries were inflicted "by reason of defendants' negligence," the position being taken that for the purpose of pleading, there is no distinction between the "negligence of a railway company" and the negligence of an "engineer." *Indianapolis Union R. Co.* v. *Houlihan* (1901) 157 Ind. 494, 54 L. R. A. 787, 60 N. E. 943.

A count in a complaint, which avers that the injury was received while the plaintiff's intestate was rightfully in discharge of the duties of his employment by the negligence of a fellow servant in charge of an engine, which was so carelessly handled as to produce the injury, is sufficiently certain and definite, and states a good cause of action. *Louisville & N. R. Co.* v. *York* (1900) 128 Ala. 305, 30 So. 676.

A complaint in an action to recover for an injury alleged to be due to the negligence of an employee in "charge of a car . . . upon a railway" is bad, if it fails to aver that such employee was in charge of the car in question, and that it was on a railway. *Central R. Co.* v. *Lamb* (1899) 124 Ala. 172, 26 So. 969.

[6] *Laughran* v. *Brewer* (1896) 113 Ala. 509, 21 So. 415.

[7] *Henderson* v. *Watson* (1892) 19 Sc. Sess. Cas. 4th series, 954.

ulars of the claim should give both the name and the description of the persons in the employer's service who are alleged to have been negligent.[8] The decisions as to this point in Alabama are curiously inconsistent.[9] In Massachusetts the name of a negligent superintendent is immaterial.[10]

e. Notice of injury. In any jurisdiction where the giving of notice of the injury is made a condition precedent to the plaintiff's right to sue under one of these statutes (see § 708, *supra*) a complaint is demurrable, unless it alleges that notice of the injury was given.[11] It is sufficient to allege that the plaintiff "duly" gave notice.[12]

f. Necessity of alleging absence of contributory negligence.—See § 858, *post*.

[8] Ruegg, Employers' Liability Act, p. 122. In the appendix of this work, the learned author gives a number of forms of particulars of demand which have been actually used in statutory suits.

[9] In one case it was held that a complaint is not demurrable for the reason that it does not designate the name or position of the person intrusted with the duty of seeing that the ways, etc., are in proper condition. *McNamara* v. *Logan* (1893) 100 Ala. 187, 14 So. 175. Defendant's counsel cited *Mobile & O. R. Co.* v. *George* (1891) 94 Ala. 199, 10 So. 145, where it was suggested, *arguendo*, but not expressly determined, that good pleading required "the name of the person to whose orders the employee was bound to conform, to be stated, so as to give the defendant notice thereof, and present an issuable fact whether such person was in the service or employment of defendant, or whether plaintiff was bound to conform to his orders. This case was distinguished by the court on the ground that, even supposing that the suggestion embodied the proper rule as to pleading under the subsection dealt with, *viz.*, that relating to conformity to orders, it did not follow that the same strictness should be required in a declaration alleging an injury from defects.

But in a later case, it was laid down, on the authority of the very decision so distinguished, that the name of the person "intrusted with the duty, etc.," must be averred, or the plaintiff must allege that he was ignorant thereof. *Louisville & N. R. Co.* v. *Bouldin* (1895) 110 Ala. 185, 20 So. 325. To the same effect is *Central R. Co.* v. *Lamb* (1899) 124 Ala. 172, 26 So. 969. The ruling in *McNamara* v. *Logan* (1893) 100 Ala. 187, 14 So. 175, *supra*, was, strangely enough, not referred to in either of these later cases.

The conflict of authorities is rendered still more perplexing by another decision, which overrules *Louisville & N. R. Co.* v. *Bouldin* (1895) 110 Ala. 185, 20 So. 325, and lays it down that the name of the person intrusted with superintendence must be averred. *Woodward Iron Co.* v. *Herndon* (1896) 114 Ala. 191, 21 So. 430.

In other cases, moreover, it is laid down that the name of a negligent employee having "charge or control" of a train, etc., must be alleged, or it must be stated that such name was unknown to the plaintiff. *Southern R. Co.* v. *Cunningham* (1895) 112 Ala. 498, 20 So. 630; *Central R. Co.* v. *Lamb* (1899) 124 Ala. 172, 26 So. 969.

The upshot of these rulings, therefore, is simply the establishment of the extremely technical and arbitrary distinction, that if the negligent employee belongs to one of two particular classes of statutory vice principals, his name must be averred, while, if he belongs to the other of those classes, such an averment is unnecessary.

A railroad employee cannot recover from the company, under a count of the complaint alleging that the name of the person guilty of the alleged negligence was unknown to him, where such allegation is disproved by the undisputed evidence. *Alabama G. S. R. Co.* v. *Davis* (1898) 119 Ala. 572, 24 So. 862.

[10] *Woodbury* v. *Post* (1893) 158 Mass. 140, 33 N. E. 86.

[11] *Dick* v. *Boston & A. R. Co.* (1881) 131 Mass. 516.

[12] *Stoffe* v. *Old Colony R. Co.* (1892) 156 Mass. 262, 30 N. E. 1137.

738. Sufficiency of the plea.— A plea stating that, if there was fault, it was that of a fellow servant, has been held sufficiently specific to go to trial upon.[1]

A plea which avers that the plaintiff "knew, or by the use of ordinary care could have known, of said defect" has been held demurrable for the reason that these statutes provide that the employer shall not be liable when the servant knows —not when he might or should have known— of the defect, and fails to give information thereof.[2]

739. Instructions to jury.— To ask a jury in general words whether there was any defect by reason of which the accident happened, or any negligence on the part of an employee having superintendence, is not a proper way of submitting the case to them.[1]

If one charge is first given at the request of the plaintiff, and then another is given at the request of the defendant, eliminating from the case the count of the complaint on which the first charge is based, the most that can be said of the first charge is that it was abstract — an infirmity not demanding a reversal.[2]

740. Provinces of court and jury.— (See generally § 865, *post*) Whether the acts of omission or commission covered by the various sections of these statutes show an absence of due care is a question for the jury, whenever the evidence is such that reasonable men may differ as to the proper inference to be drawn from it.[1] A verdict for the plaintiff, therefore, should not be set aside where there was any evidence to support the cause of action alleged.[2] But an examination of the facts in the cases decided under the statutes shows that they have exercised with considerable freedom their power of controlling the action of juries.

The question whether the material substances constituting the instrumentality which was the immediate cause of the injury were among those covered by the statutes is also one for the jury, where the proper inference from the facts is a matter of doubt, or the facts themselves are a subject of controversy.[3] But a court is almost always warranted in reviewing a verdict for the plaintiff which involves the determination of this question, for the elements of uncertainty

[1] *McNeil* v. *Kinneil Coal Co.* (1898) 25 Sc. Sess. Cas. 4th series, 962.

[2] *Louisville & N. R. Co.* v. *Hawkins* (1890) 92 Ala. 241, 9 So. 271.

[1] *Pritchard* v. *Lang* (1893) 5 Times L. R. 639.

[2] *Bessemer Land & Improv. Co.* v. *Campbell* (1895) 121 Ala. 50, 77 Am. St. Rep. 17, 25 So. 793.

[1] *McCord* v. *Cammell* [1896; H. L. E.] A. C. 57, 65 L. J. Q. B. N. S. 202, 73 L. T. N. S. 634, 60 J. P. 180, per Lord Watson (p. 651).

[2] *Reynolds* v. *Holloway* (1898) 14 Times L. R. 551.

As to the grounds upon which a new trial will be granted under the English judicature act, see generally, Rose, Employers' Liability Act, pp. 142 *et seq.*

[3] *Prendible* v. *Connecticut River Mfg. Co.* (1893) 160 Mass. 131, 35 N. E. 675

which render the finding of a jury conclusive are seldom present. See cases cited *supra* in §§ 668-670, 676.

It is also for the jury in the first instance to say whether the negligent employee was a superintendent (see §§ 680 682, *supra*), or a person to whose orders the plaintiff was bound to conform (see § 691, *supra*), or a person delegated with the authority of the employer to make rules or to give particular instructions (see § 701, *supra*), or a person in charge of one of the various appliances specified in the provision relating to negligence in the operation of railways (see §§ 703 707, *supra*). But in this connection again the control of the jury over the result is often merely nominal.

As to the functions of court and jury in determining whether inaccuracies in the notice were prejudicial to the defendant, see § 712, *supra*.

741. Removal of actions to higher courts.— To induce a judge of the English supreme court to grant a writ of certiorari to remove an action from the county court, something more is necessary than an affidavit which merely alleges in substance that the sufficiency of the notice, and other questions upon which the liability of the defendant depends, are of considerable complexity and legal difficulty. Special circumstances such as are not likely to arise in cases of this type, but which may arise in exceptional instances, must be averred in order to justify a removal. Under any other doctrine the intention of the legislature that the county court should be the regular tribunal for the trial of these actions might be frustrated in the great majority of cases.[1]

As to the power of removal generally under the judicature acts and its amendments, and the county court acts, see Rnegg, Employers' Liability Act, pp. 138 *et seq.*

741a. Appointment of assessors.— Notwithstanding that the English act merely provides that assessors may be appointed "for the purpose of ascertaining the amount of compensation," Mr. Rnegg (Employ-

[1] *Munday* v. *Thames Iron-works & Shipping Co.* (1882) 47 L. T. N. S. 351, L. R. 10 Q. B. Div. 59, 52 L. J. Q. B. N. S. 119. See also *M'Evoy* v. *Waterford S. S. Co.* (1885) Ir. L. R. 16 C. L. 291.

In *Queen* v. *London Court Judge* (1885; C. A.) L. R. 14 Q. B. Div. 905, 54 L. J. Q. B. N. S. 330, 52 L. T. N. S. 537, 33 Week. Rep. 700. Affirming (1884) L. R. 12 Q. B. Div. 818, 54 L. J. Q. B. N. S. 301, 33 Week. Rep. 521, 49 J. P. 407, it was held that § 39 of the county courts act 1856, providing for a stay of the proceedings on certain conditions, was intended to apply to actions which could be brought either in one of the superior courts or a county court, and was therefore not applicable to an action brought under the employers' liability act, since by § 6 of that act the action must be brought in the county court.

ers' Liability Act, p. 127) thinks that it was really intended that the assessors should serve the same purpose as assessors in county court actions generally; that is to say, they are to give such advice and assistance as persons of skill and experience in the matter to which the action or matter relates are qualified to give. If this conjecture is well-founded the same construction would be placed on the similar language of the Canadian and Australian acts. But so far as judicial authority goes, the point is apparently still an open one.

742. Questions which may be reviewed on appeal.— In England an appeal from a county court to the high court is only allowed on questions of law. See Rnegg. Employers' Liability Act, p. 117. It is a condition precedent to the right of appeal that the question on which it is desired to appeal should have been raised before the county court judge;[1] and that it should have been raised at or immediately after the appeal.[2]

As the American statutes contain no specific provisions affecting the procedure on appeal, the actions under them are in this respect governed by the same rules as actions at common law.

[1] *Rhodes* v. *Liverpool Commercial Invest. Co.* (1879) L. R. 4 C. P. Div. 425; *Clarkson* v. *Musgrave* (1882) L. R. 9 Q. B. Div. 386, 51 L. J. Q. B. N. S. 525, 31 Week. Rep. 47; *Cook* v. *Gordon* (C. T.) 61 L. J. Q. B. N. S. 445; *Allmarch* v. *Walker* (1885; Q. B. D.) 78 L. T. Journ. 391.

[2] *Bessemer Land & Improv. Co.* v. *Campbell* (1898) 121 Ala. 50, 77 Am. St. Rep. 17, 25 So. 793.

CHAPTER XXXVIII.

STATUTES OF ARKANSAS, MISSISSIPPI, MISSOURI, MONTANA, OHIO, SOUTH CAROLINA, TEXAS, UTAH.

743. Scope of chapter.

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744. Effect of this section.

744a. Text of statute, § 2.

745. Effect of this section.

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D. MONTANA.

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749. Statutes as to railway service.

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750. What employees are vice principals under this section.

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751. Who are fellow servants under this section.

751a. Other provisions of Texas statute.

H. UTAH.

751b. Text of statute.

752. Construction of this provision.

743. Scope of chapter.— Another group of statutes which embody

provisions of a similar character, and which may, therefore, be appropriately reviewed together, comprises the enactments by which the doctrine of common employment, as it is applied in the majority of jurisdictions, has been modified in the states specified above. These enactments render applicable to corporations generally, or to railway companies, either one or the other of two theories which, as already explained, have been adopted, independently of statute, in several jurisdictions (see §§ 500–506, and 521–524, *ante*),—the theories, namely, that all superior employees are vice principals as regards their subordinates, and that coservice is not a bar to an action for injuries caused by the negligence of an employee in a different department.

A. Arkansas.

743a. Text of statute, § 1.—Laws of 1893, chap. 46, p. 68; Sandels' & H. Dig. chap. 130, §§ 6218, 6219.

The contents of this statute are as follows:

An Act Defining and Regulating Contracts:—**Sec. 1. That all persons engaged** in the service of railway corporations, foreign or domestic, doing business in this state, who are intrusted by such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, and who have the authority to direct any other employee in the performance of any duty of such employee, are vice principals of such corporation, and are not fellow servants with such employee.

744. Effect of this section.—Railway companies have been held liable for injuries received by a subordinate owing to the negligence of a foreman of a section gang;[1] and of an engine foreman who controlled a crew engaged in switching and moving cars in a yard, and who had no power to employ the men, but only reported them for negligence or refusal to do their work.[2]

A white man associated with colored laborers in the employment of a railroad company in setting a post is not made a vice principal because such laborers regard him as a boss, or because he assumes some sort of control without authority from the company.[3]

[1] *St. Louis, I. M. & S. R. Co.* v. *Rickman* (1898) 65 Ark. 138, 45 S. W. 56, holding the foreman to be guilty of negligence in failing to order the removal of a hand car from the track until it was too late to prevent its being struck by an approaching train, and in failing to warn the section men who were attempting to remove it, of the approach of the train.

[2] *St. Louis, I. M. & S. R. Co.* v. *Tuohey* (1899) 67 Ark. 209, 77 Am. St. Rep. 109, 54 S. W. 377.

[3] *Hunter* v. *Kansas City & M. R. &*

744a. Text of statute, § 2.—Sec. 2. That all persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being intrusted by such corporations with any superintendence or control over their fellow employees are fellow servants with each other: Provided, nothing herein contained shall be so construed as to make employees of such corporation in the service of such corporation fellow servants with other employees of such corporation engaged in any other department or service of such corporation. Employees who do not come within the provisions of this section shall not be considered fellow servants.

745. Effect of this section.— A fireman and engineer on the same

Bridge Co. (1898) 29 C. C. A. 206, 54 U. S. App. 853, 85 Fed. 379. The court said: "We have, under this evidence, the case of three men working together in the common purpose of setting a post in a hole prepared to receive it. That Snowden received larger pay than Hunter, or that in some respects his work was not the same as that done by his associates, does not determine that he was a vice principal. The determining question under this statute is whether he was intrusted by the corporation with the authority of superintendence, control or command of those with whom he was associated in the service of the company, or with authority to direct these other employees in the performance of their duty to the common master. When, as in this case, it is shown that several persons are associated together and working together to a common purpose in the same department, they are presumed, under the 2d section of the Arkansas statute, to be fellow servants, and the burden is upon him who claims that a different relation existed, to establish that one was a vice principal. . . . That Hunter should regard Snowden as a 'boss,' or that he assumed to have some sort of control over those associated with him, will not make him the representative of the corporation. The authority [of a vice principal] to control and direct others must be an authority 'intrusted by such corporation' to him. His authority may, of course, be implied from the very nature of the duties imposed upon him, but he is not a vice principal merely because his higher character, greater intelligence, superior race, or natural habit of command caused him to assume an authority not intrusted to him by the common master, or to be regarded and treated with a respect due to his personal qualities rather than to his delegated power of control by those associated with him. . . . The mere fact that this common carpenter using the gauge and level should in their use have occasion to 'direct' that his fellow laborers should elevate or lower a post or should move it a few inches, more or less, nearer or further from the line of the track, did not vest him with such 'authority to direct' as was contemplated by the 1st section of this act, any more than would be the case if one of the other three were to throw a few spadesful more or less of earth into the hole, or to use more or less strokes of the rammer in tamping the earth around the post, or any other common direction like that. If Snowden should, in adjusting his gauge or using his level, have committed some error of judgment which was detected by one of the other three colaborers, and he should say to Snowden, 'Put your level here,' or 'your gauge here,' he would be in as much authority to give directions about the common work as Snowden would; and it is not such natural, incidental, and necessary 'direction' and 'control' as must occur whenever two or more work together to which this statute refers, but that kind of master-like command which involved the element of superior will and authority far more than Snowden had in this case."

The fact that the employee alleged to be a vice principal slipped, the result being that the post which was being set up fell on and injured a laborer, was also held not to be negligence, where the slipping was due to the character of the ground on which he was obliged to stand, and all the precautions necessary to the seeming exigencies of the situation were observed. *Hunter* v. *Kansas City & M. R. & Bridge Co.* (1898) 29

engine are fellow servants of the "same grade," where neither is exercising superintendence or control over the other.[1]

The foreman of a switching crew and a switchman of another crew are in different departments, and are not fellow servants.[2] The inspector in a roundhouse, who is subject to the authority of the mechanical department of the railroad company, is not a fellow servant of a fireman while on the road, who is subject to the authority of the transportation department.[3] The members of two different switching crews are not fellow servants.[4]

Sec. 3. No contract between the employer and employee, based upon the contingency of the injury or death of the employee, limiting the liability of the employer under this act, or fixing damages to be recovered, shall be valid and binding.

B. Mississippi.

745a. Text of Constitution and statutes.—Const. 1890, art. 7, § 193. This constitutional provision, which, with the exception of the last sentence, was re-enacted very nearly in the same words in the Code of 1892, § 3559, and in Laws of 1896, chap. 87, runs as follows:

Every employee of any railroad corporation (by chapter 87 of the Laws of 1896, this provision was amended so as to make it applicable to employees of all corporations)[1] shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employees, as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured; and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall not be a defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. Where death results from any injury to an employee the legal or personal representative of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons.[2] Any contract or agreement, express or implied, made by any employee

C. C. A. 206, 54 U. S. App. 653, 85 Fed. 379.

[1] *Kansas City, Ft. S. & M. R. Co.* v. *Becker* (1897) 63 Ark. 477, 39 S. W. 358.

[2] *St. Louis, I. M. & S. R. Co.* v. *McCain* (1900) 67 Ark. 377, 55 S. W. 165.

[3] *Kansas City, Ft. S. & M. R. Co.* v. *Becker* (1899) 67 Ark. 1, 46 L. R. A. 814, 77 Am. St. Rep. 78, 53 S. W. 406.

[4] *St. Louis, I. M. & S. R. Co.* v. *McCain* (1900) 67 Ark. 377, 55 S. W. 165 (negligence inferable where cars are kicked at night down a transfer track at a high rate of speed, without any attempt to ascertain whether the track is clear).

[1] See *Brooks* v. *Mississippi Cotton Oil Co.* (1899) 76 Miss. 874, 25 So. 479, where an instruction ignoring this change was held erroneous.

[2] As the effect of this sentence was

to waive the benefit of this section shall be null and void, and this section shall not be construed to deprive any employee of a corporation or his legal or personal representative, of any right or remedy that he now has by the law of the land. The legislature may extend the remedies herein provided for to any other class of employees.

By the Laws of 1898, chap. 66, the act of 1896 was amended by adding a section to the effect that pending suits should not be affected by any of its provisions.

745b. Provisions construed.— *a. Superior servants.*—The constitutional provision is not applicable, unless the delinquent servant is superior to the other in such a sense that the former can exercise a discretion and judgment in controlling the actions of the latter.[1]

A railroad engineer is not a superior agent, officer, or person having the right to control or direct the services of a brakeman on the train.[2]

The engineer of a switch engine is not a superior agent or officer of the railway company as to a yard master.[3]

The "tender" of a railway drawbridge is a fellow servant of a section hand, as he is not a superior officer in charge of work.[4]

b. Servants in different departments.—A fireman on a locomotive engine and a telegraph operator are engaged in different departments and about a different piece of work.[5]

that the statute did not inure to the benefit of parent, child, husband, or wife (see *Illinois C. R. Co.* v. *Hunter* [1892] 70 Miss. 471, 12 So. 482), it was amended thus by the Laws of 1896, chap. 87: Where death ensues from an injury to an employee an action may be brought in the name of the widow of such employee for the death of her husband, or by the husband for the death of his wife, or by the parent for the death of a child, or in the name of the child for the death of an only parent, for such damages as may be suffered by them respectively, by reason of such death, the damages to be for the use of such widow, husband, or child, except that in case the widow should have children the damages shall be distributed as personal property of the husband. The legal or personal representative of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. In every such action the jury may give such damages as shall be fair and just with reference to the injury resulting from such death to the persons suing.

[1] *Fencick* v. *Illinois C. R. Co.* (1900) 10 C. C. A. 369, 100 Fed. 247, denying recovery where one member of a switching crew, whose business it was to distribute cars on the various tracks in the yard, to make up the trains, was injured by the negligence of another member of the crew whom the yard master had appointed foreman for the night of the accident, and to whom he gave the switch list, the evidence being that such foreman merely called out the track on which a car was to be switched, as fixed by usage or by the switch list, and had no authority to command the switchman to pursue any particular line of action, and that he was of the same rank in the service as the others of the crew, and neither employed nor had power to discharge them.

[2] *Evans* v. *Louisville, N. O. & T. R. Co.* (1893) 70 Miss. 527, 12 So. 581.

[3] *Farquhar* v. *Alabama & V. R. Co.* (1900) 78 Miss. 193, 28 So. 850.

[4] *Illinois C. R. Co.* v. *Bishop* (1899) 76 Miss. 758, 25 So. 867. So far as the report shows, the question of a difference of department was not raised.

[5] *Illinois C. R. Co.* v. *Hunter* (1892) 70 Miss. 471, 12 So. 482.

A telegraph operator and a fireman are engaged "about a different piece of work," in such a sense that they are not coservants.[6]

Laws of 1897, chap. 96; Rev. Stat. 1899, § 2873. As to the constitutionality of this statute, see § 615, subd. b, *ante*.

C. Missouri.

746. Text of statute, § 1.— The contents of Mo. Rev. Stat. 1899, § 2873, are as follows:

An Act to Define the Liabilities of Railroad Corporations in Relation to Damages Sustained by Their Employees, and to Define who are Fellow Servants, and who are not Fellow Servants, and to Prohibit Contracts Limiting Liability under this act.

Sec. 1. Liability of railroad corporations for damages to agents or servants—contributory negligence a defense.—That every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad, by reason of the negligence of any other agent or servant thereof: Provided, That it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injuries.

746a. Effect of this section.—This statute is *in pari materia* with Rev. Stat. 1889, § 2666, defining the term "railroad corporations," and both statutes must be construed together.[1]

All employees whose functions are directly connected with the running of trains are, of course, covered by the words "engaged in the operation of such railroad."[2] But the phrase is not applicable to such employees alone. To bring a servant within the statute it is merely necessary that he should be "engaged in some service that is necessary to the movement of trains."[3]

746aa. Text of statute, §§ 2-4.—See. 2. Vice principals defined. That all persons engaged in the service of any such railroad corporation doing business

[6] *Illinois C. R. Co.* v. *Hunter* (1892) 70 Miss. 471, 12 So. 482.

[1] *Powell* v. *Sherwood* (1901) 162 Mo. 605, 63 S. W. 485.

[2] In a case where an extra freight train was dispatched, with orders to look out between two specified points for a work train which on that section of the road had the right of way, except as to regular trains, it was held (1) that the failure of the train dispatcher to notify the operators of the work train of the approach of the freight, so that flags could have been set, constituted negligence; (2) that the persons operating the freight train were guilty of negligence in omitting to send a flagman to locate the work train; and that, as the cars of the work train were being pushed before the engine, the failure to post a flagman on the hind car to warn the engineer of approaching danger, as required by the rules of the company, constituted negligence. *Kinard* v. *Omaha, K. C. & E. R. Co.* (1901) 164 Mo. 270, 64 S. W. 124.

[3] *Stubbs* v. *Omaha K. C. & E. R.* (1900) 85 Mo. App. 192, holding that an employee engaged in replacing old rails by new ones could recover for the negligence of a coemployee engaged in the same work.

in this state, who are intrusted by such corporation with the authority of superintendence, control, or command of other persons in the employ or service of such corporation, or with the authority to direct any other servant in the performance of any duty of such servant, or with the duty of inspection or other duty owing by the master to the servant, are vice principals of such corporation, and are not fellow servants with such employees.

Sec. 3. Fellow servants defined.—That all persons who are engaged in the common service of such railroad corporation, and who, while so engaged, are working together at the same time and place, to a common purpose of same grade, neither of such persons being intrusted by such corporation with any superintendence or control over their fellow employees, are fellow servants with each other: Provided, That nothing herein contained shall be so construed as to make any agent or servant of such corporation in the service of such corporation a fellow servant with any other agent or servant of such corporation engaged in any other department or service of such corporation.

Sec. 4. Contracts limiting liability declared invalid.—No contract made between any railroad corporation and any of its agents or servants, based upon the contingency of the injury or death of any agent or servant, limiting the liability of such railroad corporation for any damages under the provisions of this act, shall be valid or binding, but all such contracts or agreements shall be null and void.

Approved February 9, 1897.

D. Montana.

746b. Text of statute.— By a territorial act originally passed in 1873, it was provided as follows:

In every case the liability of the corporation to a servant or employee acting under the orders of his superior shall be the same in cases of injury sustained by default or wrongful act of his superior, or to an employee not appointed or controlled by him, as if such servant or employee were a passenger. See also Rev. Stat. 1879, § 31, p. 471; Comp Stat. 1887, chap. 35, § 697; Mont. Code 1895, § 905.

747. Effect of this statute.— Under this provision a railway company was held liable for the negligence of an engine hostler, resulting in injury to his helper;[1] and damages were recovered against a mining company for the negligence of one who employed and discharged employees in a mine, supplied materials and implements for its development, and had full control of the property, employees, tools, and materials, and complete charge of the management and development of the mine, no other officer or agent being present at the mine.[2]

It was also laid down that the effect of the provision was to give a cause of action against the employer for the wrongful act of any su-

[1] *Wastl* v. *Montana Union R. Co.* (1895) 16 Mont. 484, 41 Pac. 273 (accumulation of *débris* allowed in a tunnel prevented the escape of a miner).
[2] *Kelley* v. *Fourth of July Min. Co.* (1900) 24 Mont. 159, 61 Pac. 9.

perior servant, whether or not he exercised any control over the injured person before or at the time of the accident.[3]

But as the statute imposed a greater burden upon domestic, than upon foreign companies, it was declared to have been annulled by art. 15, § 11, of the Constitution, which enacts that no company formed under the laws of any other country, state, or territory, shall exercise within the state of Montana any greater rights or privileges than those possessed by corporations of the same or similar character created under the laws of Montana.[4]

E. Ohio.

747a. Text of statute, §§ 1, 2.— Act of April 2, 1890; 87 Ohio Laws, p. 149; Bates's Anno. Stat. 1787–1902, §§ 3365–20–22.

The contents of this statute are as follows:

Certain Regulations for Protection of Railroad Employees.

Sec. 1. Be it enacted by the general assembly of the State of Ohio, That it shall be unlawful for any railroad or railway corporation or company owning an operating, or operating, or that may hereafter own or operate, a railroad in whole or in part in this state, to adopt or promulgate any rule or regulation for the government of its servants or employees, or make or enter into any contract or agreement with any person engaged in or about to engage in its service, in which, or by the terms of which, such employee in any manner, directly or indirectly, promises or agrees to hold such corporation or company harmless on account of any injury he may receive by reason of any accident to, breakage, defect, or insufficiency in the cars or machinery and attachments thereto belonging, upon any cars so owned and operated, or being run and operated, by such corporation or company, being defective; and any such rule, regulation, contract, or agreement shall be of no effect. It shall be unlawful for any corporation to compel or require, directly or indirectly, an employee to join any company association whatsoever, or to withhold any part of an employee's wages or his salary for the payment of dues or assessments in any society or organization whatsoever, or demand or require either as a condition precedent to securing employment or being employed; and such railroad or railway company shall not discharge any employee because he refuses or neglects to become a member of any society or organization. And if any employee is discharged, he may, at any time within ten days after receiving a notice of his discharge, demand the reason of said discharge, and said railway or railroad company thereupon shall furnish said reason to said discharged employee in

[3] *Northern P. R. Co.* v. *Muse* (1894) 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. 114 (railway company held liable to a fireman of one train for the negligence of the conductor of another train in leaving a switch open), Reversing (1893) 57 Fed. 283, and approving construction given to the statute by Shiras, J., in *Ragsdale* v. *Northern P. R. Co.* (1890) 42 Fed. 383.

[4] *Criswell* v. *Montana C. R. Co.* (1896) 18 Mont. 167, 33 L. R. A. 554, 44 Pac. 525 (conductor held not to be a vice principal), Reversing (1895) 17 Mont. 189, 42 Pac. 767. The view of the court was that the Constitution was "self-executing as a prohibition, but not as an affirmative imposition upon, or securement to, foreign companies of the rights or privileges only accorded by state laws to domestic companies."

writing. And no railroad company, insurance society or association, or other person shall demand, accept, require, or enter into any contract, agreement, or stipulation with any person about to enter or in the employ of any railroad company, whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company, thereafter arising for personal injury or death, or whereby he agrees to surrender or waive, in case he asserts the same, any other right whatsoever; and all such stipulation and agreements shall be void. And every corporation, association, or person violating, or aiding or abetting in the violation of, this section shall for each offense forfeit and pay to the person wronged or deprived of his rights hereunder the sum not less than fifty dollars ($50) nor more than five hundred dollars ($500), to be recovered in a civil action.

Sec. 2. It shall be unlawful for any such corporation to knowingly or negligently use or operate any car or locomotive that is defective, or any car or locomotive upon which the machinery or attachments thereto belonging are in any manner defective. If the employee of any such corporation shall receive any injury by reason of any defect in any car or locomotive, or the machinery or attachments thereto belonging, owned and operated, or being run and operated, by such corporation, such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is so sustained; and when the fact of such defect shall be made to appear in the trial of any action in the courts of this state, brought by such employee, or his legal representatives, against any railroad corporation for damages on account of such injuries so received, the same shall be prima facie evidence of negligence on the part of such corporation.

747b. Effect of these sections.— The operation of a flat car having no side or end boards or standards to prevent heavy stones which are loaded on it from falling off is not within the prohibition of this section.[1]

747c. Text of statute, § 3.—Sec. 3. That in all actions against the railroad company for personal injury to, or death resulting from personal injury of, any person, while in the employ of such company, arising from the negligence of such company or any of its officers or employees, it shall be held, in addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employee of such company, is not the fellow servant, but superior, of such other employee; also that every person in the employ of such company, having charge or control of employees in any separate branch or department, shall be held to be the superior, and not fellow servant, of employees in any other branch or department who have no power to direct or control in the branch or department in which they are employed.

748. Effect of this section.—A chief inspector of cars, having other inspectors under him, is not a fellow servant of a brakeman.[1]

A train despatcher is a representative of the railroad company as regards a locomotive engineer, both at common law and under this

[1] *Toledo & O. C. R. Co.* v. *Beard Erick* (1894) 51 Ohio St. 146, 37 N. E. 128.
(1898) 20 Ohio C. C. 681.
[1] *Columbus, H. Valley & T. R. Co.* v.

statute. But telegraph operators are not vice principals as to train men under the statute, any more than they were prior to its enactment.[2]

[1] *Baltimore & O. R. Co.* v. *Camp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952. The court said: "In our opinion the telegraph operator has neither power nor authority to direct or control the engineer. He is only the medium through whom orders from the train dispatcher are communicated to the engineer and the conductor. He gives notice to the engineer and the conductor. He gives notice to the engineer of certain facts, from which the duty of the engineer arises, under the rules of the company. The conductor is in control of the train, and the engineer and the brakeman are his subordinates. Suppose that the conductor sends an order to the engineer by the brakeman. Does the brakeman thereby become a person actually having power or authority to direct or control the engineer? Manifestly not. When a switchman throws a switch, and signals to the engineer that he has done so, is he actually exercising power or authority to direct or control the engineer? Clearly not. The duty of the switchman, in such a case, is merely to give notice to the engineer of the condition of affairs upon which the engineer is required to act. And so the engineer's duty to act upon the signal from the telegraph operator does not come from any authority or power to control reposed in the telegraph operator. The authority or control is in the train dispatcher, who gives the order, not in [illegible] mere transmitter of it. When there [illegible] no order, but the telegraph oper[illegible] conveys by signal, to the engineer, [illegible]rmation as to the position of other [illegible]ns, or the condition of the track ahead, the operator is the mere register of the fact; a mere notifier; a mere giver of information, upon which the engineer, under the rules of the company, at once knows his duty, and acts accordingly. . . . There is much less ground for holding that a telegraph operator has any control or authority over an engineer or a conductor, than there is that the engineer has control or authority over a brakeman. The engineer exercises discretion to determine when the brakes shall be put on, and when not. Knowing that his signals are to be acted on by the brakeman, and having discretion to give them as he thinks it proper, in the running of the train, he may, with some plausibility be said to exercise actual power and authority over the brakeman, though under the decision of the supreme court of Ohio, as we have seen, this is not the proper view. But a telegraph operator in giving notice to an engineer of a train about to pass, has no discretion whatever. He gives the exact notice which the train dispatcher orders him to give, and no other. He exercises no discretion. He is a mere messenger boy. He is the vehicle by which the order is carried. But it is said that while this might otherwise be a reasonable and proper construction of the statute, there is a clause in section [illegible] which imposes upon the court the duty of giving to the words 'actually having power or authority to direct and control,' a meaning they do not usually have. . . . The argument is that because, by the decisions of the supreme court of Ohio previous to the passage of this act, where one employee actually had power or authority to direct or control another employee, the two were not fellow servants, and the master was liable for the negligence of the superior, therefore the court must now strain the meaning of the words 'actually having power or authority to direct or control,' so as to give them a wider effect than the then-prevailing rule of liability, and so satisfy the legislative intent expressed in the words, 'in addition to the liability now existing by law.' From this necessity for a strained construction, the court is urged to hold that mere mediums of communicating orders, mere signal givers, mere registers of facts, exercise actual power and authority to direct and control the persons to whom it is merely their duty to communicate information or orders issued by others. It is true that in the construction of a statute it is the duty of the court, when it can, to give effect and meaning to every clause and part of it. It is also true that, before the passage of the act, it was uniformly held by state courts of Ohio that any person in the employ of a railroad company or other master, actually having power or authority to direct or control any other employee of the same master, was his superior, and that the master was liable for injury to the inferior caused by the

An engineer in charge of a locomotive on a railroad train, having authority to direct or control a fireman in a branch or department of the service of the company separate from that of a brakeman on another train, is one of the employees covered by the descriptive words in the latter part of the section, and is, therefore, as to such brakeman, a vice principal.[3]

The negligence of a superior servant of a railroad company causing injury to an employee under his control renders the employee liable, although the negligence was in respect of the performance of work of the kind done by the injured person, and not in the performance of any duty imposed by law on the master personally.[4]

F. South Carolina.

748a. Text of Constitution.— Const. 1895, art. 9, § 15.

The contents of this constitutional provision are as follows:

Sec. 15. Every employee of any railroad corporation shall have the same rights

negligence of such superior. . . . But the words, 'in addition to the liability now existing by law,' can have no effect to pervert the ordinary meaning of language. Courts are not compelled to stultify themselves for the purpose of reconciling inexplicable inconsistencies of legislatures; nor, in this case, is it necessary for the court to do so. The second provision in section 3, namely, that the superior in one branch or department shall not be the fellow servant of a subordinate in another branch, does add to the liability of the railway companies under the decisions of the Ohio courts, as they were at the time of the passage of this act. . . . The words, 'in addition to the liability now existing by law,' therefore, may be given effect by referring them to this latter provision of the section. Taking the parts of the section together, it would seem that the first clause was introduced as merely declaratory of the law then existing, for the purpose of making fuller and clearer the meaning of the legislature with reference to the second clause. In commenting on the first clause, and the alleged implication in the statute that it increased the liability of railroad companies, Judge Bradbury, in delivering the opinion in *Cincinnati, H. & D. R. Co.* v. *Margrat* (1894) 51 Ohio St. 130, 37 N. E. 11 (see next note), said: 'The remedy was so complete, where the relation of superior and subordinate actually existed that the statute here could have little or no operation. Still, it may be said that the statute makes the rules of liability of certain and universal application, denying any exception to its operation, wherever the relation of subordinate and superior exist, and the subordinate is injured by the negligence of 'the superior while engaged in the common service.' There is no suggestion in this, by the court, that the words, 'actually having power and authority to direct and control,' do not describe a relation in which one is the 'superior' and the other the 'subordinate,' within the ordinary meaning of those terms. It seems too plain for further argument that the conductor and the engineer are not subordinates of the telegraph operator, within the statute."

[3] *Cincinnati, H. & D. R. Co.* v. *Margrat* (1894) 51 Ohio St. 130, 37 N. E. 11. Compare *Northern P. R. Co.* v. *Hase* (1894) 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. 114, decided under the Montana statute, § 746b, *supra*.

[4] *Peirce* v. *Van Dusen* (1897) 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693. The court said that, if a different construction were adopted, the Ohio statute would be deprived of all practical value and the manifest object of the legislature in passing it would be defeated.

As to the common-law doctrine under similar circumstances, see §§ 543–547, *ante*.

and remedies for any injury suffered by him from the acts or omission of the corporation or its employees as are allowed by law to other persons not employees when the injury results from the negligence of a superior agent or officer or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous cars or trains or engines voluntarily operated by them. When death ensues from any injury to employees, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, expressed or implied, made by any employee to waive the benefit of this section shall be null and void; and this section shall not be construed to deprive any employee of a corporation, or his legal or personal representative, of any remedy or right that he now has by the laws of the land. The general assembly may extend the remedies herein provided for to any other class of employees.

748b. Effect of this provision.— The right of a servant to recover under this provision is established by any evidence which justifies a jury in finding that the delinquent employee controlled the service of the person injured.[1] An instruction which, in effect, states this doctrine is proper.[2]

G. Texas.

749. Statutes as to railway service.—Laws 1891, chap. 24; Laws 1893, chap. 91; Laws 1897, chap. 6, p. 14. As to the constitutionality of this statute, see § 616, subd. e, *ante*. The several sections of the act by which the liability of railway companies in this state is at present defined are set out below. The second and third of those sections are virtually identical with two contained in the earlier statute, so far as their bearing upon the relations between the servant is concerned. But in the later revision there are, as will be seen, important alterations designed to extend the rights of injured servants with respect to the classes of employers who shall be deemed to be within the purview of this statute.[3]

An Act to Prescribe and Define the Liability of Persons, Receivers, or Corpo

[1] A member of a gang engaged in loading rails on flat cars may recover for injuries caused by the negligence of an employee who was charged with the duty of giving orders to the men when to take hold of rails, when to raise them, and when to throw them on the car. It is immaterial whether the "caller" is appointed by the foreman or selected by the workmen themselves. *Rutherford* v. *Southern R. Co.* (1899) 56 S. C. 446, 35 S. E. 156 (failure to countermand an order).

[2] *Bussey* v. *Charleston & W. C. R. C.* (1898) 52 S. C. 438, 30 S. E. 477.

[3] One of the alterations was intended to counteract the effect of a decision in which a street-railway company was held not to be a "railway corporation" within the meaning of the act of 1893

tions Operating Railroads or Street Railways, for Injuries to Their Servants and Employees, to Define who are Fellow Servants, and to Prohibit Contracts between Employer and Employee Based upon the Contingency of the Injury or Death of the Employee, Limiting the Liability of the Employer for Damages.

Sec. 1. Be it enacted by the Legislature of the State of Texas: That every person, receiver, or corporation operating a railroad or a street railway the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained by any servant or employee thereof while engaged in the work of operating the cars, locomotives, or trains of such person, receiver, or corporation, by reason of the negligence of any other servant or employee of such person, receiver, or corporation; and the fact that such servants or employees were fellow servants with each other shall not impair or destroy such liability.

749a. Construction of this provision.—This provision is virtually of the same tenor as the statutes of Iowa, Kansas, and Minnesota. See chapter XXXIX., *post*. It excludes the defense of coservice where the employee injured was a switchman employed in coupling cars, while a train was being made up in the yard,[1] or was a brakeman

Riley v. *Galveston City R. Co.* (1896) 13 Tex. Civ. App. 247, 35 S. W. 826 adopting the strong intimation to that effect in *Austin Rapid Transit R. Co.* v. *Otto* (1895) 88 Tex. 262, 31 S. W. 180. The court stated its reasons for this conclusion as follows: "The many and great dangers to life and limb to which the numerous persons engaged in operating railroads whose cars are moved by steam were exposed, and the many different departments of labor in which such operatives were employed, were doubtless the principal reasons which induced the legislature to modify the rule of law heretofore governing the relation of master and servant, and prescribing their reciprocal duties and liabilities. But these reasons for changing the law do not exist in respect to those engaged in operating street railways. The same article of the Revised Statutes which authorizes the creation of a private corporation for the construction and maintenance of a street railway authorizes also private corporations for the following purposes: For manufacturing or mining business; for the manufacture and supply of gas; for the supply of light or heat to the public by any means; for the building and navigation of steamboats, and the carriage of persons and property thereon; for the construction and maintenance of mills and gins. The employees of any one of these corporations are exposed to quite as great and as many risks as are the employees of street railways, and yet the legislature has not thought it necessary to make any change in the law for their protection. These considerations are persuasive, if not conclusive, that the intention of the legislature in passing the fellow-servants act was not to include street railways within its provisions, and that the words 'any railway corporation' in the 1st section of the act, should be restricted to the usual and popular import of that term, and that the act should be held not to embrace railways constructed and maintained upon streets and other highways in and contiguous to cities and towns for carrying persons."

Another alteration overrode the effect of a decision denying the applicability of the statute where a line was in the hands of a receiver. *Campbell* v. *Cook* (1894) 86 Tex. 630, 40 Am. St. Rep. 878, 26 S. W. 486.

It has been held that, as the only material difference between the acts of 1891 and of 1893 was that the scope of the law was extended so as to embrace railway corporations operated by a receiver, manager, or any other person, the result of the repeal of the former act and the re-enactment of the provisions as to fellow servants is determined by the rule of construction that, when one statute is repealed by another which is substantially of the same tenor, the binding force of the earlier one is neither destroyed nor interrupted. *San Antonio & A. P. R. Co.* v. *Kelley* (1895) 11 Tex. Civ. App. 569, 32 S. W. 847.

[1] *Missouri, K. & T. R. Co.* v. *Baker* (1900; Tex. Civ. App.) 58 S. W. 964.

coupling cars.[2] But section men engaged in loading a car are not "operating" it in such a sense that one of them may recover for injuries caused by another's negligence.[3]

749b. Text of statutes as to vice principals.—Sec. 2. All persons engaged in the service of any person, receiver, or corporation, controlling or operating a railroad or street railway the line of which shall be situated in whole or in part in this state, who are intrusted by such person, receiver, or corporation with the authority of superintendence, control, or command of other servants or employees of such person, receiver, or corporation, or with the authority to direct any other employee in the performance of any duty of such employee, are vice principals of such person, receiver, or corporation, and are not fellow servants with their coemployees.

In the act of 1891 (entitled "An Act to Define Who are Fellow Servants and Who are not Fellow Servants"), chap. 24, § 1; Sayles's Civ. Stat. Supp. 1888-1893, art. 2430f, this provision was worded as follows:

That all persons engaged in the service of any railroad corporations, foreign or domestic, doing business in this state, who are intrusted by such corporation with the authority of superintendence, control, or command of other persons in the employ or service of such corporation, or with the authority to direct any other employee in the performance of any duty of such employee, are vice principals of such corporation, and are not fellow servants with such employee.

In the act of 1893, § 1 (Rev. Stat. 1895, chap. 12b, art. 4560f), the phraseology was somewhat changed, and the provision assumed the following form:

All persons engaged in the service of any railway corporation, foreign or domestic, doing business in this state, or in the service of a receiver, manager, or of any person controlling or operating such corporation, who are intrusted by such corporation, receiver, or person in control thereof, with the authority of superintendence, control, or command of other persons in the employment of such corporation, or receiver, manager, or person in control of such corporation, or with the authority to direct any other employee in the performance of the duty of such employee, are vice principals of such corporation, receiver, manager, or person controlling the same, and are not fellow servants of such employee.

750. What employees are vice principals under this section.—This section, except in so far as it makes vice principalship depend solely upon the exercise of control, apart from the question whether the controlling employee possessed the power of discharge (see § 523, *ante*), is merely declaratory of the "superior servant" doctrine, which, as will be seen by referring to chapter XXVIII., subtitle D, *ante*, still prevails in Texas under the common law, in all cases in which the statute is not applicable.[1]

[2] *Missouri, K. & T. R. Co.* v. *Baker* (1900; Tex. Civ. App.) 58 S. W. 964.

[3] *Lawrence* v. *Texas C. R. Co.* (1901) 25 Tex. Civ. App. 293, 61 S. W. 342.

[1] The continuity of doctrine under the common law and the statute is indicated by the fact that the decisions under the common law, both in Texas and in other states where the superior servant doctrine is adopted, are sometimes cited as authorities in decisions construing the statute. Thus, the precedent relied upon in *Ft. Worth & D. C. R. Co.* v. *Peters* (1894) 7 Tex. Civ. App. 78, 25 S

The following employees have been held to be vice principals as regards the servants under their control:

A master mechanic in charge of a railway roundhouse;[2] a conductor;[3] a locomotive engineer, as to his fireman;[4] a yard master;[5]

W. 1077, is *Missouri P. R. Co.* v. *Williams* (1889) 75 Tex. 4, 16 Am. St. Rep. 867, 12 S. W. 835. Similarly, in *Texas C. R. Co.* v. *Frazier* (1896) 90 Tex. 33, 36 S. W. 432, the authority cited is *Pittsburgh, C. & St. L. R. Co.* v. *Ramsey* (1882) 37 Ohio St. 665.

An instruction in an action for the death of a railroad employee that if a designated person was intrusted with power to direct such employee and gave any direction as to the performance of the work which was an improper and unusual method of performing it, and it was attended with unusual danger and hazard, and it was negligence to so order, and such negligence, if any, directly caused the death of the employee, plaintiff is entitled to recover, is not objectionable as permitting a recovery if the performance of the work was attended with unusual danger and hazard, without reference to whether or not such danger and hazard were ordinarily incident to the character of the work. *Galveston, H. & S. A. R. Co.* v. *Bonnet* (1896; Tex. Civ. App.) 38 S. W. 813.

Where the evidence justifies the court in assuming that the culpable superior servant was a vice principal for the reason that he had the power of hiring and discharging, and in instructing the jury accordingly, the defendant cannot complain of the failure to submit to them the question whether he had such power. *Austin Rapid Transit R. Co.* v. *Grothe* (1895) 88 Tex. 262, 31 S. W. 196.

[2] *Missouri P. R. Co.* v. *Sasse* (1893; Tex. Civ. App.) 22 S. W. 187.

[3] *Culpepper* v. *International & G. N. R. Co.* (1897) 90 Tex. 627, 40 S. W. 386, Reversing on this point (1897; Tex. Civ. App.) 38 S. W. 818; *Galveston, H. & S. A. R. Co.* v. *Robinett* (1899; Tex. Civ. App.) 54 S. W. 263.

In an earlier case, it had been merely laid down that a conductor was a vice principal as to a brakeman, if it should be shown, as a matter of fact, that he had control over such brakeman, and that the question whether he was "in charge of a train" should have been submitted to the jury. *Moore* v. *Jones* (1897) 15 Tex. Civ. App. 391, 39 S. W. 593.

Where an engine of another railroad, at the request of the complainant, a conductor in the employ of the defendant, was fastened to the rear of his train to assist it, and signals were given by the conductor and the whistle of the other road's engine, which were answered by the starting up of the train, and afterwards, on a "slow-up signal" from the yard foreman, defendant's engineer applied the "emergency air," stopping the train so suddenly that an accident resulted to plaintiff, defendant's servant, the question of the negligence of defendant's engineer was for the jury. *Galveston, H. & S. A. R. Co.* v. *Adams* (1900; Tex. Civ. App.) 55 S. W. 803. Judgment Affirmed in (1900) 94 Tex. 100, 58 S. W. 831.

Where rules of a railroad require trains to be under the control of the conductor, and that no train shall leave a station without a signal from the conductor, the conductor and engineer are not fellow servants as to an injury received by the engineer because of starting his train pursuant to the conductor's orders, notwithstanding both receipted for orders commanding them to hold the train until others had passed, since the rules required all orders to be directed to those who were to execute them. *Galveston, H. & S. A. R. Co.* v. *Brown* (1900; Tex. Civ. App.) 59 S. W. 930. This judgment was reversed in (1901) 95 Tex. 2, 63 S. W. 305, but merely on the ground of contributory negligence in violating a rule.

Railroad employees in charge of a train are not required to use "all reasonable means in their power" to prevent injury to another employee, as it would be exacting too high a degree of care. *Houston, E. & W. T. R. Co.* v. *Hartnett* (1898; Tex. Civ. App.) 48 S. W. 773.

[4] *Houston & T. C. R. Co.* v. *Stuart* (1898; Tex. Civ. App.) 48 S. W. 799. Reversed, but not on this point, in (1899) 92 Tex. 540, 50 S. W. 333.

The question whether or not an engineer is a vice principal of a fireman, so as to render the company liable for the death of the latter from the negligence of the former, was held to be for the jury upon evidence that a rule of the company provides that the engineers are

a yard superintendent, as regards the foreman of yard engines engaged in switching cars about the yard;[6] a foreman of a switching crew;[7] a foreman of track repairers;[8] a foreman of construction work on a bridge.[9]

If the evidence clearly shows that the negligent employees had no actual control over the injured one, the latter cannot recover under the statute.[10]

A servant who merely gives signals is not considered to be a vice principal merely by reason of his discharge of that function.[11] Compare § 522a, *ante*.

in charge of their firemen, and shall report them if they refuse to obey their orders, and extrinsic testimony that the engineers under such rule had such control and direction as to change the relation of fellow servants. *Galveston, H. & S. A. R. Co.* v. *Ford* (1898; Tex. Civ. App.) 46 S. W. 77.

[5] As respects an engineer. *Texas & P. R. Co.* v. *Reed* (1895) 88 Tex. 439, 31 S. W. 1058, Affirming (1895; Tex. Civ. App.) 32 S. W. 118. As respects a brakeman. *International & G. N. R. Co.* v. *Sipole* (1895; Tex. Civ. App.) 29 S. W. 686; *Missouri, K. & T. R. Co.* v. *Hamilton* (1895; Tex. Civ. App.) 30 S. W. 679 (yard master failed to adjust properly a stick to be used to push a derailed car on to the track by force communicated from the engine through another car, the result being that the stick slipped and allowed the cars to come together and crush plaintiff).

[6] *Texas & N. O. R. Co.* v. *Tatman* (1895) 10 Tex. Civ. App. 434, 31 S. W. 333 (switch engine collided with a flat car left standing on the track, possibly by negligence of superintendent, and injured foreman).

[7] *Gulf, C. & S. F. R. Co* v. *Powell* (1901) 25 Tex. Civ. App. 91, 60 S. W. 979 (switch displaced); *Houston & T. C. R. Co.* v. *White* (1900) 23 Tex. Civ. App. 280, 56 S. W. 204 (train was started by foreman without notice, catching decedent between a derailed car and a platform, and was then negligently backed while he was in that predicament).

[8] *Sweeney* v. *Gulf, C. & S. F. R. Co.* (1892) 84 Tex. 433, 31 Am. St. Rep. 71, 19 S. W. 555; *Ft. Worth & D. C. R. Co.* v. *Peters* (1894) 7 Tex. Civ. App. 78, 25 S. W. 1077, Affirmed in (1894) 87 Tex. 222, 27 S. W. 257.

Evidence that defendant company's foreman threw a tie so far from a caboose as to strike a danger post and hit plaintiff, an employee, mashing his leg while he was endeavoring to get out of the way, was sufficient to support a verdict for damages in plaintiff's favor. *Galveston, H. & S. A. R. Co.* v. *Johnson* (1900; Tex. Civ. App.) 57 S. W. 64.

[9] *San Antonio & A. P. R. Co.* v. *McDonald* (1895; Tex. Civ. App.) 31 S. W. 72 (foreman failed to give servant notice of danger from swinging timber).

[10] An engineer of a freight train is not a vice principal of a head brakeman, where the rules of the company subject all the trainmen, including the engineer, to the order of the conductor, and require the engineer to obey the latter unless his orders are in violation of the rules of the company or involve risk, although it is customary for head brakemen, as a matter of convenience, to seek information as to their duties from the engineer, who has the same running orders as the conductor. *International & G. N. R. Co.* v. *Moore* (1897) 16 Tex. Civ. App. 51, 41 S. W. 70.

[11] *Texas C. R. Co.* v. *Frazier* (1896) 90 Tex. 33, 36 S. W. 432, Reversing (1896; Tex. Civ. App.) 34 S. W. 661 and holding that a rule of a company by which an engineer is intrusted with discretion to give signals notifying the brakeman to apply brakes, does not give the former "authority to direct" the latter in the performance of his duties. The court relied upon *Pittsburgh, C. & St. L. R. Co.* v. *Ranney* (1882) 37 Ohio St. 665, a common-law decision, and stated its views as follows: "The purpose of the statute was to impute to the master the negligence of an employee upon whom he has conferred authority or power to influence the action or volition of another employee in the performance of his duties. Under the common-law rule, as settled in the state before the statute, the negligence

Where one employee is normally in control of another, so as to be a vice principal under the statute, a rule of the railway company which empowers a subordinate to exercise an independent judgment when certain contingencies arise does not operate so as to render the two employees fellow servants during such period as the subordinate undertakes to act upon his own responsibility in the manner thus authorized.[12]

of an employee would not have been imputed to the master unless he had the power to employ and discharge, it being assumed that such power was necessary to subject the will of the latter to that of the former. The statute, however, is based upon the theory that the authority or power in one employee to superintend, control, or command, or direct another employee in the performance of his duties, as effectually influences and subjects to the former the will of the latter as does the power to employ and discharge. But it was not the purpose of the statute to impute to the master the negligence of an employee upon whom he had conferred no such power, but had merely imposed the duty, in certain contingencies arising in the course of his employment, of giving a signal whereby another employee would know that the occasion had arisen for him to perform some duty imposed upon him by the rules governing his employment, leaving such employee free to perform such duty in his own way under such rules. In such a case there is no subjection of the will of one to that of the other. . . . We are of the opinion that the signal given by the engineer for brakes was a mere notice to the brakeman, Frazier, that the occasion had arisen for him to perform a duty imposed upon him by the rules; that the fact that the engineer was intrusted by the company with the discretion of determining when the brakes should be applied, and to signal therefor, did not give him any 'authority of superintendence, control, or command,' or 'authority to direct' Frazier in the performance of his duties; that Frazier, in attempting to set brakes in the performance of his duties, was governed and controlled by the direction and command of the rules, and not of the engineer; and that, therefore, under the statute, they were 'in the same grade of employment,' and fellow servants."

shows that under the rules of the defendant company the conductor had general superintendence over the movements of the train, and command of all the employees engaged in its operation; but it also tended to show that, when the safety of the train became involved, the engineer was no longer subject to the absolute control of the conductor, but was empowered to act upon his own judgment. The written rule of the company as to the authority of these employees was read in evidence, and is as follows: 'All trains will be run under the direction of conductors, except when their directions conflict with rules, or involve risks, in which case the engineer will be held equally responsible.' The contention seems to be that whenever a risk became involved, and the engineer saw proper to stop his train in order to avoid it, for the reason that he was not then subject to the control of the conductor, they became fellow servants, and so remained as long as that state of affairs continued to exist. But, as we have previously intimated, we are of the opinion that this position cannot be maintained. Merely because, by reason of the engineer's superior technical knowledge and skill in operating the machinery, it was not deemed advisable to empower the conductor to direct the action of the engineer in certain contingencies, it does not follow that the latter was not under the general superintendence and control of the former. The exception emphasizes the rule. Conceding that, in case of danger, the engineer has power to stop the train, does the conductor cease to have a general superintendence over the train in case he sees proper to exercise that power? The conductor's authority is not abrogated, but merely restricted for the occasion. . . . The mere fact that upon the happening of some contingency the engineer may act independently of the conductor does not, for the occasion, change the general relation of subordination existing between them. The conductor still has the general con

[12] In *Culpepper v. International & G. N. R. Co.* (1897) 90 Tex. 627, 40 S. W. 386 the court said: "The testimony

A superior employee does not cease to be a vice principal within the meaning of the statute, while he is performing the duties of a mere servant.[13]

750a. Text of statutes as to common service.—Sec. 3. All persons who are engaged in the common service of such person, receiver, or corporation, controlling or operating a railroad or street railway, and who, while so employed, are in the same grade of employment and are doing the same character of work or service and are working together at the same time and place and at the same piece of work and to a common purpose, are fellow servants with each other. Employees who do not come within the provisions of this section shall not be considered fellow servants.

The corresponding section (2) in the act of 1891 runs as follows: That all persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together at the same time and place to a common purpose, of same grade, neither of such persons being intrusted by such corporations with any superintendence or control over their fellow employees, are fellow servants with each other: Provided, That nothing herein contained shall be so construed so as to make employees of such corporation, in the service of such corporation, fellow servants with other employees of such corporation, engaged in any other department or service of such corporation. Employees who do not come within the provisions of this section shall not be considered fellow servants.

Section 2 of the act of 1893 (Rev. Stat. 1895, chap. 12b, art. 4560g) is slightly different: All persons who are engaged in the common service of such railway corporation, receiver, manager, or person in control thereof, and who, while so employed, are in the same grade of employment and are working together at the same time and place, and to a common purpose, neither of such persons being intrusted by such corporation, receiver, manager, or person in control thereof, with any superintendence or control over their fellow employees, or with the authority to direct any other employee in the performance of any duty of such employee, are fellow servants with each other: Provided, That nothing herein contained shall be so construed as to make employees of such corporation, receiver, manager, or person in control thereof, fellow servants with other employees engaged in any other department or service of such corporation, receiver, manager, or person in control thereof. Employees who do not come within the provisions of this chapter shall not be considered fellow servants.

trol, subject, for the time, to the engineer's power to act upon his own judgment during the emergency. As soon as the danger is obviated, the power of the conductor again comes into play. To hold that, because the conductor may temporarily be deprived of the power to control his subordinate, the rule of the statute is not to apply, would be, in our opinion, to confine its operation within limits which the legislature did not intend to prescribe."

[13] *Texas & P. R. Co.* v. *Reed* (1895) 88 Tex. 139, 31 S. W. 1058, Affirming (1895; Tex. Civ. App.) 32 S. W. 118 (company held liable for the failure of yard master to signal engineer to moderate speed of car which was about to be kicked on to main track, the consequence being that brakeman could not stop it, and was injured by its collision with a stationary car): *Sweeney* v. *Gulf, C. & S. F. R. Co.* (1892) 84 Tex. 433, 31 Am. St. Rep. 71, 19 S. W. 555 (foreman threw switch prematurely, while hand car was passing over it, and the car was derailed).

The same rule prevailed in Texas under the common law. See § 546, *ante*.

751. Who are fellow servants under this section.—The general effect of this section has been thus explained by the supreme court:

"The distinctive characteristics prescribed by the statute as essential to be found concurring and common to two or more employees in order to constitute them fellow servants are: First, they must be 'engaged in the common service.' As here used, 'service' means the thing or work being performed for the employer at the time of the accident, and out of which it grew, and 'common' means that which pertains equally to the employees sought to be held fellow servants; and therefore 'common service' means the particular thing or work being performed for the employer, at the time of the accident, and out of which it grew, jointly by the employees sought to be held fellow servants. . . . Second, they must be 'in the same grade of employment.' Grade means the rank or relative positions occupied by the employees while 'engaged in the common service.' This definition, however, gives us no certain means of determining whether given employees are in the same or different grades, for it furnishes no test by which their respective ranks or relative positions 'in the common service' can be ascertained. In the absence of a statutory test the grade would have depended upon the test which might have been adopted by the courts,—such as authority one over another, order of promotion, skill in the service, compensation received, etc. We are of the opinion that the legislature anticipated and settled this difficulty in the construction of the word 'grade' by the use of the clause, 'neither of such persons being intrusted with any superintendence or control over their fellow employees,' etc., as explanatory of what was meant by the clause 'in the same grade,' thus adopting the most natural test of grade in the construction of the statute,—authority one over the other while 'engaged in the common service.' Probably the most serious difficulty in arriving at the conclusion that one clause was intended as merely explanatory of the other is the fact that the explanatory clause does not immediately follow the one it explains; but this objection is removed, when we consider that, in the original section, as enacted in 1891, the qualifying clause immediately follows the words 'same grade,' and was evidently intended to explain their meaning. We do not think there was any intention to change the construction of the statute by changing the position of these clauses, and expressing the words 'of employment,' which were clearly implied in said original section. . . . Third, they must be 'working together at the same time and place.' While 'at' indicates nearness in time and place, it does not demand an exact coincidence as to either, but only

that it shall be sufficiently so to afford the employees a reasonable opportunity of observing the conduct of each other, with a view of guarding themselves against injury therefrom. . . . Fourth, they must be working 'to a common purpose.' By this is meant that the acts required of each in the performance of his duties at the time of the accident must be in furtherance of 'the common service.' . . . When these four distinguishing characteristics are found concurring and common to two or more employees, they must be held fellow servants under the statute; otherwise, not."[1]

According to the court of appeals, these statutes show an intention on the part of the legislature to adopt substantially the doctrine of those decisions which proceed upon the theory that employees are not in the same department, and in a common employment, unless they are subject to the same immediate supervision and control.[2] The same court also considers that the statutes abrogate the common-law rule

[1] *Gulf, C. & S. F. R. Co.* v. *Warner* (1896) 89 Tex. 475, 35 S. W. 364, holding that a switchman is a fellow servant with a switch engineer where the latter has no authority or control over the former and they are members of a switching crew, although they belong to different departments, are employed and discharged by different persons, and the duties of the engineer require skilled labor while those of the switchman do not.

In *San Antonio & A. P. R. Co.* v. *Bowles* (1895; Tex. Civ. App.) 30 S. W. 89, the court, in holding that an engineer and a brakeman upon a railway train are not engaged in the same grade of service, and for that reason are not fellow servants, said: "The duties of the former are much more important and are not different from those of the latter, and their successful performance requires special knowledge and training not necessary to perform the services usually rendered by a brakeman. It is true that the second section of the statute above quoted is awkwardly constructed. Nevertheless, we think the words 'of the same grade,' as used in said section, refer to the common service designated in a previous part of the same section. This is the only construction that will give the phrase just quoted a reasonable and practical meaning." This decision was modified on rehearing in (1895; Tex. Civ. App.) 30 S. W. 727, but not in respect to the point here ruled.

[2] For this reason it was held that an engineer running a train on a railroad under the supervision of the train master at one place is not a fellow servant with a yard engineer in charge of a switch engine under the supervision of the yard master at another place. *San Antonio & A. P. R. Co.* v. *Harder* (1895) 11 Tex. Civ. App. 197, 33 S. W. 373. The court said: "The servant having control of others is first declared to stand in the relation of master to those under him, and then, in defining the relation of other employees to each other, it is provided that, in order to be fellow servants, they must be in the common service, in the same department, of the same grade, working together at the same time and place, and to a common purpose. The servants subjected to the control of different superiors are thus treated as being in separate departments and different services. When we consider that many authorities, including some of the later opinions of our supreme court, had expressed the view that sound reason for the existence of the rule as to fellow servants could only be found in cases where the employees were so situated with reference to each other as to be enabled to exercise over the conduct of each other that watchfulness regarded as essential to the efficiency of the service and the safety of the public, we see that the legislature has adopted that view, and intended to enforce it, in the provisions referred to."

that all employees of the same grade over the whole line are fellow servants, as a matter of law.[3]

Servants may be in the same department, according to the system of nomenclature adopted by the railway company itself, and yet in different departments within the meaning of the statute. The company's liability is determined by the relations which the employees actually bear to each other, and not by the mere names that are given by it to the different branches of the service.[4]

The subjoined rulings will show the construction which has been put upon the statute in actions for the negligence of various employees.[5]

[3] *Galveston, H. & S. A. R. Co.* v. *Worthy* (1895; Tex. Civ. App.) 32 S. W. 557, reiterating opinion in (1894; Tex. Civ. App.) 27 S. W. 426 (reversed on another point by the supreme court), that there was no error in refusing to instruct the jury that the engineer on a through freight train is not, as a matter of law, a fellow servant with the engineer and brakeman of a local freight train operated by the same company, where the evidence showed that the delinquent and injured servants were at no time on the day of the death closer to each other than 20 miles,—the one being in charge of one train, the other of another, the one running a gravel train, the other a local freight.

[4] *San Antonio & A. P. R. Co.* v. *Harding* (1895) 11 Tex. Civ. App. 497, 33 S. W. 373, denying that the two engineers concerned (see note 2, *supra*) were coservants, although they were both in the "motive power department," and so, in a sense, in the same department.

[5] (a) *Recovery allowed on the ground that there was no coservice.* A locomotive engineer is not a fellow servant with the train dispatchers and telegraph operators giving orders for the movement of his train. *Hogan* v. *Missouri, K. & T. R. Co.* (1895) 88 Tex. 679, 32 S. W. 1035.

A brakeman and an engineer belonging to different crews operating different trains on the same division of a railroad are not fellow servants. *Houston & T. C. R. Co.* v. *Patterson* (1899) 20 Tex. Civ. App. 255, 48 S. W. 747, Reiterating Opinion in (1897; Tex. Civ. App.) 40 S. W. 442.

An engineer in charge of a road engine in a railroad yard, temporarily, for the purpose of taking out a train, is not a fellow servant of the foreman and members of the yard crew. *Missouri, K. & T. R. Co.* v. *Whitlock* (1897) 16 Tex. Civ. App. 176, 41 S. W. 407.

A brakeman on a train which has been made up and is about ready to leave the yard and start on its regular trip is not a fellow servant with employees in charge of a switch engine which is not at the time engaged in any service or performing any act in reference to such train. *Patterson* v. *Houston & T. C. R. Co.* (1897; Tex. Civ. App.) 40 S. W. 442.

A switchman on one engine is not a fellow servant of a switchman on another engine. *Galveston, H. & S. A. R. Co.* v. *Masterson* (1893; Tex. Civ. App.) 51 S. W. 1091.

An engineer in charge of an engine doing switch work is not a fellow servant with a fireman on another engine also employed in doing switch work in the same yard, where the crews of the two engines are not working together. *Masterson* v. *Galveston, H. & S. A. R. Co.* (1897; Tex. Civ. App.) 42 S. W. 1001, Writ of Error Denied in (1898) 91 Tex. 383, 43 S. W. 875.

Yard crews are not coservants of train crews. *Gulf, C. & S. F. R. Co.* v. *Williams* (1897; Tex. Civ. App.) 39 S. W. 967; *Houston, E. & W. T. R. Co.* v. *Powell* (1897; Tex. Civ. App.) 41 S. W. 695 (train run at speed exceeding that permitted by ordinance); *International & G. N. R. Co.* v. *Johnson* (1900) 23 Tex. Civ. App. 160, 55 S. W. 772 (brakeman injured by negligence of switchman).

Employees of a railroad company operating a train are not fellow servants with track repairers. *Southern P. Co.* v. *Ryan* (1895; Tex. Civ. App.) 29 S. W. 527; *DeWalt* v. *Houston, E. & W. T. R. Co.* (1900) 22 Tex. Civ. App. 403, 55 S. W. 534.

A car repairer who, at the time of the collision in which he was injured, was

A servant who, after a temporary transfer to another place of work, is injured, after resuming his original duties, by conditions created

on a car, under orders to go to the scene of a wreck to repair cars, is not a fellow servant of either a "hostler" employed to run locomotives to and from a roundhouse, nor of a switchman whose negligence caused the injury. *San Antonio & A. P. R. Co.* v. *Keller* (1895) 11 Tex. Civ. App. 569, 32 S. W. 847.

A night crew engaged in loading railroad ties from a stack on cars on one railroad track are not fellow servants with another crew engaged during the daytime in unloading ties from cars on another track on the opposite side of the stack, and placing them on the stack. *Texas & N. O. R. Co.* v. *Echols* (1897) 17 Tex. Civ. App. 677, 41 S. W. 488 (stack put up by night crew fell).

Trainmen are not fellow servants of laborers engaged in unloading cars. Accordingly, in a case where a servant alleged that a train was backed with such force against a car which he was unloading that he was thrown down and injured, the case is properly submitted to the jury, where, although no witness testified in express terms that the jar or jolt caused by the collision of the two cars was unusual, or that it was caused by imperfect appliances, it was shown that the noise of the impact between the two cars was unusually loud, and that the collision was sufficiently violent to throw plaintiff down upon the floor of the car. *Texas & P. R. Co.* v. *Abernathy* (1900; Tex. Civ. App.) 58 S. W. 175.

An allegation of a pleading that lumber was improperly loaded on a car, or, if properly loaded, was negligently permitted by the servants of the railway to become improperly and unsafely loaded, may authorize the submission of the question of negligence of the railway company in running its train at too high a rate of speed, in a suit to recover for causing the death of a section hand by lumber falling from the car. *Houston & T. C. R. Co.* v. *Speake* (1899; Tex. Civ. App.) 51 S. W. 509.

A brakeman is not a fellow servant of an employee of the railroad company engaged in painting a coal house. *Missouri, K. & T. R.* v. *Collins* (1898) 15 Tex. Civ. App. [illegible] 39 S. W. 150.

A station agent [illegible] not a fellow servant of the members [illegible] a train crew employed at the station in coupling cars to their train. *Gulf, C. & S. F. R. Co.* v. *Calvert* (1895) 11 Tex. Civ. App. 297, 32 S. W. 246.

An engine wiper subject to the control of the foreman of the roundhouse is not a fellow servant of employees of the yard master, although it was in the line of duty of both sets of employees to take coal from the car. *Houston & T. C. R. Co.* v. *Talley* (1896) 15 Tex. Civ. App. 115, 39 S. W. 206.

A section hand returning from work to the tool house to place his tools therein was not a fellow servant with other section men engaged in carrying tools to the tool house on a hand car because doing the same character of work, since the means employed in doing the work differentiated its character; nor was he a fellow servant because working at the same piece of work, since he was carrying his tools without their aid. *Long* v. *Chicago, R. I. & T. R. Co.* (1900) 94 Tex. 53, 57 S. W. 802.

Employees of an inside and of an outside foreman of a roundhouse are not coservants. *Texas & P. R. Co.* v. *Scruggs* (1900) 23 Tex. Civ. App. 712, 58 S. W. 186.

An employee of a railroad company while riding in his employer's car from one place to another in obedience to orders is not a fellow servant with the engineer of the train. *Galveston, H. & S. A. R. Co.* v. *Norris* (1894; Tex. Civ. App.) 29 S. W. 950; *Galveston, H. & S. A. R. Co.* v. *Crawford* (1894; Tex. Civ. App.) 29 S. W. 958; *Galveston, H. & S. A. R. Co.* v. *Leonard* (1894; Tex. Civ. App.) 29 S. W. 955.

Brakemen in the employ of a railway company, who are sent on a train to a certain place, are not fellow servants with the engineer in charge of the engine attached thereto, where they are not operating the train, although they are getting their regular pay and are subject to be ordered to take charge thereof. *Galveston, H. & S. A. R. Co.* v. *Waldo* (1894; Tex. Civ. App.) 26 S. W. 1004.

Members of a bridge gang transported with the material used by them from one point to another as their work demands are not fellow servants of the conductor in charge of the train, where he has nothing to do with the loading and unloading of the cars or the work

during his absence by his former associates, and left unremedied through their negligence, is precluded by the statute from recovering.[6]

The mere fact that the negligent and the injured servants are both exercising superintendence over other men will not prevent their being fellow servants within the meaning of the statute.[7]

of building bridges. *Missouri, K. & T. R. Co.* v. *Hines* (1897; Tex. Civ. App.) 39 S. W. 152, holding that the result was not changed by the fact that the conductor was at the time trying to stop one of the gang from injuring the back of the car.

(b) *Recovery denied on the ground of coservice.*—Railroad employees engaged in switching cars are fellow servants with a car repairer who is injured by the failure of the former to give proper notice before running cars on the repair track on which such repairer is engaged in repairing a car. *Texas & P. R. Co.* v. *Campbell* (1894) 6 S. W. 1104; *Campbell* v. *Texas & P. R. Co.* (1897) 16 Tex. Civ. App. 665, 39 S. W. 1105.

The fact that a train parts into two sections, leaving the conductor upon the rear one, does not create between him and the engineer the same relations as exist between the conductors of different trains, and thus destroy the relation of coservice. *Moore* v. *Jones* (1897) 15 Tex. Civ. App. 391, 39 S. W. 593.

A boiler washer and a hostler employed by, and working under, a roundhouse foreman are fellow servants. *Missouri, K. & T. R. Co.* v. *Whitaker* (1895) 11 Tex. Civ. App. 668, 33 S. W. 716.

A member of a gang engaged in repairing a bridge is a fellow servant with a brakeman of the train which hauls him over the road, partly for the purpose of doing his work. *Dustin & N. W. R. Co.* v. *Beatty* (1894) 6 Tex. Civ. App. 650, 24 S. W. 934. See, however, cases cited at the end of the preceding subdivision of this note.

[6] *Allen* v. *Galveston, H. & S. A. R. Co.* (1896) 14 Tex. Civ. App. 3 et. 37 S. W. 171 (plaintiff was injured by the slipping of a plank, which had not been fastened when it was first laid, and was still in that condition when he returned to his former work).

[7] *Texas & N. O. R. Co.* v. *Tatman* (1895) 10 Tex. Civ. App. 434, 31 S. W. 333. There it was held that the foremen of two yard engines engaged in the same yard for shifting and switching cars are fellow servants. The court said: "The proper construction of the statute is, we think, that a servant intrusted with superintendence and control over another is not a fellow servant with such other; but he may, nevertheless, be a fellow servant with employees over whom he has no such superintendence or control. Where there is no such superintendence or control by one over the other, the question depends upon other provisions of the act. The first section of the act furnishes the rule, where there is superintendence or command, providing that the superior is not a fellow servant with his subordinate, but is a vice principal of the corporation. He stands in the relation of vice principal of the corporation only to those who are under him. The second section of the act provides affirmatively what employees are to be considered fellow servants, excluding all who do not come within the definition. They are defined to be 'all persons who are engaged in the common service of such railway company, and who, while so engaged, are working together at the same time and place to a common purpose, of same grade.' All not thus defined are declared not to be fellow servants. And of those who might otherwise fall within the definition given, the statute excludes those intrusted with superintendence or control over their fellow employees. As to these the rule is declared by the first section, and the second section does not alter that rule, but simply excludes those subject to it from the definition given of fellow servants. The second section also excludes from its definition of fellow servants, employees of the railway corporation engaged in different departments or service of such corporation. Tatman and Holzinger were in the same department of service, and the proviso of the statute just referred to does not apply to them. . . . The question then is, whether or not Holzinger and Tatman were working together at the same time and place, and to a common purpose. It is conceded that they were of the same grade. Both were engaged in moving cars about the yards. Holzinger and his crew were making up a train, and were moving the cars from the main line to the

751a. C[illegible] provisions of Texas statute.—Sec. 4. No contract made between the employer and employee, based on the contingency of injury or death of the employee, limiting the liability of the employer under this act, or fixing damages to be recovered, shall be valid or binding. (This provision is the same as that of sec. 3 in each of the earlier acts.)

Sec. 5. Nothing in this act shall be held to impair or diminish the defense of contributory negligence when the injury of the servant or employee is caused proximately by his own contributory negligence.

Sec. 6. The short duration of the special session of the legislature, and the fact that the existing fellow-servant law is inadequate to accomplish its purposes, and the fact that a large portion of our citizens have no adequate remedy for personal injuries sustained, create an emergency; and an imperative public necessity exists that the constitutional rule requiring bills to be read on three several days be, and the same is, hereby suspended, and that this act take effect and be in force from and after its passage; and it is so enacted.

Approved June 18, 1907.

H. Utah.

751b. Text of statute.—The contents of Rev. Stat. chap. 3, § 358, are as follows:

Sec. 1342. Who are vice principals. All persons engaged in the service of any person, firm, or corporation, foreign or domestic, doing business in this state, who are intrusted by such person, firm, or corporation, as employer, with the authority of superintendence, control, or command of other persons in the employ or service of such employer, or with the authority to direct any other employee in the performance of any duties of such employee, are vice principals of such employer and are not fellow servants.

Sec. 1343. Who are fellow servants. All persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and are working together at the same time and place and to a common purpose neither of such persons being intrusted by such employer with any superintendence or control over his fellow employees, are fellow servants with each other. Provided, That nothing herein contained shall be so construed as to make the employees of such employer fellow servants with other employees engaged in any other department of service of such employer. Employees who do not come within the provisions of this section shall not be considered fellow servants.

switch, when the key of a drawhead broke and the drawhead pulled out, and some of the cars were left standing on the main track, and some of them, with the engine, on the switch track. They had thus been standing for two or three minutes when the collision occurred. Holzinger and his crew were waiting for the car repairer to replace the key, which work, the evidence shows, required only a few minutes. Tatman was also moving cars, intending to pass through the switch to the same siding that was being used by Holzinger. We think they come within the definition given by the statute of those to whom the rules established by the courts as to the liability of the master to his servant for negligence of a fellow servant are still to apply. Each of them being required to do the same kind of work, in the same yard, and at all parts of the yard, and it being, therefore, necessary for each to observe and take cognizance of the movements of the other, both the language and reason of the statute make them fellow servants."

752. Construction of this provision.—Whether or not a workman engaged in the lower tunnel of a mine was a fellow servant of one engaged in the upper tunnel, about 12 feet above, was held to be a question for the jury upon evidence that neither was ordinarily in sight or hearing of the other.[1]

As to the constitutionality of this statute, see § 645, *f*, *ante*.

[1] *Dryburg* v. *Mercur Gold Min. & Mill Co.* (1898) 18 Utah, 110, 55 Pac. 367, declaring it to be gross negligence to remove the waste supporting one upright of a ladder used by workmen in passing from the upper to the lower level of a mine, where it was dark, and the changed condition was not observable to one attempting to pass from the upper level.

CHAPTER XXXIX.

STATUTES OF COLORADO, FLORIDA, GEORGIA, IOWA, KANSAS, MINNESOTA, NORTH CAROLINA, WISCONSIN, WYOMING.

753. Scope of chapter.

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754a. Text of the statute.

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764. Effect of these statutes.

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I. Wyoming.

765a. Statutory provisions.

753. Scope of chapter.—Another group of statutes which may be conveniently dealt with in the same chapter is composed of those by which all employers, without distinction, or, as is the effect of most of the enactments, railway companies only, have been, either entirely or in regard to certain classes of injuries, deprived of the protection afforded by the defense of common employment.

A. Colorado.

753a. Text of the statute.—Sess. Laws 1901, chap. 67. The contents of this statute are as follows:

An Act to Give a Right of Action against an Employer for Injuries or Death Resulting to His Agents, Employees, or Servants, either from the Employer's Negligence or from the Negligence of Some of His Other Employees, Servants, or Agents, and to Repeal All Acts and Parts of Acts in Conflict Herewith.

Sec. 1. That every corporation, company, or individual who may employ agents, servants, or employees, such agents, servants, or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee, or servant, resulting from the carelessness, omission of duty, or negligence of such employer, or which may have resulted from the carelessness, omission of duty, or negligence of any other agent, servant, or employee of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty, or negligence causing the injury or death was that of the employer.

Sec. 2. All acts and parts of acts in conflict herewith are hereby repealed: Provided, however, that this act shall not be construed to repeal or change the existing laws relating to the right of the person injured, or, in case of death, the right of the husband or wife or other relatives of a deceased person to maintain action against the employer.

As to the earlier employers' liability act of this state, see chapter XVII., *ante*.

754. **Effect of this statute.**—This simple and straightforward enactment places the state of Colorado in the honorable position of being the first of the countries in which the common law prevails, to abrogate a doctrine which, as the writer has endeavored to show in an earlier section (475), does not rest upon any satisfactory basis, logical, social, or economic, and which, by relegating the injured person to his action against a coemployee who is [illegible] irresponsible, leaves him, in the great majority of instances, without any prospect whatever of obtaining an adequate indemnity.

B. Florida.

754a. Text of the statute.—Laws 1897, chap. 3744. The contents of this statute are as follows:

Sec. 1. That no person shall recover damages from a railroad company for injury to himself or his property, when the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault the former may recover: but the damages shall be diminished by the jury trying the case, in proportion to the amount of default attributable to him.

Sec. 2. If the person injured is himself an employee of the company, and the damage was caused by another employee and without fault or negligence on the

part of the person injured, his employment by the company shall be no bar to recovery; and no contract which restricts such liability shall be legal or binding.

755. Effect of this section.—In one case it was held that the rights of any servant whose injury was received before this act came into force were governed by the common-law doctrine that a master was not liable to a servant for injuries from the negligence of a coservant in a common work or in the same general employment.[1]

The effect of the provision as to contributory negligence is stated in § 652, *ante*.

C. Georgia.

756. Statute as to railway service.—As to the constitutionality of the statute reviewed below, see § 645, subd. *a*, *ante*.

In 1855 Laws, p. 155, the doctrine of common employment was abrogated as regards servants of railroad companies by the following provision:

Railroad companies are common carriers, and liable as such. As such companies necessarily leave many employees who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employees as to passengers for injuries arising from the want of such care and diligence.[2]

This provision was subsequently incorporated in the Code of 1860, § 2057; of 1873, § 2057; of 1882, § 2083; of 1895, § 2297.

In view of the industrial conditions which prevailed in Georgia at the date when the act was first passed, the fact that this should have been the earliest of such statutes in any common-law jurisdiction is, as Mr. McKinney observes in his work on Fellow Servants (p. 232), somewhat remarkable.

Under this provision a railroad company is liable for injuries to the person of an employee by the negligence or misconduct of other employees of the company, whether such injuries are connected with

[1] *Parrish* v. *Pensacola & A. R. Co.* (1891) 28 Fla. 251, 9 So. 696, there recovery was denied in a case where the act had come into force while the appeal was pending.

[2] The act of 1856, being only applicable to railroad companies, was held not to confer any rights on employees working on the Western & Atlantic Railroad, which belonged to the state. *Walker* v. *Spullock* (1857) 23 Ga. 436. But the benefits of its provisions were extended to these employees by the act of April, 1863, p. 182. See *Cannon* v. *Barbour* (1866) 34 Ga. 422.

Nor does this provision apply to a case where the injury in suit was received by a laborer in the employ of an independent contractor, owing to the negligent operation of cars furnished to such contractor by the railway company, and entirely under his control. *Central R. & Bkg. Co.* v. *Grant* (1872) 46 Ga. 417.

The act of 1869 repealing the 3d section of the act of 1856, did not repeal

the running of trains or otherwise.[2] The statute has, therefore, extended the liability of railroad companies further than has been done in Iowa, Kansas, and Minnesota. See subtitles D, E, and F of this chapter.

§§ 2054 and 2980 of the Code of 1863, embodying the act of 1855. *Georgia R. & Bkg. Co.* v. *Oaks* (1874) 52 Ga. 410. That act had been repealed or superseded by the act of 1860 adopting the Code, as well as by the adoption of the Code by the Constitution of 1868. *East Tennessee, V. & G. R. Co.* v. *Duggan* (1874) 51 Ga. 212.

Thompson v. *Central R. & Bkg. Co.* (1875) 54 Ga. 509.

The doctrine thus established was reaffirmed in *Georgia R. Co.* v. *Ivey* (1881) 73 Ga. 499 (injury received in shops). The court thus disposed of the contention that the doctrine of *stare decisis* did not bear on the case: "A construction of a statute in reference to the legal status of all employees of railroad companies, in their relations to other employees and to the corporations, was given in that case [*i. e.* the *Thompson Case*] by a unanimous bench, and became settled law; it entered into every contract between master and servant; it fixed the liability of the master for the default of a coemployee in case of some by the servant hurt; it took railroad companies without the ordinary rule of the liability of the master to his servant; it made the corporation, on the one hand, more careful to employ competent fellow servants, and the injured servant more cautious in his own acts so as to be free of all fault himself; and thus the master when he contracted with employees, and the employee when he engaged to work with his master, the railroad corporation, contracted with each other in the light of this law as construed by this court."

Later cases in which the same doctrine was again applied are these: *Georgia R. & Bkg. Co.* v. *Brown* (1890) 86 Ga. 320, 12 S. E. 812 (piece of timber fell on foot of servant working in shop); *Georgia R. & Bkg. Co.* v. *Hicks* (1894) 95 Ga. 301, 22 S. E. 613 (injury received in putting a line of gas pipe on the ceiling of a car shop); *Georgia R. & Bkg. Co.* v. *Miller* (1892) 90 Ga. 571, 16 S. E. 939 (holding that a charge to the effect that the plaintiff could not recover unless his injuries were connected with the running of trains had been properly refused).

A railroad company is liable for the death of a yardmaster who was under the orders of the superintendent, and who, without fault on his own part and in obedience to the directions of such superintendent, to break into a gasroom to extinguish a fire, was killed by the walls falling in upon him, where the superintendent knew or ought to have known of the danger in which he was placed. *Augusta Factory* v. *Hill* (1889) 83 Ga. 709, 10 S. E. 450.

The questions whether the kicking of a hand car following another, by one sitting upon the forward car, to prevent it from running into the latter, was such an act of negligence as would render the railroad company liable for injury to a fellow servant by the subsequent derailing of the car, and whether the injured person himself put in motion the chain of events which led to the injury by the manner in which he ran the cars, and whether the kicking of such car was sufficient to account for the derailment of the front car,—are for the jury where there is evidence each way. *Smith* v. *Southern R. Co.* (1896) 75 Fed. 103 (verdict for defendant upheld).

A nonsuit is erroneous where there is evidence tending to show that the injury was caused by the negligence of a fellow servant, although there may be some testimony tending to show that when the plaintiff was hurt he was a vice principal of the defendant company. *Chandler* v. *Southern R. Co.* (1901) 113 Ga. 130, 38 S. E. 305.

There is no error in refusing to charge that a railroad employee is prevented from recovering from his employer for an injury because the negligence of a coemployee was the sole cause thereof. *Georgia R. & Bkg. Co.* v. *Cosby* (1895) 97 Ga. 299, 22 S. E. 912.

Where a rule of the company enjoins upon a coemployee of the plaintiff the performance of a particular duty, such coemployee is bound to exercise ordinary care in the discharge of that duty. It is not cause for reversal that the court charged the jury that, if such coemployee failed to exercise ordinary care in discharging such duty, they "ought to find the defendant company negligent in

It has also been held that the benefit of the provision is not restricted to employees who cannot control those whose function it is to operate trains.[3]

By the Code of 1873 it was further provided as follows:

Sec. 3033. A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damages done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence—the presumption in all cases being against the company. The same provision is found in Code of 1882, § 3033, and in Code of 1895, § 2321.

Sec. 3036. If the person injured is himself an employee of the company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery. The same provision is found in the Code of 1882, § 3036, and in Code of 1895, § 2323.[4]

757. Effect of these sections.— Under § 3033 alone, an employee of a railroad company would not be entitled to recover damages for an injury sustained by him, caused by the negligence of other employees of the company. Without §§ 2083 and 3036, he would be under the common-law rule, and could not maintain an action.[1] But the effect of these three sections, when construed together, is that, when the plaintiff shows that the injury was inflicted through the negligence of a fellow servant engaged in and about the common employment, and without fault on the part of the former, the burden is cast upon the company of showing only that its servants exercised ordinary and reasonable care. An instruction to the jury which imposes upon the

that regard." *Western & A. R. Co.* v. *Bussey* (1894) 95 Ga. 584, 23 S. E. 207.

In a suit against a railroad on account of the homicide of an employee, an allegation that the company did the negligent or careless act which caused the homicide, or omitted the diligence which would have prevented it, is sufficient, and is equivalent to an allegation that the coemployees of the deceased were guilty of such negligence. *Central R. Co.* v. *Crosby* (1885) 74 Ga. 737, 58 Am. Rep. 463.

When construed in connection with this provision as to railways, § 2971 of the Code, which gives a widow an action for the homicide of her husband, precludes recovery for a death caused by the negligence of a fellow servant, unless the homicide amounted to a crime in the delinquent servant, either murder or manslaughter of some grade. *Daly* v. *Stoddard* (1880) 66 Ga. 145.

[3] *Georgia R. & Bkg. Co.* v. *Goldsmith* (1876) 56 Ga. 196, negativing the theory that trainmen were not within the purview of the statute, as they can control the conductor and engineer by reporting them for neglect of duty.

[4] This section was not repealed by the act of 1869 repealing the act of 1856. The act of 1856 had been repealed or superseded by the act of 1860 adopting the Code, as well as by the adoption of the Code by the Constitution of 1868. *East Tennessee, V. & G. R. Co.* v. *Daggon* (1874) 51 Ga. 212.

[1] *Campbell* v. *Atlanta & R. Air Line R. Co.* (1873) 53 Ga. 188.

A charge with reference to this section, that the company is liable for damage "to" any person in the employment of the company, is erroneous. *Western & A. R. Co.* v. *Vandiver* (1890) 85 Ga. 670, 11 S. E. 781.

defendant the superadded duty of showing how the casualty occurred is erroneous.[2]

The effect of the clause as to the absence of contributory negligence is discussed in § 652, *ante*.

758. Provision declaratory of the doctrine of common employment.—The doctrine of common employment is embodied in the following provision:

> The principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same work. Code of 1873, § 2202; Code of 1882, § 2202; Code of 1895 § 3030.

In the Code of 1895, § 2610, the following provision was also added:

> Except in case of railroad companies, the master is not liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business.

These provisions operate as an explicit declaration of what is obviously a matter of necessary inference from the others already commented on in the preceding sections, *viz.*, that the common-law rule as to coservice is applied in Georgia in all cases except those in which a railroad employee is injured. The particular form under which that rule prevails in this state has already been considered in former chapters. See chapter XXVII., subtitle B, and the summary in § 549, *ante*.[1]

[2] *Georgia R. & Bkg. Co.* v. *Hicks* (1894) 95 Ga. 301, 22 S. E. 613.

A charge to the effect that, under this section, the onus of proving that ordinary care was exercised is upon the railway company when a person in its employ is injured by the negligence of a coservant, is erroneous. *Western & A. R. Co.* v. *Vandiver* (1890) 85 Ga. 470, 11 S. E. 781, laying it down that the presumption is not against a railway company when the servant injured is connected with the act which caused the injury unless he shows his freedom from fault.

[1] The statute is not applicable to a lumber company operating cars on a track for the purposes mainly of its own business; and even though it does on some occasions transport passengers and freight for hire, it is not a railway company, within the purview of that statute, so as to render it liable to a track repairer who is injured by a movement of the locomotive at a time and upon an occasion when it is in no sense engaged in transacting business as a public carrier. *Ellington* v. *Beaver Dam Lumber Co.* (1893) 93 Ga. 53, 19 S. E. 21; *White* v. *Kennon* (1889) 83 Ga. 313, 9 S. E. 1082; *Railey* v. *Garbutt* (1900) 112 Ga. 288, 37 S. E. 360 (woodcutter injured by negligence of engineer).

No recovery can be had where an operative in a cotton factory is injured by the negligence of a workman having charge of two others in the picker room. *McGovern* v. *Columbus Mfg. Co.* (1887) 80 Ga. 227, 5 S. E. 492.

A servant whose duties were to stand on a scaffold used in the construction of a building, and receive and detach timbers from the derrick when they were sufficiently elevated for the use intended, was a fellow servant of one who stood on the ground and operated the derrick, where the evidence shows that they were under one common employment and received orders from another as superintendent of the entire construction, although it may also be proved that the person who operated the derrick was invested with authority to

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758a. Statutory provisions.—As to the constitutionality of the statute reviewed below, see § 646, *ante*. By Laws 1862, chap. 169, § 7, it was provided as follows:

"Every railroad company shall be liable for all damages sustained by any person in consequence of any neglect of the agents, or by any mismanagement of the engineer or other employee of the corporation, to any person sustaining such damage."

This act was superseded by chapter 65, § 1, of the Laws of 1872, to the following effect:

Every corporation and person owning or operating a railroad in this state shall be liable for all damages sustained by any person in consequence of the wilful wrongs, whether of commission or omission, of their agents and employees, when such wilful wrongs are in any manner connected with the use and operation of any railroad so owned or operated, on or about which they shall be employed.

By the Code of 1873, § 1307, this provision was modified so as to read thus:

Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed; and no contract which restricts such liability shall be legal or binding. Same provision in McClain's Anno. Code, § 2002, and Code of 1897, § 2071.

A construction company which is engaged in building a railway, and is for that purpose running gravel trains, is operating a railway within the meaning of the statute.[1]

direct how and when the elevation of the timbers should be made. *Gunn* v. *Willingham* (1900) 111 Ga. 427, 36 S. E. 804.

A mason and a carpenter working on the same building are coservants. *Keith* v. *Walker Iron & Coal Co.* (1888) 81 Ga. 49, 12 Am. St. Rep. 296, 7 S. E. 866.

It has been held with special reference to § 2610 of the Code of 1895, that the master is not liable to one servant for injuries arising from the negligence of another servant about the same business, though they may be employed in different departments of business, and so far removed from each other that one can in no degree control or influence the conduct of the other. *Brush Electric Light & P. Co.* v. *Wells* (1900) 110 Ga. 192, 35 S. E. 365 (engineer of power house of electric company held to be fellow servant of lineman).

Another recent ruling is that a complaint averring that plaintiff's husband was a night watchman in the employ of defendant, who was operating a saw mill, and was killed by the explosion of a boiler used in running the mill, which was occasioned by negligence of an engineer having charge of the boiler, fails to state a cause of action. *McCosker* v. *Holton & D. Lumber Co.* (1900) 110 Ga. 328, 35 S. E. 369.

[1] *McKnight* v. *Iowa & M. R. Constr. Co.* (1876) 43 Iowa, 406.

But it does not enure to the benefit of the employees of independent contractors engaged in constructing a railway, where the injury complained of was caused by the acts of servants of the railway company.[2]

759. What injuries are within the purview of the statute.— The class of acts for which railroad companies were rendered liable by the act of 1862 is held to have been narrowed by the amendment of the law in 1873. The words "such wrongs," in the limiting clause of the second act, are deemed not to relate alone to the wilful wrongs spoken of in the preceding clause, but also to the mismanagement and negligence spoken of in a preceding clause.[1] Under this construction the liability of the companies, which, by the unrestricted terms of the act of 1862, extended to any negligence whatever which their employees might commit in the course of their employment, is now limited to "such damages as are occasioned by the negligence or mismanagement or wilful wrongs of its employees which are connected with the use and operation of the railroad on or about which they are employed." [2] In the case cited it was argued that the employment of the plaintiff was entire, and that, as part of his service related to the business of operating the road, he had his remedy under the statute, even though the injury was not sustained while in the performance of that particular part of the service. The court, in rejecting this theory, said: "The subsequent legislation has established a new rule as to the class of acts for which the companies are liable. So that to entitle an employee now to recover against the company for injuries which he has sustained in consequence of the negligence, or mismanagement, or wilfulness of a coemployee, he must show (1) that he belonged to the class of employees to whom the statute affords a remedy, and (2) that the act which occasioned the injury was of the class of acts for which a remedy is given."

To bring a case within the statute it is not necessary to show that the injured person was actually engaged in the operaton of the road. Its provisions take effect wherever it appears that the injury was caused by the operation of the road.[3]

[1] Voy v. *Dubuque & S. C. R. Co.* (1866) 20 Iowa, 347.

[2] *Foley* v. *Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 644, 21 N. W. 124.

[3] *Malone* v. *Burlington, C. R. & N. R. Co.* (1884) 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756.

[4] *Pierce* v. *Central Iowa R. Co.* (1887) 73 Iowa, 140, 34 N. W. 783. The court said: "The statute is not construed to mean that actions can be maintained by trainmen only, or by men whose employment is such as pertains to the running of trains. . . . There is language in some of the cases which seems to imply that the statute embraces only those who are engaged in the actual operation of a railroad in running the trains. But that the right of action is not thus limited is apparent. Track men, switch tenders, and others whose duty requires them to be upon the track are more or less exposed to the hazards of the business of railroading, and such

The subjoined note indicates the classes of employees who are, and those who are not, deemed to be entitled to recover under this broad construction of the statute.[4]

employees, when injured by the use or operation of the road and by the negligence of coemployees, are as plainly within the provisions of the statutes as those whose duty requires them to assist in the running of trains. We think the proper test in determining the question is, Does the duty of the employee require him to perform service which exposes him to a hazard peculiar to the business of using and operating a railroad? If it does, and if, while in the line of his duty, he by the negligence of a coemployee receives an injury from a passing train or from other appliances used in the use and operation of the road, he may recover." *Pyne* v. *Chicago, B. & Q. R. Co.* (1880) 54 Iowa, 223, 37 Am. Rep. 198, 6 N. W. 281.

"The cases are all grounded upon the view that the statute applies when the employment and the wrong are connected with the handling of railroad machinery moved upon railroad tracks." *Larson* v. *Illinois C. R. Co.* (1894) 91 Iowa, 81, 58 N. W. 1076.

A railroad company, therefore, is held liable whenever the injured person was one who was "exposed by the nature of his employment to the peculiar hazards" incident to the operation of railways (*Butler* v. *Chicago, B. & Q. R. Co.* [1893] 87 Iowa, 206, 54 N. W. 208); or who was, by the nature of his employment, exposed to the hazards incident to moving trains, even though he may not have been engaged in operating them (*Smith* v. *Hameston & S. R. Co.* [1889] 78 Iowa, 583, 43 N. W. 545); or who, "in the performance of the duties of his employment was necessarily exposed to all of the ordinary risks and dangers which arise from the operation of the trains" (*Handelan* v. *Burlington, C. R. & N. R. Co.* [1887] 72 Iowa, 709, 32 N. W. 4).

[4](a) *Employees held to be within the statute.*—That the statute is applicable to members of train crews is, of course, beyond dispute. The essential questions in cases where such employees are injured are merely whether the coservant was, as matter of fact, negligent, and whether the injured servant was himself in fault.

Whether, under the circumstances, the conductor of a train was negligent in applying the brake when he did, whereby a brakeman engaged in cutting the train while running slack was injured, was held to be a question for the jury in *Dunlavy* v. *Chicago, R. I. & P. R. Co.* (1885) 66 Iowa, 435, 23 N. W. 911.

A rule by which conductors are "cautioned as to flying switches," and directed to "avoid such switching even if it increases their work," is advisory merely, and does not forbid such switches. The fact, therefore, that a conductor orders a brakeman to make such a switch is not such negligence as will render the company liable for injuries to the latter. *Youll* v. *Sioux City & P. R. Co.* (1885) 66 Iowa, 346, 23 N. W. 736.

Where detached cars are following a short distance behind a train, a conductor and brakeman are negligent in not soon discovering the detachment and in not being on top of the cars. *Farley* v. *Chicago, R. I. & P. R. Co.* (1881) 56 Iowa, 337, 9 N. W. 230.

The facts that a freight train standing at a station started while the conductor was attending to business inside of the station, supposing the brakes to have been sufficiently set, he himself not having set the brakes; and that the cars collided with other detached cars, killing a brakeman thereon,—do not show negligence on the conductor's part. *Brady* v. *Burlington, C. R. & N. R. Co.* (1887) 72 Iowa, 53, 33 N. W. 380.

A verdict for the plaintiff is justified by evidence showing that he was employed on a construction train and in the discharge of his duty walked to the rear of the train while it was in motion, that, when within 5 feet of the last car in front of the caboose the latter was uncoupled by the conductor, and that at a signal the engineer caused a sudden jerk which threw the plaintiff from the car, and he was run over. *Jones* v. *Keokuk & D. M. R. Co.* (1881) 56 Iowa, 546, 9 N. W. 884.

Negligence of which a locomotive fireman, injured by falling from the engine as cars attached to it came in contact with standing cars, may complain, cannot be predicated of the act of a trainman in giving a signal indicating a longer distance to the point of coupling than should have been indicated, where the signals were only designed to indicate in a general way the distance to be traversed before reaching the coupling

point, and the trainman did not know, and had no reason to expect, that the fireman was in a place of danger. *Kelsey* v. *Chicago & N. W. R. Co.* (1898) 106 Iowa, 253, 76 N. W. 670.

The fact that a brakeman's foot was caught in a rail so that he could not escape, as he otherwise might have done, from a car which was driven over him, will not excuse the company, if the manner in which the cars were moved betokened negligence irrespective of the brakeman's actual condition, whether he was free to get out of the way or not. *Burns* v. *Chicago, R. I. & P. R. Co.* (1882) 58 Iowa, 150, 12 N. W. 222.

A delay by trackmen of a little over twenty minutes after the commencement of a storm, in inspecting the track as required by a rule of the company in case of a storm, does not constitute negligence which will support an action for injuries to an employee, caused by the engine catching up a limb which had been blown upon the track. *Cox* v. *Chicago & N. W. R. Co.* (1897) 102 Iowa, 711, 72 N. W. 301.

Employees in charge of an engine have the right to assume that a switchman who has attempted to mount on the front footboard for the purpose of making a switch has succeeded in doing so, where he is hidden from their view by the boiler; and they are not required to stop the engine to ascertain whether or not he has done so. *Ferguson* v. *Chicago, M. & St. P. R. Co.* (1897) 100 Iowa, 733, 69 N. W. 1026.

Employees operating a switch engine, whose duty it is to be on the lookout for employees on or near the tracks, and to warn them of the approach of the engine by ringing the bell or blowing the whistle or in some other manner, are not, as matter of law, free from negligence toward an employee walking along the track in the course of his duty, where no signal of any kind is given of the approach of such engine. *McLeod* v. *Chicago & N. W. R. Co.* 1897) 101 Iowa, 139, 73 N. W. 614.

Recovery has been allowed where the injury was received by the following employees engaged in working on or near the track under the circumstances indicated:

A foreman of a bridge gang whose duty it was to set out a slow flag on the approach of a train, if the condition of the track over the bridge required it. *Keathley* v. *Illinois C. R. Co.* (1897) 103 Iowa, 282, 72 N. W. 545 (freight car left the track and fell on plaintiff).

One employed to carry water to railroad employees working near the approach of a bridge, and to perform such other services as the foreman shall direct, the injury being caused by the negligent running of a train at a dangerous speed across the bridge, which is untinished and insecure. *Keathley* v. *Illinois C. R. Co.* (1895) 94 Iowa, 685, 63 N. W. 560.

A car inspector whose duty required him to go under all cars. *Canoa* v. *Chicago, M. & St. P. R. Co.* (1897) 101 Iowa, 613, 70 N. W. 755.

Men employed to remove ashes, etc., from locomotives, to supply them with water and sand and to couple locomotive tanks forming a necessary part of a train, so that they could be moved to their proper place for train service. *Ruther* v. *Chicago, R. & Q. R. Co.* (1893) 87 Iowa, 206, 54 N. W. 208 (injury received while coupling the tanks).

A person employed in a railway car shop, who, while on a ladder leaning against one of the cars in a train, was injured by the negligence of employees in charge of the train in moving it without notice. *Perea* v. *Central Iowa R. Co.* (1887) 73 Iowa, 140, 34 N. W. 783.

One whose duty it was to operate a turntable. *Malone* v. *Burlington, C. R. & N. R. Co.* (1884) 65 Iowa, 117, 54 Am. Rep. 11, 21 N. W. 756 (remarks in the opinion; for actual decision, see subd. 4b), *supra*.

A detective injured, while in the discharge of his duty, by the negligence of an engineer. *Pyne* v. *Chicago, R. & Q. R. Co.* (1880) 54 Iowa, 223, 37 Am. Rep. 198, 6 N. W. 281 (complaint held not demurrable which alleged that he set out to walk along the track to a house in compliance with the orders of the defendant's agent, and, being prostrated by sunstroke, was run over while in a state of insensibility).

A laborer working in connection with a construction train, who, although he was engaged exclusively in shoveling gravel and had nothing to do with the management of the train, was shoveling gravel from the train and was therefore not less dependent for his safety upon the skill and fidelity of those who were managing it, than if part of the management devolved upon himself. *McKnight* v. *Iowa & M. R. Constr. Co.* (1876) 43 Iowa, 406 (injury caused by sudden starting of train).

An employee whose duty it was to assist in loading and unloading gravel cars, and to perform any other service required of him in or about such work and to ride to and fro on the gr-

cars. *Handelan* v. *Burlington, C. R. & N. R. Co.* (1887) 72 Iowa, 709, 32 N. W. 4.

A laborer who was engaged in shoveling earth on flat cars which carried it to a place where it was used in making an embankment, and who sometimes went with the train to unload the earth, and at other times remained behind while the train was absent, and helped to undermine the bank which was being excavated. *Deppe* v. *Chicago, R. I. & P. R. Co.* (1872) 36 Iowa, 52 (bank fell on the plaintiff). "It is true," that the court, the plaintiff "was not injured while, or by, operating the train; but neither the act itself nor the constitutional limitation requires us to put this very narrow construction upon it. The plaintiff was employed for the discharge of a duty which exposed him to the perils and hazards of the business of railroads; and although the injuries did not arise from such hazards, they can not be separated from the employment. If the plaintiff had been employed exclusively for shoveling or loading the dirt he could not recover, although he might have ridden to and from his work on the cars." This decision was declared to be correct in *Malone* v. *Burlington, C. R. & N. R. Co.* (1884) 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756, though it was pointed out that some of the expressions used in the opinion were no longer authoritative under the later act.

A laborer employed in the working of a ditching machine on a railroad, which was operated by moving along the track the train of which it formed a part. *Nelson* v. *Chicago, M. & St. P. R. Co.* (1887) 73 Iowa, 576, 35 N. W. 611 (plaintiff was struck by the crank of a windlass used to lower the scoop bucket). The court said: "The ditching machine is altogether unlike a steam shoveler, or a dredge worked by a stationary engine. It was propelled by a moving engine upon the track of the road. It is true, the plaintiff was not injured by contact with the wheels of a car or engine; but this was not necessary in order to entitle him to recover, because it is equally true that, if the car had not been in motion at the time, it would have been useless to raise or lower the bucket or shovel. It was the movement of the train that made it necessary to lower the rear end of the bucket. It was not necessary, to maintain the action, that the plaintiff should be an employee engaged in the actual movement of the train, as an engineer, brakeman, or conductor. It is sufficient if he was one of the crew necessary for the performance of the work intended to be done by the train and its machinery and appliances."

The foreman of a crew working a pile-driver car. *Houser* v. *Chicago, R. I. & P. R. Co.* (1882) 60 Iowa, 230, 3 Am. Rep. 65, 14 N. W. 778. The injury in this case was caused by the fall of a gin pole, so that the decision seems of doubtful correctness. See authorities cited, *infra*.

One of two employees engaged in filling tenders with coal from cars upon an adjoining track, the injury being caused by the negligence of the other employee in pushing into the coal car a plank extending from the coal car to the tender and used in filling the tender after the work had been completed and the engine was about to start. *Keegan* v. *Chicago, R. & Q. R. Co.* (1898) 104 Iowa, 54, 73 N. W. 676.

A person employed to travel on a train, and to remove snow and ice at various points from the track of the railway, is entitled to recover for injuries resulting from the negligence of the employees of the road, although the train was not in motion at the time of the accident, and he was not then engaged in the duties required of him. *Smith* v. *Hamilton & S. R. Co.* (1880) 58 Iowa, 583, 43 N. W. 545.

In a case where a workman engaged in taking down a bridge was injured while traveling on the train which was transporting the timbers to the place where they were to be deposited, it was held that the case was properly left to the jury, with instructions to the effect that, if the plaintiff was employed for the purpose of taking down and moving the bridge, and in doing this work a train was used on defendant's road upon which plaintiff, in the course of his employment and in obedience to the requirements of his superior, was riding at the time he sustained the injury, he was engaged in operating the road, and that if the negligence of the defendant and the care of the plaintiff were found the defendant was liable under the statute. The court said that the purpose for which the train was operated could not relieve the defendant from liability if the injury was sustained in its operation. *Schroeder* v. *Chicago, R. I. & P. R. Co.* (1877) 47 Iowa, 375. First Appeal (1875) 41 Iowa, 344.

Recovery has been allowed where an accident occurred to a section man while he was engaged in track repairing

Hadee v. *Sioux City & P. R. Co.* [1894] 92 Iowa, 226, 60 N. W. 537 [section foreman, after stepping on the track after the first section of a train had passed, was struck down by the second section, the approach of which he had no reason to expect]); and while he was trying to remove a hand car from the track (*Brands* v. *Chicago, R. I. & P. R. Co.* [1873] 36 Iowa, 372); and while he was traveling on freight cars loaded with material for ballasting, which was to be unloaded at a specified place (*Rayburn* v. *Central Iowa R. Co.* [1888] 74 Iowa, 637, 35 N. W. 606, 38 N. W. 529 [plaintiff while getting on a car was thrown off by sudden jerk]); and while he was traveling on a hand car (*Smith* v. *Chicago G. W. R. Co.* [1890; Iowa] 80 N. W. 658 [collision with another hand car]; *Larson* v. *Illinois C. R. Co.* [1894] 91 Iowa, 81, 58 N. W. 1076 [similar accident]).

In the last cited case the court said: "It is true . . . that running hand cars is not attended with the same degree of danger that attends the running of engines and trains of cars; yet instances of serious accidents in that service are numerous. They are not so noticeable as other railroad accidents, because fewer persons are exposed and the casualties are less. It is probable that, if the introduction of railroads had brought no greater perils than attend the movements of hand cars, the rule of the common law would not have been changed. It has been changed, and we think, so as to include such a case as that stated in plaintiff's petition."

An employee who received an injury while riding on a small and overcrowded hand car, owing partly to the company's failure to provide the hand car with appliances for removing snow from the rails and a proper brake and foot rests, and partly to the negligent construction of the cattle guard, is within the statute. *Chicago, M. & St. P. R. Co.* v. *Ivtery* (1890) 137 U. S. 507, 34 L. ed. 747, 11 Sup. Ct. Rep. 129. The court said: "The plaintiff was upon a moving car propelled by hand power. The movement of the car, its speed, the position of the plaintiff upon it, and the duties he had to discharge in that position, were under the direction of the foreman, who was upon the same car. The injury was directly connected with the use and operation of the railway, in whose common service the foreman and the plaintiff were, and they were coemployees. . . . The railway was being used and operated in the movement of the hand car, quite as much as if the latter had been a train of cars drawn by a locomotive. If a single locomotive be on its way to its engine house, after leaving a train which it has drawn, or if it be summoned to go alone for service to a point more or less distant, and, in either case, by the negligence of one employee upon it, another employee is injured, the injury takes place in the use and operation of the railway, under § 1307, quite as much as if it takes place while the locomotive is drawing a train of cars. This we understand to be the manifest purport and effect of the decisions of the supreme court of Iowa on the subject, as well as obviously the proper interpretation of the statute."

A jury may properly find a foreman in charge of a hand car guilty of negligence where, upon the car's coming up behind another traveling much more slowly, he gave the signal to slacken speed, by motion merely, and not by speaking to the brakeman to the end that there might be no misunderstanding. *Lombard* v. *Chicago, R. I. & P. R. Co.* (1877) 47 Iowa, 494.

Although section hands incur more than ordinary danger where they are taken over a road in a hand car when a train is overdue, their safety is not of such paramount importance that a section boss must necessarily be pronounced guilty of negligence, if he has exposed them to that danger. *Campbell* v. *Chicago, R. I. & P. R. Co.* (1876) 45 Iowa, 76, disapproving instructions which implied that such a course was negligent if it involved "more than ordinary danger."

An engineer of a special train was not guilty of negligence in running down a hand car proceeding in the same direction and operated by employees whose backs were toward the train, where he gave all the signals that diligence required, appreciating the fact that a strong wind then blowing might prevent his signals from being heard and used every appliance and effort at his command to stop the train as soon as he had reason to believe that his signals had not been heard. *Nelling* v. *Chicago, St. P. & K. C. R. Co.* (1895) 98 Iowa, 534, 63 N. W. 568. On the second appeal the rule was laid down that a railroad engineer has a right to assume that a section man will perform his duty in watching for trains, and is under no obligation "to check his train on seeing him and another section man

An injured employee is none the less entitled to the benefit of the statute, for the reason that the person by whose negligence he was injured was under his control.[5]

on a hand car on the track, until it is reasonably apparent that they are not likely to clear the track in time." *Welling* v. *Chicago, St. P. & K. C. R. Co.* (1896) 98 Iowa, 559, 67 N. W. 404.

A railroad company is not liable for an injury to an employee caused by the starting of a hand car by a fellow servant while the former's hand was in a dangerous position, when no one knew of its position, and the car was started without directions from the foreman. *Hamilton* v. *Chicago, R. I. & P. R. Co.* (1894) 93 Iowa, 66, 61 N. W. 415.

(b) *Employees not deemed to be within the statute.* — A section hand injured while loading timber on a car. *Smith* v. *Burlington, C. R. & N. R. Co.* (1882) 59 Iowa, 73, 12 N. W. 763.

A car repairer who, although he was at times required to take passage upon the caboose of a freight train, or in a passenger car, to ride to his work, was not required to engage in his employment at points where these were moving trains. *Fales* v. *Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 644, 21 N. W. 124 (injury caused by the fall of a car which was being elevated by jack-screws), distinguishing *Doppe* v. *Chicago, R. I. & P. R. Co.* (1872) 36 Iowa, 52 (see above), on the ground that in that latter case part of plaintiff's duties were peculiar to the operation of a railroad, he being one of the force necessary to make the crew of a construction train. Special stress was laid on the *dictum* in that case that, if the plaintiff "had been employed exclusively in shoveling or loading the dirt he could not recover, although he might have ridden to and fro from his work on the cars."

A member of a construction gang, whose duties required him to go and ride upon, and to work upon and about, cars and tracks. *Watson* v. *Chicago, R. I. & P. R. Co.* (1885) 68 Iowa, 22, 25 N. W. 911 (plaintiff was injured by a heavy stone thrown by a coemployee while the gang were raising ties).

One employed in a railway coal house, where the injury resulted from the negligence of a coemployee while coal was being loaded on a car. *Luce* v. *Chicago, St. P. M. & O. R. Co.* (1885) 67 Iowa, 75, 24 N. W. 600.

An employee handling a derrick used in coaling an engine. *Reddington* v. *Chicago, M. & St. P. R. Co.* (1899) 106 Iowa, 96, 78 N. W. 800, Reversing on Rehearing (1898) 75 N. W. 679. Distinguishing *Hixson* v. *Chicago, R. & Q. R. Co.* (1898) 106 Iowa, 51, 75 N. W. 676.

One whose sole duty is to elevate coal to the platform convenient for delivering it to the tenders of the engines. *Strokle* v. *Chicago, M. & St. P. R. Co.* (1886) 70 Iowa, 555, 59 Am. Rep. 91, 31 N. W. 63 (steps leading to platform gave way).

Workmen employed in the machine shops. *Potter* v. *Chicago, R. I. & P. R. Co.* (1877) 46 Iowa, 399.

A sweeper in a roundhouse injured by falling into a hole which he alleged was negligently left uncovered by other employees. *Hanson* v. *Red River R. & N. R. Co.* (1884) 64 Iowa, 240, 20 N. W. 169.

One engaged in wiping locomotive engines, opening and closing doors of the engine house, and removing snow from a turntable and the tracks. *Walters* v. *Burlington, C. R. & N. R. Co.* (1884) 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756 (where recovery was denied for an injury received, not in working the turntable, but in closing the doors).

Where an employee, while preparing to couple cars, was caught by the foot between the guard rail and one of the rails of the track, and, being unable to extricate himself, made outcries which were heard by a fellow brakeman who caused the train to be stopped, but not in time to prevent such employee from being run over, judgment upon a verdict for plaintiff was reversed, there being nothing whatever to show negligence on the part of defendant's employees. *Yard* v. *Central Iowa R. Co.* (1886) 69 Iowa, 327, 21 N. W. 587, 29 N. W. 755.

[5] In *Honsee* v. *Chicago, R. I. & P. R. Co.* (1882) 60 Iowa, 230, 46 Am. Rep. 65, 14 N. W. 778, where the foreman of a bridge gang was the plaintiff, the court said: "The statute authorizes recovery by employees for the negligence of other employees is very broad and general in its terms. It makes no distinction as to the character of the employment, or the station or grade of the employee. If we should hold that

An instruction to the effect that a railway company is bound, under the statute, to see that extraordinary diligence and care are exercised by coemployees is erroneous.[6]

It has been held that a complaint in an action on this statute should state that the negligence of an employee is relied on as the cause of action, and also what employee was negligent. In the case cited, the court refused to discuss whether allegations charging a railroad company with negligence could be supported by evidence of the negligence of a coemployee.[7]

E. Kansas.

759a. Statutory provisions.—As to the constitutionality of the statute reviewed below, see § 647, *ante*. The statute as first enacted in this state ran thus:

Every railroad company organized or doing business in this state shall be liable for damages done to any employee of such company, in consequence of any negligence of its agents, or by any misunderstanding of its engineers or other employees, to any person sustaining such damage. (Stat. 1874, chap. 93, § 1.)

The provision now in force (Gen. Stat. 1889, ¶ 1251; Gen. Stat. 1897, chap. 70, § 15) is substantially the same:

Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage.

The operation of this statute is confined strictly to railroad corporations. A partnership of private persons engaged in constructing a road is not within its purview, although it is operating cars and trains in the prosecution of its work, having servants and employees at work upon the road and in charge of the trains.[1]

760. What injuries are within the scope of the statute.— The Kansas statute is couched in language very similar to that found in the first Iowa act, upon which it is avowedly based. In Kansas, therefore, the

the foreman of a gang of bridge builders is not a coemployee with the men working under his direction, and thus by construction limit the language of the statute, it would lead to all manner of distinctions which would be extremely difficult of application. We would be called upon to determine whether a conductor under whose orders the brakeman performs his duty, a section foreman whose duty it is to direct the men under his charge, and who, as we understand, employs his men and discharges them at will, and other employees who have the direction and supervision of men under them, come within the provisions of the statute."

[6] *Hunt* v. *Chicago & N. W. R. Co.* (1868) 26 Iowa, 363.

[7] *Burns* v. *Chicago, M. & St. P. R. Co.* (1886) 69 Iowa, 450, 58 Am. Rep. 227, 30 N. W. 25.

[1] *Beeson* v. *Busenbark* (1890) 41 Kan. 669, 10 L. R. A. 839, 25 Pac. 48.

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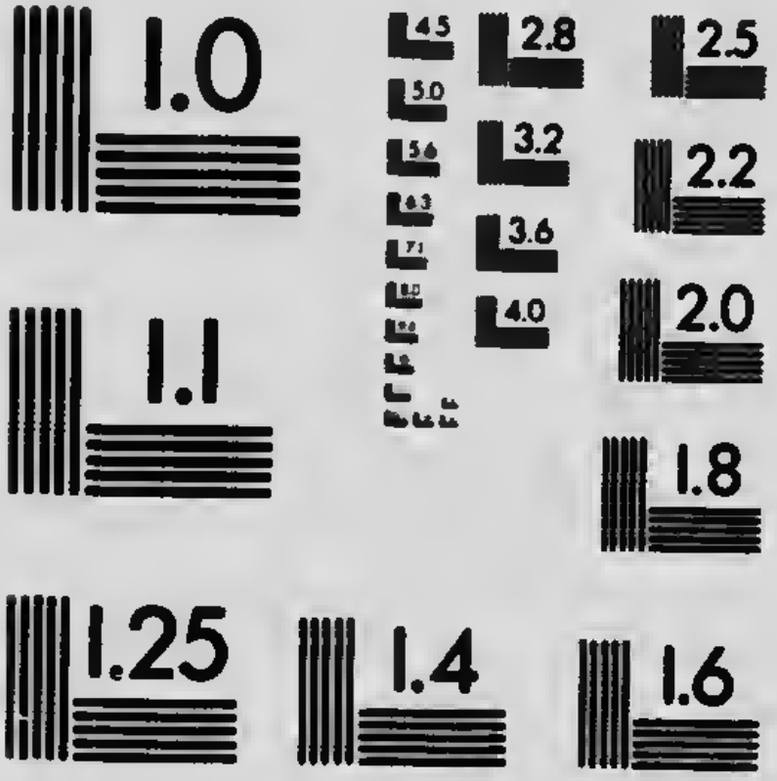

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liability of railway companies is determined upon principles simila to those discussed in the preceding subtitle, employees being held en titled or not, according as their work was or was not "directly con nected with the operation of the road." [1]

But in the absence of any amending act similar to that of Iowa, th provisions of the Kansas statute are deemed to be applicable to vari ous classes of employees, who under the decisions rendered with ref erence to the more recent legislation in the sister state, would not b entitled to recover. The Iowa doctrine which confines the benefit o the act to cases where the delinquent and injured employees, or eithe of them, were engaged in the use and operation of a railroad, is re jected in Kansas.[2]

The cases collected in the subjoined note indicate the employee who are and who are not, entitled to claim the benefit of the statute.

[1] *Chicago, R. I. & P. R. Co.* v. *Stahley* (1894) 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363; *Chicago, K. & W. R. Co.* v. *Pontius* (1894) 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *Atchison, T. & S. F. R. Co.* v. *Koehler* (1887) 37 Kan. 463, 15 Pac. 567.

[2] *Union P. R. Co.* v. *Harris* (1885) 33 Kan. 416, 6 Pac. 571.

[3] (a) *Employees within the statute.*—

A brakeman thrown from a moving car by the engineer's suddenly stopping the engine and car with a violent jerk, without signal or necessity, when the car was moving at about 6 miles an hour and was about 400 feet away from the stationary part of the train to which it was to be coupled under signals from the brakeman. *Kansas City, Ft. S. & M. R. Co.* v. *Murray* (1895) 55 Kan. 336, 40 Pac. 646.

An employee who, while engaged in ditching along the track, was struck by a piece of coal from the tender of a passing engine on which it had been piled to a dangerous height. *Croll* v. *Atchison, T. & S. F. R. Co.* (1896) 57 Kan. 548, 46 Pac. 972. Reversing (1896) 3 Kan. App. 242, 45 Pac. 112.

A section man injured, while traveling on a hand car, by a collision with another car. *Union Trust Co.* v. *Thomason* (1881) 25 Kan. 1.

A section band upon whom a colaborer let a rail fall. *Union P. R. Co.* v. *Harris* (1885) 33 Kan. 416, 6 Pac. 571.

A section man injured while unloading ties from a car for the purpose of repairing a railroad track, by the negligence of a coemployee in turning the tie before the former has secured a good hold, and pulling it so as to strike h *Atchison, T. & S. F. R. Co.* v. *Brassfie* (1893) 51 Kan. 167, 32 Pac. 814.

One employed on the track and in th yard to assist in loading rails, who particular duty it was to assist in pla ing the rails on the car after they we lowered from the pile by another set employees, the injury being due to th negligence of the latter employees lowering a rail before plaintiff had suf eient time to get out of the way afte being duly warned. *Atchison, T. & F. R. Co.* v. *Koehler* (1887) 37 Kan 463, 15 Pac. 567.

An employee upon a constructio train, whose business was to carry wa ter for the trainmen and to gather an put up tools, and who, while riding up on the train, was directed to pick u a tool on the rear flat car, and in at tempting to do so was thrown off b the reversing of the engine without signal. *Missouri P. R. Co.* v. *Hal* (1881) 25 Kan. 35 (negligence on par of engineer was denied, as engine wa reversed to prevent a collision with cat tle).

An employee in a roundhouse, em ployed in putting an engine into condi tion for immediate use. *Chicago, R. & P. R. Co.* v. *Stahley* (1894) 11 C. C A. 88, 27 U. S. App. 157, 62 Fed. 36

A fireman on a switching engine, wh was injured by a collision with anothe switching engine while he was shove ing coal into the engine. *Missouri P R. Co.* v. *Mackey* (1885) 33 Kan. 29 6 Pac. 291.

An employee whose general employ ment was as a bridge carpenter, but wh

F. Minnesota.

760a. Statutory provisions.—By Laws of 1887, chap. 13, and Gen. Stat. 1894, § 2701, it is enacted as follows:

An Act To Define the Liabilities of Railroad Companies in Relation to Damages Sustained by Their Employees.

Negligence of coemployees; liability of company. Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained with in this state; and no contract, rule, or regulation between such

received injuries by reason of the negligence of a coemployee while engaged in loading timbers on a car for transportation over the road. *Chicago, K. & W. R. Co.* v. *Pontius* (1893) 52 Kan. 264, 34 Pac. 739, Affirmed in (1895) 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585.

The engineer in charge of a switch engine is not, as matter of law, free from negligence in failing to observe that a push car which he sees in front of him at a sufficient distance to stop the engine before reaching it is so close to the track as to collide with an employee riding on the engine. *Atchison, T. & S. F. R. Co.* v. *Slattery* (1896) 57 Kan. 499, 46 Pac. 941.

A freight engineer who approaches a work train in plain view in front of him, so near and at such a rate of speed that it is necessary to make a sudden and violent application of the air brakes to prevent a collision, whereby a brakeman is thrown from the top of a car and killed, is guilty of negligence. *Atchison, T. & S. F. R. Co.* v. *Carter* (1898) 60 Kan. 65, 55 Pac. 279.

A railway company is not liable for personal injuries sustained by a fireman on a motor or dummy, through the alleged negligence of the engineer in failing to keep a proper lookout for obstructions upon or near the track, unless the obstruction is there for a sufficient length of time to enable the engineer in the exercise of reasonable care to know of it, and stop the motor before reaching it. That it is there at the precise moment of the collision is insufficient. *Telle* v. *Leavenworth Rapid Transit R. Co.* (1893) 50 Kan. 455, 31 Pac. 1076 (for general principle here applied, see chapter X., *ante*).

An engineer was negligent in failing to stop a train in time to prevent a collision with a hand car upon the track, where he had time to do so after it was reasonably apparent to him that the car could not be moved from the track by workmen who were engaged in such an attempt. *Walker* v. *Shelton* (1898) 59 Kan. 774, 52 Pac. 441.

The foreman of a crew of section men who takes one end of a rail upon his shoulder to relieve a section man who has been carrying it, and gives the word to throw it down before the latter has stepped to a place of safety, by reason of which he is injured, is guilty of negligence which will render the company liable to the latter. *Atchison, T. & S. F. R. Co.* v. *Vincent* (1896) 56 Kan. 344, 43 Pac. 251 (service necessary to the use and operation of the road).

A section hand who, while in the performance of his duties, took a hand car off the track to allow a train to pass, and while standing near it and in sight of the engineer was struck in the eye by steam and water thrown from the passing engine, was held to have a cause of action. *Atchison, T. & S. F. R. Co.* v. *Thul* (1884) 32 Kan. 255, 49 Am. Rep. 484, 4 Pac. 352.

The act of a railroad employee in throwing the forward end of a plank from a car in motion before the signal to throw had been given, and before the employee holding the rear end had thrown the same, was gross negligence. *Riley* v. *Grand Island Receivers* (1897) 72 Mo. App. 280 (decision as to Kansas statute).

Where a section of a train has been shunted on to a track, those in the management of the train must use reasonable diligence to see that it has gone sufficiently far to be cleared by any other cars which may afterwards be shunted on to an adjoining track; and if the second section strikes, the company is liable for any injury which may be caused by the collision to an

corporation and any agent or servant shall impair or diminish such liabili
Provided, that nothing in this act shall be so construed as to render any railro
company liable for damages sustained by any employee, agent, or servant wh
engaged in the construction of a new road, or any part thereof, not open to pu
travel or use.

This statute is not applicable to street railways, although they m
be operated by cable.[1]

employee on the first section. *Atchison, T. & S. F. R. Co.* v. *Butler* (1896) 56 Kan. 433, 43 Pac. 767.

A railway company is not liable to an employee injured through the act of a coemployee who, while they were jointly lifting out of its place the fire box of a locomotive, suddenly, without warning, dropped his end of the box and injured the former, because some ashes fell into his eyes, causing intense pain. *Union P. R. Co.* v. *Mahaffy* (1896) 4 Kan. App. 88, 46 Pac. 187.

(b) *Employees not within the statute.*—A stone mason employed by a railroad company in setting curbing around a depot and office building, who is injured by the fall of a curbstone left standing in an insecure position by a coemployee, is not within the protection of the act. *Missouri, K. & T. R. Co.* v. *Medaris* (1899) 60 Kan. 151, 55 Pac. 875 (not "a peculiar peril incident to the operation of the railroad").

[1] *Funk* v. *St. Paul City R. Co.* (1895) 61 Minn. 435, 29 L. R. A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099. Mitchell, J., in a concurring opinion, said: "In its original literal sense the word 'railroad' means a road with rails laid on it, upon which the wheels of carriages or vehicles run. In this sense it would, of course, include street railroads. But according to common popular usage the word 'railroad,' without any qualifying or explanatory prefix, is generally understood as referring exclusively to ordinary commercial railroads, used for the transportation of both passengers and freight; and whenever street railroads are referred to the word 'street' is prefixed. This is also the general legislative use of the words. In all the legislation of this state I have found no act (unless this be an exception) in which the word 'railroad' or 'railway,' standing alone, was not evidently intended to apply exclusively to ordinary commercial railroads. Neither have I found an act (unless this be an exception) which had reference to street railroads in which the word 'street' was not prefixed. I do not claim that th
might not be a law enacted where
would be evident from its subject-m
ter and object that the word 'railro
was intended to include street railroa
But in my opinion this is clearly
such a case. The occasion for enact
this law was the peculiar risks incid
to the operation of railroads, and
pecially those resulting from the ne
gence of fellow servants. The rem
sought to be attained was better prot
tion to railroad employees from th
peculiar hazards. The peculiar con
tions which were considered to requ
peculiar legislation for the protection
employees engaged in the operation
railroads are too familiar to requ
repetition. Generally, it may be sta
that the most cogent ones were
high rate of speed at which trains
run; the great momentum acquired
long and heavy trains, where an ac
dent to one car is liable to wreck
entire train; the peculiar dangers in
dent to the operation of freight trai
that the roads are often built up
high embankments or trestles where
accident would be peculiarly dangero
the danger of collisions, owing to
fact that numerous trains are opera
over the same tracks; the vast numb
of employees of different grades and
gaged in different lines of work, ma
of whom are necessarily personally
known to the others. The mere fa
that steam was used as a motive pow
was not, in and of itself, either the
casion or the justification for the
actment of a law establishing for r
road companies a special rule of l
hility for the negligence of their se
ants. If one of these companies was
substitute electricity for steam as
motive power, it would still be subj
to the provisions of the act. In
case of street railways, whatever be
motive power, the peculiar conditio
above referred to either do not ex
at all, or, at most, only in a very mo
fied degree. This is a fact of such co
mon knowledge that it need not be m

To bring a railroad company within the act it is not necessary that it should own, but only that it should be "operating," a railroad in the state.[2]

Work done by a railroad company in constructing a yard to be used in connection with a line already open to the public is not construction of a new road within the proviso with which the statute concludes.[3]

761. What injuries are within the purview of the statute.— To enable a servant to claim the benefit of this statute it is not necessary that the injury should have been received through negligence in the operation of trains, or in the moving of detached cars. Recovery is allowed wherever the injured person was engaged in work which exposed him to some element of hazard or condition of danger peculiar to the repair and operation of railroads. The scope and effect of the statute, therefore, are virtually the same as that which has been enacted in Kansas.[1]

than stated. The question is not whether the legislature had the power to place street railroads in the same class with ordinary commercial railroads, but whether they have in fact done so. The difference in conditions affecting the risks to which employees are exposed is sufficiently substantial to authorize the legislature to make the law applicable to ordinary commercial railroads alone, and furnishes, in my judgment, ample reason for concluding that they so intended, and that they used the word 'railroad' in its ordinary popular sense, and in the sense in which they themselves had generally used it in other statutes."

To the same effect, see *Lundquist* v. *Duluth Street R. Co.* (1896) 65 Minn. 387, 67 N. W. 1006.

[2] *Moran* v. *Eastern R. Co.* (1892) 48 Minn. 46, 50 N. W. 930 (defendant was operating a line composed of the tracks of several companies).

[3] *Moran* v. *Eastern R. Co.* (1892) 48 Minn. 46, 50 N. W. 930.

[1] (a) *Employees within the statute.*— A section hand injured, while at work on the road, by the negligence of an engineer in operating his engine. *Smith* v. *St. Paul & D. . Co.* (1890) 44 Minn. 17, 46 N. W. 149.

A car cleaner engaged inside a passenger coach, and injured by the kicking against it of another coach at a dangerous and unusual speed through the negligence of a switching crew. *Mitchell* v. *Northern P. R. Co.* (1895) 70 Fed. 15.

An engine wiper in a roundhouse, injured while assisting in coaling an engine, by the negligence of a coemployee in moving the same. *Mikkelson* v. *Truesdale* (1895) 63 Minn. 137, 65 N. W. 260.

A wiper in a roundhouse, injured by the negligence of his fellow servants while engaged in straightening a wire cable used to pull a plow in unloading gravel from flat cars in repairing the road. *Nichols* v. *Chicago, M. & St. P. R. Co.* (1895) 60 Minn. 319, 62 N. W. 386. The court said: "It is claimed by respondent that the use of a cable is not peculiar to the railroad business; that cables are used in operating elevators and mines, in transmitting power in factories, and in many ways, and that, therefore, the statute does not apply. The test is not whether the conditions are in any respect parallel to those to be found in some other kind of business, or whether the appliances are in any respect similar to those used in some other kind of business. If there is any element of hazard or condition of danger which contributed to the injury, and which is peculiar to the railroad business, the statute applies. There certainly are such elements and conditions in this case."

An employee whose duty it was to step from a high platform on to stock cars as they drew up opposite the platform, and pull bundles of hay from the platform on the top of the cars, and who was thrown to the ground and in-

G. North Carolina.

761a. Statutory provisions.—By Private Laws 1897, chap. 56, p. 83, titled, An Act to Prescribe the Liabilities of Railroads in Certain Cases, it provided as follows:

Sec. 1. That any servant or employee of any railroad company operating this state, who shall suffer injury to his person, or the personal representative any such servant or employee who shall have suffered death, in the course of services or employment with said company by the negligence, carelessness, incompetency of any other servant, employee, or agent of the company, or by a

jured by stepping from the platform on to the top of a car moving without his knowledge, at an unsafe rate of speed, in obedience to the order of the conductor. *Leier* v. *Minnesota Belt-Line R. & Transfer Co.* (1895) 63 Minn. 203, 65 N. W. 269.

The danger incident to great and extraordinary haste in which the work of replacing ties is performed in order to avoid danger to trains is peculiar to the "railroad business," within the construction placed upon the statute; and a section man injured under such circumstances by the dropping of a rail by a fellow servant is within the protection of the statute. *Blomquist* v. *Great Northern R. Co.* (1896) 65 Minn. 69, 67 N. W. 804.

It is negligence in an engineer to drive a locomotive against a car to which it is to be coupled, with an extraordinary sudden impulse. *McKnight* v. *Chicago, M. & St. P. R. Co.* (1890) 44 Minn. 141, 46 N. W. 294.

A railway company is liable for injuries to a section man on a hand car under the direction of the foreman, sustained by the negligence of the foreman in not stopping the car and having it taken off the track when he knew that a train was following, that fact being unknown to the section man. *Slette* v. *Great Northern R. Co.* (1893) 53 Minn. 341, 55 N. W. 137.

A swingman on top of freight car next the engine, whose special duty it is to look out for signals from the rear end of the train, and watch so as to avoid accidents in case the train breaks in two, does not, as matter of law, exercise reasonable care where he fails, while setting a brake, to observe a signal from the conductor at the rear end of the train after a break occurs, repeated several times, for the engineer to go ahead, as a result of which a brakeman is injured while attempting to uncouple the engine. *Wood* v. *Chicago, St. P. M. & O. R. Co.* (1896) 66 Minn. 49, 68 W. 462.

Evidence which shows that an engineer, on receiving from the conductor a signal to stop after the train had passed the mile board, adopted the usual course for a station stop, except that he put on a little more air than usual, does not show that the engineer was guilty of negligence in making an unduly sudden stop. *Crane* v. *Chicago, M. & P. R. Co.* (1901) 83 Minn. 278, 86 W. 328.

Whether or not the work was being executed under such circumstances to expose the plaintiff to the peculiar hazards of railroad service is a question for the jury, where the evidence shows that, while at work with a number of others clearing away a wrecked train, he entered a car, and was handing out the contents to others on the top of the car; that, owing either to their number or the removal of the contents from within, the roof sagged down on him, and that the road master had given directions as to the manner of executing his orders, but had repeatedly told the men to hurry the work. *Krueger* v. *Great Northern R. Co.* (1901) 83 Minn. 385, 86 N. W. 413.

The conduct of a switching crew in using the main track of a railroad for switching purposes at the time a passenger train is due, and in plain violation of the rules of the company, is gross negligence, almost wanton and criminal, which renders the company liable for injuries to the engineer of the passenger train resulting therefrom. *Hall* v. *Chicago, B. & N. R. Co.* (1891) 46 Minn. 439, 49 N. W. 239.

Whether an engineer in charge of a second locomotive was guilty of negligence in failing to heed a signal to shut off steam is for the jury, where the testimony shows that such signal was given after the leading locomotive left the rails, but the engineer in charge of the

defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company.

Sec. 2. That any contract or agreement, expressed or implied, made by any employee of said company to waive the benefit of the aforesaid section, shall be null and void.

761aa. Burden of proof.— This statute is a public law, of which the court will take notice without its being pleaded, although it has been improperly published among the private acts.[1]

762. Effect of statute.— As the defense of common employment by this statute is wholly abolished, so far as railways are concerned, the question whether the delinquent servant was or was not in control of

second engine testifies that he did not hear it. *McGrath* v. *Great Northern R. Co.* (1899) 76 Minn. 146, 78 N. W. 972.

Negligence is predicable from evidence which shows that, after the forward part of a train had been uncoupled and moved some distance away from the rear section, the engineer, finding that the forward section was stalled, backed down again without ringing a bell or sounding a whistle, and crushed to death the brakeman, who, after uncoupling the two sections of the train, was proceeding to do some work on the coupler. *Hooper* v. *Great Northern R. Co.* (1900) 80 Minn. 400, 83 N. W. 440.

An engineer who is about to back a train on to a side track for the purpose of having attached to it some loaded cars, and observes that there is another car further on which is only partially loaded, is bound to know that there may be someone working on the latter car, and is therefore negligent if he propels the train with such force that the coupling is missed and the loaded cars driven against one partially loaded, the result being that a person engaged in loading that car is killed. *Jacobson* v. *St. Paul & D. R. Co.* (1889) 41 Minn. 206, 42 N. W. 932.

The statute is applicable to injuries caused by the operation of a hand car, as well as those caused by the operation of trains. *Steffenson* v. *Chicago, M. & St. P. R. Co.* (1891) 45 Minn. 355, 11 L. R. A. 271, 47 N. W. 1068 (action held maintainable where an employee was thrown off a moving hand car by the carelessness of a coservant); *Benson* v. *Chicago, St. P. M. & O. R. Co.* (1899) 75 Minn. 163, 74 Am. St. Rep. 4[illegible] 77 N. W. 798 (collision between hand cars).

Compare decisions under the Iowa act, § 759, note 1, subd. (a), *ante*.

Railroad employees are not, as matter of law, free from negligence in running a hand car at a high rate of speed on a down grade and slippery track, only 60 feet behind another hand car, where the usual distance at which hand cars are kept apart is 510 feet. *Christianson* v. *Chicago, St. P. M. & O. R. Co.* (1896) 67 Minn. 94, 69 N. W. 640.

(b) *Employees not within the statute.*—One of a crew of men engaged in repairing a bridge, who is injured by the negligence of a fellow servant in leaving the draw unfastened. *Johnson* v. *St. Paul & D. R. Co.* (1890) 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156.

One of a crew of section men injured, while engaged in loading railroad iron upon a flat car, by a rail negligently allowed by the others to fall upon his arm. *Pearson* v. *Chicago, M. & St. P. R. Co.* (1891) 47 Minn. 9, 49 N. W. 302.

A servant injured, while putting a hose on an engine tender, then standing still, by the falling of loose coal dislodged by another servant standing on the tender to receive the hose. *Weisel* v. *Eastern R. Co.* (1900) 79 Minn. 215, 82 N. W. 576.

An employee injured by a bolt driven through the bottom of a car which he was assisting to repair. *Holtz* v. *Great Northern R. Co.* (1897) 69 Minn. 524, 72 N. W. 805.

A boiler maker's assistant injured by the negligence of a coservant in letting fall the smokestack of a locomotive which was being removed. *Lavallee* v. *St. Paul, M. & M. R. Co.* (1889) 40 Minn. 249, 41 N. W. 974.

[1] *Hancock* v. *Norfolk & W. R. Co.* (1899) 124 N. C. 222, 32 S. E. [illegible] 0.

the injured one has ceased to be material in North Carolina.[1] (S summary in § 549, *ante*, for common-law rule in this state.)

This statute has been declared to be inapplicable to an accide which occurred before its enactment.[2]

II. Wisconsin.

763. Statutory provisions.—In 1875 the following provision w enacted:

Every railroad corporation shall be liable for all damages sustained by a agent or servant thereof by reason of the negligence of any other agent or serv thereof, without contributory negligence on his part, when sustained within t state, or when such agent or servant is a resident of, and his contract of empl ment was made in, this state; and no contract, rule, or regulation between a such corporation and any agent or servant shall impair or dimini liability.

This act was repealed by Wis. Laws 1880, chap. 232. From th date common-law doctrines were applied until another statute of t following tenor was enacted:

Wis. Laws 1889, chap. 438, § 1816a (Sanborn & Berryman's Anno. Stat. 18 § 1816a).

Liability for injuries to employees. § 1. Every railroad corporation doi business in this state shall be liable for damages sustained by any employ thereof within this state, without contributing negligence on his part, when suc damage is caused by the negligence of any train despatcher, telegraph operato superintendent, yardmaster, conductor, or engineer, or of any other employee wh has charge or control of any stationary signal, target point, block, or switch.

Sec. 2. This act shall take effect and be in force from and after its publicatio Approved April 10, 1889.

The act of 1889 was modified by Laws of 1893, chap. 220, entitle An Act To Define the Liability of Railroad Companies in Relatio to Damages sustained by their employees.

Sec. 1. Every railroad or railway company operating any railroad or railway the line of which shall be, in whole or in part, within this state, shall be liabl for all damages sustained within this state by any employee of such company without contributory negligence on his part: First, when such injury is caused by any defect in any locomotive, engine, car, rail, track, machinery, or appliance

[1] *Kinney* v. *North Carolina R. Co.* (1898) 122 N. C. 961, 30 S. E. 313.

Collision between two passenger trains in broad daylight, one of which was running at a high rate of speed, the other having slowed up when the former was seen approaching, is of itself evidence of negligence, in an action by the engineer of the latter train for personal injuries sustained in the collision. *Kinney* v. *North Carolina R. Co.* (1898) 122 N. C. 961, 30 S. E. 313.

[2] *Rittenhouse* v. *Wilmington Street R. Co.* (1897) 120 N. C. 544, 26 S. E. 92

required by said company to be used by its employees in and about the business of such employment, when such defect could have been discovered by such company by reasonable and proper care, tests, or inspection; and proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company; second, While any such employee is so engaged in operating, running, riding upon, or switching passenger, freight, or other trains, engines or cars, and while engaged in the performance of his duty as such employee, and which such injury shall have been caused by the carelessness or negligence of any other employee, officer or agent of such company in the discharge of, or for failure to discharge, his duties as such.

No contract, receipt, rule, or regulation between any employee and a railroad corporation shall exempt such corporation from the full liability imposed by this section.

Sec. 2. Chapter 438 of the Laws of 1889 is hereby repealed.

Sec. 3. No action or cause of action now existing shall be affected by this act.

Sec. 4. No contract, receipt, rule, or regulation between any employee and a railroad company shall exempt such corporation from the full liability imposed by this act.

Sec. 5. This act shall take effect and be in force from and after its passage and publication.

Approved April 17, 1893.

764. Effect of these statutes.—So much of the phraseology in the last two statutes is identical that the decisions relating to both may be conveniently reviewed together.

The word "superintendent" covers a foreman f a switching crew;[1] but not a foreman of a repair shop.[2]

Negligence of a brakeman when told to accompany a passenger car kicked rapidly into a railroad yard in the dark, in riding on the rear instead of the front of the car, so that he gave no warning to a yard workman who was struck, renders the employer liable.[3]

A railway company is liable where an engineer is negligent in the manageme[illegible] ngine.[4]

[1] Negligen[illegible] ible where, after being warne[illegible] is about to be chained on a [illegible]ack, such a foreman deliberat[illegible]ders a train to be backed against the cars standing on such track. *Pier* v. *Chicago, M. & St. P. R. Co.* (1896) 94 Wis. 357, 68 N. W. 464.

[2] *Hartford* v. *Northern P. R. Co.* (1895) 91 Wis. 374, 64 N. W. 1033.

[3] *Promer* v. *Milwaukee, L. S. & W. R. Co.* (1895) 90 Wis. 215, 48 Am. St. Rep. 905, 63 N. W. 90.

[4] As, where a brakeman, while making a coupling, is injured by the engineer's negligently and without notice increasing the speed of the train when the brakeman has given no signal and is in a position of extreme danger. *Krause* v. *Chicago, M. & St. P. R. Co.* (1892) 82 Wis. 568, 52 N. W. 755.

Where it is conceded that an engineer was not guilty of negligence in understanding a conductor's signal to mean that all the cars were to be cut off, he cannot be found guilty of negligence in giving his attention to the brakeman at the tender, who was cutting off all the cars, and in failing to see the signals of plaintiff, who was injured by the speed of the train being increased while he was endeavoring to cut off one car at the other end. *Despins* v. *Chicago, M. & St. P. R. Co.* (1899) 105 Wis. 69, 81 N. W. 493.

A railway engineer who, without re-

One employed as yardmaster, though not to be regarded as in that capacity when switching cars in or out of a spur track leading to a quarry, was in "charge or control" of the "switch" to the spur track where it was his duty to open and close switches and follow the switch engine from yard to yard, taking cars in and out from the quarry, and he had a key for the purpose of opening and closing switches.

The provision for the benefit of employees "engaged in operating" etc., "trains," etc., covers a case where a freight handler, while assisting to separate by hand one freight car from others, was injured by the negligence of other employees in running a train against such freight cars;[6] but not a case where a warehouseman in the employ of a railway company was injured, while engaged in sealing a car, by the negligence of the trainmen in suddenly moving it without warning;[7] nor a case where an injury was sustained by a car repairer through the negligence of a switchman in causing a car to be kicked against the stationary car under repair;[8] nor a case where a railway conductor, standing by a car for the purpose of watching a switch as

ceiving any notice from his fireman of his intention to go under the engine to clean out the ash pan, such as the well-understood custom among engineers and firemen requires shall be given, blows off the engine while the fireman is so at work under it and scalds him, is not guilty of negligence in so doing. *Crane v. Chicago, M. & St. P. R. Co.* (1896) 93 Wis. 187, 67 N. W. 1152.

[5] *Albrecht v. Milwaukee & S. R. Co.* (1896) 94 Wis. 397, 69 N. W. 63.

[6] *Lau v. Chicago, M. & St. P. R. Co.* (1897) 95 Wis. 69, 69 N. W. 997. The court said: "The test in any given case is, Was the person injured employed in one of the branches of the railway service covered by the act, at the time of the injury? If so, he is entitled to its benefits, whether such service was the principal kind of work to be performed by him under his contract of employment, or a mere incident to his general duties. As in cases where an employee is injured by the negligence of another whose general employment is that of a vice principal, and such other is temporarily doing the work of an employee, the right of the injured party is governed by the nature of the service in which such other is engaged at the time of such injury; so here, whether the deceased, had he lived, would have been entitled to the benefits of the act in question, depends wholly upon whether he was doing the kind of service specified in the act, at the time of the injury. If he was, whether such service required him to assist in running the car at a distance of three car lengths or a greater distance, or whether by the power of a locomotive, or by some other means, makes no difference. While actually engaged in moving the car, he was within the extraordinary peril which the act was designed to protect employees against."

[7] *Hibbard v. Chicago, St. P. M. & O. R. Co.* (1897) 96 Wis. 413, 71 N. W. 807.

[8] *Smith v. Chicago, M. & St. P. R. Co.* (1895) 91 Wis. 503, 63 N. W. 183. The court considered it quite clear that, whether the intent of the legislature should be ascertained by the principle that statutes in derogation of the common law are to be strictly construed, or by the principle that remedial laws are to be liberally construed, the words, "while engaged in the performance of his duties as such employee," referred to the words, "while operating, running, riding upon, or switching passenger or freight or other trains, engines, or cars," and that the object of this part of the law was plainly to give a right of action to the class of employees engaged in operating and moving trains, engines, and cars, while actually so engaged.

closing the car door when it was unloaded, was struck and injured by a bundle negligently thrown from the car by coemployees.[9]

Track repairers, while riding on hand cars from the place where they are working to their boarding cars, are not "engaged in the discharge of their duties" within the meaning of the statute.[10]

An action may be maintained, under this statute, by the administrator of a deceased railroad employee who was killed while operating cars, etc., through the negligence of another employee or agent of the company, provided the circumstances were such that the deceased, if he had lived, could have maintained an action for his injuries under the statute.[11]

764a. Later legislation.— The liability of railway companies was still further enlarged by the following provision in Laws of 1898, § 1816:

Liability for injuries to employees. Every railroad company operating any railroad which is, in whole or in part, within this state, shall be liable for all damages sustained within the same by any of its employees without contributory negligence on his part:

1. When such injury is caused by a defect in any locomotive, engine, car, rail, track, machinery, or appliance required by said company to be used by its employees in and about the business of their employment, if such defect could have been discovered by such company by reasonable and proper care, tests, or inspection; and proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company.

765. Effect of this provision.— Where the wages of workmen in a railway bridge gang cover the whole time during which they are absent from the place where they reside, they are "engaged in the performance of their duties" during the time spent in traveling to and from the place of work by train and hand car.[1]

Compare, generally, the decisions cited under §§ 624, 625, *ante*, and § 768, *post*.

Wyoming.

765a. Statutory provisions.— The territorial act of 1869 (Wyo.

[9] *Mulherrin* v. *Chicago, M. & St. P. R. Co.* (1900) 106 Wis. 191, 81 N. W. 659. Two judges dissented, mainly on the ground that the conductor was engaged in watching the switch, and was therefore operating the train.

[10] *Benson* v. *Chicago, St. P. M. & O. R. Co.* (1899) 78 Minn. 303, 80 N. W. 1050 (hand cars collided). Contrast common-law cases in § 624, *ante*, and the decision cited in the following section.

[11] *Ean* v. *Chicago, M. & St. P. R. Co.* (1897) 95 Wis. 69, 69 N. W. 997.

[1] *Wallin* v. *Eastern R. Co.* (1901) 83 Minn. 149, 54 L. R. A. 481, 86 N. W. 73. See, however, the *Benson Case* (1899) 78 Minn. 303, 80 N. W. 1050, cited in § 764, note 10, *supra*.

Comp. Laws, p. 512, chap. 97, § 1) which has since been repealed, ran as follows:

Where any person in the employment of any railroad company in this territory may be killed by any locomotive, car, or other rolling stock, whether in the performance of his duty or otherwise, his widow or heirs may have the same right of action for damages against such company as if said person so killed were not in the employ of said company; any agreement he may have made, whether verbal or written, to hold such company harmless or free from an action for damages in the event of such killing, shall be null and void, and shall not be admitted as testimony in behalf of said company in any action for damages which may be brought against them; and any person in the employ of said company who may be injured by any locomotive, car, or other rolling stock of said company, or by other property of said company, shall have his action for damages against said company the same as if he were not in the employ of said company; and no agreement to the contrary shall be admitted as testimony in behalf of said company.

This act shall take effect from and after its passage.

The Wyoming Constitution provides (art. 10, § 4) that "any contract or agreement with any employee, waiving any right to recover damages for causing the death or injury of any employee, shall be void."

CHAPTER XL.

ENGLISH WORKMEN'S COMPENSATION ACT 1897.

766. Purpose and effect of the act; generally.

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778. Proceedings under section 6.

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E. ACT OF 1900.
797. Effect of this statute.

766. Purpose and effect of the act; generally.—The statute which is discussed in this chapter represents an entirely new departure in the law of employers' liability, as it enables a servant, under the circumstances which fall within its purview, to recover without establishing any negligence on the part of the defendant. The theory of the act is that, apart from any negligence or misconduct, a man employed in

certain dangerous employments shall in a certain sense, be insured against any accident that takes place in the course of his employment.[1]

In a practical point of view this statute is at present of no importance, except to residents in the United Kingdom. But it is well worthy of the attention of lawyers and statesmen of other countries, as being the earliest specimen of a type of legislation which will unquestionably become more and more common in future years. How far the constitutional limitations by which the statutory powers are circumscribed in the United States will assist employers in resisting such legislation is a question which remains to be settled. But in view of the existing relations between capital and labor, it can scarcely be doubted that strong efforts will be made before long to secure the enactment of statutes framed upon lines similar to that with which we are now concerned.

The number of cases in which the meaning of the provisions of the English act have been considered is already so extraordinarily large as fully to justify the remark of Lord Brampton that it is "so framed as to provoke, rather than minimize, litigation."[2] It bristles with obscurities, and is so extremely ill drawn that, during the few years of its existence it has been a target for more censure, and even ridicule, than has ever been leveled against any statute, within the same space of time.[3]

In view of the tentative nature of the act, and its merely local interest up to the present time,—whatever the future may bring forth,—it is not proposed in this chapter to do more than state the effect of the actual decisions of appellate courts with regard to the various provisions which have come under consideration. Anything beyond this would be out of place in a general treatise. For a more detailed analysis of the act, and a discussion of the procedure applicable to its administration, the reader is referred to the treatises compiled by Mr. Beven, by Mr. Minton-Senhouse, and by Messrs. Parsons and Bertram.

A. Circumstances under which compensation is recoverable.

766a. Text of section 1.—An Act to Amend the Law with Respect to Com-

[1] *Cooper* v. *Wright* [1902] A. C. 302, per Earl Halsbury, F. C.

[2] *Cooper* v. *Wright* [1902] A. C. 302.

[3] It is noteworthy that several members of the House of Lords have been especially severe in their comments upon the act, and that they have thus placed themselves in the curious predicament of criticising, as judges, a measure for which they are, as lawmakers, presumptively responsible. In the situation thus disclosed there is a touch of comedy which carries the thoughts to that amusing scene in the "Mikado," where Mr. Gilbert's official pluralist describes the embarrassing conflict of duties which results from the discharge of his manifold functions.

pensation to Workmen for Accidental Injuries Suffered in the Course of their Employment. [6th August 1897.] Be it enacted by the Queen's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sec. 1. (1) If, in any employment to which this act applies, personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule of this act.

(2) Provided that:

(*a*) The employer shall not be liable under this act in respect of any injury which does not disable the workman, for a period of at least two weeks, from earning full wages at the work at which he was employed;

(*b*) When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this act shall affect any civil liability of the employer; but in that case the workman may, at his option, either claim compensation under this act, or take the same proceedings as were open to him before the commencement of this act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of, and in the course of, the employment, both independently of and also under this act, and shall not be liable to any proceedings independently of this act, except in case of such personal negligence or wilful act as aforesaid;

(c) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed.

(3) If any question arises in any proceedings under this act as to the liability to pay compensation under this act (including any question as to whether the employment is one to which this act applies), or as to the amount or duration of compensation under this act, the question, if not settled by agreement, shall, subject to the provisions of the first schedule to this act, be settled by arbitration, in accordance with the second schedule to this act.

(4) If, within the time hereinafter in this act limited for taking proceedings, an action is brought to recover damages independently of this act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this act, the action shall be dismissed; but the court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action, instead of proceeding under this act.

In any proceeding under this subsection, when the court assesses the compensation it shall give a certificate of the compensation it has awarded, and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this act.

(5) Nothing in this act shall affect any proceeding for a fine under the enactments relating to mines or factories, or the application of any such fine, but if any such fine, or any part thereof, has been applied for the benefit of the person injured, the amount so applied shall be taken into account in estimating the compensation under this act.

767. "Accident" (sec. 1, subs. 1).—This word involves the idea of something fortuitous and unexpected.[1]

Where a workman suffers injury while doing his ordinary work in his ordinary way, and the primary and efficient cause of the injury is his diseased or impaired physical condition at the time, the injury is not caused by an "accident."[2]

On the other hand it is considered that an injury was caused by an "accident," whenever it was the result of some fortuitous and external event, although the consequences of the injury may be aggravated by plaintiff's physical condition at the time when he was hurt.[3]

768. "Out of, and in the course of, the employment" (sec. 1, subs. 1).—This phrase embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake, and which is calculated to further, directly or indirectly, the master's business.[1]

[1] *Hensey* v. *White* [1900] 1 Q. B. 481, 81 L. T. N. S. 767.

A rupture caused by the effort of separating a plank from one to which it was stuck by ice formed during the preceding night may properly be found to have been caused by an "accident." *Timmins* v. *Leeds Forge Co.* [1899; C. A.] 16 Times L. R. 521, 83 L. T. N. S. 120.

A workman in normal health was engaged in the course of his duty in removing a beam from a loom. He was in the act of lifting the beam on to his shoulder, when, finding that it was not evenly balanced, he gave it an extra lift, or hitch up, and in so doing ruptured several fibres of the muscles of his back, which incapacitated him for work,—held, that he had sustained personal injury by "accident." *Boardman* v. *Scott* [1902; C. A.] 1 K. B. 43, 71 L. J. K. B. N. S. 1902.

Internal injuries resulting from an unusual strain in lifting heavier articles than those which the employee had previously been handling do not arise from an "accident." *Roper* v. *Greenwood* [1901] 83 L. T. N. S. 471.

Where a miner was employed in hewing coal, and while so employed a piece of coal worked itself into his knee, with the result that blood poisoning set in and caused his death, there was an injury resulting from an "accident." *Thompson* v. *Ashington Coal Co.* [1901; C. A.] 84 L. T. N. S. 412, 17 Times L. R. 345.

[2] *Hensey* v. *White* [1900; C. A.] 1 Q. B. 481, denying the right of recovery in a case where a workman who was inherently weak, internally ruptured a blood vessel when making an effort to start the wheel of a gas engine, which had become stiff from disuse.

A workman employed to make a steam pipe joint, who suffers injury through the red lead coming into contact with a finger which had previously been in a blistered condition, does not suffer injury by "accident." *Walker* v. *Lilleshall Co.* [1900; C. A.] 1 Q. B. 488, 81 L. T. N. S. 769.

[3] Where a workman in handling a hammer makes a mis-hit and strikes a "flatter" held by another workman, thus jarring his arm and producing a severe swelling, there is an "accident," although the swollen condition is declared by a doctor to have been due to gout brought on by the jar. *Lloyd* v. *Sugg* (1900) 1 Q. B. 486.

[1] (a) *Recovery has been allowed under the following circumstances.*—Where a carter in the employment of a railway company was injured while he was endeavoring to stop a horse which had suddenly started off, from some unexplained cause, with the cart. *Devine* v. *Caledonian R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 1105. 36 Sc. L. R. 877.

Where a miner, believing that a shot had missed fire, went forward to examine it, and was injured by the explosion of the charge. *McNicoll* v. *Speir's* (1899) 1 Sc. Sess. Cas. 5th series, 604, 36 Sc. L. R. 428.

Where a workman undertook to ascend by a hoist to a platform for the

If the act which caused the injury was within the scope of t servant's employment, the mere fact that he had been expressly f bidden to do that act will not necessarily be fatal to his claim.[2] It

purpose of obtaining a certain article which he required for his work. *Logue* v. *Fullerton* (1901) 3 Sc. Sess. Cas. 5th series, 1006, 38 Sc. L. R. 738.

Where an engineer was run down, when recrossing a track to reach his engine which he had left in order to ask a traffic regulator why he had been ordered to take it to a certain place. *Goodlet* v. *Caledonian R. Co.* (1902) 4 Sc. Sess. Cas. 5th series, 986, 39 Sc. L. R. 759.

Where an engineer who, after being relieved of duty when his engine was on a siding, walked along the track to a station, where he had to report himself as being off duty. *Todd* v. *Caledonian R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 1047, 36 Sc. L. R. 784.

Where the injury was received by a servant who was sitting near a fire warming himself, while he was waiting for the arrival of some trucks, the wheels of which it was his duty to oil. *Harrison* v. *Whittaker* (1899; C. A.) 16 Times L. R. 108.

In *Brown* v. *Scott* (1899) 2 W. C. C. 11, Times Newspaper June 12, 1899, the court of appeals (Williams, L. J., dissenting) allowed recovery to be had for an injury received by a boy who undertook to oil a machine while in motion, in compliance with the order of a fellow workman, who had no authority over him, but told him falsely that his foreman had given the direction thus conveyed to him. But this decision can scarcely be intended to embody any general principle.

(b) *Recovery has been denied under the following circumstances:*—Where an injury was received by a ticket collector while riding on the footboard of a train for his own pleasure, and not for any object of his employment. *Smith* v. *Lancashire & Y. R. Co.* [1899; C. A.] 1 Q. B. 141, 68 L. J. Q. B. N. S. 51. The court emphasized the point that, to render an employer liable to pay compensation, the accident must arise, not only "out of," but also "in the course of," the employment.

Where a girl engaged in passing sheaves undertook, in disobedience to an express prohibition, to step across the opening through which they were fed, merely for the purpose of speaking to a friend, and without any necessity ar ing out of the work. *Callaghan* *Maxwell* (1900) 2 Sc. Sess. Cas. series, 420, 37 Sc. L. R. 313.

Where an accident happened to workman while engaged at his wo through a tortious act of a fellow wo man, which had no relation whatever their employment. *Armitage* v. *Lan shire & Y. R. Co.* [1902; C. A.] 2 K. 178.

Where the injury was caused by plaintiff's fellow workmen, who at time were not engaged in their wo but were indulging in horse play. *P coner* v. *Londen & G. Shipbuilding* (1901) 3 Sc. Sess. Cas. 5th series, 5

Where a workman's foot was pier by the spikes on top of a railing wh he undertook to scale in order to en a church through a window, after fi ing that the door was locked. *Gib* v. *Wilson* (1901) 3 Sc. Sess. Cas. series, 661, 38 Sc. L. R. 450.

[2] Recovery has been allowed where carpenter, part of whose duty was sharpen his tools on a grindstone rot ed by machinery, had been forbidden touch the machinery, and was injur while endeavoring to replace the b which started the grindstone after had slipped. *Whitehead* v. *Rea* [1901; C. A.] 2 K. B. 48, 84 L. T. N. 514.

And where a workman employed the defendants to attend to a steam e gine within a shed, and to a mortar p outside the shed, worked by the ste engine and used to grind mortar for building, was caught in a revolvi shaft, as a result of his entering t shed by a door which he had been f bidden to use. *McNicholas* v. *Dunn* [1891] 1 Q. B. 773, 68 L. J. Q. B. S. 470, 80 L. T. N. S. 317, 47 We Rep. 500.

And where a collier leaving a mi induced a boy by a truck to wind hi up by a shaft which was used only f pulling up tools, and by which the m were prohibited to ascend, the boy b ing so startled when the collier reach the top that he let go. *Douglas* *United Mineral Min. Co.* (C. A.) Time Newspaper, February 20, 1900, 2 W. C. 15.

otherwise where the prohibited act was one which lay entirely outside the range of his functions.[3]

A workman's employment begins, in the ordinary course, when the time for work has arrived, and the locality has been reached at which the work is to be performed.[4] But recovery may be had for an accident occurring before the place of work was reached if, during the antecedent period within which it occurred, the servant was, as a matter of fact, under the master's control.[5]

Whether a servant whose active duties are finished for the day, but who is still on his employer's premises, is entitled to recover under the act, probably depends on the circumstances of the case. There seems to be no reason why a more rigorous standard should be applied under this act than under the common law, which, as has been shown in § 625, *ante,* treats a servant in many situations, as being still within the protection of his master, although he may not be actually at work.[6]

A servant does not cease to be in the course of his employment, merely because he is not actually engaged in doing what is specially prescribed to him, if, in the course of his employment, an emergency arises, and, without deserting his employment, he does what he thinks necessary for the purpose of advancing the work in which he is engaged in the interest of his master.[7]

[1] Where a person employed in a factory to do purely unskilled labor, and expressly forbidden to touch any of the machinery, was injured while attempting, in violation of such orders, to clean a machine. *Loure* v. *Pearson* [1899; C. A.] 1 Q. B. 261, 68 L. J. Q. B. N. S. 122.

[2] Where an employee of railroad contractors engaged in ballasting a railroad siding was run over by a train about seven minutes before the hour for commencing work, at a point several hundred yards from the work, as he was proceeding, in accordance with his employer's directions, along the main track, for the purpose of going to work, this was not an accident arising out of, and in the course of, his employment. *Holness* v. *Mackay* [1899; C. A.] 2 Q. B. 319, 68 L. J. Q. B. N. S. 724 (Romer, L. J., dissenting).

[3] As, where an engine cleaner who had been conveyed free of charge in his employer's train to the place where he was to do his work was run over while crossing the line to reach the shed where the engines were standing. *Holmes* v. *Great Northern R. Co.* [1900; C. A.] 2 Q. B. '09, 83 L. T. N. S. 44, distinguishing between the beginning of the employment and the beginning of work. Compare cases cited in § 624, *ante.*

[4] In a Scotch case recovery was denied where a workman who, after the conclusion of his day's work, was walking home along a private railway track belonging to his employer, was run over at a point about 230 yards from the place where he worked. *Caton* v. *Summerlee & Mossend Iron & Coal Co.* (1902) 4 Se. Sess. Cas. 5th series, 989.

[5] *Durham* v. *Brown* (1898) 1 Se. Sess. Cas. 5th series, 279, 36 Se. L. R. 190.

In *Rees* v. *Thomas* [1899; C. A.] 1 Q. B. 1015, 68 L. J. Q. B. N. S. 539, recovery was allowed where a fireman employed in a coal mine was, in the course of his duty, carrying a report of the state of the mine from the pit's mouth to the office, and the horse drawing the tramway truck in which he was riding ran away, and in endeavoring to stop it he fell and was killed. *Loure* v. *Pearson* [1899; C. A.] 1 Q. B. 261, 68 L. J. Q. B. N. S. 122 (see note 3, *supra*), was distinguished on the ground that the act there which was done outside

A servant does not cease to be in the course of his employment cause he takes a wrong or dangerous method of doing what migh done safely.[8]

The burden of proving that an accident arose out of, and in course of, the workman's employment lies on the plaintiff.[9]

The cases cited in this section should be compared with those co ered in chapter XXXIII., *ante*.

769. Period of disablement (sec. 1, subs. 2, a).—A workman w work consisted partly of superintendence and partly of the ad ment of certain machines was held to have been disabled from "e ing full wages at the work at which he was employed," within meaning of this subsection, where, although it was shown that the accident he continued to work for the same employer at the s wages, it was also proved that he was unable to attend to the ad ment of machines; that he could do no work except that of sup tendence; and that he would have been unable to earn the same w if he had had to take service under another employer.[1]

770. Alternative remedies open to workmen (sec. 1, subs. 2, b This provision does not prevent a workman from maintaining a mon-law suit, after it has been determined that his case was not which came within the purview of the act.[1]

An election to take under the act is evidenced by receipts for we payments, some of which were worded "in full satisfaction of am due to me under the act."[2]

771. "Serious and wilful misconduct" (sec. 1, subs. 2, c).—The tion whether the servant is or is not debarred from recovery on ground of "serious and wilful misconduct" ceases to be of any portance, when it is apparent from the circumstances that the acci

the scope of the servant's employment was not done in any emergency.

A laborer injured while giving assistance to a machine man, in replacing some loose belting while the machine was in motion, was held entitled to recover in *Menzies* v. *McQuibban* (1900) 2 Sc. Sess. Cas. 5th series, 732, 37 Sc. L. R. 526.

[8] *Durham* v. *Brown* (1898) 1 Sc. Sess. Cas. 5th series, 279, 36 Sc. L. R. 190, per Lord McLaren. A fatal accident to a workman will be deemed to have occurred in the course of his employment, notwithstanding that at the time when it occurred he was going from one place of his employment to another by a forbidden route, which was more dangerous than another route which was available to him. *McNicholas* v. *D* [1899; C. A.] 1 Q. B. 773, 68 L. J. N. S. 470, 47 Week. Rep. 500.

[9] *McNicholas* v. *Dawson*, 68 L. J. N. S. 470 [1899] 1 Q. B. 773, 80 N. S. 317, 47 Week. Rep. 500.

[1] *Chandler* v. *Smith* [1899; C. Q. B. 506, 68 L. J. Q. B. N. S. 90 L. T. N. S. 317, Followed in *Fre* v. *Macfarlane* (1900) 2 Sc. Sess. 5th series, 832, 37 Sc. L. R. 599; *Northern of Scotland R. Co.* v. *F* (1900) 3 Sc. Sess. Cas. 5th series, 38 Sc. L. R. 653.

[1] *Beckley* v. *Scott* (1902) 2 Ir. 504

[2] *Little* v. *MacLellan* (1900) 2 Sc. Cas. 5th series, 387.

did not arise out of, or in the course of, his employment.[1] But if the workman brings himself within the act by showing that the accident arose out of, and in the course of, his employment, his case can only be met by the employer by showing that the injury to the workman is attributable to his serious and wilful misconduct.[2]

The judicial conception of what constitutes "serious and wilful misconduct" can scarcely be said to have, as yet, assumed a definite form. But, so far as can be judged from the comparatively few decisions which bear upon the subject, the phrase implies something nearly, if not quite, the same as that "wilful misconduct" which was explained by the court of appeals in a case involving the liability of a carrier for damage to goods. "There must be the doing of something which the person doing it knows will cause risk or injury, or the doing of an unusual thing with reference to the matter in hand, either in spite of warning, or without care, regardless whether it will or will not cause injury."[3]

772. Arbitration (sec. 1. subs. 3).—In order that this subsection

[1] *Lowe* v. *Pearson* [1899; C. A.] 1 Q. B. 261, 68 L. J. Q. B. N. S. 122.

[2] *McNicholas* v. *Dawson* [1899] 1 Q. B. 773, 68 L. J. Q. B. N. S. 470, 80 L. T. N. S. 317, 47 Week. Rep. 500, per Collins, L. J.

[3] Cotton, L. J., in *Lewis* v. *Great Western R. Co.* (1877) L. R. 3 Q. B. Div. 195, 47 L. J. Q. B. N. S. 131, 37 L. T. N. S. 774, 26 Week. Rep. 255. The language used by the other lords justices is to a similar effect.

A finding in favor of a servant will not be pronounced erroneous, as a matter of law, where a rule made under the coal mines regulation act of 1887 was violated by a workman employed in a coal mine. *Rumboll* v. *Nunnery Colliery Co.* [1899; C. A.] 80 L. T. N. S. 42. Nor where a miner failed to inform himself as to the contents of a rule,—especially where the evidence shows that it was not generally observed. *McNicoll* v. *Speirs* (1899) 1 Sc. Sess. Cas. 5th series, 604, 36 Sc. L. R. 428. Nor where an engineer, after leaving his engine, walked along the track to a station where he had to report himself off duty. *Todd* v. *Caledonian R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 1047, 36 Sc. L. R. 784. Nor where a watchman, stationed at a certain point to warn approaching trains of a landslide, went along the line for about 300 yards. *Glasgow & S. W. P. Co.* v. *Laidlaw* (1900) 2 Sc. Sess. Cas. 5th series, 708, 37 Sc. L. R. 593. Nor where a boy of nineteen, in contravention of an express order, put his hand across a circular saw to pick up an uncut screw which had fallen from its place. *Reeks* v. *Kynock* [1901; C. A.] 18 Times L. R. 34. Nor where a servant used a hoist to ascend to a platform, in contravention of a prohibitory notice, but the trial judge did not find that he knew of the prohibition. *McArthur* v. *McQueen* (1901) 3 Sc. Sess. Cas. 5th series, 1006. Nor where a miner failed to get into a manhole in the main haulage road of the mine, after he had been warned by a fellow workman that a train of cars was approaching. *John* v. *Albion Coal Co.* [1901; C. A.] 18 Times L. R. 27.

On the other hand no recovery can be had where a girl engaged in passing sheaves on a threshing machine undertook, in disobedience to an express prohibition, to step across the opening through which they were fed to the machine, merely for the purpose of speaking to a friend, and without any necessity arising out of the work. *Callaghan* v. *Maxwell* (1900) 2 Sc. Sess. Cas. 5th series, 420, 37 Sc. L. R. 313. Nor where a miner infringed a rule forbidding him to carry a naked light on his cap while carrying cartridges not inclosed in a case. *Dailly* v. *Watson* (1900) 2 Sc. Sess. Cas. 5th series, 1044, 37 Sc. L. R. 782. Nor where the servant cleaned machinery in motion, such an act being forbidden by a rule known to him. *Guthrie* v. *Boase Spinning Co.* (1901) 3 Sc. Sess. Cas. 5th series, 769, 38 Sc. L. R. 483.

may apply, it must be shown that a question has arisen and that it has not been settled by agreement.[1] Where a question as to the amount or duration of compensation has been settled by agreement, there is no room for arbitration. The workman's proper course is to get a memorandum of agreement recorded.[2]

773. Recovery in cases where nonliability apart from the act is established (sec. 1, subs. 4).— This subsection is applicable where it is found that no cause of action at common law and under the act of 1880 was stated by the averments of the complaint.[1]

Where a workman who has failed in an action to recover damages is desirous of having compensation for his injury assessed under the act, he must follow the procedure prescribed by this subsection, and must apply, then and there, to the judge trying the action, for an assessment of compensation; he cannot at a subsequent date initiate independent proceedings against his employer by a request for arbitration under the act.[2]

774. Application of fines imposed on other proceedings (sec. 1, subs. 5).— The enactments here referred to are the coal mines regulation act 1887; the metalliferous mines regulation act 1872; and the factory and workshop act 1901.

774a. Text of section 2.—Sec. 2.—(1) Proceedings for the recovery under this act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death: Provided, always, That the want of, or any defect or inaccuracy in, such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defense by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause.

[1] *Field* v. *Longden* [1902] 1 K. B. 47. There a workman, having been incapacitated for work by an accident arising out of, and in the course of, his employment, his employers had, since the second week after the accident, paid to him, by way of compensation, weekly payments of the full amount mentioned in schedule I., § 1 (b) (see subtitle C. *infra*), and promised to continue to do so during the period of his incapacity; but the workman, nevertheless, filed a request for arbitration in the county court, and the county court judge made an award for compensation in his favor. It was held, that, under the subsection it was a condition precedent to the jurisdiction of the county court judge that a question should have arisen as to the liability to pay, or as to the amount or duration of compensation under the act, and that, no such question having arisen, the county court judge had no jurisdiction to make an award.

[2] *Dunlop* v. *Rankin* (1901) 4 Sc. Sess. Cas. 5th series, 203, 39 Sc. L. R. 146.

[1] *Henderson* v. *Glasgow* (1900) 2 Sc. Sess. Cas. 5th series, 1127, 37 Sc. L. R. 857.

[2] *Edwards* v. *Godfrey* [1899] 2 Q. B. 333, 68 L. J. Q. B. N. S. 666, 80 L. T. N. S. 672.

(2) Notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

(3) The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

(4) The notice may also be served by post, by a registered letter addressed to the person on whom it is to be served, at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post; and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.

(5) Where the employer is a body of persons corporate or unincorporate, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to the employer at the office, or, if there be more than one office, any one of the offices of such body.

775. Notice of the accident (sec. 2, subs. 1).— *a. "Proceedings."*— This word is used in a "sense different from that which would describe legal procedure ordinarily."[1] It signifies a claim for compensation, and a refusal of such compensation.[2] A notice of injury, not followed by a claim for compensation, is not a "proceeding."[3]

b. "Claim for compensation."—This phrase means, not the intiation of proceedings before the tribunal by which the compensation is to be assessed, but a notice of a claim for compensation, sent to the workman's employer.[4] A request for arbitration is a sufficient "claim for compensation."[5]

c. Excuses for not serving notice in time.—The provision which requires the claim for compensation to be made within six months of the occurrence of the accident causing the injury is not necessarily an absolute bar to proceedings for the assessment of compensation, commenced after six months by an injured workman; and the county court judge or other arbitrator has jurisdiction to inquire whether

[1] Lord Halsbury in *Powell* v. *Main Colliery Co.* [1900] A. C. 366.

[2] *Powell* v. *Main Colliery Co.* [1900] 2 Q. B. 145, per Romer, L. J., whose conclusions were adopted by the House of Lords.

[3] *Perry* v. *Clements* (1901) 17 Times L. R. 525, 49 Week. Rep. 669.

[4] *Powell* v. *Main Colliery Co.* [1900] A. C. 366, holding that the proceedings were in time where a workman sent to his employers, within six months, a notice of the accident, and also a notice stating that he claimed a certain amount as compensation for the injury, and then, more than six months after the accident, filed a request for arbitration in the county court. The decision of the court of appeal ([1900] 2 Q. B. 145) was reversed.

A letter was written by the agent of a deceased servant's father to the employer to the following effect: "I am instructed by his father to intimate that he holds you liable for compensation. This notice is given in terms of the statute." Held, that the letter was not a claim for compensation, but merely notice of an intention to make a claim. *Bennett* v. *Wordie* (1899) 1 Sc. Sess. Cas. 5th series, 855, 36 Sc. L. R. 643.

[5] *Wright* v. *Baynall* [1900] 2 Q. B.

there are any circumstances in the case to debar the employer fr raising that defense.[6]

The *onus* lies on the workman to show that the employer has n been prejudiced by the former's failure to give due notice of the cident.[7]

775a. Text of sections 3 and 4.—Sec. 3.—(1) If the registrar of frien societies, after taking steps to ascertain the views of the employer and workm certifies that any scheme of compensation, benefit, or insurance for the workm of an employer in any employment, whether or not such scheme includes oth employers and their workmen, is, on the whole, not less favorable to the gene l y of workmen and their dependents than the provisions of this act, the e ployer may, until the certificate is revoked, contract with any of those workm that the provisions of the scheme shall be substituted for the provisions of th act, and thereupon the employer shall be liable only in accordance with t scheme; but, save as aforesaid, this act shall apply, notwithstanding any contra to the contrary made after the commencement of this act.

(2) The registrar may give a certificate, to expire at the end of a limited perio not less than five years.

(3) No scheme shall be so certified which contains an obligation upon t workmen to join the scheme as a condition of their hiring.

(4) If complaint is made to the registrar of friendly societies, by or on beha of the workmen of any employer, that the provisions of any scheme are no long on the whole, so favorable to the general body of workmen of such employer a their dependents as the provisions of this act, or that the provisions of su scheme are being violated, or that the scheme is not being fairly administered, that satisfactory reasons exist for revoking the certificate, the registrar sha examine into the complaint, and, if satisfied that good cause exists for such co plaint, shall, unless the cause of complaint is removed, revoke the certificate.

(5) When a certificate is revoked or expires, any moneys or securities held f

240, 82 T. N. S. 346; *Fraser* v. *Great North of Scotland R. Co.* (1897) 3 Sc. Sess. Cas. 5th series, 908, 38 Sc. L. R. 333.

[6] An agreement arrived at between the parties shortly after the accident, that there is a statutory liability on the employer to pay compensation, the amount of compensation being left open for future settlement, is evidence upon which the judge or arbitrator may properly find that the employer is estopped from setting up the defense that the request for arbitration was not filed within six months of the accident. Having allowed the six months to expire while the negotiations were still proceeding, the employer cannot then turn round and say t he time for claiming compensation ne by. *Wright* v. *Bagnall* [1900] 2 . 240, 82 L. T. N. S. 346.

But the mere fact that the employer has made weekly payments to a workman is not such evidence of an admission of liability and of an agreement pay compensation as will enable t workman to commence proceedings u der the act after the expiration of s months from the accident, where the e ployer took a receipt which stated th the money was received on account compensation which might be or becom due to the workman under the act. *Re dall* v. *Hill's Dry Docks & Engineeri Co.* [1900] 2 Q. B. 245. Distinguishi *Wright* v. *Bagnall* [1900] 2 Q. . 24 82 L. T. N. S. 346, *supra*.

A trial judge is in error if he di misses the action, when he has dete mined that there was no good excu for the want of notice. He is still boun to inquire whether the defendant wa as a matter of fact, prejudiced. *McLa* v. *Carse* (1899) 1 Sc. Sess. Cas. 5 series, 878.

[7] *Shearer* v. *Miller* (1899) 2 Sc. Ses Cas. 5th series, 114, 37 Sc. L. R. 80.

the purpose of the scheme shall be distributed as may be arranged between the employer and workmen, or as may be determined by the registrar of friendly societies in the event of a difference of opinion.

(6) Whenever a scheme has been certified as aforesaid, it shall be the duty of the employer to answer all such inquiries and to furnish all such accounts in regard to the scheme as may be made or required by the registrar of friendly societies.

(7) The chief registrar of friendly societies shall include in his annual report the particulars of the proceedings of the registrar under this act.

Sec. 4. Where, in an employment to which this act applies, the undertakers, as hereinafter defined, contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this act to those workmen in respect of any accident arising out of, and in the course of, their employment, the undertakers shall be liable to pay to any workmen employed in the execution of the work any compensation which is payable to the workmen (whether under this act, or in respect of personal negligence or wilful act independently of this act) by such contractor, or would be so payable if such contractor were an employer to whom this act applies: Provided, That the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section.

This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively.

776. Liability to servants of contractors (sec. 4).—*a. Generally.*—This section "contemplates the case of persons who, being undertakers in respect to a particular class of business, substitute for themselves a contractor to do some part of that business, and provides that the workmen of such a contractor shall have the same rights against such persons as they would have if they were employed by them."[1]

b. "Undertakers."—The meaning of this phrase is discussed in § 786, *infra*.

c. "Work merely ancillary or incidental to."—Whether the employer is exempt from liability under this provision is determined in each instance as a question of fact. The decisions, as will be seen by the subjoined note, are not consistent.[2]

[1] Collins, L. J. *Wrigley* v. *Bagley* [1901] 1 K. B. 78, 84 L. T. N. S. 415.

[2] The following operations have been held to be "merely ancillary" to the business of the defendant:

The erection of a station building for a railway company by a contractor. *Pearce* v. *London & S. W. R. Co.* [1900; C. A.] 2 Q. B. 100.

The work of putting a new driving wheel into a steam engine belonging to a cotton factory, where such work is done under contract by a firm of engineers. *Wrigley* v. *Bagley* [1901; C. A.] 1 K. B. 780, 84 L. T. N. S. 415, Affirmed in [1902] A. C. 299.

The fixing of an iron roof by a subcontractor for a builder, the evidence showing that this was no part of the latter's business. *Bush* v. *Hawes* [1902; C. A.] 1 K. B. 216, 71 L. J. K. B. N. S. 58.

The erection by a contractor of coal-hauling machinery at the power station

776a. Text of section 5.—Sec. 5. (1) Where any employer becomes liable under this act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company of the company having commenced to be wound up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and the judge of the county court may direct the insurers to pay such sum into the Postoffice Savings Bank in the name of the registrar of such court, and order the same to be invested or applied in accordance with the provisions of the first schedule hereto with reference to the investment in the Postoffice Savings Bank of any sum allotted as compensation; and those provisions shall apply accordingly.

(2) In the application of this section to Scotland, the words "have a first charge upon" shall mean "be preferentially entitled to."

777. Proceedings under this section.—An appeal lies to a divisional court from an order of a county court judge, giving a workman a charge upon moneys due from an insurer to the employer.[1]

777a. Text of section 6.—Sec. 6. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer, to pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this act, but not against both; and if compensation be paid under this act, the employer shall be entitled to be indemnified by the said other person.

of an electric railway company. *Brennan* v. *Dublin United Tramways Co.* (1900) 2 Ir. Rep. 241.

The erection by a contractor of a retaining wall to protect the track of a railway. *Dundee & Arbroath Joint R. Co.* v. *Carlin* (1901) 3 Sc. Sess. Cas. 5th series, 843, 38 Sc. L. R. 635 (servant run over by train).

The work of a man employed by a window cleaning company, who was injured while cleaning the windows of the defendant, a firm of tailors. *Dempster* v. *Hunter* (1902) 4 Sc. Sess. Cas. 5th series, 580, 39 Sc. L. R. 395.

Work done by a subcontractor for a firm of building contractors, who habitually made contracts for the demolition of old buildings on the site of which new ones were to be constructed. *Knight* v. *Cubitt* [1902] 1 K. B. 31.

The following operations have been held not to be "merely ancillary" to the business of the defendant:

The erection of signals for a new railway siding by a contractor. *Burns* v. *North British R. Co.* (1900) 2 Sc. Sess. Cas. 5th series, 629, 37 Sc. L. R. 448 (workman was run over).

Work done in the course of his employment by a servant of a contractor for the collection and delivery of goods conveyed by a railway for a third party. *Greenhill* v. *Caledonian R. Co.* (1900) 2 Sc. Sess. Cas. 5th series, 733, 37 Sc. L. R. 524 (servant injured while transferring a barrel from a lorry to a goods train).

Carting work done by the servant of a firm of contractors, who were under contract to do all the carting work in connection with a factory. *Brew* v. *Grant* (1900) 2 Sc. Sess. Cas. 5th series, 470, 37 Sc. L. R. 328 (factory owner held liable).

Work done by a carter in the employ of a railway company, while he was engaged in transporting the goods of the defendants, a firm of sausage makers, to a station on the railway. *Cooper* v. *McGovern* (1902) 4 Sc. Sess. Cas. 5th series, 249. This decision is almost certainly erroneous.

[1] *Knowleton* v. *Northern Employers' Mut. Indemnity Co.* [1902] 1 K. B. 880, 18 Times L. R. 504; *Morris* v. *Northern Employers' Mut. Indemnity Co.* [1902] 2 K. B. 165.

778. Proceedings under section 6.—Where both the "undertakers" and a contractor with them are made respondents to a claim for compensation under the act, and the contractor is found liable to pay compensation, a claim for indemnity cannot be made in the arbitration by the undertakers against the contractor under rule 23 (2) of the workmen's compensation rules 1898, unless the notice prescribed by rule 19 has been given.[1]

B. Employments to which the Act is Applicable.

778a. Text of sections 7-10.—Sec. 7.—(1) This act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined, on in or about any building which exceeds 30 feet in height and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof.

(2) In this act "railway" means the railway of any railway company to which the regulation of railways act 1873, applies, and includes a light railway made under the light railways act 1896; and "railway" and "railway company" have the same meaning as in the said acts of 1873 and 1896; "factory" has the same meaning as in the factory and workshop acts 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the factory acts is applied by the factory and workshop act 1895, and every laundry worked by steam, water, or other mechanical power; "mine" means a mine to which the coal mines regulation act 1887, or the metalliferous mines regulation act 1872, applies; "quarry" means a quarry under the quarries act 1894; "engineering work" means any work of construction or alteration or repair of a railroad, harbor, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water or other mechanical power is used; "undertakers" in the case of a railway means the railway company; in the case of a factory, quarry, or laundry means the occupier thereof, within the meaning of the factory and workshop acts 1878 to 1895; in the case of a mine means the owner thereof within the meaning of the coal mines regulation act 1887, or the metalliferous mines regulation act 1872, as the case may be; in the case of an engineering work, means the person undertaking the construction, alteration, or repair; and in the case of a building means the persons undertaking the construction, repair, or demolition; "employer" includes any body of persons, corporate or unincorporate, and the legal personal representative of a deceased employer; "workman" includes every person who is engaged in an employment to which this act applies, whether by way of manual labor or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative, or to his dependents, or other person to whom compensation is

[1] *Appleby* v. *Horseley Co.* [1899] 2 Q. B. 521, 80 L. T. N. S. 853, 68 L. J. Q. B. N. S. 892.

payable; "dependents" means (*a*) in England and Ireland, such members of the workman's family specified in the fatal accidents act 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death; and (*b*) in Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman as were wholly or in part dependent upon the earnings of the workman at the time of his death.

(3) A workman employed in a factory which is a shipbuilding yard shall not be excluded from this act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard.

Sec. 8.—(1) This act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to any employment by or under the Crown to which this act would apply if the employer were a private person.

(2) The treasury may, by warrant laid before Parliament, modify for the purposes of this act their warrant made under section one of the superannuation act 1887, and notwithstanding anything in that act, or any such warrant, may frame a scheme with a view to its being certified by the registrar of friendly societies under this act.

Sec. 9. Any contract existing at the commencement of this act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this act, be deemed to continue after the time at which the workman's contract of service would determine, if notice of the determination thereof were given at the commencement of this act.

Sec. 10. (1) This act shall come into operation on the 1st day of July, 1898.

(2) This act may be cited as the workmen's compensation act 1897.

779.—Scope and effect of these provisions; generally.—From the provisions above set out it will be seen that the right of the servant to recover compensation under the act is made to depend, in the majority of instances, upon two distinct tests, *viz.* (1) physical contiguity with respect to the locality in which one or other of certain specific classes of business are carried on; and (2) the character of the operations in which the servant is engaged. In any case in which the former of these tests is controlling, the essential subject of inquiry is the import of the phrase "on or in or about." The applicability of the latter test is a question which hinges upon the connotation of the various terms used to designate the various kinds of business which fall within the purview of the act.

780. Meaning of the phrase "on or in or about," when used in connection with various kinds of concerns.—In the subjoined note is stated the effect of the cases which turn directly upon the question whether the conditions of physical contiguity implied by the phrase "on or in or about" existed at the time of the accident, with regard

to certain localities in which one or other of the various kinds of business which are covered by the act was carried on.[1]

[1](a) ***On or in or about a railway.***—(See also § 783, *infra.*) The conditions contemplated by these words do not exist where a carter in the employ of a contractor for the cartage of goods to and from a station of the company is injured owing to the fact that, after his day's work is finished, his horse bolts just outside the gate of the station and dashes into a shop 315 yards distant. *Bathgate* v. *Caledonian R. Co.* (1901) 4 Sc. Sess. Cas. 5th series, 313, 39 Sc. L. R. 246.

Nor can any compensation be recovered under the act, where the conductor of a freight train met with an accident about ¾ of a mile from the main line of a railway, from which a private siding belonging to a trading company diverged. *Brodie* v. *North British R. Co.* (1900) 3 Sc. Sess. Cas. 5th series, 75, 38 Sc. L. R. 38. With respect to this case it should be observed that the siding itself was not a "railway" for the purposes of the act, as it was not one to which the regulation of railways act 1873, referred to in section 7, subs. 2, was applicable. See § 783, *infra.*

In England the accepted doctrine is that no part of the premises of a railway company can be regarded as being "used for purposes of public traffic," within the meaning of the regulation of railways act, unless some one of the processes directly connected with the operation of the trains are conducted thereon. This doctrine is assumed to involve the consequence that no recovery can be had under the compensation act where the accident occurs in a railway refreshment room, to which the only entrance for the public is from the station platform. *Milner* v. *Great Northern R. Co.* [1900; C. A.] 1 Q. B. 795, 82 L. T. N. S. 187.

But another view prevails in Scotland, several claims having been allowed to recover where the accident occurred in a smithy within the area of a yard, where the horses used by a railway company for collecting and delivering goods were shod. *Caledonian R. Co.* v. *Breslin* (1900) 2 Sc. Sess. Cas. 5th series, 1158, 37 Sc. L. R. 308. And also where the claimant was a carter whose business it was to deliver to consignees goods received at one of the stations of his employers, a railway company. *Devine* v. *Caledonian R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 1105, 36 Sc. L. R. 877.

Of these two theories the latter would seem to be the preferable one. The English decision ignores the plain and liberal meaning of the words "on or in or about," and fastens on them a restricted significance which is not justified by any of the phraseology employed in the act itself.

(b) "*On, in, or about a factory.*"—Recovery has been allowed where an employee was injured while loading a cart belonging to the owners of the factory, standing in a street close to the entrance to the factory yard, in a place where it was usually loaded. *Powell* v. *Brown* [1899; C. A.] 1 Q. B. 157, 68 L. J. Q. B. N. S. 151, 79 L. T. N. S. 631, 47 Week. Rep. 145. And where a workman employed as a quay laborer at a wharf was injured on the street outside the wharf shed, while engaged in removing girders to the side of a steamer. *Strain* v. *Sloan* (1901) 3 Sc. Sess. Cas. 5th series, 663, 38 Sc. L. R. 475. And where a car driver of a cable railway company was injured, while oiling his car in the car shed, 374 feet distant from a machine room adjoining the shed in which grips and other parts of the cars were repaired. *Mooney* v. *Edinburgh & D. Tramways Co.* (1901) 4 Sc. Sess. Cas. 5th series, 390, 38 Sc. L. R. 260.

Recovery has been disallowed where a carter, employed by the occupiers of a factory to cart goods to and from the factory, was injured when he was about a mile and a half distant from the factory. *Lowth* v. *Ibbotson* [1899] 1 Q. B. 1003, 80 L. T. N. S. 341, 68 L. J. Q. B. N. S. 465. And where a laborer, whose duty it was to fetch water in a cart from a brook at some distance along the main road, for the use of a factory, was injured while returning with the cart, at a spot about 110 to 160 yards distant from the engine and mortar-mill, owing to the horse running away. *Fenn* v. *Miller* [1900] 1 Q. B. 788, 82 L. T. N. S. 284. And where a cart used to carry timber from a factory upset about 2 miles away from the factory, and injured an employee. *Bell* v. *Whitton* (1899) 1 Sc. Sess. Cas. 5th series, 942. And where the workman was injured in the employment of a firm of ship repairers, while repairing a ship in a public dock at a distance from his employer's factory of 550 yards in a direct line, and about a mile by road. *Barclay*

781. "On or in or about a building" which exceeds 30 feet in height.—*a. Height of building.*—In an arbitration before the county cou under this act, the question whether a building "exceeds 30 feet i height," within the meaning of this section, is a question of fact to b determined by the county court judge, having regard to the particula circumstances existing at the time of the accident to the workman.[1]

v. *M'Kinnon* (1901) 3 Sc. Sess. Cas. 5th series, 436, 38 Sc. L. R. 321, Affirmed in [1901] A. C. 269.

The expression "employment by the undertakers . . . on or in or about a . . . factory" means employment by the undertakers on, in, or about their own factory. A workman, therefore, who is sent by his employers on their business to the factory of a third party, and is there injured by accident, is not entitled to compensation under the act. *Francis* v. *Turner Bros.* [1900] 1 Q. B. 478.

In a case where a railway car or was injured while taking goods from a factory to a dray, in which they were to be conveyed to the station of a railway which had contracted for the conveyance of the goods for a lump sum, including both collection and delivery, it was held that the owners of the factory were "undertakers," and that the accident occurred while the carter was employed "in or about" the factory. *McGovern* v. Cooper (1901) 4 Sc. Sess. Cas. 5th series, 249. But this decision seems to be wholly anomalous and unsound.

It has been held that a workman employed on board a ship lying in dock is not employed "on or in or about" a dock, and is therefore not employed "on or in or about" a factory, whether the dock itself is or is not a "factory" within the meaning of that word, as defined in the act. (See § 783a, *infra.*) *Flowers* v. *Chambers* [1899; C. A.] 2 Q. B. 142, 80 L. T. N. S. 834, 68 L. J. Q. B. N. S. 648. But this case was overruled in *Raine* v. *Jobson* [1901] A. C. 404.

(c) *On or in or about a mine.*—Recovery has been allowed where a servant was injured while engaged in blasting boulders, for the purpose of forming a road to be used in the operation of a mine which was being opened a few yards away. *Ellison* v. *Longden* (1901; C. A.) 18 Times L. R. 48. And where a brakeman in the service of a colliery company was injured while coupling cars on a siding belonging to the company. *Monaghan* v. *United Collieries* (1900) 3 Sc. Sess. Cas. 5th series, 14 38 Sc. L. R. 92.

Recovery has been disallowed whe an engine driver in the employ of co liery owners was killed about ¾ of mile from the pit mouth of the collier while his engine was drawing a co train to the depot where the coal wa stored. *Turnbull* v. *Lambton Colliera Co.* (1900; C. A.) 82 L. T. N. S. 58 16 Times L. R. 329. And where an in jury was received by a workman, wh after the conclusion of his day's wor was walking home along a private ra way belonging to his employer, and wa run over at a point about 230 yard from the place where he worked. *Cato* v. *Summerlee & M. Iron & Coal Co* (1902) 4 Sc. Sess. Cas. 5th series, 969.

(d) *On or in or about "engineering work."*—These words are not descriptiv of an accident which occurred to a work man while he was engaged in unloadin from a hopper, about 1½ miles out a sea, mud dredged from a harbor, not withstanding that he was at times em ployed on the dredger. *Chambers* v *Whitehaven Harbour Comrs.* [1899; C A.] 2 Q. B. 132, 68 L. J. Q. B. N. S 740, 80 L. T. N. S. 586, 47 Week. Rep 533.

[1] *McGrath* v. *Neill* [1902; C. A.] K. B. 211, 71 L. J. K. B. N. S. 5 approving a finding that the buildin was over 30 feet in height, where th judge took the lowest part of the foo ings as the level from which to estimat the height, and there was no evidenc to show that, at the time, anything mor than the footings had been covered in.

An accident to a workman employe on, in, or about a building in the cours of construction, which does not at the time exceed 30 feet in height, although it is intended that when completed it shall exceed such height, is not within the act. *Billings* v. *Halloway* [1899; C. A.] 1 Q. B. 70, 68 L. J. Q. B. N. S 16, 79 L. T. N. S. 396.

A finding that the employment of the workman was upon a building exceeding 30 feet in height, being demolished, is

The distance from the ground to the top of the roof, and not the distance from the ground to the top of the walls, is to be considered in determining whether a building is more than 30 feet high, within the act.[2]

b. 'Being constructed or repaired."—These words do not confine the employment to the construction or repair of the building as a whole. "Construction" here includes a case where the building has been constructed and believed to be complete, but, having been afterwards thought to be faulty and unstable, is being strengthened by the addition of stays or supports.[3]

The word "repair" includes painting, whitewashing, and dubbing the ceiling and walls of the interior of a building, where the painting and whitewashing is a portion of the work necessary to finish the building.[4]

On the ground that the buildings in question came within the descriptive words, "being constructed by a scaffolding," recovery has

justifiable, where the evidence shows that, although the building had been reduced to less than 30 feet, the party-wall between the building and the adjoining one remained intact at the time of the accident, and was more than 30 feet in height. *Knight* v. *Cubitt* [1902] 1 K. B. 31, 71 L. J. K. B. N. S. 65.

The conditions indicated by this phrase are satisfied where the height of the building, without including the foundation, is more than 30 feet. *Halstead* v. *Thomson* (1901) 3 Sc. Sess. Cas. 5th series, 668, 38 Sc. L. R. 473.

Internal communication between a building over 30 feet high and an adjoining building less than that height, coupled with the fact that the same business is carried on in both buildings, is not evidence to justify a finding that the lower building is a part of the higher, and that a workman injured while engaged in demolishing the lower building is employed on the demolition of a building exceeding 30 feet in height. *Rixson* v. *Pritchard* [1900] 1 Q. B. 800, 82 L. T. N. S. 186.

[2] *Hoddinott* v. *Newton* (1899; C. A.) 68 L. J. Q. B. N. S. 495, [1899] 1 Q. B. 1018, Affirmed as to this point in [1901] A. C. 49.

[3] In *Hoddinott* v. *Newton* [1901] A. C. 49, 84 L. T. N. S. 1, Reversing [1899; C. A.] 1 Q. B. 1018, 68 L. J. Q. B. N. S. 495, Lord Macnaghten said: "Construction, repair, demolition,—these three operations cover, I think, every varying phase in the life of a building, from its beginning to its end." Lord Morris said: "In my opinion, when you realize what the entity called the building is, all operations on it must be either constructing, or repairing, or demolishing, —alteration in its construction is, in my opinion, constructing. . . . In my opinion, whether completed or not completed, if work of the nature of construction goes on, that is constructing; if work in the nature of repair, that is repairing; and there is no room for any third operation of so-called alteration as distinct from constructing or repairing." Lords Shand and Lindley dissented from the judgment of the majority.

[4] *Reddy* v. *Broderick* (1901) 2 Ir. Rep. 328.

A large amount of whitewashing work was being done upon a school building more than 30 feet high, by means of a scaffolding, and a workman employed upon the work was killed owing to the collapse of the scaffolding. Held, that the building was "being repaired" by means of a scaffolding. *Dredge* v. *Conway* [1901] 2 K. B. 42, 84 L. T. N. S. 345.

The court stated that the effect of the decision in *Hoddinott* v. *Newton* [1901] A. C. 49, 84 L. T. N. S. 1, *supra*, was to overrule the earlier ruling (*Wood* v. *Walsh* [1899] 1 Q. B. 1009, 80 L. T. N. S. 345, 68 L. J. Q. B. N. S. 492) that the ordinary outside painting of a building is not "repair" within the meaning of the act.

been allowed in a case where, at the time of the accident, the component parts of the scaffolding were lying on the ground ready for use, but the scaffolding itself had not been erected;[5] and in a case where the building itself had been completed, but the scaffolding was still standing.[6]

c. What is a "scaffolding."—It is now definitely settled that the word "scaffolding" is not restricted to those permanent external structures to which the word is most commonly applied, but also embraces an internal staging, arranged by means of planks and trestles and without poles.[7] Whether a mere temporary staging of this kind is a scaffolding is a mixed question of law and fact. When the facts are ascertained it is a question of law, upon which a court of review is not only entitled, but bound, to express an opinion.[8]

The cases dealing with the question whether a ladder is a "scaffolding" within the meaning of the act are so strangely conflicting that it is difficult to predict in what manner this point will finally be settled. In two of those cases it has been held to be a conclusion of law that a ladder used in the ordinary way is not embraced in the word "scaf-

[5] *Halstead* v. *Thomson* (1901) 3 Sc. Sess. Cas. 5th series, 668, 38 Sc. L. R. 473. The special consideration on which the court relied was that "the scaffolding was regularly used from time to time by all the tradesmen engaged in the work during the construction of the building, both prior and subsequently to the accident."

[6] A builder erected a scaffolding for the purpose of raising building materials from a lower level to the higher level on which the building which he was constructing stood. After the building was complete, and while it was in actual use, a workman was injured as he was removing gear from this scaffolding. Held, that the workman was employed on a building which was "being constructed" by means of a scaffolding. *Frid* v. *Fenton* (1900; C. A.) 82 L. T. N. S. 193.

[7] *Hoddinott* v. *Newton* [1901] A. C. 49, 84 L. T. N. S. 1, Reversing [1899] 1 Q. B. 1018, 68 L. J. Q. B. N. S. 495.

[8] *Hoddinott* v. *Newton* [1901] A. C. 49, 84 L. T. N. S. 1, per Lord Macnaghten.

A new house more than 30 feet high had been roofed in, and workmen employed by the builder were plastering the walls and ceilings inside the house, for which purpose trestles and boards were being used. One of the men, while standing on the floor of the top landing plastering the wall, fell down the well of the staircase, there being no railing, and was killed. At that time other workmen were at work plastering some of the rooms, and were standing on boards placed across trestles 4 feet high, in order to enable them to reach the ceilings and upper part of the walls. It was held that there was evidence to justify a finding of the county judge that such arrangement of trestles and boards was a "scaffolding." *Maude* v. *Brook* [1900] 1 Q. B. 575. Collins, L. J., dissented, being of opinion that the word "scaffolding" ought to be construed in its ordinary popular meaning, taken in connection with its context, and that it meant some structure of planks and supports capable of being used for the construction or repair of a building over 30 feet in height.

A new house more than 30 feet high had been roofed in and the external scaffolding removed. The applicant was engaged in plastering the walls and ceiling in one of the rooms, and in order to reach his work was standing on a structure of trestles, with boards on them. While at work in this manner he met with an accident, for which he claimed compensation. An arbitrator appointed by a county court judge decided that the structure was not a scaffolding, and refused to make an award of compensation, but referred the matter to the

folding."[9] In another, a finding that a "crawling board" used in the repair of a roof was "scaffolding" was held not to be an improper one.[10] In a third the court of appeals refused to disturb a finding to the effect that a ladder placed so that one end rested on the ground and the other against the parapet of a house was not a "scaolding."[11] The question whether or not an arrangement of a plank and ladder is a scaffolding is deemed to be a question of fact.[12] The result of the decisions, as a whole, is manifestly to bring within the purview of the act some classes of structures which are assuredly not scaffolds in the sense in which that term is ordinarily employed, when it is applied to a contrivance for facilitating the erection of buildings. The question whether the interpretation thus adopted is correct is now practically closed in the only country in which the meaning of the provision is, as yet, a matter of any moment. But it would certainly seem to be not improbable, to say the least, that the legislature really intended to confine the statutory right of compensation to cases in which the cause of the accident is a scaffolding which is of such a height and in such a situation that the workmen on it are exposed to the danger of falling about 30 feet or over. The present mode of interpreting the act involves the curious result that a plasterer who, when working in a house exceeding 30 feet in height, falls from a low, temporary platform, erected in a room where the floor is completely finished, and where he is in no greater danger than if he were on a similar platform in a completed house, may recover compensation, while on the other

court judge, who reversed the decision of the arbitrator and awarded the compensation provisionally settled by the arbitrator. On appeal it was held that the question whether the structure was a scaffolding or not was a question for the arbitrator, and that his finding was not open to review. *Ferguson* v. *Grece*, [1901] 1 K. B. 25.

The word "scaffolding" includes an internal staging formed by planks resting on the step of a ladder and upon one of the roof principals in the center of a room. *Reddy* v. *Broderick* (1901: C. A.) 2 Ir. Rep. 328.

[8] *Wood* v. *Walsh* [1899] 1 Q. B. 1009, 68 L. J. Q. B. N. S. 492; *M'Donald* v. *Hobbs* (1899) 2 Sc. Sess. Cas. 5th series, 3, 36 Sc. L. R. 393.

[10] *Veazey* v. *Chattle* [1902] 1 K. B. 494 (Stirling, L. J., dissenting). The crawling board, a contrivance ordinarily used in the repair of roofs, consisting of a wooden plank about 18 to 20 feet long and 10 inches wide, across which were nailed transverse pieces of wood to give support to the man while working upon it; on the under side at one end was fastened a cross-piece of wood, which fitted over the ridge of the roof and kept the board in position. At the time of the accident the workman was on the roof fixing the crawling board, while the lower end of the board was being steadied by an assistant standing on the ladder.

[11] *Marshall* v. *Radforth* [1902] 2 K. B. 175.

See also *Veazey* v. *Chattle* [1902] 1 K. B. 494, 85 L. T. N. S. 74, where Collins remarked: "A ladder might be—at any rate I cannot say that it could not be—a scaffolding; and it would make no difference whether it were high above ground or on the roof of a house, or whether it were resting on the ground."

[12] *Wood* v. *Walsh* [1899] 1 Q. B. 1009, 80 L. T. N. S. 345, 68 L. J. Q. B. N. S. 492

hand, no compensation is recoverable by a servant who, while working on a house of less than 30 feet in height, falls from a platform resting on the ground, which subjects him to precisely the same amount of peril. It is, no doubt, true that the construction of the act has disclosed other anomalies of the same description. But in this instance the courts appear to have gone out of their way to create one.

782. "On or in or about a building in which machinery driven by steam," etc.— The act applies to employment in or about a building "in which machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition thereof," although the building does not exceed 30 feet in height.[1]

783. Meaning of "railway."—See also § 780, note 1, subd. (a), *supra*.) Private railways, not being "used for purposes of public traffic," are not covered by the compensation act, although they may be connected with a public railway.[1]

783a. — of "factory."— In order to render intelligible the decisions which bear upon the meaning of this word as used in the compensation act, it will be necessary to set out *in extenso* two of the sections of the factory acts which are referred to.

Factory Act 1878, § 93. The expression "nontextile factory" in this act means (1) any works, warehouses, furnaces, mills, foundries, or places named in part one of the fourth schedule of this act; (2) also any premises or places named in part two of the said schedule, wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there; (3) also any premises wherein, or within the close or curtilage or precincts of which, any manual labor is exercised by way of trade or for purposes of gain in, or incidental to, the following purposes, or any of them; that is to say,—(*a*) in or incidental to the making of any article or of part of any article, or (*b*) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or (*c*) in or incidental to the adapting for sale of any article, and wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

The expression "factory" in this act means textile factory and nontextile factory, or either of such descriptions of factories.

The expression "workshop" in this act means (1) any premises or places named in part two of the fourth schedule to this act, which are not a factory within the

[1] *Mellor* v. *Tomkinson* [1895]; C. A.] 1 Q. B. 374, 68 L. J. Q. B. N. S. 214, 79 L. T. N. S. 715; *Murnin* v. *Calderwood* (1899) 1 Sc. Sess. Cas. 5th series, 862, 36 Sc. L. R. 648.

[1] The word "railway" is not applicable to a siding in a dockyard, constructed merely as an adjunct to the ordinary business of the proprietors of the dockyard. *London & I. Docks Co.* v. *Midland & G. E. R. Co.* (1902; Q. B. D.) 18 Times L. R. 171, (C. A.) 19 Times L. R. 325. Nor to a private siding belonging to a trading company which does business with the railway company. *Brodie* v. *North British R. Co.* (1900) 3 Sc. Sess. Cas. 5th series, 75, 38 Sc. L. R. 38.

meaning of this act; (2) also any premises, room, or place, not being a factory within the meaning of this act, in which premises, room, or place, or within the close or curtilage or precincts of which premises, any manual labor is exercised by way of trade, or for purposes of gain in, or incidental to, the following purpose or any of them; that is to say,—(*a*) in or incidental to the making of any article or of part of any article, or (*b*) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or (*c*) in or incidental to the adapting for sale of any article, and to which or over which premises, room, or place the employer of the persons working therein has the right of access or control.

A part of a factory or workshop may, for the purposes of this act, be taken to be a separate factory or workshop; and a place solely used as a dwelling shall not be deemed to form part of the factory or workshop for the purposes of this act.

Where a place situate within the close, curtilage, or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, such place shall not be deemed to form part of that factory or workshop for the purposes of this act, but shall, if otherwise it would be a factory or workshop, be deemed to be a separate factory or workshop, and be regulated accordingly.

Any premises or place shall not be excluded from the definition of a factory or workshop by reason only that such premises or place are or is in the open air.

Factory Act 1895, § 23. (1) The following provisions, namely, (i) section 82 of the principal act, (ii) the provisions of the factory acts with respect to accidents, (iii) section 68 of the principal act, with respect to the powers of inspectors, (iv) sections 8 to 12 of the act of 1891, with respect to special rules for dangerous employment, and (v) the provisions of this act, with respect to the power to make orders as to dangerous machines, shall have effect as if (*a*) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and (*b*) any premises on which machinery worked by steam, water, or other mechanical power, is temporarily used for the purpose of the construction of a building or any structural work in connection with a building, were included in the word factory, and the purpose for which the machinery is used were a manufacturing process; and as if the person who, by himself, his agents, or workmen, temporarily uses any such machinery for the before-mentioned purpose were the occupier of said premises; and for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the person using any such machinery, shall be deemed to be the occupier of a factory.

(2) The provisions of this act with respect to notice of accidents and the formal investigation of accidents shall have effect as if—(*a*) any building which exceeds 30 feet in height, and which is being constructed or repaired by means of scaffolding; and (*b*) any building which exceeds 30 feet in height, and in which more than twenty persons, not being domestic servants, are employed for wages were included in the word "factory;" and as if, in the first case, the employer of the persons engaged in such construction or repair, and, in the second case, the occupier of the building, were the occupier of a factory.

These provisions are now incorporated, with some additions, in the factory and workshop act 1901.

a. "Dock, wharf, quay."—The combined effect of the act of 1897

and the factory acts is that every dock, wharf, or quay is deemed to be a "factory," within the meaning of the former act, whether steam power was or was not being used in the work in which the servant claiming compensation was engaged.[1]

A floating structure carrying cranes for loading and unloading ships, which is moored in a river 500 feet from the shore by chains fastened to piles driven into the bed of the river, but is not connected with the shore except by boats, is a "wharf."[2]

Whether a space not immediately contiguous to the area appropriated to the ships themselves is embraced under one or other of the terms "dock, wharf, or quay" is determined as a question of fact, with reference to the elements of distance, the intervention of barriers, and the uses to which the space was put.[3]

It is now settled that a ship lying in a dock is to be regarded as a "factory" for the purposes of enabling a servant to recover under the act, whether the dock is a wet one,[4] or a dry one.[5]

[1] *Raine* v. *Jobson* (1901) A. C. 404. In that case the respondents admitted that the construction of the act specified in the text was the correct one, and the admission was referred to by the Lord Chancellor as being "very frank and proper."

The decision of the House of Lords discredits the earlier judgment of the court of appeal to the effect that a wharf on which no machinery is used is not a factory within the act. *Hall* v. *Snowden* [1899; C. A.] 2 Q. B. 136, 68 L. J. Q. B. N. S. 645, 80 L. T. N. S. 554.

The doctrine of the House of Lords has been also applied in Scotland. *Strain* v. *Sloan* (1901) 38 Sc. L. R. 475, 3 Sc. Sess. Cas. 5th series, 663.

[2] *Ellis* v. *Cory* [1902] 1 K. B. 38, 71 L. J. K. B. N. S. 72.

[3] An accident happened to a workman, while engaged in removing timber from a stack upon a piece of land which was within the ambit of a system of docks belonging to a railway company, and which had been let by the company to timber merchants for the storage of timber. This piece of land was about 40 yards from the water of the dock. Between it and the water ran the lines of a dock railway or tramway, but it was not separated from the adjoining wharf or quay space by any fence or other physical barrier. Timber had sometimes been landed from the before-mentioned dock and brought to the said piece of land, but during the year 1900 all the timber stacked thereon had been landed from other docks forming part of the dock system, more or less remote, and brought to the said piece of land by rail. Held that there was evidence to support the finding that the place where the accident happened was a "factory," as being a "dock, wharf, or quay," and that the court was bound by such finding. *Kent* v. *Harrison* [1902; C. A.] 2 K. B. 1

For the purpose of unloading timber from timber ships a dock board provided quay or wharf space inland for 1 yards from the water's edge; at the further end of this space was a fence, with gates at intervals, behind which came a series of yards leased by the dock board to different timber merchants for storing their timber, the whole being the property of the dock board, and separated by a wall from the surrounding property. A workman employed by a firm of carters was killed while moving a log of timber in one of the yards leased to a firm of timber merchants. Held, that the word "wharf" must be construed in its ordinary and popular signification of a place contiguous to water, over which goods pass in the process of loading and unloading; that the yard where the accident happened was not a wharf within the meaning of the sections; and that the employment of the deceased was therefore not one to which the compensation act applied. *Haddock* v. *Humphrey* [1900] 1 Q. B. 609, 82 L. T. N. S. 72 (Rigby, L. J. dissenting).

[4] *Cattermole* v. *Atlantic Transport*

b. "Premises wherein steam, water, or other mechanical power is used."—In view of these descriptive words (factory act 1878, § 93, subs. 3), it has been held that a yard in which stones are dressed by manual labor, and in which there is an engine house in which the workmen's tools are sharpened, is a "factory."[6] But as machinery actuated by hand power is not within this description, the user of such machinery does not constitute the premises in which it is employed a "factory."[7] Nor can the words quoted at the beginning of this subsection be so construed as to bring within the category of "factories" a threshing machine and traction engine, which at the time of the accident, were in transit to a place where they were to be used for threshing, the engine being connected with the machine for no purpose but that of haulage.[8]

c. "Machinery or plant."—These words, as used in the factory act 1895, § 23, have been held not to be applicable to gangway doors through which cargo is taken into or discharged from a ship;[9] nor to a staging outside a ship, on which the servant was standing to screw up the iron doors of a ship after the loading was completed.[10]

The effect of the clause in § 23 (1) (i) (b), of the factory act of

Co. [1902; C. A.] 1 K. B. 204; *Bartell* v. *Gray* [1902; C. A.] 1 K. B. 225.

The case of *Flowers* v. *Chambers* [1899; C. A.] 2 Q. B. 142, 68 L. J. Q. B. N. S. 648, 80 L. T. N. S. 834, 47 Week. Rep. 513, in which it was held that a workman injured on a ship within a dock was not within the purview of the act, was overruled by the House of Lords in *Raine* v. *Jobson* [1901] A. C. 404. See next note. The effect of that decision is also to destroy the authority of the following cases, in which *Flowers* v. *Chambers* [1899; C. A.] 2 Q. B. 142, 80 L. T. N. S. 834, 68 L. J. Q. B. N. S. 648, was followed; *Holness* v. *MacKay* (1898; C. A.) 15 Times L. R. 351, [1899] 2 Q. B. 319, 68 L. J. Q. B. N. S. 724; *Durrie* v. *Warren* (1898; C. A.) 15 Times L. R. 365; *Low* v. *Abernethy* (1900) 2 Sc. Sess. Cas. 5th series, 722; *Jackson* v. *Rodgers* (1900) 2 Sc. Sess. Cas. 5th series, 533 (where the court emphasized the fact that the fitting of the engines in a steamer, the work in which the servant was engaged, was being done without the aid of any steam power); *Laing* v. *Young* (1900) 3 Sc. Sess. Cas. 5th series, 31 (act held not to be applicable to a lighter fitted with machinery, the property of and worked by stevedores, which was employed in raising goods from the hold to the deck of a vessel, moored between the lighter and the quay); *Healy* v. *Macgregor* (1900) 2 Sc. Sess. Cas. 5th series, 634, 37 Sc. L. R. 454 (act held not to be applicable where the work of loading or unloading a ship is done by servants on board her, and by means of her own machinery); *Aberdeen Steam Trawling & Fishing Co.* v. *Peters* (1899) 1 Sc. Sess. Cas. 5th series, 786 (act held not to be applicable to the work of loading or unloading machinery which forms part of the apparatus of a ship lying in a dock); *Aberdeen Steam Trawling Co.* v. *Kemp*, Cited in Rueg, Employers' Liability, 4th ed. p. 211, note (x).

[6] In *Raine* v. *Jobson* [1901] A. C. 404. Reversing the decision of the court of appeal, compensation was held to be recoverable where one of a gang of ship repairers fell from the gangway connecting the ship with the quay.

[6] *Petrie* v. *Weir* (1900) 2 Sc. Sess. Cas. 5th series, 1041, 37 Sc. L. R. 795.

[7] *Willmott* v. *Paton* [1902] 1 K. B. 237, 71 L. J. K. B. N. S. 1.

[8] *George* v. *Macdonald* (1901) 4 Sc. Sess. Cas. 5th series, 190, 39 Sc. L. R. 136.

[9] *Medd* v. *McIver* (1898; C. A.) 15 Times L. R. 364.

[10] *Durrie* v. *Warren* (1898, C. A.) 15 Times L. R. 365.

1895, to the effect that the provisions of this act with respect to th power of the inspector to make orders as to dangerous machines sh have effect as if "any premises on which machinery worked by steam water, or other mechanical power, is temporarily used for the purpo of the construction of a building, . . . were included in the wor factory, has been held to be that an engine shed and room containin a steam engine connected with a mortar pan for mixing mortar for us on a building near at hand is a "factory" within the meaning of th compensation act.[11]

d. "Premises wherein . . . any manual labor is exercised . . . for purposes of gain."—Construing these words (factory act 187 § 93, subs. 3) the Scotch court of session has held that the refuse di patch works of a city, where the saleable parts of the city refuse ar separated from the unsaleable part by processes in which steam powe is used, is a "factory."[12] But a workman, who was employed by farmer on his farm to drive a movable steam engine, for the purpo of working a mill for grinding meal intended to be used for food fo stock on the farm, and not for sale, is not employed on, in, or abou a "factory."[13]

e. "Machinery used in the process of loading or unloading."— These words (factory act 1895, § 23, subs. 1) import either a landing of something from a ship, or a loading on the ship from the land. They are not applicable to a steam winch on a ship's deck, which i being used for the purpose of loading goods from a lighter.[15]

f. "Bleaching or dyeing works."—The effect of section 93, sub (1) of the act of 1878, when construed in connection with schedu IV., part I., § 2, is that premises in which the processes of hooking lapping, making up, and packing cloth are carried on, are a "factory," even if none of those processes are carried on as incidental to bleach ing and dyeing.[16]

[11] *McNicholas* v. *Dawson* [1899; C. A.] 1 Q. B. 773, 68 L. J. Q. B. N. S. 470.

[12] *Henderson* v. *Corporation of Glasgow* (1900) 2 Sc. Sess. Cas. 5th series, 1127, 37 Sc. L. R. 857.

[13] *Nash* v. *Hollinshead* [1901; C. A.] 1 K. B. 700.

[14] Where a ship was unloading in a dock by means of a crane on the quay hired by her owners, and a workman employed by them in unloading her was killed by the explosion of a case of percussion caps which he was placing in a basket attached to the chain of a crane for the purpose of its being hoisted out of the ship onto the quay, it was held that the accident arose out of, and in the course of, the workman's employment on or about machinery used in the process of unloading to a quay within the meaning of the act of 1897. *Wood ham* v. *Atlantic Transport Co.* [1899 C. A.] 1 Q. B. 15, 68 L. J. Q. B. N. S 17, 79 L. T. N. S. 395.

This decision was followed in another where a workman was killed while en gaged in making up sets of bags to be hoisted from the hold of a ship by means of a crane operated by a man on the quay. *Lawson* v. *Atlantic Trans port Co.* (1900; C. A.) 82 L. T. N. S. 77

[15] *Hennessey* v. *McCabe* [1900] 1 Q. B 491, 81 L. T. N. S. 575.

[16] *Rogers* v. *Manchester Packing Co*

g. "Shipbuilding yard."—The fact that repairs are being done to a ship does not make the dock a "shipbuilding yard" within the meaning of the factory act 1878, schedule IV., part II. (21). Under such circumstances, therefore, the dock is not a "factory" within the meaning of section 7 of the compensation act.[17]

784. — of "engineering work."— These descriptive words have been held applicable to the employment of the driver of a water cart used to sprinkle a newly laid surface before it is rolled by a steam roller;[1] and to work which includes the hoisting of iron girders by means of a steam winch to the top of a building to which a new story is being added.[2] It may be that they also embrace work on a steam dredger.[3] But they do not cover pulleys worked by a winch;[4] nor the operation of lifting an air compresser by means of a hydraulic jack, for the purpose of taking it away on a truck after it had been purchased from the party who had used it in building a bridge.[5]

785. — of "mine."— The provision in the coal mines regulation act 1887, § 75, to the effect that "in this act, unless the context otherwise requires, 'mine' includes . . . all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine," cannot be construed in such a sense as to enable an engine driver to recover for an injury received while he was operating his engine on his employers' private railway about ¾ of a mile from the pit mouth. The words "adjacent to and belonging to the mine" mean "physically adjacent to and belonging to the mine itself," and not merely belonging to the owner.[1]

Road work done as a necessary preliminary to the operation of a mine has been held to be a "mine" within the act, although no mine in actual operation may exist.[2]

A tramway laid along a public road is a "railroad" within the definition of "engineering work."[3]

The word "railroad" is used in the same comprehensive sense as

[1898] 1 Q. B. 344, 67 L. J. Q. B. N. S. 310, 78 L. T. N. S. 17.

[17] *Spencer* v. *Livett* [1900; C. A.] 1 Q. B. 498.

[1] *Middlemiss* v. *Berwickshire* (1900) 2 Sc. Sess. Cas. 5th series, 302, 37 Sc. L. R. 297.

[2] *Cosgrove* v. *Partington* (1900; C. A.) 17 Times L. R. 39.

[3] In *Chambers* v. *Whitehaven Harbour Comrs.* [1899] 2 Q. B. 132, 80 L. T. N. S. 586, 47 Week. Rep. 533, 68 L. J. Q. B. N. S. 740, this point was referred to, but not explicitly decided, the action being held not maintainable for another reason. See § 780, note 1, subd. (d), *supra*.

[4] *Wrigley* v. *Bagley* [1901] 1 K. B. 780.

[5] *Gibson* v. *Wilson* (1899) 1 Sc. Sess. Cas. 5th series, 1017.

[1] *Turnbull* v. *Lambton Collieries Co.* (1900; C. A.) 82 L. T. N. S. 589, 16 Times L. R. 309.

[2] *Ellison* v. *Longden* (1901) 18 Times L. R. 48.

[3] *Fletcher* v. *London United Tramways* [1902; C. A.] 2 K. B. 269.

the word "railway" and is not restricted to the permanent way merely.[4]

786. — of "undertakers." — *a. In the case of a factory.*—An "undertaker" in relation to a factory is a person who occupies, and conducts his business upon, the premises where those processes are conducted which constitute the place of work or "factory" within the meaning of the act.[1] Accordingly a person who, for the time being, has the actual use of a "dock, wharf, or quay," as those terms are construed (see § 783a, subd. a, *supra*), is liable as an "undertaker" for an injury received by one of his workmen, while engaged in any of the operations with a view to which the use of the premises has been obtained.[2] As a ship in a dock is deemed to be a "factory" (see § 783a, *supra*), an employer who is doing work on such a ship is also an "undertaker."[3]

To render the employer an "undertaker" it is not necessary that

[4] *Pullick* v. *Evans* (1901; C. A.) 84 L. T. N. S. 413, holding that, where a workman was accidentally injured in the course of his employment on the construction of a signal box on a new line of railway, his employment was on, in, or about a work of construction of a "railroad."

[1] See the judgment of Smith, L. J., in *Francis* v. *Turner Bros.* [1900] 1 Q. B. 480, where it was laid down that, in the definition of "undertakers" in the compensation act, the meaning of the word "occupier" is not affected by the sense in which that word is used in section 23 of the factory act 1895.

[2] Where the owners of a ship moored alongside of a quay, who acted as their own stevedores, had the use of the portion of the quay alongside of which their ship lay, for the purpose of unloading the ship's cargo onto the quay, and a workman employed by them was killed through an accident arising out of, and in the course of, his employment on the quay, the ship owners are liable as "undertakers." *Merrill* v. *Wilson* [1901; C. A.] 1 K. B. 35; *Hainsborough* v. *Ralli* (1901; C. A.) 18 Times L. R. 21.

Persons who are in the actual use or occupation of a dock (or, *semble*, of a berth in a dock), and employ workmen in cleaning or repairing a ship in the dock, are "undertakers" within the meaning of the act, and liable to pay compensation to a workman injured in the course of his employment. *Raine* v. *Jobson* (1901) A. C. 404.

A person using machinery, the property of another party, in the process of loading a ship from a quay, is an "undertaker." *Carrington* v. *Bannister* [1901; C. A.] 1 K. B. 20, holding that in section 23 of the factory act of 1895 the expression "such machinery," as last used in the latter part of the section, refers to the "machinery and plant" mentioned previously in clause (a), and not to the "machinery" mentioned in clause (b).

[3] Stevedores were loading a vessel in a dock by means of machinery. The cargo had been put into the hold, and the men employed by the stevedores were "finishing off" by slinging the beams across the hatchway. The machinery having become entangled, one of the workmen went to disentangle it, was caught by it, and injured so that he died. Under these circumstances it was held by the House of Lords (Lord Lindley dissenting) that the stevedores were occupying a "factory," namely, the machinery, within the meaning of the act, and that the deceased was injured in the course of his employment in loading from the wharf, the process of loading not being complete till the hatchway was secured, within the meaning of those acts. *Stuart* v. *Nixon* [1901] A. C. 79.

A shipbuilding firm which has sent a newly-launched ship to a public dock to have the engines for which it had contracted with another firm erected and fitted are "undertakers." *Jackson* v. *Rodger* (1899) 1 Sc. Sess. Cas. 5th series, 1053, 36 Sc. L. R. 851, 37 Sc. L. R. 390.

his possession of the premises should be exclusive. All that is requisite is that he should be in possession so far as may be necessary for the purpose of doing the work in hand.[4]

It has been held that an employer is not liable, as an "undertaker," for injuries received by one of his servants in the factory of another person, while he was engaged in removing a portion of the plant which was to be transferred to the defendant's own factory.[5] But, manifestly, it is not easy to define precisely the boundary line between the circumstances which call for the application of the principle thus exemplified and that which controls cases of the type mentioned in the preceding paragraph.

b. In the case of engineering work.— Where it is the usual practice of a firm of builders to enter into contracts for pulling down and rebuilding, but they invariably sublet the work of pulling down, they are "undertakers" as regards the servants of the subcontractors.[6] The owner of a building who contracts with someone to execute repairs on the building, and does not engage in the work himself, is not an "undertaker."[7] But a building contractor who is erecting a tene-

[4] A firm of employers contracted to do the painting and plumbing on a ship lying in a dock, and sent workmen on board to do the work. Some of the crew were in charge of the ship for the owners, but the firm were in possession of the ship so far as was necessary for the work that they had contracted to do. One of the workmen was injured by an accident in the course of his employment. Held, that the possession of the shipowners, for a purpose not inconsistent with the possession of the employers, did not prevent the latter from having the "actual use or occupation" of the ship within the meaning of the factory and workshop act 1895, § 23, subd. (b). *Bartell* v. *Gray* [1902; C. A.] 1 K. B. 225, 18 Times L. R. 70.

A similar doctrine is embodied in *Jackson* v. *Rodger* (1899) 1 Sc. Sess. Cas. 5th series, 1053. But in other Scotch decisions a different view was taken. In one of these the mere fact that a steamship was lying in a dock while a workman employed by a firm of engineers was engaged in repairing the boilers was held not to make the firm "occupiers" of the dock. *Low* v. *Abernethy* (1900) 2 Sc. Sess. Cas. 5th series, 722, 37 Sc. L. R. 506.

In another, shipping agents who had contracted with the owners of a vessel lying at a dock to load her were denied to be "occupiers of the dock. *Bruce* v. *Henry* (1900) 2 Sc. Sess. Cas. 5th series, 717, 37 Sc. L. R. 511.

[5] *Francis* v. *Turner* [1900] 1 Q. B. 478. With this decision may be compared three Scotch cases. In one of these a firm of engineers making a preliminary run for the purpose of testing machinery in a building belonging to a cold storage company were denied to be "occupiers." *Purves* v. *Sterne* (1900) 2 Sc. Sess. Cas. 5th series, 887, 37 Sc. L. R. 696.

In another it was held that the term "occupiers" was not applicable to the place where a laborer in the employ of a coal dealer, who was under contract to deliver coal to the steamers of a packet company, fell into the water, while he was waiting for the arrival of a steamer on which some coal was to be shipped. *Stewart* v. *Dungavril* (1902) 4 Sc. Sess. Cas. 5th series, 425, 39 Sc. L. R. 302.

In another it was held that an iron founder was not liable to the widow of a workman, who was killed by falling from a scaffold while he was doing some work in a soap factory to which he had been sent for that purpose. *Malcolm* v. *M'Millan* (1900) 2 Sc. Sess. Cas. 5th series, 525, 37 Sc. L. R. 383.

[6] *Knight* v. *Cubitt* [1902; C. A.] 1 K. B. 31, 71 L. J. K. B. N. S. 65.

[7] *M'Gregor* v. *Dunsken* (1899) 1 Sc

ment for himself is deemed to be within that description in such a sense as to be liable to a servant of one of the trading firms with whom he had contracted for particular parts of the work which are not being executed by his own workmen.[8]

The word "undertaker" is not restricted to persons who contract for the construction of a building as a whole. Hence, where a building over 30 feet high is being constructed by means of a scaffolding, and the work of construction is carried on by several persons, not acting jointly, but each of them contracting with the building owner for the construction of a separate substantial part of the building, each of them is an "undertaker," and is liable to compensate the workmen employed by him for personal injury sustained by them in the course of their employment. Every workman employed by the undertaker upon the building is within the act, whatever may be the nature of his own particular work.[9]

A firm of engineers who have sold a hay-cutting machine are "undertakers" as regards one of their workmen, who is injured while its operation is being tested.[10]

It was at first held that a subcontractor for engineering work is not an "undertaker" within the meaning of the compensation act.[11] But this view has now been pronounced erroneous by the House of Lords.[12]

An employer who, under a contract with a firm engaged in building operations on their own premises, supplies the labor for the brick work,—the workmen so supplied, although paid by him, being under the control, while at work, of the foreman of the building owners,—is not an "undertaker."[13]

787. — of "workman." — *a. Contractors.*—It is not disputed that recovery under the act cannot be had if the facts show that the injured person was an independent contractor.[1] Compare the decisions cited in § 723, subd. *i, ante.*

Sess. Cas. 5th series, 536, 36 Sc. L. R. 393 (Lord Young dissenting.)

[8] *Stalker* v. *Wallace* (1900) 2 Sc. Sess. Cas. 5th series, 1162, 37 Sc. L. R. 898.

[9] *Mason* v. *Dean* [1900: C. A.] 1 Q. B. 770.

[10] *Reid* v. *Fleming* (1901) 3 Sc. Sess. Cas. 5th series, 1000, 38 Sc. L. R. 720.

[11] *Cass* v. *Butler* [1900] 1 Q. B. 777; *Cooper* v. *Davenport* (1898; C. A.) 16 Times L. R. 266.

[12] *Cooper* v. *Crane* [1902] A. C. 302, holding that a person contracting to erect a building is entitled to be indemnified by a subcontractor for the amount for which he is liable to a workman employed by the latter. See section 1, subs. 4 of the act.

[13] *Percival* v. *Garner* [1900: C. A.] 2 Q. B. 406, holding that the persons from whom recovery should have been sought were the firm of contractors.

[1] A contractor for a lump sum, whose tender is for labor and tools, but who is not to supply any materials, is not within the act. *Simmons* v. *Faulds* (1901; C. A.) 17 Times L. R. 352.

See also *M'Gregor* v. *Dansken* (1899) 1 Sc. Sess. Cas. 5th series, 536, 36 Sc. L. R. 393, a case of a small contractor.

b. Seamen.—The compensation act does not "deal with the relation between shipowners and sailors, when engaged in their ordinary occupation of sailing upon the seas."[2] Compare § 724, *ante*. But this doctrine does not involve the consequence that the mere fact of the accidents having happened in or upon a ship prevents the injured workman from claiming compensation under the act. His right of recovery must be tested with reference to the circumstances attending the accident.[3]

787a. — of "dependents."— *a. In England and Ireland.*—At p. 197 of his treatise on Accidents to Workmen, Mr. Minton-Senhouse remarks that the word "'dependent' probably means, dependent for the ordinary necessaries of life for a person of that class and position," and this definition has been approved by high judicial authority.[1] The term does not signify a person who merely derived a benefit from the earnings of the injured workman.[2]

A father earning wages may be "in part dependent" upon the earnings of his child, within the meaning of the act; and there is evidence upon which the father may be found to be, in fact, so dependent, and to be entitled to compensation for the death of the child, where it is proved that the child contributed to the family wages fund, and that the father received the contribution and spent it in main-

On the other hand a finding that the injured person was n "workman" is justifiable, where he was employed in a quarry under an agreement that he should be paid so much for every ton he got out, and the tools were found for him, and he used to hire and discharge the men who worked under him. *Evans* v. *Penrylt Dinas Silica Brick Co.* (1901; C. A.) 18 Times L. R. 58. And where he was one of n squad of mechanics who were paid by the piece, for work on a vessel under construction, but were bound to work continuously all the working hours recognized in the yard, were supervised generally by the foreman of the employer, and were subject to printed rules and regulations "to be observed by the workmen in the employment" of shipbuilders. *M'Cready* v. *Dunlop* (1900) 2 Sc. Sess. Cas. 5th series, 1027, 37 Sc. L. R. 779.

[2] Lord Halsbury in *Raine* v. *Jobson* [1901] A. C. 404. In an Irish case it was held that an able-bodied seaman, working at the hoisting of a ship's boat by means of a crane on the quay alongside his ship, is merely carrying out the normal duties of a seaman, and is therefore not engaged in an employment to which the act applies. *O'Hanlon* v. *Dundalk & N. Steam Packet Co.* (1899) 33 Ir. L. T. R. 36.

[3] An ordinary laborer employed for the purpose of doing anything that is to be done on a ship lying in a dock is not without the scope of the act. *Raine* v. *Jobson* [1901] A. C. 404. Nor is a man working on a dredger, which went 2 miles out to sea for the purpose of being emptied. *Chambers* v. *Whitehaven Harbour Comrs.* [1899] 2 Q. B. 132.

[1] Romer, L. J., in *Simmons* v. *White Bros.* [1899] 1 Q. B. 1007, 68 L. J. Q. B. N. S. 507, and Lord Shand in *Main Colliery Co.* v. *Davies* [1900] A. C. 358. In the latter case Lords Halsbury and Davey expressed the opinion that the question of dependency was to be decided without respect to the standard of living in the neighborhood or the class to which the family belong; that the act sets up no such standard; and that the actual means of living and expenditure need alone be regarded. Lord Shand did not agree with this view.

[2] *Simmons* v. *White* (1899; C. A.) 80 L. T. N. S. 344.

taining himself and his family.[3] Similarly it is held there may be a "dependency" for the purposes of the act, although the claimant is able to maintain himself and family without the assistance of the deceased.[4]

In the case of the death of a workman, leaving dependents, the test by which to determine whether they were wholly dependent on his earnings at the time of his death, within the meaning of the act, is whether money which the workman was earning at the time of his death was the sole source to which they could look for maintenance at that time. Accordingly the fact that money came to them on the death of the workman cannot be taken into consideration.[5]

b. In Scotland.—The mother of a deceased workman, whose parents were in part dependent on him, is not entitled to sue, where the father is alive.[6]

Grandchildren are entitled to claim compensation for the death of their grandfather, in cases where their father is dead.[7]

An illegitimate child has no right to sue the employer of his deceased mother.[8]

A woman living separate from a husband who only contributed a small sum to her support, the rest of her sustenance being obtained from relatives, and occasional employment, may claim compensation for his death.[9]

The fact that the father of the deceased was assisting a crippled relative does not show, as a matter of law, that he was not "partially dependent" on his son's earnings.[10]

788. "Shipbuilding yard" (sec. 7, subs. 3).—The question whether a dock 2 miles from a shipbuilding yard was "near" it was held to be a question of fact, not of law.[1] In the case cited the court agreed with the finding of the arbitrator in favor of the servant, as having been injured "near" the yard.

[3] *Main Colliery Co.* v. *Davies* [1900] 10 A. C. 358. This decision embodies a doctrine similar to that adopted in an earlier case, in which it was held that a finding of "dependency" was sufficiently supported by evidence that the parents of an employee fourteen years old, who was killed, had received his weekly wages for five weeks before his death, and handed over to him such pocket money as they thought right. *Simmons* v. *White Bros.* (1899; C. A.) 68 L. J. Q. B. N. S. 507, (1899) 1 Q. B. 1005.

[4] *Howells* v. *Vivian* (1901) 18 Times L. R. 36.

[5] *Pryce* v. *Penrikyber Nav. Colliery Co.* [1902] 1 K. B. 221.

[6] *Barrett* v. *North British R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 1139, 36 Sc. L. R. 874.

[7] *Hanlin* v. *Melrose* (1899) 1 Sc. Sess. Cas. 5th series, 1012, 36 Sc. L. R. 814.

[8] *Clement* v. *Bell* (1899) 1 Sc. Sess. Cas. 5th series, 924, 36 Sc. L. R. 725.

[9] *Cunningham* v. *M'Gregor* (1901) 3 Sc. Sess. Cas. 5th series, 775, 38 Sc. L. R. 574.

[10] *Legget* v. *Burke* (1902) 4 Sc. Sess. Cas. 5th series, 693, 39 Sc. L. R. 448.

[1] *M'Millan* v. *Barclay* (1899) 2 Sc. Sess. Cas. 5th series, 91, 37 Sc. L. R. 61.

C. Compensation recoverable under the act.

788a. Text of statutory provisions.—First Schedule. Scale and Conditions of Compensation. (1) The amount of compensation under this Act shall be: (a) where death results from the injury—

(i) if the workman leaves any dependents wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of those sums is the larger, but not exceeding in any case £300: Provided, That the amount of any weekly payments made under this act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer;

(ii) if the workman does not leave any such dependents, but leaves any dependents in part dependent upon his earnings at the time of his death, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this act, to be reasonable and proportionate to the injury to the said dependents and

(iii) if he leaves no dependents, the reasonable expenses of his medical attendance and burial, not exceeding £10.

(b) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week, not exceeding 50 per cent of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed £1.

(2) In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident, and the average amount which he is able to earn after the accident, and to any payment, not wages, which he may receive from the employer in respect of his injury e period of his incapacity.

(3) Where a workman has g c of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner, provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation and any proceeding under this act in relation to compensation, shall be suspended until such examination takes place.

(4) The payment shall, in case of death be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefits of his dependents, or, if he leaves no dependents, to the person to whom the expenses are due; and if made to the legal personal representative shall be paid by him to or for the benefit of the dependents or other person entitled thereto under this act.

(5) Any question as to who is a dependent, or as to the amount payable to each dependent, shall, in default of agreement, be settled by arbitration under this act.

(6) The sum allotted as compensation to a dependent may be invested or other

wise applied for the benefit of the person entitled thereto, as agreed, or as ordered by the committee or other arbitrator.

(7) Any sum which is agreed or is ordered by the committee or arbitrator to be invested may be invested in whole or in part in the Postoffice Savings Bank in the registrar of the county court in his name as registrar.

(8) Any sum to be so invested may be invested in the purchase of an annuity from the National Debt Commissioners through the Postoffice Savings Bank, or may be accepted by the Postmaster-General as a deposit in the name of the registrar as such, and the provisions of any statute or regulations respecting the limits of deposits in savings banks, and the declaration to be made by a depositor, shall not apply to such sums.

(9) No part of any money invested in the name of the registrar of any county court in the Postoffice Savings Bank under this act shall be paid out, except upon authority addressed to the Postmaster-General by the treasury or by the judge of the county court.

(10) Any person deriving any benefit from any moneys invested in the Postoffice Saving Bank under the provisions of this act may, nevertheless, open an account in a postoffice savings bank or in any other savings bank in his own name, without being liable to any penalties imposed by any statute or regulation in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank.

(11) Any workman receiving weekly payments under this act shall, if so required by the employer, or by any person by whom the employer is entitled, under this act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner, provided and paid by the employer, or such other person; but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition, when communicated to him, he may submit himself for examination by one of the medical practitioners appointed for the purposes of this act, as mentioned in the second schedule to this act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place.

(12) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided; and the amount of payment shall, in default of agreement, be settled by arbitration under this act.

(13) Where any weekly payment has been continued for not less than six months, the liability therefor may, on the application by or on behalf of the employer, be redeemed by the payment of a lump sum, to be settled, in default of agreement, by arbitration under this act, and such lump sum may be ordered by the committee or arbitrator to be invested or otherwise applied as above mentioned.

(14) A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same.

(15) Where a scheme certified under this act provides for payment of compensation by a friendly society, the provisions of the proviso to the first subsection

section 8, section 16, and section 41 of the friendly societies act 1896, shall not apply to such society in respect of such scheme.

(16) In the application of this schedule to Scotland the expression "registrar of the county court" means "sheriff clerk of the county," and "judge of the county court" means "sheriff."

(17) In the application of this act to Ireland the provisions of the county officers and courts (Ireland) act 1877, with respect to money deposited in the Postoffice Savings Bank under that act shall apply to money invested in the Post-office Savings Bank under this act.

789. Amount recoverable in case of death, by persons wholly dependent on workman's earnings (par. 1, a, i).—The effect of this provision, as a whole, is that, where death results from the injury, and the workman leaves dependents who were wholly dependent on his earnings, the amount of compensation is to be a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or, where the employment has been less than the three years, a sum equal to 156 times his average weekly earnings during the period of his actual employment. But in neither case is the compensation to exceed £300 or be less than £150. The maximum and minimum amounts of compensation which are specified apply to the whole provision,—not merely to the first branch of it, but also to the second.[1]

Where a workman dies some months after an award of a weekly sum has been made, his dependents are entitled to claim, as compensation, three years' wages, after giving credit for the payments already made.[2]

It has been held that where the sole dependent of a deceased workman dies after having served notice of the accident, but before any claim for compensation has been made, the right to recover compensation does not pass to the personal representative of the dependent.[3]

The death may be the result of the injury within the meaning of this paragraph of the act, even though, in fact, it may not be the natural or probable consequence thereof.[4]

790. — by persons partially dependent on the workman's earnings.—There can be no claim under the act by a person in part dependent on a workman at the time of his death, if there is in existence a person who is wholly dependent.[1]

[1] *Forrester* v. *M'Callum* (1901) 3 Sc. Sess. Cas. 5th series, 650, 38 Sc. L. R. 448, Reconsidering and Disapproving *Doyle* v. *Beattie* (1900) 2 Sc. Sess. Cas. 5th series, 1116, 37 Sc. L. R. 915.

[2] *O'Keefe* v. *Lovatt* (1901; C. A.) 18 Times L. R. 57.

[3] *O'Donovan* v. *Cameron* (1902) 2 Ir. Rep. 637, 34 Ir. L. T. 169.

[4] *Dunham* v. *Clare* [1902; C. A.] 2 K. B. 292.

[1] *Fagan* v. *Murdock* (1899) 1 Sc. Sess. Cas. 5th series, 1179, 36 Sc. L. R. 921.

In determining the sum, "reasonable and proportionate to the i
jury," which is to be awarded to the dependents, the funeral expen
of the workman may be taken into consideration.[2]

791. — in case of total or partial incapacity (par. 1, b).— In fixi
the amount of compensation in cases of partial incapacity, the ar
trator may, if upon the evidence he sees fit, give as compensation t
whole amount of the difference between the average earnings of t
workman before the injury and the average amount of his earni
after the injury, provided that it does not exceed 50 per cent of t
average earnings before the injury and does not exceed £1 a week.[1]

The proper and only test of the right of a workman to be award
a weekly payment, on the ground of a partial incapacity for work,
his comparative wage-earning capacity before and after the accide
If an actual diminution of his wage-earning capacity is establish
the fact that, at the date of his claim, he was earning the same wa
as he had earned before the accident does not, of itself, show that
is not entitled to compensation. The arbitrator may consider t
probabilities that, if the injuries had not been sustained, the m
might be making more money.[3] Nor is his right to compensati

[2] *Bevan* v. *Crawshay* [1902; C. A.] 1 K. B. 25, 71 L. J. K. B. N. S. 49.

[1] *Parker* v. *Dixon* (1902) 4 Sc. Sess. Cas. 5th series, 1147, 39 Sc. L. R. 663.

[2] In *Irons* v. *Davis* [1899; C. A.] 2 Q. B. 330, 68 L. J. Q. B. N. S. 873, 80 L. T. 673, 47 Week. Rep. 616, a workman lost the top joint of his left thumb, and was consequently incapacitated for work for a certain period. Subsequently he was taken back again into the service of the same master at the same rate of wages as before the accident, but upon a different kind of work. The county court judge awarded him compensation for the period during which he was incapacitated for work, and also half a crown a week for life. Upon appeal it was held that there was no evidence justifying the award of half a crown a week for life.

In *Pomphrey* v. *Southwark Press* [1901] 1 K. B. 86, 83 L. T. N. S. 468, an apprentice sustained an injury to his right hand which prevented his working as a skilled artisan, and the indenture of apprenticeship was canceled. He obtained, in proceedings under the act, an award of a weekly payment based on his wages for the previous year. He afterwards resumed work at weekly wages higher than his wages at the time of the accident, but less than those that would be ordinarily paid to a workman employed on the same class of w
since the injury he had sustained
fected his ability to earn full wa
The county court judge dismissed
application by the employers for th
view and termination of the weekly
ment, on the ground that the work
was earning less, by a sum equal to
amount of the weekly payment awar
than if he had had the use of his
hand. On appeal it was held that
a review of a weekly payment made
award under the act, the test to
applied is the difference between
amount of the average earnings be
the accident and the average amo
which the workman is able to earn a
the accident; that in the absence of
dence of advantages incidental to
employment, and capable of being
praised at a money value, the earni
before the accident must be determi
by the wages received: that the co
court judge was therefore wrong in
fusing to review the weekly paym
but that the weekly payment should
continued at a nominal amount,
order to preserve the right of the a
cant to make any further applica
that might become necessary.

[3] *Freeland* v. *Macfarlane* (1900) 2
Sess. Cas. 5th series, 832, 37 Sc. L
599.

necessarily forfeited because he refused to accept an offer of his employer to give him work at wages equal to his former earnings.[4]

The words "if he has been so long employed" do not import employment in the same class or kind of employment, but employment by the same employer.[5]

The clause which provides that, in fixing the amount of a weekly payment, regard is to be had to the difference between the average weekly earnings of the workman before the accident, and the average amount which he is able to earn after the accident, does not operate so as necessarily to cut down the maximum rate of compensation allowed by this paragraph of the schedule.[6] A workman engaged at a weekly salary, who has received compensation under the act, in respect to partial incapacity resulting from an injury, is not entitled to claim his wages during the time for which he has been incapacitated.[7]

792. Average weekly earnings.— *a. Generally.* — The "average weekly earnings" of the workman constitute the basis of computation for the assessment of the amount recoverable, both in cases where there is a fatal accident after a period of employment amounting to less than three years, and also in cases where total or partial incapacity results from the injury. This phrase has been defined as the total amount actually earned by the workman during his employment, divided by the number of weeks during which, or during part of which, he was employed.[1]

The only proper basis for the assessment of the amount of compensation with reference to the average weekly earnings of the workman is to consider the period of actual employment under his own employer, and the sum actually recovered by him from that employer. An arbitrator is not entitled to take into consideration what the workmen might possibly earn in the employment of other employers.[2]

[1] *Fraser* v. *Great North of Scotland R. Co.* (1901) 5 Sc. Sess. Cas. 5th series, 908, 38 Sc. L. R. 333.

[2] *Price* v. *Marsden* [1899: C. A.] 1 Q. B. 493, 80 L. T. N. S. 15, 68 L. J. Q. B. N. S. 307, holding that the amount of compensation due to a workman who had been employed by the same employer during twelve months before the accident should be computed from the weekly earnings during the entire twelve months, although the character of his work had, within that period, been altered, and his wages increased.

[3] *Illingworth* v. *Walmsley* [1900; C. A.] 2 Q. B. 142, 82 L. T. N. S. 647.

[4] *Elliott* v. *Liggens* [1902] 2 K. B. 84.

[5] *Fleming* v. *Lockgelly Iron & Coal Co.* (1902) 4 Sc. Sess. Cas. 5th series, 890, 39 Sc. L. R. 684.

[6] In *Bartlett* v. *Tutton* [1902: C. A.] 1 K. B. 72, 71 L. J. K. B. N. S. 52, a workman employed as a casual dock laborer to work for a day met with an accident in the course of his employment. He was paid 3s. 3d. for the work done by him up to the time of the accident, being at the rate of so much an hour for the number of hours he had worked. There was no evidence that the workman had ever before, or would again, work for the employers. An award in the workman's favor for 50 per cent of 18s.,—which the judge found to be the average weekly earnings of an ordinary casual dock laborer in the port

In computing the average weekly earnings for a year or more
total amount of the year's earnings should be divided by 52, and
by any less number, obtained by excluding the weeks when he was
at work."

In a Scotch case, where death ultimately resulted from injuries
ceived during the workman's first week of employment, but he l
continued to work during a second week, it was held that the ea
ings of the second week might be taken into account in calculating
amount recoverable.[4]

*b. Period of employment necessary to furnish basis for compu
tion of average weekly earnings.*—The English court of appeal l
down the rule that in order to obtain the benefit of the act a workm
must have been, for at least two weeks, in the employment of the e
ployer in whose service he has sustained the injury for which he se
compensation.[5] But the decisions cited were reversed by the Ho
of Lords,[6] and the correct doctrine was declared to be that the ri
to compensation given by section 1 of the act is not restricted
schedule I. to employments by the week, or for weekly wages, or
two weeks at least, and that employment by the day for one or m
days is within the act. It was remarked that the word "average"
the expression "average weekly earnings" is used loosely and ina
rately in the schedule, and that the words in section 1 "in accorda
with the first schedule to this act" are not intended to limit or res
the right of the workman to receive compensation, or the obligat
upon the employer to pay it, but denote the manner and mode
which the payment is to be carried into effect. The effect of this d
sion is that the right to compensation does not depend on the lengt
service, but merely on the fact that the workman was injured wh
in the employment of the "undertaker" through an accident aris
out of the employment.[7]

There is a conflict between the English and Scotch courts with

of Bristol (where the workman worked), taking one week with another throughout the year,—was held to be erroneous, as there were materials before the arbitrator upon which it was possible for him to find the weekly earnings of the workman in the employment of the defendant.

[3] *Keast* v. *Barron Hematite Steel Co.* (1898; C. A.) 15 Times L. R. 141. To the same effect is a Scotch ruling to the effect that, in computing the "average weekly earnings" of a laborer who had been employed for a varying number of hours on seventy-seven stated days at irregular intervals, during a period 105 weeks, the total amount of the e ings should be divided by the w number of weeks, without discar weeks in which there had been no ployment. *Small* v. *McCormick* (1 1 Sc. Sess. Cas. 5th series, 883, 36 L. R. 700.

[4] *Doyle* v. *Beattie* (1900) 2 Sc. S Cas. 5th series, 1166, 37 Sc. L. R.

[5] *Lysons* v. *Knowles* [1900] 1 Q 780; *Stuart* v. *Nixon* [1900] 2 Q. B. 82 L. T. N. S. 489.

[6] [1901] A. C. 79.

[7] *Leonard* v. *Baird* (1901) 3 Sc. S

gard to the effect of the decision of the House of Lords upon the rights of a servant who is working under a weekly contract. The court of appeal has taken the position that where such a servant had worked less than two weeks before the accident, the average earnings are to be arrived at by taking the actual facts, and deducing therefrom a hypothetical sum which represents what the workman would have earned if he had had the opportunity of performing his duties during two complete weeks. The actual sum earned in a given fraction of a week is not treated as the week's earnings.[8] The same court has also held that, where the employment has extended over two calendar weeks, the amount actually earned should not be divided by two, so as to average the amount under two weeks' earnings.[9]

In Scotland, on the other hand, it has been held that the proper construction of the decision of the House of Lords is that the actual earnings for part of a week, if the period of work has been no longer, are to be taken as the earnings with reference to which the compensation is to be assessed.[10]

There is a difference of opinion as to the point that, in cases of casual and intermittent employment, the average weekly earnings are arrived at by taking the total amount earned, and dividing that sum by the number of weeks during which the employment lasted.[11]

Where a workman, after working one week, is injured so soon after the beginning of the following week that no right to any wages had then accrued, the sum earned in the first week represents his average weekly earnings.[12]

c. Trade and calendar weeks.—In an English case, where a servant worked for six consecutive days, beginning on Wednesday and ending on the following Tuesday, the work being done under a daily engagement, no notice on either side being necessary to terminate the connection, but where it was also shown that there was a custom in the trade to pay weekly wages, it was held that compensation was

Cas. 5th series, 890, 38 Sc. L. R. 649, holding that in a case where a servant was killed so soon after the employment that no right to any wages had accrued at the time of his death, a dependent was entitled to recover £150.

There is a sufficient basis for computing the "average weekly earnings," where a servant worked on the Friday in one week, and then during the following week until Thursday, when the accident occurred. *Cadzow Coal Co.* v. *Gaffney* (1900) 3 Sc. Sess. Cas. 5th series, 72, 38 Sc. L. R. 40. And where the servant was injured on the fifth day of his second week of work. *Russell* v. *McCluskey* (1900) 2 Sc. Sess. Cas. 5th series, 1312, 37 Sc. L. R. 931.

[8] *Ayres* v. *Buckeridge* [1902] 1 K. B. 57, 71 L. J. K. B. N. S. 28.

[9] This point was involved in the second and third of the cases cited in the last note.

[10] *McCue* v. *Barclay* (1902) 4 Sc. Sess. Cas. 5th series, 909; *Grewar* v. *Caledonian R. Co.* (1902) 4 Sc. Sess. Cas. 5th series, 895, 39 Sc. L. R. 687.

[11] *Williams* v. *Poulson* (1899; C. A.) 16 Times L. R. 42.

[12] *Nelson* v. *Kerr* (1901) 3 Sc. Sess. Cas. 5th series, 893, 38 Sc. L. R. 645.

properly awarded on the footing that the sum earned during the days represented his average weekly earnings. The court considered that it was immaterial, for the purposes of the computation, that the trade week of the employer ended on the Thursday night, and rejected the contention of the employer that, for this reason, the average weekly earnings were half of the amount actually received.[13] But another view prevails in Scotland, where it has been held that the week to be taken as the unit of division is not the calendar week, but the trade or pay week of the particular employment.[14]

If there is no trade week, the calendar week from Sunday to Saturday is to be taken as the week with reference to which the average earnings are to be estimated.[15]

d. Continuity of the employment.—The words "period of his actual employment under the said employer," as used in paragraph 1 (*a*) (*i*), are construed as denoting the period of continuous employment immediately preceding the accident; and that period alone is to be taken into account in computing the amount of compensation recoverable.[16] Any separate and distinct periods during which the servant may previously have worked are not intended to be taken into consideration.[17]

A temporary cessation of work does not necessarily break the continuity of the employment in such a manner as to exclude from the computation the period anterior to that cessation.[18] To bring about that consequence there must have been an actual interruption for the time being of the relation of master and servant. Whether there was

[13] *Watters* v. *Clover* (1901; C. A.) 18 Times L. R. 60.

[14] *Fleming* v. *Lockgelly Iron & Coal Co.* (1902) 4 Sc. Sess. Cas. 5th series, 890, 39 Sc. L. R. 684. The facts were that the claimant had been employed for three days in one week, and during the whole of the next two weeks, and on the Sunday of the fourth week. It was held that, in estimating his average weekly earnings, the total amount of his earnings must be divided by the number of calendar weeks, *i. e.*, four, over which his employment extended. The court explained that the special point thus ruled upon had not been raised in an earlier case, in which the system of computation followed was the same as in the English case just cited. *Peacock* v. *Viddrie & B. Coal Co.* (1902) 4 Sc. Sess. Cas. 5th series, 443, 39 Sc. L. R. 317.

[15] *McCue* v. *Barclay* (1902) 4 Sc. Sess. Cas. 5th series, 902.

[16] *Appleby* v. *Horseley Co.* [1899; A.] 2 Q. B. 521, 80 L. T. N. S. 853, L. J. Q. B. N. S. 892, and cases cited *infra*.

[17] *Grewar* v. *Caledonian R. Co.* (19 4 Sc. Sess. Cas. 5th series, 895, 39 L. R. 687.

[18] There is no break in the workman's employment where he goes away on holiday. *Keast* v. *Barrow Hematite Steel Co.* (1898; C. A.) 15 Times L. 141, 63 J. P. 56.

In *Jones* v. *Ocean Coal Co.* [18 C. A.] 2 Q. B. 124, 68 L. J. Q. B. N. 731, while it was declared that, w the average of the weekly earn should not be reduced by taking account a part of the year during wh the relation of master and servant not exist, a different rule was appl ble where the relation continued, the men did not work simply beca there was nothing for them to do.

been such an interruption is to be determined from the evidence, as a question of fact.[19]

To enable a court to say that "a series of short periods [of work] could be taken together and treated as a continuous term, there must be some *nexus* to join them. There must be some contract, express or implied, which raises a reasonable expectation of continuity in the employment. In the absence of that *nexus*, casual engagements on noncontract days do not constitute one continuous employment, for they are not bound together."[20]

e. Deductions.—In one case the court of appeal approved of the course followed by an arbitrator, who disregarded a weekly deduction from the workman's wages which, under the employer's rules, was made on account of lamp oil supplied to him, and took the full amount

[19] A workman was in the employment of the defendants as a riveter at a weekly wage of £2, 10s., from the 27th of September, 1895, to the 16th of March, 1896, when he was injured by an accident which incapacitated him for eleven months, during which time he did not work, and earned no wages. In February, 1897, the defendants employed him as a time keeper at a weekly wage of £1, 10s., and he continued in such employment until the 27th of September, 1898, when he was killed by an accident. Held, that for the purpose of calculating the compensation payable, the period of the workman's employment by the defendants had been less than three years, and that his "average weekly earnings" must be calculated with reference only to the period between the time when he resumed work and the date of his death. *Appleby* v. *Horseley Co.* (C. A.) 68 L. J. Q. B. N. S. 892 [1899] 2 Q. B. 521, 80 L. T. N. S. 853.

A finding that the employment was not continuous was held justifiable in a case where the workman had been absent eleven weeks on account of sickness, although when he resumed work no fresh engagement was entered into. *Hewlett* v. *Hepburn* (1899; C. A.) 16 Times L. R. 56.

A period of six weeks during which the servant was disabled from work, owing to a previous accident, constitutes a break in the employment, and any compensation that may be due for a second injury received after resuming work must be ascertained with reference to the period which had elapsed between the resumption of work and the occurrence of the second accident, upon which the claim is based. *Gibb* v. *Dunlop* (1902) 4 Sc. Sess. Cas. 5th series, 971, 39 Sc. L. R. 750.

Such portion of the period of one year preceding the injury as occurred prior to a strike during which the injured workman was not employed, and after the termination of which he reentered the employment under a new agreement, is not to be considered. *Jones* v. *Ocean Coal Co.* [1899; C. A.] 2 Q. B. 124, 68 L. J. Q. B. N. S. 731.

[20] Collins, L. J., in *Hathaway* v. *Argus Printing Co.* [1901; C. A.] 1 K. B. 96, 83 L. T. N. S. 465. There a workman was under an agreement to work for his employers on the nights of Thursday and Friday in each week, for a period extending over two weeks, and at a fixed rate of wages for each night. During the rest of the week he worked, at times, for the same employers, when they had work to give him, and at other times for other firms carrying on a similar business to that of the employers. The workman was injured during the third week of his employment under the agreement, and an award was made in his favor, based on the weekly wages earned by him in respect of the two nights a week during which he worked under the agreement. On appeal it was held (1) that the employment for two nights a week was a continuous one, and that the earnings of those two nights were properly taken into account in determining the weekly payment to be made to the applicant; (2) that the amount received for casual work done for the same or different employers could not be taken into account in estimating the average weekly earnings of the applicant.

of his weekly wages as the basis of the award.[21] In another case some court intimated its opinion, but did not expressly decide, the value of the tuition given to an apprentice should not be taken to account in computing the amount of his "average weekly earnings."[22] In another it was held by the Scotch court of sessions that in estimating the average earnings of a servant who was paid according to his output, nothing is to be deducted in respect to the value of the services of his son, whom he employed as an assistant, without paying him anything.[23]

703. Medical examination after accident (par. 3).—The mere fact that an employer has made no objection to the commencement of proceedings, on the ground that no notice of the accident was given by the workman, does not warrant the inference of a waiver by the employer of his right to compel the workman to submit to a medical examination, nor justify the arbitrator in imposing terms upon the employer, as a condition of his obtaining an order that the workman shall be examined.[1]

The report of a medical practitioner appointed for the purpose of the act is conclusive upon the question whether the incapacity arising from the injury has ceased.[2]

704. Payment to dependents (par. 4).—Where an application for compensation under the workmen's compensation act 1897 is made by the legal personal representative of a deceased workman, on behalf of himself and other dependents of the workman, the county court judge or other arbitrator has jurisdiction under schedule I., pars. 4–6 to order so much of the compensation as is alloted to the dependents to be paid to the county court registrar for investment in his name on their behalf, and is not compelled to order it to be paid to the deceased's personal representative.[1]

705. Review of weekly payments (par. 12).— A weekly payment awarded as compensation to an injured workman can only be reviewed under the provision in cases where the circumstances have changed since the making of the award.[1]

When an application to review a weekly payment is brought before an arbitrator, he is not bound to treat the agreement for, or award

[21] *Houghton* v. *Sutton Heath & Lea Green Collieries Co.* [1901; C. A.] 1 K. B. 93, 83 L. T. N. S. 472.

[22] *Pomphrey* v. *Southwark Press* [1901] 1 K. B. 86, 83 L. T. N. S. 468.

[23] *Nelson* v. *Kerr* (1901) 3 Sc. Sess. Cas. 5th series, 893, 38 Sc. L. R. 645.

[1] *Osborn* v. *Vickers* [1900; A. C.] 2 Q. B. 91.

[2] *Ferrier* v. *Gourlay* (1902) 4 Sc. Sess. Cas. 5th series, 711; *McLean* v. *Spinning Co.* (1901) 3 Sc. Sess. Cas. 5th series, 1048.

[1] *Daniel* v. *Ocean Coal Co.* [1900; C.] 2 Q. B. 250, 82 L. T. N. S. 52[illegible]

[1] *Crossfield* v. *Tanian* [1900; C. 82 L. T. N. S. 813.

a weekly payment as enforceable up to the time of his decision, but has jurisdiction to inquire whether the incapacity had ceased when the application to review was made, or at any and what subsequent time before the hearing, and to make his award with reference to the date so determined.[2]

D. Arbitration.

795a. Text of statutory provisions.—Second Schedule. Arbitration. The following provisions shall apply for settling any matter which, under this act, is to be settled by arbitration:—

(1) If any committee, representative of an employer and his workmen, exist with power to settle matters under this act in the case of the employer and workmen, the matters shall, unless either party objects, by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided.

(2) If either party so objects, or there is no such committee, or the committee so refers the matter or fails to settle the matter within three months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement, by the county court judge, according to the procedure prescribed by rules of court: or if, in England, the Lord Chancellor so authorizes, according to the like procedure, by a single arbitrator appointed by such county court judge.

(3) Any arbitrator appointed by the county court judge shall, for the purposes of this act, have all the powers of a county court judge, and shall be paid for out of moneys to be provided by Parliament in accordance with regulations to be made by the treasury.

(4) The arbitration act 1889 shall not apply to any arbitration under this act: but an arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this act, shall be final, unless within the time and in accordance with the condition prescribed by rules of the supreme court either party appeals to the court of appeal; and the county court judge, or arbitrator appointed by him, shall, for the purpose of an arbitration under this act, have the same powers of procuring the attendance of witnesses and the production of documents as if the claim for compensation had been made by plaint in the county court.

(5) Rules of court may make provision for the appearance in any arbitration under this act of any party by some other person.

(6) The costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. The costs, whether before an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules.

(7) In the case of the death or refusal or inability to act of an arbitrator, a judge of the high court at chambers may, on the application of any party, appoint a new arbitrator.

[1] *Morton* v. *Woodward* [1902; C. A.] 2 K. B. 276.

(8) Where the amount of compensation under this act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court, by the said committee or arbitrator, or by any party interested, to the registrar of the county court for the district in which any person entitled to such compensation resides, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register, without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment: Provided, That the county court judge may at any time rectify such register.

(9) Where any matter under this act is to be done in a county court, or by, to, or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules of court, be done in, or by, to, or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or if they reside in different districts the district in which the accident out of which the said matter arose occurred, without prejudice to any transfer, in manner provided by rules of court.

(10) The duty of the county court judge under this act, or of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court, and the officers of the court shall act accordingly; and rules of court may be made both for any purpose for which this act authorizes rules of court to be made, and also generally for carrying into effect this act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before such arbitrator; and such rules may, in England, be made by the five judges of the county courts appointed for the making of rules under section 164 of the county courts act 1888, and when allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent.

(11) No court fee shall be payable by any party in respect of any proceedings under this act in the county court prior to the award.

(12) Any sum awarded as compensation shall be paid on the receipt of the person to whom it is payable under any agreement or award, and his solicitor or agent shall not be entitled to recover from him, or to claim a lien on, or deduct any amount for costs from, the said sum awarded, except such sum as may be awarded by the arbitrator or county court judge, on an application made by either party to determine the amount of costs to be paid to the said solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of court.

(13) The secretary of state may appoint legally qualified medical practitioners for the purpose of this act, and any committee, arbitrator, or judge may, subject to regulations made by the secretary of state and the treasury, appoint any such practitioner to report on any matter which seems material to any question arising in the arbitration; and the expense of any such medical practitioner shall, subject to treasury regulations, be paid out of moneys to be provided by Parliament.

(14) In the application of this schedule to Scotland—(*a*) "sheriff" shall be substituted for "county court judge," "sheriff court" for "county court," "action" for "plaint," "sheriff clerk" for "registrar of the county court," and "act of sederunt" for "rules of court:" (*b*) any award or agreement as to compensation under this act may be competently recorded for execution in the books of council and session or sheriff court books, and shall be enforceable in like manner as a recorded decree arbitral; (*c*) any application to the sheriff a

arbitrator shall be heard, tried, and determined summarily in the manner provided by the 52d section of the sheriff courts (Scotland) act 1876, save only that parties may be represented by any person authorized in writing to appear for them, and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by act of sederunt to require the sheriff to state a case on any question of law determined by him; and his decision thereon in such case may be submitted to either division of the court of session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced.

(15) Paragraphs 4 and 7 of this schedule shall not apply to Scotland.

(16) In the application of this schedule to Ireland the expression "county court judge" shall include the recorder of any city or town.

796. Effect of these provisions; generally.— In a general treatise upon the law of employers' liability it would be out of place to undertake to analyse such provisions as those which are set out above, or make any reference to the local rules of court which have been framed with reference to the administration of the act. The rights of injured servants from the standpoint of procedure are fully discussed in the English works mentioned in § 766, *supra*. But it will not be amiss to mention the substance of the few cases in which the effect of these provisions has been directly under consideration by courts of review.

A county court judge sitting to hear an application for compensation is acting as an arbitrator only, and has no jurisdiction to grant a new trial.[1]

An appeal will not lie to the court of appeal under par. (4), against the refusal of the county court judge to direct insurers to pay insurance money into the Post Office Savings Bank, in accordance with the provisions of subsection 1 of section 5 of the act.[2]

The memorandum of the compensation awarded by an arbitrator under the act, when recorded in the manner prescribed by paragraph (8), may be enforced by an order of committal under the debtors' act 1869, § 5.[3]

When a workman, resident in England, is injured by an accident occurring in England, but his employer resides in Scotland, proceedings for compensation under the act may be taken in the county court of the district in which the accident occurred, and service of the necessary notices may be effected by registered post.[4]

In cases within paragraph 14 (c) no appeal lies to the House of Lords from a decision of the Scotch court of session.[5]

An arbitrator, although he has no power to vary his award, is en-

[1] *Mountain* v. *Parr* [1899; C. A.] 1 Q. B. 805, 68 L. J. Q. B. N. S. 447.

[2] *Leech* v. *Life & Health Assur. Asso.* [1901; C. A.] 1 K. B. 707.

[3] *Bailey* v. *Plant* [1901; C. A.] 1 K B. 31.

[4] *Rex* v. *Owen* [1902] 2 K. B. 436.

[5] *Osborne* v. *Barclay* [1901] A. C. 269.

titled to deal with a subsequent claim by the dependents of a workman who has died from his injuries, after having been awarded weekly payments.[6]

The limitations of the powers of the court of appeal, as defined by paragraph (4), are indicated by the following remark of Smith, L. J. "In cases under this act, as in appeals generally from county courts, questions of fact are not the subject of appeal. The county court judge has found the facts and has relegated them to us, and we have to decide any question of law arising on them."[7]

E. Act of 1900.

An Act to Extend the Benefits of the Workingmen's Compensation Act 1897, to Workmen in Agriculture. Be it enacted by the Queen's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

Sec. 1.—(1) From and after the commencement of this act, the workmen's compensation act 1897 shall apply to the employment of workmen in agriculture by any employer who habitually employs one or more workmen in such employment.

(2) Where any such employer agrees with a contractor for the execution by or under that contractor of any work in agriculture, section 4 of the workmen's compensation act 1897 shall apply in respect to any workmen employed on such work as if that employer were an undertaker within the meaning of that section. Provided That, where the contractor provides and uses machinery driven by mechanical power, for the purpose of threshing, ploughing, or other agricultural work, he, and he alone, shall be liable under this act to pay compensation to any workman employed by him on such work.

(3) Where any workman is employed by the same employer mainly in agricultural, but partly or occasionally in other, work, this act shall apply also to the employment of the workman in such other work.

The expression "agriculture" includes horticulture, forestry, and the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry, or bees, and the growth of fruit and vegetables.

Sec. 2. This act may be cited as the workmen's compensation act 1900, and shall be read as one with the workmen's compensation act 1897, and that act and this act may be cited together as the workmen's compensation acts 1897 and 1900.

Sec. 3. This act shall come into operation on the 1st day of July, 1901.

797. Effect of this statute.—The meaning of these provisions has so far been very little considered by courts of review. The only reported decision by such a court seems to be one in which it was held that the work of a man hired by a saw miller to cut down trees and cart them to a saw mill is not "forestry."[1]

[6] *O'Keefe* v. *Lovatt* (1902) 18 Times L. R. 57.

[7] *Smith* v. *Lancashire & Y. R. Co.* [1899] 1 Q. B. 141, 68 L. J. Q. B. N. S. 51.

[1] *Meally* v. *McGowan* (1902) 4 Sc. Sess. Cas. 5th series, 883, 39 Sc. Sess. Cas. 662.

CHAPTER XLI.

STATUTES IMPOSING VARIOUS SPECIFIC DUTIES UPON EMPLOYERS.

799. Servant's right to sue for injuries caused by a breach of a statutory duty; generally.

800. Same subject continued: provision of special remedy for violation of duty: effect of.

801. Employe not rendered an insurer of his servant's safety by the imposition of a specific duty.

802. Construction of statutes imposing specific duties on employers.

The extent to which the imposition of a specific duty upon a master is regarded as creating a non-delegable duty is discussed in § 565, *ante*.

As to the statutory and constitutional provisions requiring railway companies to receive and forward foreign cars, see chapter XII., *ante*

As to the necessity of showing that the breach of duty alleged was the proximate cause of the injury, see chapter XLII., *post*.

As to the constitutionality of statutes imposing specific duties on employers, see § 617, *ante*.

799. Servant's right to sue for injuries caused by a breach of a statutory duty; generally.—The general rule which defines the extent of a servant's right to bring an action for injuries caused by the breach of a statutory duty has been thus stated in a recent English case: "It cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and someone belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie and if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty."[1]

By many courts it is held that a violation of such a statute constitutes negligence *per se*, as respects a person entitled to sue for its infringement.[2] It has also been held in numerous cases that fault is

[1] *Groves* v. *Wimborne* [1898] 2 Q. B. 402, 415, 67 L. J. Q. B. N. S. 862, per Vaughan Williams, L. J. To the same effect see *Stainer* v. *Hall Mines* [1899] 6 B. C. 579.

[2] This principle is taken for granted in nearly all of the cases cited in § 802, *infra*, and is explicitly enunciated in the following, among others: *Krause* v. *Morgan* (1895) 53 Ohio St. 26, 40 N. E. 886 (violation of statute compelling mine owners to adopt safety appli-

predicable, as a matter of law, of the infringement of a municipal ordinance.[3] According to other authorities, on the other hand, the failure to comply with a statute or ordinance is merely evidence of culpability.[4]

ances for their employees); *Cincinnati, H. & D. R. Co.* v. *Van Horne* (1895) 16 C. C. A. 182, 37 U. S. App. 262, 69 Fed. 139 (blocking of frogs); *Craig* v. *Lake Erie & W. R. Co.* (1896) 35 Ohio L. J. 15 (blocking of frogs); *Schloff* v. *Louisville & N. R. Co.* (1893) 100 Ala. 377, 14 So. 105 (telltales on railways); *Winship Mach. Co.* v. *Burger* (1900) 110 Ga. 296, 35 S. E. 120 (machinery reasonably safe for operators to be furnished); *Morris* v. *Stanfield* (1898) 81 Ill. App. 264 (employment of child under prescribed age); *Bodell* v. *Brazil Block Coal Co.* (1900) 25 Ind. App. 654, 58 N. E. 856 (mining act); *Hochstettler* v. *Mosier Coal & Min. Co.* (1893) 8 Ind. App. 442, 35 N. E. 927 (mining act); *Keenan* v. *Edison Electric Illuminating Co.* (1893) 159 Mass. 379, 34 N. E. 366 (automatic gates to elevator shafts); *Lore* v. *American Mfg. Co.* (1901) 160 Mo. 608, 61 S. W. 678 (guarding of machinery); *Colliott* v. *American Mfg. Co.* (1897) 71 Mo. App. 163; *Greenlee* v. *Southern R. Co.* (1898) 122 N. C. 977, 41 L. R. A. 399, 65 Am. St. Rep. 734, 30 S. E. 115 (self-couplers on railway cars); *Graham* v. *Newburg Orrel Coal & Coke Co.* (1893) 38 W. Va. 273, 18 S. E. 584 (ventilation of mines); *Messenger* v. *Pate* (1876) 42 Iowa, 443 (fencing of machinery); *Kucera* v. *Merrill Lumber Co.* (1895) 91 Wis. 637, 65 N. W. 374 (fencing of machinery); *Kutchera* v. *Goodwillie* (1896) 93 Wis. 448, 67 N. W. 729 (fencing of machinery); *Queen* v. *Dayton Coal & I. Co.* (1895) 95 Tenn. 458, 30 L. R. A. 82, 49 Am. St. Rep. 935, 32 S. W. 460 (employment of boys under twelve in mines).

It was intimated, but not expressly decided, in a Scotch case, that a mine owner is liable if the plaintiff was injured by doing the incautious thing which the statutory rules forbid, and it appears that the rules had not been published as directed by the statute. *Gray* v. *Lawson* (1860) 22 Sc. Sess. Cas. 2d series, 710.

[3] This principle was applied for the benefit of servants in *Thompson* v. *Citizens' Street R. Co.* (1899) 152 Ind. 461, 53 N. E. 462; *Cincinnati, I. St. L. & C. R. Co.* v. *Long* (1887) 112 Ind. 166, 13 N. E. 659 (operation of trains); *Pittsburgh, C. C. & St. L. R. Co.* v. *Wom* (1898) 152 Ind. 345, 44 L. R. A. 65 53 N. E. 290 (operation of trains); *Ba timore & O. S. W. R. Co.* v. *Peterson* (1901) 156 Ind. 364, 59 N. E. 1044 (complaint held not demurrable which charged that injuries to a railroad employee were caused by the violation of a valid city ordinance making it the duty of persons in charge of a moving locomotive to ring a bell attached thereto, and providing that no train shall be run backward without a watchman on the rear thereof); *Central R. & Bkg. Co.* v. *Brantley* (1893) 93 Ga. 259, 20 S. E. 98 (ordinance limiting speed of locomotives in a railroad yard); *Tobey* v. *Burlington, C. R. & N. R. Co.* (1895) 94 Iowa, 256, 33 L. R. A. 496, 62 N. W. 761 (kicking cars at forbidden speed). As to this Iowa case, however, see note 4, *infra*.

In declaring the right of a person to recover for injuries caused by the breach of a municipal ordinance, the New York court of appeals speaks of "the axiomatic truth that every person while violating an express statute is a wrongdoer, and, as such, is *ex necessitate* negligent in the eye of the law; and that every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury notwithstanding any redress the public may also have." *Jetter* v. *New York & H. R. Co.* (1865) 2 Keyes, 154. This sentence was quoted with approval in *Freeman* v. *Glens Falls Paper Mill Co.* (1891) 61 Hun, 125, 15 N. Y. Supp. 657. See, however, the New York cases cited in the next note.

[4] See cases cited in Shearm. & Redf. Neg. § 13, note 12, and also *McCambl* v. *Staten Island Midland R. Co.* (1898) 32 App. Div. 346, 52 N. Y. Supp. 84 (municipal ordinance); *Pitcher* v. *New York C. & H. R. R. Co.* (1891) 127 N. Y. 678, 28 N. E. 136 (telltales on railways); *Harlin* v. *Kruhsh* (1898) 2 Misc. 402, 54 N. Y. Supp. 1093, Reversed in (1899) 26 Misc. 381, 56 N. Y. Supp. 275, but not as to this point; *Marino* v. *Lehmaier* (1901) 62 App. Div. 43, 70 N. Y. Supp. 790 (employment of child under legal age).

In one recent case in Illinois it was

That the former of these theories is the correct one can scarcely be doubted. A doctrine the essential effect of which is that the quality of an act which the legislature has prescribed or forbidden becomes an open question upon which juries are entitled to express an opinion would seem to be highly anomalous. The command or prohibition of a permanent body which represents an entire community ought, in any reasonable view, to be regarded as equivalent to a final judgment upon the subject-matter, which renders it both unnecessary and improper that this question should be submitted to a jury.[5] As thus determined, the actual liability of the delinquent party is precisely the same as that which results from considering the juridical situation from the standpoint which is indicated by the following remark of Rigby, L. J., in a case already cited: "Where an absolute duty is imposed upon a person by statute, it is not necessary, in order to make him liable for breach of that duty, to show negligence. Whether there can be negligence or not, he is responsible, *quacunque via*, for nonperformance of the duty."[6]

In any jurisdiction in which negligence is inferable, as a matter of

remarked that the "violation of a statute established for the protection of persons is prima facie evidence of negligence." *Jupiter Coal Min. Co.* v. *Mercer* (1899) 84 Ill. App. 96. In another the same rule was laid down with regard to the violation of a municipal ordinance which provided that every person owning or operating any freight elevator in any building within the city should employ a competent person to take charge of and operate the same, and prescribed a fine for a failure to comply with the provisions. *H. Channon Co.* v. *Hahn* (1901) 189 Ill. 28, 59 N. E. 522, Affirming (1900) 90 Ill. App. 256. And this seems to be the theory upon which the courts of this state proceed generally all, if not all, the cases [illegible] ing act, which are cited in § 802, note 1, *infra*. But one decision by the court of appeals, in which a breach of a statute was treated as negligence *per se*, has been cited in note 2, *supra*.

In Iowa the court, while holding that an instruction that the violation of the statute providing for ventilation of mines is negligence justifying a recovery was proper, in the absence of any exculpatory evidence, remarked that such an instruction would have been erroneous if evidence had been introduced which tended to show that the defendant was without fault. *Mosgrove* v. *Zimbleman Coal Co.* (1899) 110 Iowa, 169, 81 N. W. 227. The language thus used seems to indicate a point of view different from that which was adopted in *Tobey* v. *Burlington, C. R. & N. R. Co.* (1895) 94 Iowa, 256, 33 L. R. A. 496, 62 N. W. 761, cited in note 3, *supra*.

In § 670, note 7, *ante*, several Ontario cases have been cited which apply the doctrine that where a statutory obligation exists a noncompliance with it is evidence of negligence upon which it is competent for a jury to base a verdict against an employer. The authoritative weight of these rulings, however, is much impaired, if not destroyed, by the fact that, with one exception, they antedate *Groves* v. *Wimborne* [1898] 2 Q. B. 402, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47 Week. Rep. 87 (notes 1 and 3, *supra*), and that, in the single decision which is of later date than the English case, it was, so far as the report shows, entirely overlooked by the court. As to the other error involved in these decisions, see § 800, note 8, *infra*.

[5] See the language used by the court in *Tobey* v. *Burlington, C. R. & N. R. Co.* (1895) 94 Iowa, 256, 33 L. R. A. 496, 62 N. W. 761.

[6] *Groves* v. *Wimborne* [1898] 2 Q. B. 402, 412, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47 Week. Rep. 87.

law, when an infringement of a definite statutory requirement is one established, it is not competent, in an action for injuries caused by such infringement, to introduce, for the purposes of exculpation, evidence that the arrangements prescribed would be dangerous and apt to cause accidents. The proper system to adopt is a matter to be decided by the legislature.[7] Nor can a witness be asked what was, in his opinion, a safe manner of affording the protection contemplated by the statute, and whether the method actually adopted by the defendant was prudent. The sole question to be determined is whether the duty created by the statute has been performed.[8]

An employer is liable to any employee injured by the breach of the statute, although he could not reasonably have anticipated that the accident would happen in the precise manner in which it actually did happen.[9]

Where the injury is a direct consequence of the violation of a penal statute, the only prerequisite to a conviction in a criminal prosecution is the submission of satisfactory evidence that the statute had been violated. But in a civil action, involving questions of negligence on the part both of the employer and employed, proof of a violation of the statute is not necessarily enough to entitle the servant to damages.[10]

800. Same subject continued; provision of special remedy for violation of duty; effect of.—According to a standard treatise the general rule is that, when a duty or obligation exists at common law, independently of the statute, a new remedy given by the statute is simply cumulative, and does not preclude the ordinary common-law remedy by way of action, unless there are express words to that effect.[1] In this instance, therefore, the determination of the question whether the common-law rights of the party suing have been superseded by the given statute "depends usually upon whether the statute is at variance with the common law, or is merely cumulative. The legislature could formulate a complete code of rules so particular and minute in their character as to cover all common-law rights with reference to any particular business, and in that event there would be a complete supe-

[7] *State* v. *Anaconda Copper Min. Co.* (1900) 23 Mont. 498, 59 Pac. 854.

[8] *Spira* v. *Osage Coal & Min. Co.* (1885) 88 Mo. 68.

[9] *Christianson* v. *Northwestern Compo-Board Co.* (1901) 83 Minn. 25, 85 N. W. 826.

[10] *Evans* v. *American Iron & Tube Co.* (1890) 42 Fed. 519, denying the right to recover where a child of less than twelve years, and therefore under the age at which he might lawfully be employed, was injured while voluntarily going about a factory, and thus exposing himself to dangerous machinery the character of which he was old enough to appreciate.

[1] Addison, Torts, p. 75, citing Comyn Digest, title *Action upon Statute* (C); *Chapman* v. *Pickersgill* (1762) 2 Wil. 145.

sedure. But unless that is done, all common-law rights not at variance with some provision of the enactment would continue in force."[2]

There is high authority for the unqualified doctrine that, "where a new duty or prohibition is created by statute, and the same act gives a remedy for the breach, by penalty or otherwise, for the benefit of the party grieved, he has no other." But in a very recent English case the rule is laid down in the more guarded form that the remedy prescribed by the statute is exclusive, where upon the purview of the whole act it appears that the remedy so given is intended to be a substitute for the right of action which would otherwise exist.[4] The inference that it was the intention of the legislature that the particular remedy designated should be the only one available is, it would seem,

[1] *Consolidated Coal Co.* v. *Bokamp* (1898) 75 Ill. App. 605, Affirmed in (1899) 181 Ill. 9, 54 N. E. 567. There it was held that the statutes of Illinois regulating coal mining, requiring owners of mines to keep on hand a supply of timbers, and to deliver the same to the workmen as required, to enable them to properly secure the workings for their own safety, do not supersede the requirement of the common law that a master shall furnish his servant a reasonably safe place to work. An action was declared to be maintainable, on this ground, by a workman driving cars over tracks in a mine entry, who had nothing to do with the propping of the roofs, the evidence being that the mine owner had been notified of the unsafe condition of the roof of the entry, and had assumed to repair it.

By § 43 of the act of Congress of February 28, 1871, entitled "An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam, and for Other Purposes" (16 Stat. at L. 453, chap. 100, U. S. Comp. Stat. 1901, p. 3058), it is provided that the master and owner of any vessel, or either of them, and the vessel itself, shall be liable to any passenger for any damage sustained by him or his baggage from explosion, fire, collision, or other cause, if it happens through any failure or neglect to comply with the provisions of the law; and also that any person sustaining loss or injury through the carelessness, negligence, or wilful misconduct of any captain, mate, engineer, or pilot, or his neglect or refusal to obey the provisions of the law, may recover damages for such loss or injury from the captain, mate, engineer, or pilot causing such loss or injury. A shipowner sought to draw the inference from this section that a mariner on a vessel was precluded from a suit against the vessel for any injury done him, because an action against the vessel was given to passengers only for damage from fire, explosion, collision, or other cause arising from neglect or failure to comply with the law, and that he was remitted by the last clause of the section to an action against the captain, mate, or other officer who caused such injury. This argument did not prevail. The provisions of the act were considered to be cumulative, and not intended to interfere with the rights of sailors under the maritime law, or to deprive them of remedies given them by that law. *Brown* v. *The D. S. Cage* (1872) 1 Woods, 461, Fed. Cas. No. 2,002.

In some cases where the liability to a penalty is specified as one of the consequences of the violation of a statute, the legislature has inserted, *ex abundanti cautela*, a proviso that such statute shall not be construed so as to prohibit the bringing of an action for damages. See, for example, Mass. Pub. Stat. chap. 104, § 22 (as to the fencing of machinery).

[2] *Jones* v. *Stanstead, S. & C. R. Co.* (1872) L. R. 4 P. C. 98, 116, 41 L. J. P. C. N. S. 1, 26 L. T. N. S. 456, 20 Week. Rep. 417, 8 Moore P. C. C. N. S. 312 (infringement of statutory right to tolls). To the same effect see the remarks of Lord Campbell as quoted in note 8, *infra*.

[4] *Groves* v. *Wimborne* [1898] 2 Q. B. 402, 412, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47 Week. Rep. 87, per Rigby, L. J.

peremptory and invariable wherever the statute in question stan outside the category of those which are enacted for the benefit or pr tection of a particular class of persons.[5] But if the statute is o which, like those under review in this chapter, belongs to that ca gory, the mere fact that a penalty is imposed for the infringement its provisions will not necessarily preclude a party who is specia injured by that infringement from maintaining an action for da ages.[6] Whether an indemnity can be recovered in such a proceedi is a question which is to be determined in each instance from a co sideration of the words used in the provision which has been viola and in any other parts of the statute which throw light upon the i

[5] In *Gorris* v. *Scott* (1874) L. R. 9 Exch. 125, 30 L. T. N. S. 431, 43 L. J. Exch. N. S. 92, 22 Week. Rep. 575, it was held that the fact that plaintiff's sheep were washed overboard by reason of the failure of the shipowner to provide the pens prescribed by the English contagious diseases (animals) act of 1869 would not give him a right of action for the damage thus caused. Discussing the contention of counsel that, under certain circumstances, if special damage results to anyone from the breach or violation of the statutory duty, there is then also a remedy for such damage by way of action for such breach of duty, Kelly, C. B., said: "That is true; but in cases only where, by the act of Parliament whose provisions are thus violated, a benefit is conferred upon the individual who suffers from the breach of duty. And if the protection or the benefit of the individual owner of the animals were the object and intention of the act of Parliament, then undoubtedly this action might be maintained: but nothing can be more plain, on looking at the act, than that such was not the object or intention of the legislature in passing it, but that the providing these pens and footholds was entirely for the protection of the animals themselves from unnecessary suffering during the voyage, and that any private individual benefit was not within the intention of the act at all."

These remarks of the chief baron were recently referred to with approval by Smith, L. J., in *Groves* v. *Wimborne* [1898] 2 Q. B. 402, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47 Week. Rep. 87 (see note 8, *infra*).

No action lies against a local board for personal injuries caused by its failure to keep a highway in proper repair in accordance with the provisions of the English public health act of 1875. *Cu ley* v. *Newmarket Local Board* [18 A. C. 345.

See also the opinions of the lo justices in *Atkinson* v. *Newcastle & Waterworks Co.* [1877] L. R. 2 Ex Div. 441, 46 L. J. Q. B. N. S. 775, L. T. N. S. 761, 25 Week. Rep. 794.

The following rule has been formul ed by Mr. Addison (Torts, p. 74 "Where no specific right is created a vested in the plaintiff for his own be fit and advantage, and no specific du in favor of the plaintiff has been i posed, but the statute merely prohibi a thing from being done, under a pe alty for doing it, an action for damag is not maintainable."

[6] *Klatt* v. *N. C. Foster Lumber C* (1897) 97 Wis. 641, 73 N. W. 56 *Narramore* v. *Cleveland, C. C. & St. R. Co.* (1899) 48 L. R. A. 68, 37 C. A. 499, 96 Fed. 298; *New York, C. St. L. R. Co.* v. *Lambright* (1891) Ohio C. C. 433; *Freeman* v. *Glens Fa Paper Mill Co.* (1891) 61 Hun, 125, N. Y. Supp. 657; *Messenger* v. *Pe* (1876) 42 Iowa, 443; *Queen* v. *Dey Coal & I. Co.* (1895) 95 Tenn. 458, L. R. A. 82, 49 Am. St. Rep. 935, 32 W. 460; *Campbell* v. *Caldebank St & Coal Co.* (1898) 25 Sc. Sess. Cas. 4 series, 753 (explosives act).

See, generally, the cases cited Shearm. & Redf. Neg. § 467.

In *Wilson* v. *Merry* (1868) L. R. H. L. Sc. App. Cas. 326, 341, 19 L. N. S. 30, Lord Chelmsford remark that the scope of the decision in *Cou* v. *Steel* (1854) 3 El. & Bl. 402, 2 C. Rep. 940, 23 L. J. Q. B. N. S. 121, Jur. 515, was merely that a person su fering damage from an omission of duty is not deprived of his remedy b cause the legislature has attached penalty to such omission.

tention of the legislature.[7] In view of the more recent decisions and expressions of judicial opinion in England, it seems to be impossible to state the situation more favorably than this for the servant, al-

In *Groves* v. *Wimborne* [1898] 2 Q. B. 402, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47 Week. Rep. 87, Vaughan Williams, L. J., said with reference to the factory act: "I have equally no doubt that, where in a statute of this kind a remedy is provided in cases of nonperformance of the statutory duty, that is a matter to be taken into consideration for the purpose of determining whether an action will lie for injury caused by nonperformance of that duty, or whether the legislature intended that there should be no other remedy than the statutory remedy; but it is by no means conclusive, or the only matter to be taken into consideration for that purpose. If it be found that the remedy so provided by the statute is to inure for the benefit of the person injured by the breach of the statutory duty, that is an additional matter which ought to be taken into consideration in dealing with the question whether the legislature intended the statutory remedy to be the only remedy. But again, the fact that the legislature has provided that that remedy shall inure, or inure in some circumstances shall inure, for the benefit of the person injured, is not conclusive of the question, and, although it may be a cogent and weighty consideration, other matters also have to be considered."

In *Detter* v. *New York & H. R. Co.* 1865) 2 Keyes, 154, the doctrine propounded in *Brown* v. *Buffalo & S. L. R. Co.* (1860) 22 N. Y. 191, that the penalty fixed by an ordinance as to running of cars was the only consequence which the law imposed for its violation, was declared to stand upon grounds too doubtful to justify its application to cases not strictly within it. That doctrine was explicitly discarded in *Massoth* v. *Delaware & H. Canal Co.* (1876) 64 N. Y. 524.

Where the duties imposed by statute are merely ministerial, the general rule is that an action will lie at the suit of the party aggrieved by them. *Pickering* v. *Jones* (1873) L. R. 8 C. P. 189, 509, 42 L. J. C. P. N. S. 217, 21 Week. Rep. 786, 29 L. T. N. S. 210, per Brett, J.

The mining act of Missouri (Rev. Stat. 1889) expressly declares that a servant may sue for injuries caused by a breach of its provisions. *Adams* v. *Kansas & T. Coal Co.* (1900) 85 Mo. App. 486. A similar clause is doubtless inserted in other enactments of this class.

[7] (a) *Action held maintainable.* In *Groves* v. *Wimborne* [1898] 1 Q. B. 402, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47 Week. Rep. 87, where a servant was allowed to recover for injuries caused by the defendant's noncompliance with the provisions of the English factory act with regard to the guarding of machinery, Smith, L. J., made the following remarks: "It is to be observed, in the first place, that under the provisions of § 82 not a penny of the fine necessarily goes to the person injured or his family. The provision is only that the whole or any part of it may be applied for the benefit of the injured person or his family, or otherwise, as a secretary of state determines. Again, if proceedings for the fine are taken before magistrates, upon what considerations are they to act in determining the amount of the fine? One matter to be considered, clearly, would be the character of the neglect to fence. This neglect would be either of a serious or of a venial character. Suppose that it was of the latter character, but a person was unfortunately killed or injured in consequence of it. What fine are the magistrates to impose? Are they to impose a fine of the same amount as if it were a flagrant case of neglect to fence? The first thing one would say that they would have to consider would be whether the offense was of a grave character or otherwise. It may be said that, in determining the amount of the fine, the character of the injury sustained by the workman would be considered, but I am not sure that that is the meaning of the section. It seems to me that the fine is inflicted by way of punishment of the employer for neglect of the duty imposed by the act and must be proportionate to the character of the offense. This consideration, and the fact that whatever penalty the magistrates inflict does not necessarily go to the injured workman or his family, lead me to the conclusion that it cannot have been the intention of the legislature that the provision which imposes upon the employer a fine

though one much discussed case has been supposed to embody a broad general proposition "that, wherever a statutory duty is created any person who can show that he has sustained injuries from the

as a punishment for neglect of his statutory duty should take away the prima facie right of the workman to be fully compensated for injury occasioned to him by that neglect. Another observation which makes the matter still clearer arises from the fact that, having regard to the provisions of § 87, it may not be the employer—presumably a person of means and capable of paying a substantial fine—who would have to pay the fine. Under that section the employer may be exempted from the penalty, and the fine may be imposed upon the actual offender, who may be a workman employed at weekly wages; and yet it is said that a fine payable by such a person is the only remedy given by the statute to the injured workman for breach by the occupier of the imperative statutory duty. I cannot read this statute in the manner in which it is sought to be read by the defendant."

Rigby, L. J., summed up his conclusions as follows: "Looking at the whole purview of the act, is it one of those acts by which the legislature renders a particular course of conduct imperative, and a deviation from it punishable by penalty, in the general interests of the public at large, but does not intend that an individual shall have a private right of action for injury occasioned to him by breach of its provisions? Or is it one of those acts in which the legislature, having created a new duty in the interests of a certain class of persons, and having provided a statutory remedy for breach of that duty, intends that that remedy shall be the only one available? It is, in my opinion, neither one nor the other."

See also the extract in note 7, *supra*, from the opinion of Vaughan Williams, L. J.

That there is a right of action for injuries caused by a breach of the provisions of the English factory act was taken for granted in the cases cited in § 802, note 1, *infra*.

That the American doctrine is to the same effect with regard to a[illegible] statutes enacted for the protection of servants is shown by the decisions cited in the last note, as well a[illegible]y many of those collected in § 80[illegible] *infra*. See especially those relating to mines. In none of them does it seem to have been seriously contended, much less decided, that [illegible] infliction of a penalty had the effect [illegible] precluding the injured servant [illegible] covering damages in an action for breach of the statutory duty.

In *Freeman* v. *Globe Pulp & Paper Co.* (1891) 61 Hun, 125, 15 N. Y. Supp. 857, it was taken for granted that a servant had a right of action for injuries caused by the failure of his master to comply with an ordinance which imposed a penalty for the omission to have automatically closing doors to elevator shafts.

As to the case of *Couch* v. *Steel*, [illegible] the following note.

(b) *Action held not maintainable.* The statute of 23 & 24 Vict. chap. 1[illegible] for the regulation and inspection of mines, specifies (§ 10) several rules to be observed by persons operating mines: one of these provisions is that an adequate amount of ventilation shall be constantly produced to such extent that the pits, etc., shall be in a fit state for working. By § 22 a penalty is imposed for a violation of any of these rules.

According to Lord Chelmsford—the other law lords declined to express an opinion on this point—this statute did not give a miner a right of action which he would not have had without it. In *Atkinson* v. *Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 341, 19 L. T. N. S. 3[illegible] "The statutable duty," he remarked, "is no doubt, created absolutely for the purposes of the act; but it is a duty which, if unperformed, [illegible] only be enforced by the penalty. [illegible] this, for the protection of the pit[illegible] to be covered against the [illegible]er or occupier who causes the work [illegible]e done. It is individual sustains an injury in consequence of the work being imperfectly or improperly performed, a civil liability is not imposed upon the owner, if without the statutable obligation he would not have been liable." The reasoning of the court of exchequer chamber in *Gorris* v. *Pullen* (1864) 5 Best & S. 970, 34 L. J. Q. B. N. S. 265, 11 L. T. N. S. 5[illegible] 13 Week. Rep. 257, where an action was sustained against a house owner whose omission of a statutory duty for the nonperformance of which a penalty was imposed caused an injury to a mem[illegible]

performance of that duty can bring an action for damages against the person on whom the duty is imposed." [8]

of the public, was considered by him to be unsatisfactory.

As article 3053 of the Quebec factories act expressly declares that its provisions in nowise modify the responsibility of an employer to his employees under the civil laws of the province, those provisions are to be treated as other regulations, which merely subject employers to fine and imprisonment. See *Montreal Rolling Mills Co.* v. *Corcoran* (1896) 26 Can. S. C. 595.

A local building act required fire escapes on buildings where more than a certain number of operatives were employed, and imposed a penalty for a violation of the law, and also provided for an injunction. Held, that an operative employed in such a building having no fire escape could not maintain an action against the owner for an injury sustained because he was compelled to jump from the building. *Grant* v. *Sharpe Mill & Power Co.* (1884) 14 R. I. 380.

The doctrine embodied in several Ontario cases is that the provisions of the factories acts of that province (Ont. Rev. Stat. 1887, chap. 141; Ont. Rev. Stat. 1897, chap. 208) are penal merely, and do not confer any civil right of action. The theory propounded was that a person who is injured by a violation of the statutory provisions, and wishes to bring suit for damages, is relegated to his common law rights of action, and cannot avail himself of those provisions, except to the extent of adducing the defendant's failure to comply with them as a circumstance which tends to prove negligence on his part (§ 799, note 2, *supra*). See *Finlay* v. *Wisecompbell* (1890) 20 Ont. Rep. 29; *Headford* v. *McClary Mfg. Co.* (1893) 23 Ont. Rep. 335; *McCloherty* v. *Gale Mfg. Co.* (1892) 19 Ont. App. Rep. 117; *Roberts* v. *Hamilton Cotton Co.* (1893) 23 Ont. Rep. 425. The ruling of the English court of appeal in *Groves* v. *Wimborne* (1898) 2 Q. B. 402, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47 Week. Rep. 87 (see subd. (a), *supra*), would seem to have overthrown the authority of these decisions. That ruling virtually determines that a factory act framed on the same lines as the English one is not within the purview of the principle relied upon in the first named of the Ontario cases, *viz.*, that "where no specific right is created and vested in the plaintiff for his own benefit and advantage, and no specific duty in favor of the plaintiff has been imposed, but the statute merely prohibits a thing being done under a penalty for doing it, an action for damages is not maintainable." Addison, Torts, 8th ed. 40.

[8] This was the construction put by Lord Cairns in *Atkinson* v. *Newcastle & G. Waterworks Co.* (1877; C. A.) L. R. 2 Exch. Div. 441, 46 L. J. Q. B. N. S. 773, 36 L. T. N. S. 761, 25 Week. Rep. 791, upon the language used by the court of Queen's bench in *Couch* v. *Steel* (1854) 3 El. & Bl. 402, 2 C. L. Rep. 910, 23 L. J. Q. B. N. S. 121, 18 Jur. 515. Both he and the other lords justices had grave doubts about the correctness of the proposition thus enunciated. Those doubts were afterwards reiterated by Lord Herschell in *Cowley* v. *Newmarket Local Board* (1892) A. C. 345.

In *Couch* v. *Steel* it was held that a seaman who suffered injury by reason of the failure of his employer to furnish the supply of medicines prescribed by the English shipping act could recover damages, although a penalty was also imposed for nonperformance of the statutory duty. Lord Campbell, whose views were adopted by the rest of the court, expressed the opinion, in the first place, that the statutory provision in question was enacted for the benefit of individuals, and that, under these circumstances, the case fell within the scope of the general principle laid down in Comyn's Digest, title *Action upon Statute* (F), that, "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." Reliance was also placed upon the statute of Westm. 2 (1 Stat. 13th ed. 1) chap. 50, which gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute. See 2 Coke's Inst. 486. He then proceeded as follows: "Therefore, the simple enactment requiring the supply of medicines would have entitled the plaintiff to an action in the same manner as if the obligation had been imposed by the common law, or had been expressly in-

For a more complete discussion of the extent of the right of an aggrieved individual to sue for damages resulting from the infringement of a statute, in cases where a penalty is imposed for a breach, reader is referred to general treatises on the law of negligence.

cluded in the ship articles. However, § 18 of Stat. 7 & 8 Vict. chap. 112, which creates the duty also makes the party who ought to perform it liable to a penalty for nonperformance, to be recovered at the suit of any person, and to be applied in part to the informer, and the residue to the Seaman's Hospital Society. The penalty being annexed to the offense and only because of the act creating it, no action or other proceeding could be taken against the person making default, for the mere breach of the duty upon him by the act. The duty, from its nature, the duty would exist by the common law, and for a breach of it, except for some particular mode of punishment by a penalty prescribed by the act. As for the public wrong is concerned, the remedy but that prescribed by the act of Parliament. There is, however, beyond the public wrong, a special and particular damage sustained by the plaintiff by reason of the breach of duty by the defendant, for which he has no remedy unless an action on the case at his suit be maintainable; and the question is whether the penalty annexed to the offense concludes the plaintiff, who has sustained a special and particular damage, as well as the public, though no part of the penalty is payable to him.

"If the performance of a new duty created by act of Parliament is enforced by a penalty recoverable by the party aggrieved by the nonperformance, there is no other remedy than that given by the act, either for the public or the private wrong; but by the penalty given in the act now in question (Stats. 7 & 8 Vict. chap. 112), compensation for private special damage seems not to have been contemplated. The penalty is recoverable in case of a breach of the public duty, though no damage may actually have been sustained by anybody; and no authority has been cited to us, nor are we aware of any, in which it has been held that, in such a case as the present, the common-law right to maintain an action in respect of a special damage resulting from the breach of a public duty (whether such duty exists at common law or is created by statute) is taken away by reason of a penalty recoverable by a former being annexed as for the nonperformance of duty. . . . The case of cooke (1848) 11 Q. B. 731, B. N. S. 163, 12 Jur. 477, distinguishable from the present was, by the statute in that posed upon the defendant prohibited under a penalty cising the right of fishing to be had it at the common law not bound to perform any duty created by the act but to do that which but for the might have done. . . . Rooening v. Goodchild (1777) 2 W. 906, 3 Wils. 443, an action case was held to be maintainable a deputy postmaster for duty in not delivering a post required by Stat. 9 Anne though he was, by the liable to a penalty for delivering. The objection was taken, the court being of opinion that the duty was created by statute tion lay at common law. as in this, the penalty was by a common informer, and not party grieved.

"In the present case if had prescribed a particular which a person sustaining age by reason of a breach of the imposed by the statute was to compensation, undoubtedly only could be adopted; but 8 Vict. chap. 112, has not for compensation to a person special damage by reason of a the duty prescribed by the there any words taking away which the injured party would common law to maintain an special damages arising from the of a public duty; the penalty given the statute being applicable only to public wrong, and not the private age. . . . Upon principle, then, as upon authority, as far as we been able to find any upon the point, think the second count is maintainable and that the plaintiff's right, by common law, to maintain an action the case for special damage sustained by the breach of a public duty, is

801. Employer not rendered an insurer of his servant's safety by the imposition of a specific duty.— It has been laid down that statutes of the kind here under review do not operate so as to render the employer an insurer of his servant's safety in respect to the performance of the duty imposed by the statute;[1] and that his liability for a breach of such a duty is not absolute, but conditional upon his being chargeable with notice that the provisions of the statute have not been complied with.[2]

802. Construction of statutes imposing specific duties on employers.— In the subjoined note are collected the decisions in which the courts have construed various statutes providing for the safety and health of

[1] *Bourgo* v. *White* (1893) 159 Mass. 216, 34 N. E. 191; *Consolidated Coal Co.* v. *Scheller* (1891) 42 Ill. App. 619; *Colliatt* v. *American Mfg. Co.* (1897) 71 Mo. App. 163. In the last-cited case the court, in discussing a statute (Mo. Sess. Acts 1891, § 3, p. 160) which provided that "the belting, shafting, gearing, and drums in all manufacturing, mechanical, and other establishments in this state, when so placed as to be dangerous to persons employed therein or thereabout while engaged in their ordinary duties, shall be safely and securely guarded when possible," stated its conclusions as follows: "The . . . guards required are safe and secure . . . such guards as will protect the employee from contact with the machinery by the use of ordinary prudence and caution on his part. We do not think the purpose of the legislature was to make the master an insurer of the safety of the servant, but it was its evident purpose to increase the degree of care required by the common law. The guards he is required to provide are such as will protect the employee using ordinary care against all dangers that can be foreseen by ordinary human foresight; but the master is not required to guard against the negligence of the employee, nor against such dangers or accidents as no human knowledge or experience could anticipate."

[2] *Mulhern* v. *Lehigh Valley Coal Co.* (1894) 161 Pa. 270, 28 Atl. 1087 (decision as to Pennsylvania mine law of 1885, requiring that a person employed at an engine shall be a sober and competent person).

In a prosecution under 5 & 6 Vict. chap. 99, forbidding the employment of women in mines, it was testified that two women had been seen lowering parties into the pit. This was held to be insufficient evidence to charge the person operating the mine with knowledge of the breach of the statute, though a different conclusion would have been justifiable if it had appeared that what had occurred was habitual or customary. *Reg.* v. *Handley* (1874) 2 L. T. N. S. 827.

See, however, the North Carolina cases cited in § 832, note 5, *post*.

[1] . . . taken away by reason of the statute which creates the duty imposing a penalty recoverable by a common informer for neglect to perform it, though no special damage be sustained by anyone."

Besides intimating their disagreement, as already stated, with the general proposition mentioned in the text, the lords justices in the *Atkinson Case* (1877; C. A.) L. R. 2 Exch. Div. 441, 36 L. J. Q. B. N. S. 775, 36 L. T. N. S. 761, 25 Week. Rep. 794, cited above, expressed their inability to accept Lord Campbell's theory, that the act under discussion was passed for the benefit of individuals. Brett, L. J., also said that he entertained the strongest doubt as to the correctness of the rule enunciated in the passage quoted above, that, where a new duty is created by statute, and a penalty is imposed for its breach, which penalty is to go to the person injured by such breach, the penalty, however small and inadequate a compensation it may be, is in such a case to be regarded as indicating an intention on the part of the legislature that there should be no action by such person for damages, but that, where a similar duty is created, and a similar penalty imposed which is not to go to the person injured, then the intention is that he is to have a right of action."

servants by the imposition of specific duties upon their employe
Some of these statutes undoubtedly operate so as to enlarge the rig
of servants beyond any limits which could conceivably have been r
ognized if the liability of the employers had been left to be determi
by the application of common-law principles to the given groups
facts. As regards others, it may be said that they probably emb
a standard of duty which would have been ultimately fixed by me
of litigation, and that they have, therefore, merely anticipated
results of the slow process of forensic legislation.

A complete list of the statutes which affect the extent of the l
bility of employers, both those which have and those which have
been construed in this chapter, will be found on p. 2429, *post*.[1]

[1] (a) *Statutes imposing various duties on railway companies.*—The provisions of Hurd's Rev. Stat. (Ill.) chap. 114, § 90, that no railroad shall run a train "for the transportation of merchandise or other freight," without a sufficient brake attached to the rear car and a skilful brakeman in charge, unless the brakes are operated by power applied from the locomotive, has no application to the switching of loaded cars and the making up of trains in the yards of the railroad company. It refers only to trains running from one station to another. *Chicago & E. I. R. Co.* v. *Maloney* (1898) 77 Ill. App. 191. In this case it was also held that there was a practical compliance with this provision where the switchman in a railroad yard, who was stationed on the rear car, after opening a switch notified one employed to clean snow and ice from the tracks that the train was about to back, and to look out for it; and that the company was not liable where he failed to do so, and was run over.

Eight-wheeled gondola or flat cars are not excepted from S. C. Gen. Stat. § 1499, requiring brakes to be placed on every freight car other than four-wheeled freight cars. *Ueir* v. *Charleston & S. R. Co.* (1898) 55 S. C. 90, 32 S. E. 828.

A railroad company might use cars not equipped with automatic couplers prior to January 1, 1895, provided such cars were not first sent out for use in the state after the taking effect of Neb. Sess. Laws 1891, chap. 19, making it unlawful to put into use in the state any new cars or cars sent into the shop for general repairs, not equipped with such couplers. *Thompson* v. *Missouri P. R. Co.* (1897) 51 Neb. 527, 71 N. W. 61.

A railroad company is not negli
as to a brakeman in constructing a
tle guard several hundred feet fro
street, at a point where the ordi
rigid of way joined the railroad sta
grounds, which were crossed by s
street, under the Michigan statute
quiring railway companies to constr
cattle guards at highway crossings. *
ler* v. *Lake Shore & M. S. R. Co.* (18
108 Mich. 690, 66 N. W. 593.

Where a telltale is erected in acc
ance with a statute, but the comm
sioners who are to approve it have
acted, its suitableness is a question
the jury, and a court cannot say, a
matter of law, that a telltale with w
that do not come down as low as
under surface of the bridge is suita
Hardy v. *Boston & M. R. Co.* (1896)
N. H. 523, 41 Atl. 179.

Under Mass. Pub. Stat. chap.
§ 160, it is not necessary to main
a guard at a cornice of a roof ov
station platform which is 1 foot 5 in
from the nearest line of the outside r
since that provision requires such gu
only where some portion of such st
ture "crosses" the railroad. *Quinn*
New York, N. H. & H. R. Co. (19
175 Mass. 150, 55 N. E. 891.

In the following paragraphs the
fect of the cases in which the co
have construed various statutes req
ing that frogs, etc., should be bloc
is stated.

The power conferred upon the railw
committee by the railway act of the
minion of Canada (51 Vict. chap.
§ 262, subs. 4), to allow "such filling
be left out from the month of Decem
to the month of April in each year, b
months included," refers only to
duty prescribed by subs. 4, of filling
spaces between winged rails and railw

frogs and between guard and track rails, and not to the duty prescribed by subs. 3, of filling the spaces between and in front of railway frogs and crossings and between the fixed rails of switches where the spaces are less than 5 inches wide. *Grand Trunk R. Co.* v. *Washington* [1899; P. C.] A. C. 275, 68 L. J. P. C. N. S. 37, Affirming (1897) 28 Can. S. C. 184, Which Reversed (1897) 24 Ont. App. Rep. 183.

The duty imposed by the Michigan statute (Laws 1883, Act No. 174, § 22; 3 How. Anno. Stat. § 3397 [a]), is not fulfilled by the adoption of a method of blocking which the ordinary use of the road renders ineffectual in two or three days,—in this case by the wheel flange wearing down the blocking so far that it became practically useless. The alternative safe method suggested was to give the blocking a grooved or furrowed surface, so as to allow the flanges of the wheels to pass without interference. *Eastman* v. *Lake Shore & M. S. R. Co.* (1894) 101 Mich. 597, 60 N. W. 309.

Under Mich. Comp. Laws, § 6313, requiring railroad companies to block frogs, "it is the duty of the railroad companies to make the frogs as nearly safe as possible," and evidence that the blocking of a certain frog was old and worn by the flanges is sufficient to render the question of a company's negligence one for the jury. It is compliance with the statute, and not merely with the established practice, that is required. *Jones* v. *Flint & P. M. R. Co.* (1901) 127 Mich. 198, 86 N. W. 838.

By Ohio Rev. Stat. § 3365, it is provided that every railroad corporation operating in that state shall fill or block frogs, switches, and guard rails on its tracks, with the exception of guard rails on bridges, so as to prevent the feet of its employees from being caught therein. In a case where a servant was injured on a structure 18 feet high, by reason of defendant's failure to block the space between the main rail and the guard rail, it was held that the question whether such structure was a bridge, within the act, was a question for the jury. *Johns* v. *Cleveland, C. C. & St. L. R. Co.* (1900) 7 Ohio N. P. 592.

The word "employee," in the Ohio statute (Rev. Stat. 7th ed. § 9822; 85 Ohio Laws, March 23, 1888) means all those who, "by rightful authority of the company, are engaged in the business of walking over these frogs and guard rails," although employed and paid by another company. *Ulsh* v. *Wabash R. Co.* (1889) 41 Fed. 193.

(b) *Statutes requiring that dangerous machinery shall be guarded.—United Kingdom.*—By the factory workshop act 1878, § 5, subs. 3, it was provided as follows: "Every part of the mill gearing shall either be securely fenced, or be in such a position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced." By the factory workshop act 1891, § 6, subs. 2, this provision was amended by inserting before the words "every part" the words "all dangerous parts of the machinery and."

In *Hindle* v. *Birtwistle* (1897) 1 Q. B. 192, 76 L. T. N. S. 159, the court of first instance in construing this provision proceeded on the theory that the manufacturer is only responsible for machinery which is in itself dangerous in the ordinary course of careful working. Referring to this expression of opinion, Wills, J., said: "He seems to think that no machinery can be said to be dangerous unless it is dangerous in itself, however carefully worked. I entirely disagree with such an interpretation, and think that it would limit most materially a very beneficial act of Parliament. It seems to me that machinery or parts of machinery is and are dangerous if, in the ordinary course of human affairs, danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration. It is entirely a question of degree." It was accordingly held that shuttles of cotton looms which occasionally fly out from their bed under circumstances rendering them dangerous to any persons in the line of flight, because of negligence of the weaver in charge, or a foreign substance accidentally getting into the shuttle race, or defect in the yarn, though not in themselves defective, are within the purview of the provision, if any of the causes of their flying out are likely to occur with any degree of frequency.

This provision imposes a less stringent obligation than that imposed by

the subs. 2 of § 5, with regard to a "wheel race," which is required to be absolutely fenced. But where a servant is killed while oiling machinery, owing to the want of a hand rail to protect the pit in which it was sunk, a verdict for his widow will not be set aside, although the trial judge has omitted to ask the jury whether the pit was a "wheel race." Under such circumstances it is for the jury to say whether the absence of the railing implied negligence, and it cannot be inferred that the verdict would have been different if the proper question had been put. *Chapman* v. *Nitro-Phosphate Co.* (1885) 1 Times L. R. 493.

The injured servant is entitled to maintain the action, whether the breach of the statute was in not providing, or in not maintaining, a fence. *Groves* v. *Wimborne* [1898] 2 Q. B. 402, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47 Week. Rep. 87.

The requirement as to fencing is not limited to such machinery as supplies or conveys the motive power to the machines by which the industrial operations of the factory are immediately effected, but applies to all machinery in the factory. *Redgrave* v. *Lloyd* [1895] 1 Q. B. 876, 64 L. J. M. C. N. S. 155, 15 Reports, 403, 72 L. T. N. S. 565, 43 Week. Rep. 527, 18 Cox C. C. 149, 59 J. P. 293.

The provision as to fencing machinery is applicable, though the servant was not actually engaged in the performance of his duties at the time of the injury. *Kelly* v. *Globe Sugar Ref. Co.* (1893) 20 Sc. Sess. Cas. 4th series, 833.

An employer is guilty of a violation of the statute, if he maintains unguarded cogwheels in such a position that girls of twelve or thirteen years of age are required, in the course of their duties, to place their hands and dresses within about 8 or 9 inches of the wheels. *Gemmills* v. *Gourock Rope Work Co.* (1861) 23 Sc. Sess. Cas. 2d series, 425.

A complaint is not demurrable which alleges that the plaintiff, being obliged to stand upon an iron-bound table, slipped, and in trying to save himself thrust his hand into an uncovered pinion wheel. *Shields* v. *Murdock* (1893) 20 Sc. Sess. Cas. 4th series, 727.

Where a machine is worked by hand, there is no such danger as calls for fencing. *Millican* v. *Muir* (1891) 19 Sc. Sess. Cas. 4th series, 18.

The mere fact that there will be danger if reasonable care be not taken by the workmen does not show that it is a case in which fencing is obligatory. *Robb* v. *Bullock* (1892) 19 Sc. Sess. Cas. 4th series, 971.

The provision in the act of 7 Vic. chap. 15, § 21, was held to cover a case in which an employee had to enter a space between a fly wheel and a spur wheel for the purpose of oiling the latter. *Britton* v. *Great Western Cotton Co.* (1872) L. R. 7 Exch. 130, 41 L. J. Ex. N. S. 99, 27 L. T. N. S. 125, 20 W. Rep. 525.

British colonies.—Under the Quebec factories act an employer is liable for injuries to a girl employed in his factory whose hair is caught in a revolving shaft under the table at which she is at work, as she stoops to pick up a comb, where such shaft is not covered or otherwise guarded. *Bergeron* v. *Tooke* (1896) Rap. Jud. Quebec, 9 C. S. 506.

In construing the words "all belting, shafting, gearings, flywheels, drums and other moving parts of machinery" (Ont. Rev. Stat. 1887, chap. 208, s. 1, subs. 1), a divisional court was of opinion that the general clause covered only those parts of machinery which were of a similar nature to those enumerated specifically, and that the word "moving" was used in the transitive sense of "propelling," and was accordingly held not to be applicable to a saw. *Hamilton* v. *Groesbeck* (1890) 19 Ont. Rep. 76. This construction seems to have been approved by the court of appeal (18 Ont. App. Rep. 437), which, by holding that no negligence on the defendant's part was shown in leaving the saw unguarded, may be presumed to have proceeded on the theory that the plaintiff was relegated to his common-law right. Whether this narrow construction is correct would seem to be very disputable, to say the least. Some of the most dangerous parts of machines are those which do the actual work for which the machines are designed, and it is difficult to believe that it was not the intention of the legislature to include these within the purview of the act. To construe that act in such a sense that only the "propelling" parts would be covered by it would deprive it of at least one half of its beneficial operation. Clearly, however, there are some kinds of saws—e.g. the circular—which cannot be guarded without rendering them virtually useless, and a decision holding the act to be inapplicable to such saws might perhaps be sustained on the ground that, under such circumstances, the case was one which came within the purview of the

saving clause of the statute, which exempts employers from the obligation to guard machinery where it is not practicable to do so. Another strong reason for doubting the correctness of the construction placed in this case upon the word "moving" is that, in subs. 4 of § 5 of the English factories act of 1878, it is directed that "all fencing shall be constantly maintained in an efficient state while the parts required to be fenced are in motion or use." Considering that this statute is the one from which that of Ontario is copied, it seems a reasonable inference that, although these precise words are not found in the latter statute, the colonial legislature intended to enact a provision which would give servants a protection at least as complete as that which they derived from the English act.

By the amended factories act of Ontario (58 Viet. chap. 50, § 3, Ont. Rev. stat. 1897, chap. 20 (1) a), employers are required to fence "all dangerous parts" of machinery. This change entirely gets rid of the ambiguity of the earlier act.

The maintenance of unprotected spindles with a projecting set screw has in Canada been regarded as a breach of the act as it stood before this amendment. *O'Connor* v. *Hamilton Bridge Co.* (1894) 25 Ont. Rep. 12. Affirmed in (1894) 21 Ont. App. Rep. 596 (1895) 24 Can. S. C. 598.

Indiana.—A complaint in an action on Burns's Supp. 1897, § 7087h (Acts 1897, p. 101), which provides that machinery of every description shall be "properly guarded" in manufacturing establishments, is demurrable where its allegations are that plaintiff was required to hold down pieces of wood which were being run through a sticker; that while he was so doing his hand caught in the bit of the machine, the defendants having knowingly and negligently allowed the machine to become unsafe in that there was no guard around the knives and no rollers to hold the pieces of wood in the proper position, but they had to be held down by hand; and that they were negligent in suffering the machine to become out of repair and in allowing plaintiff to work about the machine, he being inexperienced, as they knew, and ignorant that guards were necessary. Such a complaint does not show that the injuries were due to the want of guards or rollers, or due to the fact that plaintiff was holding the timber, or that it was negligence to allow plaintiff to do so, or that guards were necessary to the safe operation of the machine. *Rietman* v. *Bangert* (1901) 26 Ind. App. 468, 59 N. E. 1080.

Michigan.—The failure of an employer to provide covering for cogwheels as required by 3 How. Anno. Stat. chap. 5, § 1997, will not render him liable for injury to a boy falling into such wheels in a scuffle, where the notice from the inspector, provided for by such statute, has not been given. *Borck* v. *Michigan Bolt & Nut Works* (1896) 111 Mich. 129, 69 N. W. 254.

Massachusetts.—An employer is not liable to criminal prosecution or to an action for injuries by an employee, under Mass. Pub. Stat. chap. 191, until he has received notice from an inspector, as required by § 32 of that chapter. *Foley* v. *Pettee Mach. Works* (1889) 149 Mass. 294, 4 L. R. A. 51, 21 N. E. 394.

Minnesota.—Whether it is "practicable," within the meaning of the Minnesota act, to fence a particular piece of machinery, is a question for the jury. *Peterson* v. *Johnson-Wentworth Co.* (1897) 70 Minn. 538, 73 N. W. 540.

Where the hood or blower to a revolving cylinder with knives, in a planing machine, was battered and worn so that it did not fit closely, and thereby a suction of air was created over a roller into the cylinder under the hood, and care was required to adjust it, it was held that the hood was not a proper protection to dangerous machinery. *Janoszeski* v. *Osgood & B. Mfg. Co.* (1900) 80 Minn. 393, 83 N. W. 389.

Missouri.—In an action for injuries founded on the act of April 20, 1891, declaring that all dangerous shafting and gearing in manufacturing establishments shall be "safely and securely guarded," it is not necessary that the complaint should refer to the title of the act, or aver that defendant's negligence was in violation of the act. It is sufficient if it states facts bringing the case within the statute. *Lore* v. *American Mfg. Co.* (1901) 160 Mo. 608, 61 S. W. 678.

In the same case it was held that an instruction that the employer does not guarantee or insure the employee against injury from machinery, but he discharges the measure of his duty if he provides such guards for the protection of the employees as a person of ordinary care would deem sufficient, was properly refused since such an instruction called for a less degree of care than that required by the statute. The plain

tiff was held entitled to recover, the evidence being to the effect that the rods protecting the gearing had become bent so as to produce an opening which the sheet iron within the rods did not guard, and that in passing around the machine in the discharge of her duty, she slipped on the floor, rendered slippery from the spraying of oil from the machinery, and her hand passed through the opening in the guard, and was crushed in the cog-wheels.

That this act does not make the employer an insurer of his servant's safety, see § 801 *supra*.

New York.—Failure to comply with N. Y. Laws 1886, chap. 409, § 8, as amended by 1892, chap. 673, § 8, requiring that all cogs, belting, shafting, etc., shall be "properly guarded," is prima facie evidence of negligence, in an action by an employe against his employer for injuries caused by coming in contact with cogs. *Harlin* v. *Krulish* (1898) 25 Misc. 402, 54 N. Y. Supp. 1093, Reversed in (1899) 26 Misc. 381, 56 N. Y. Supp. 275, but merely on the special ground that evidence showing that the defendant had no control over the machinery in question had been improperly excluded.

This statute does not require employers to fence every machine, but only those which, "in reasonable anticipation, may be a source of danger." *Byrne* v. *Nye & W. Carpet Co.* (1899) 46 App. Div. 479, 61 N. Y. Supp. 741, holding that the defendant was not bound to anticipate that a child would attempt to adjust material passing through a swiftly moving machine which was in no way connected with the child's work in another part of the factory.

It is error to rule, as a matter of law, that there was a noncompliance with this statute, where the evidence is that the injury was caused by a set screw projecting ⅛ of an inch from a shaft which was 15 feet above the floor and was reached by a ladder used only when necessary to oil the shaft bearing. *Glens Falls Portland Cement Co.* v. *Travelers' Ins. Co.* (1900) 162 N. Y. 399, 56 N. E. 897, Affirming (1896) 11 App. Div. 411, 42 N. Y. Supp. 285. The court said: "The necessity for the guard, and the character and description of the guard, must of necessity depend upon the situation, nature, and dangerous character of the machinery, and in each case becomes a question of fact. . . . The manifest purpose of the enactment was doubtless to give more force to the existing rule that masters should afford a reasonably safe place in which the servants are called upon to work."

Similarly, it has been held that shafting and set screws in a factory, etc., guarded 9 feet above the floor, are not within the provisions of this statute. *Glassheim* v. *New York Economic Printing Co.* (1895) 13 Misc. 174, 34 N. Y. Supp. 69.

The owner of a manufacturing establishment, who has provided a covering for machinery, sufficient to prevent the clothing of the employees from coming in contact therewith, is not liable under N. Y. Laws 1890, chap. 398, § 12, providing that all machinery "shall be properly guarded," for injuries occasioned by an employee's throwing her hair over her head as she is coiling it in such a manner that it flies under the back of the covering of the shafting. Such an accident is not one which could have been anticipated. *Cobb* v. *Welcher* (1894) 75 Hun, 28, 26 N. Y. Supp. 1058.

On the theory that no greater duty is imposed upon a manufacturer by N. Y. Laws 1885, chap. 560, § 6, providing that all cogs shall be properly guarded than devolves upon him under the common law, it has been held that the omission to provide guards does not create a liability for injuries to a servant where the cogs could not have been guarded in any manner that would have tended to make them safer for employees, without preventing their use. *Spaulding* v. *Tucker & C. Cordage Co.* (1895) 13 Misc. 398, 34 N. Y. Supp. 237. In this case a boy of seventeen employed on a rope walk near the cogs tripped, and in falling brought his hand into contact with them. The manner in which the cogs were guarded is not described.

These statutes were re-enacted, with a few modifications, in the labor laws of 1897 (N. Y. Laws 1897, chap. 415).

Pennsylvania.—In a case where a boy thirteen years old was employed as a slate picker in a coal breaker, and fell into a pair of rollers breaking coal, and was injured, the evidence showed that the master had covered the rollers with a box, in the top of which was an opening covered by a plank, and that the plank was displaced by a fellow servant of the boy at the time of the accident and had often been thus displaced before, with the boy's knowledge. It was held that the master had done his duty under the act of March 3, 1870, providing that all machinery where boys work shall be properly fenced off, and that

the boy could not maintain an action against the master. *Honor* v. *Albrighton* (1889) 93 Pa. 475.

Wisconsin.—In *Thompson* v. *Edward P. Allis Co.* (1895) 89 Wis. 528, 62 N. W. 527, it was argued that the provision in Sanborn & Berryman's Anno. stat. § 1638f (Rev. Stat. § 1636j) which declares that all belting, etc., so located as to be dangerous to employees when engaged in their ordinary duties shall be securely guarded or fenced so as to be safe for persons employed in any such place of employment, did not apply to an employee who was engaged in work upon the gears themselves, but merely to the case of other employees who in performing their duties are in danger of being caught by the gears, but who are not employed directly upon or about them. The court rejected this contention, and held that an older who, when injured, was feeling a shaft to see if it was hot, was entitled to recover.

The provision cited only requires the guarding of such machinery as is dangerous in an unguarded condition. The mere fact that it occasioned an injury to an employee does not of itself show that it came within this description. *Powalske* v. *Cream City Brick Co.* (1901) 110 Wis. 461, 86 N. W. 153.

Whether a set screw is "so located as to be dangerous to employees engaged in their ordinary duties," so as to require it to be covered or guarded, is a question for the jury. *Gunnard* v. *Knapp-Stout & Co. Co.* (1897) 95 Wis. 482, 70 N. W. 671.

It cannot be said, as matter of law, that negligence is inferable from the fact that a set screw on a paper winder projected $\frac{3}{16}$ of an inch above the surface of the collar. Whether such an arrangement was indicative of negligence is a question for the jury. *Kreider* v. *Wisconsin River Paper & Pulp Co.* (1901) 110 Wis. 645, 86 N. W. 662.

A master is not required to guard a shafting which is so located that an employee must necessarily go out of his ordinary course, or the course which he might be reasonably expected to take, in order to reach it. *Powalske* v. *Cream City Brick Co.* (1901) 110 Wis. 461, 86 N. W. 153, denying recovery where the employment of a servant did not bring him within the reach of danger from an unguarded shaft which was about 18 inches from his place of work, and where a movement directly towards the shaft was guarded against by a large pile of stones, and the only way to reach the shaft was by stepping out of his path and up on the pile of stones,—an act which was not required in his work.

An employer is not, as matter of law, free from negligence in leaving unguarded a constantly moving elevator chain and carrying chain at a point where the two meet on the surface of the floor and run over a sprocket-wheel projecting just above the surface of the floor, beside which an inexperienced employee seventeen years old is placed at work. *Klatt* v. *N. C. Foster Lumber Co.* (1897) 97 Wis. 641, 73 N. W. 563.

In a late case in which recovery was denied on the ground that the plaintiff fully appreciated and had assumed the risk, the court remarked that it was not yet settled in Wisconsin whether leaving gears uncovered constituted negligence under the act cited above. *Williams* v. *J. G. Wagner Co.* (1901) 110 Wis. 456, 86 N. W. 157.

(c) *Other statutory provisions relating to factories and workshops.*—Any place in which a part of the processes mentioned in the statutory definition of a certain kind of factory are carried on is a "factory" within the meaning of the statute, although the main process from which that particular description of factory receives its designation is carried on in a distinct establishment. Hence, premises in which the processes of hooking, lapping, making up, and packing cloth are carried on, are a factory within the English factory and workshop act of 1878, § 93, relating to the employment of young persons, even if none of such processes are carried on as incidental to bleaching or dyeing within the provision including bleaching and dyeing works,—that is to say, any premises in which such bleaching, dyeing, and the processes specified are carried on. *Rogers* v. *Manchester Packing Co.* [1898] 1 Q. B. 344, 67 L. J. Q. B. N. S. 310, 78 L. T. N. S. 17, 46 Week. Rep. 350, 62 J. P. 166, 18 Cox C. C. 698.

The factory and workshop act of 1883 (46 & 47 Vict. chap. 53), § 2, which declares that it shall be unlawful to carry on a white lead factory, unless it is certified by an inspector that the owner has complied with the directions of the act with regard to ventilation, etc., has been held not to be applicable to a factory in which a process was employed which was invented after the passage of the act, and produced an article which, although it presented the same appearance and was adapted for the same uses, differed in some essential respects from that previously manufactured,—especially in regard to the fact

of its being much less dangerous to the workmen. *Creery* v. *Hannay's Patents Co.* (1889) 16 Sc. Sess. Cas. 4th series, 993.

An underground place which for fifteen years has been used as a bakehouse does not cease to be so used while undergoing repairs and remaining unoccupied thereafter at the time of the taking effect of the English factory and workshop act 1895, § 27, subs. 3, prohibiting the use of a place under ground as a bakehouse "unless so used at the commencement of such act." The court took the position that, for the purposes of the act, trying to let the premises was equivalent to using them, and that there had been no interruption of use as a bakehouse, as the evidence showed that during a portion of the period during which the premises had remained unoccupied they had been under repair, and that during the whole of that period a notice to the effect that they were to let had constantly been exhibited.

A justice may be compelled by mandamus to hear a complaint against part of the owners of a mine who failed to provide a boiler with a proper steam gauge as required by 18 & 19 Vict., chap. 108, § 11, as the act renders any owner, agent, or viewer liable for neglect to observe the rules. *Queen* v. *Brown* (1857) 7 El. & Bl. 757, 26 L. J. M. C. N. S. 183, 3 Jur. N. S. 745.

A city ordinance requiring every vat with hot liquids to be surrounded with "proper safeguards" for preventing accident or injury to those employed at or near them requires some practical safeguard which, while affording reasonable security, does not unreasonably interfere with the work which must be performed. *Chicago Packing & Provision Co.* v. *Rohan* (1892) 47 Ill. App. 640, disapproving an instruction which left it to the jury to say whether a railing which had been provided was a proper safeguard, a matter as to which no evidence had been produced, and which could be settled only by an expert.

The duty of the owner of a manufacturing establishment to provide an inclosure for an elevator shaft, under N. Y. Laws 1887, chap. 462, § 8, amending N. Y. Laws 1886, chap. 409, arises only after the inspector has declared that in his opinion it is necessary to do so in order to protect the life or limbs of those employed in the establishment. *Bodin* v. *Vace* (1892) 28 Abb. N. C. 138, 18 N. Y. Supp. 106.

N. Y. Laws 1887, chap. 566, provides for protecting the opening of a hoistway in warehouses by a substantial railing, or with good and sufficient trap doors to be kept closed at all times except when in actual use. Under this provision it was held that where an employee, just after entering a building on a dark morning, fell into a hoistway which had been left open by a coemployee who had passed through a few minutes before, it was for the jury to say whether the protection required by the statute was given. *McCaulay* v. *Smith* (1892) 47 N. Y. S. R. 500, 19 N. Y. Supp. 991.

The Ontario factories act 1884, chap. 39, § 15, subs. 1, providing that unguarded dangerous places shall be securely guarded, is infringed where a vat on which workmen have to stand is inadequately covered. *Dean* v. *Ontario Cotton Mills Co.* (1887) 14 Ont. Rep. 119.

A depression in the floor of a mill, of the depth of the floor, made by an opening in the same at a place where the elevator passes up and down, the opening being closed by an automatic shaft, does not constitute a violation of Mass. Pub. Stat. chap. 104, § 14, declaring that all hoistways and elevators on every floor of a factory shall be protected by sufficient trap doors or self-closing hatches. *Hoard* v. *Blackstone Mfg. Co.* (1900) 177 Mass. 69, 58 N. E. 180.

A druggist's establishment in which the only part of the wares manufactured is that which is produced in a laboratory, the entire output being only about 2 per cent of the business, is not a "factory" within the meaning of a statute requiring fire escapes. *Hornischel* v. *Texas Drug Co.* (1901) 26 Tex. Civ. App. 1, 61 S. W. 419.

For a case in which the defendant was sued for breach of a statute requiring the construction of fire escapes (Wis. Laws 1895, chap. 355 Rev. Stat. 1898, § 4390), and was held not to be obliged to construct new fire escapes, for the reason that his factory was within the statutory exception as being "supplied with a reasonable fire escape" see *Dunlavey* v. *Racine Malleable & Wrought Iron Co.* (1901) 110 Wis. 391, 85 N. W. 1025.

A safe landing place is an essential part of an efficient fire escape. Hence evidence that a fire escape attached to a factory terminated above a chute extending into the basement of the building, so that persons attempting to descend landed in such chute, justifies a finding that the owners failed to provide a proper fire escape as required by the New York statute providing that

factories shall be provided with suitable and proper fire escapes connecting with each floor. *Johnson* v. *Steam Gauge & Lantern Co.* (1893) 72 Hun, 535, 25 N. Y. Supp. 689.

Negligence by the proprietor of a factory cannot be predicated of the fact that the windows leading to the fire escapes were screwed down, where such windows were light structures and could easily have been kicked out with as little delay as would be occasioned by raising them if unfastened, and propping them up. *Huda* v. *American Glucose Co.* (1895) 13 Misc. Rep. 657, 34 N. Y. 931.

In construing the Ontario factories act (Rev. Stat. 1887), § 15, subs. 4, providing for safety devices on elevators, the court has held that, even if the device furnished has neither been approved nor disapproved by the government inspector, the plaintiff cannot recover unless he shows that it was of such a pattern as to make the use of it unreasonable. *Black* v. *Ontario Wheel Co.* (1890) 19 Ont. Rep. 578.

A manufacturer making use of elevators is not compelled, under Mass. stat. 1882, chap. 208, amending Mass. Pub. Stat. chap. 104, § 14, providing that all elevators, cabs, or cars shall be provided with some suitable mechanical device to be approved by the state inspector of factories and public buildings, whereby the cabs or cars will be "securely held in the event of accident," to provide an arrangement that will surely and securely hold the car in every circumstance, but only some device, to be approved by the inspector, designed for the purpose of securely holding the cab in case of accident. *Bourgo* v. *White* (1893) 159 Mass. 216, 34 N. E. 191.

See also *H. Channon Co.* v. *Hahn* (1901) 189 Ill. 28, 59 N. E. 522, cited in § 799, note 4, *supra*.

(d) *Statutes regulating the operation of mines.*—As regards some of their provisions, the statutes which have been enacted for the regulation of mines in the United States and the other countries with which we are concerned in the present treatise are similar, or substantially identical. But it seems to be preferable, on the whole, to classify the cases with reference rather to territorial lines than to the subject matter. No provisions, of course, will be adverted to here except those which have a direct bearing upon the extent of the right of miners to recover damages for injuries received in the course of their employment.

United Kingdom.—The shaft of a lead mine, which is completed and has a tunnel driven from the bottom of it for the purpose of arriving at the ore, although no ore has yet been got out, is a "working shaft" within the meaning of the English metalliferous mines regulation act 1872, § 23, subs. 10; and the owners of the mine are liable to be convicted of an offense against that section, if the men employed in the mine are drawn up the shaft in a bucket unprovided with guides. *Foster* v. *North Hendre Min. Co.* [1891] 1 Q. B. 71, 60 L. J. M. C. N. S. 6, 63 L. T. N. S. 458, 17 Cox C. C. 216, 55 J. P. 103. The decision was based on the principle that the danger to the miners is the same whether the mine is productive or not.

Under 18 & 19 Vict., chap. 108, § 4, requiring ventilation constantly if a colliery "be worked," the suspension of actual work from Saturday to Monday will not suspend the requirements as to ventilation during that time. *Knowles* v. *Dickinson* (1860) 2 El. & El. 705, 29 L. J. M. C. N. S. 135, 6 Jur. N. S. 678, 8 Week. Rep. 411.

Under 23 & 24 Vict., chap. 151—an act for the regulation and inspection of mines.—so much of the mine must be kept ventilated as to render the working places safe. *Brough* v. *Homfray* (1868) 15 Mining Reg. 6, L. R. 3 Q. B. 771, 37 L. J. M. C. N. S. 177, 16 Week. Rep. 1123, 9 Best & S. 492.

The coal miners' regulation act 1887, general rules No. 15, provides as follows: "Every road on which persons travel underground, where the load is drawn by a horse or other animal, shall be provided, at intervals of not more than 50 yards, with sufficient manholes or with places of refuge; and every such place of refuge shall be of sufficient length, and at least 3 feet in width between the wagons running on the road and the side of such road." In a Scotch case it was held by Lord Macdonald (the other judges reserving their opinions on the point) that the mouths of the cross roads which led off the main level of a mine, and were within 50 yards of each other, were to be considered as "manholes" in the sense of the rule. *Hughes* v. *Clyde Coal Co.* (1891) 19 Sc. Sess. Cas. 4th series, 313.

As to the question whether the effect of the act of 23 & 24 Vict. chap. 151, § 10, with regard to the ventilation of coal mines, is or is not to make the operator of the mine absolutely responsible for failure to provide such ventila

tion, and thus exclude *pro tanto* the defense of coservice, see § 565, *ante*.

British colonies.—Rule 18, § 25, Inspection of metalliferous mines act (B. C. Rev. Stat. chap. 134), runs as follows: "Each winze or mill hole extending from one level or drift to another level or drift shall be protected at the top by a cover or guard rail." This provision does not compel a mine owner to cover an opening on an intermediate level. Martin, J., in *Staines* v. *Hall Mines* (1899) 6 B. C. 579.

Section 6, subs. 20, of the Victoria regulation of mines statute of 1877, declaring that no person in charge of steam machinery in connection with the working of any mine shall, unless relieved by a competent person for that purpose, absent himself or cease to supervise the machinery during the time it is used in working the mine, applies only in the case of machinery in connection with working of a mine, and not in a case where the enlpable party is a contractor engaged in erecting machinery. *Dunstan* v. *Stewart* (1880) 6 Viet. L. Rep. (L.) 175.

Illinois.—Under the mining act of this state the liability of the owner is conditioned upon proof that he has "wilfully violated" the statutory requirements. *Consolidated Coal Co.* v. *Carson* (1896) 66 Ill. App. 434. Mere noncompliance with these requirements does not constitute a "wilful violation" thereof. *Odin Coal Co.* v. *Deaman* (1900) 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192. Affirming (1899) 84 Ill. App. 190; *Springside Coal Min. Co.* v. *Grogan* (1892) 53 Ill. App. 60 (instruction based on opposite theory held erroneous).

Instructions are defective unless they are such as to keep permanently before the jury the question whether the breach of the statutory requirement complained of was willful. *Hanley* v. *Dailey* (1883) 13 Ill. App. 391.

Where the report of an examination of defendant's mine did not show that all the conditions were safe, and plaintiff gave defendant notice of the dangerous condition of an entry, and was permitted to enter the mine to work, and was injured, there was evidence to support an instruction based on wilful violation of mining act, § 4, providing that all mines shall be examined every morning, and that no one shall be permitted to enter until the conditions are reported to be safe. *Pancake Coal Co.* v. *Royce* (1900) 184 Ill. 402, 56 N. E. 621, Reversing (1898) 79 Ill. App. 469.

Wilful violation is predicated when the owner is affected with notice that the requirements have not been complied with, and fails to remedy the defective conditions. *Bartlett Coal & Min. Co.* v. *Roach* (1873) 68 Ill. 174; *Jupiter Coal Min. Co.* v. *Mercer* (1899) 84 Ill. App. 96; *Girard Coal Co.* v. *Higgins* (1893) 52 Ill. App. 69.

In a case where a declaration alleged that plaintiff's intestate came to his death by defendant's wilful omission to comply with two sections of the act, it was held proper to refuse to allow officers of defendant to testify that they intended to comply with the statute in good faith, since the word "wilful," as employed in the declaration, did not charge wrongful intent, but only that the omissions were conscious acts of the mind, and did not result from mere inadvertence. *Odin Coal Co.* v. *Deaman* (1900) 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192. Affirming (1899) 84 Ill. App. 190.

Negligence so gross as to amount to recklessness and indicate a willingness to subject others to a known and avoidable risk will support a charge of wilful wrong; but such a charge is not sustained by proof of a want merely of ordinary care. *Girard Coal Co.* v. *Higgins* (1893) 52 Ill. App. 69.

Whether there has been a wilful failure must be determined by the jury upon a consideration of all the facts and circumstances of the case. *Odin Coal Co.* v. *Deaman* (1899) 84 Ill. App. 190; *Muddy Valley Min. & Mfg. Co.* v. *Phillips* (1899) 39 Ill. App. 376.

Under Starr & C. Anno. Stat. 2d ed. chap. 93, § 4, which provides that mines in which men are employed shall be examined every morning to determine obstructions to roadways and other dangerous conditions, and § 14, giving a right of action to the widow and children of any person killed by the wilful violation or failure to comply with such law, where any injury happens contemporaneously with the continued violation of the statute, to a person within its protection, a verdict finding that the violation of the statute caused the injury will not be set aside unless there is an entire absence of proof. *Jupiter Coal Min. Co.* v. *Mercer* (1899) 84 Ill. App. 96.

A wilful violation of § 7 of [illegible] mining act, which forbids the owner [illegible] in charge of a hoisting engine [illegible] an experienced, competent, and [illegible] person, is established where the jury finds that an incompetent person was

employed and retained with knowledge of his incompetency. *Niantic Coal & Min. Co.* v. *Leonard* (1888) 126 Ill. 216, 19 N. E. 294.

The inference that a mine owner possessed that knowledge of the failure to comply with the statute which warrants the conclusion that he had wilfully violated it may properly be drawn where he was operating a coal mine, the original shaft of which was 200 feet in depth, and had failed to construct an additional or escapement shaft, in the manner required by 2 Starr & C. Anno. Stat. chap. 93, § 3, within a year after coal was mined for sale or use. *Carterville Coal Co.* v. *Abbott* (1898) 81 Ill. App. 279.

Evidence, in an action for death resulting from negligence, that the state mine inspector has never made complaint of the conditions surrounding the shaft of a mine, is not conclusive that such conditions were not the result of wilful violation of the law. *Odin Coal Co.* v. *Denman* (1899) 84 Ill. App. 190. Judgment Affirmed in (1900) 185 Ill. 113, 76 Am. St. Rep. 45, 57 N. E. 192.

Sections 4 and 6, Rev. Stat. 1874, and § 4 of the statute entitled "Health and Safety of Miners" (Sess. Laws 1883, p. 114), require the owners of mines to have the working places examined every morning in order to detect fire damp. This provision is applicable not only to an employee actually engaged in digging for coal, but also to an employee who, at the time of an explosion, was timbering a shaft. *Coal Run Coal Co.* v. *Jones* (1886) 19 Ill. App. 365. Reversed in (1886) 127 Ill. 379, 8 N. E. 865, 20 N. E. 81, but only on the ground that the breach of the statute did not contribute to the accident.

A mining company wilfully neglecting to prevent accumulation of gas, as required by the act of July 1, 1887, is liable for injuries to an employee caused thereby. *Muddy Valley Min. & Mfg. Co.* v. *Phillips* (1890) 39 Ill. App. 376.

Under Ill. Rev. Stat. 1874, chap. 93, § 9, as amended by act of May 11, 1877, the person whose duty it is to report accidents to the mine inspector is the person who has immediate personal charge of the mine or colliery. The owner and operator of the mine, or his agent, is not within the penalty unless he has personal charge of the mine. *Shell* v. *People* (1879) 93 Ill. 129.

Recovery has been allowed for injuries caused by a wilful violation of the provision (§ 7) requiring the owners of mines to provide safe hoisting apparatus, sufficient brakes, and sufficient light, and not to place an incompetent engineer or a boy under eighteen years of age in charge. *Consolidated Coal Co.* v. *Hackl* (1889) 130 Ill. 551, 22 N. E. 715. See also *Niantic Coal & Min. Co.* v. *Leonard* (1888) 126 Ill. 216, 19 N. E. 291.

The fact that the statute came into effect only a few days before the accident occurred is no excuse for a noncompliance with its provisions. If unable to carry out any of the statutory duties at once, the mine owner is bound to suspend operations until he has made the necessary preparation. *Bartlett Coal & Min. Co.* v. *Roach* (1873) 68 Ill. 174.

The operator of a coal mine, who, before permitting persons to enter such mine, causes it to be examined by a competent and duly authorized agent, who in good faith makes an examination to ascertain if there are any dangerous conditions which render it unsafe for men to work therein, and reports the mine to be in a safe condition, when in fact it is not, cannot be sued under that provision of the statute which relates to the inspection of mines (2 Starr & C. Anno. Stat. 2719, chap. 92, §§ 4, 14), though possibly recovery may be had in a common law action for negligence. *Himrod Coal Co.* v. *Schroath* (1900) 91 Ill. App. 231.

Section 6 of the act of 1879 enacts that there shall be provided for hoisting and lowering miners a cage covered with boiler iron and furnished with guides, a brake in every drum, and safety catches.

A pit boss in charge of a mine, whose duty it is to see that the hoisting apparatus satisfies the statutory requirements, cannot recover under this section from the mine owner for injuries caused by his failure to perform this duty. *Beaucoup Coal Co.* v. *Cooper* (1883) 12 Ill. App. 373.

Rev. Stat. 1874, chap. 93, § 14, requires that "every drum shall be provided with a sufficient brake to prevent accident in case of the giving out or breaking of machinery." The failure of the machinery to perform its proper office is a "giving out" within the meaning of the statute. *Beard* v. *Skeldon* (1885) 113 Ill. 584 (instruction to this effect approved), Affirming (1883) 13 Ill. App. 54.

The provision in Rev. Laws 1874, chap. 70, § 14, regarding the covering of hoisting cages, applies where a person was killed while upon the cage for the

purpose of being hoisted, by a lump of coal which fell down the shaft, the cage not being covered. *Litchfield Coal Co.* v. *Taylor* (1876) 81 Ill. 590.

A law requiring mine owners to provide hoisting machinery which will keep the miners safe "as far as possible" is not complied with where a valve of the hoisting engine of a mine cage is defective, to the knowledge of the officers of the company, so as to allow the steam to escape through it and start the engine automatically; and the mining company is liable for the death of a miner caused by such unexpected starting. *Consolidated Coal Co.* v. *Mæhl* (1888) 31 Ill. App. 252.

Hurd's Rev. Stat. (Ill.) 1889, chap. 93, § 6, provides that a sufficient light shall be furnished at the top of every shaft of a mine to insure the safety of persons getting on or off the cage. Section 8 requires that the top of every shaft shall be securely fenced by gates properly protecting such shaft. Section 14 provides that any injury arising from failure to comply with the provisions of the act shall give a cause of action. In a case where these provisions were construed, it was held that, where a mine owner had erected above the opening of a shaft an unincloscd framework of timber, supporting a structure called a "tipple house," to which the cage could be hoisted, and through which the day shift entered and left the shaft, but it was customary to let off the night shift at the surface of the ground, and plaintiff's intestate, being one of the night shift, and endeavoring to alight, fell into the shaft and was killed (it being dark at the surface, and there being then no fence there), it was proper to submit to the jury the questions whether the surface or the tipple house was the top of the shaft, within the meaning of § 8, and whether the proximate cause of the injury was the absence of a light. *Odin Coal Co.* v. *Denman* (1900) 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192, Affirming (1899) 84 Ill. App. 190.

Rev. Stat. chap. 93, § 8, providing for signals, applies to all coal mines without reference to the motive power. *Sangamon Coal Min. Co.* v. *Wiggerhaus* (1887) 25 Ill. App. 77, (1887) 122 Ill. 279, 13 N. E. 648.

By Rev. Stat. chap. 93, § 16, it was enacted that the owners of coal mines should keep a sufficient supply of timber to be used as props, and send down such props when required.

A recovery may be had under this provision by a miner, the [illegible] which he is opening ha[illegible] dangerous roof, and he is [illegible] paid reason thereof, a price exceeding scale fixed by the union to which he longs. Such a person is a work within the meaning of the statute. *Olive & S. Coal Co.* v. *Herbeck* (1 190 Ill. 39, 60 N. E. 105, Affirm (1900) 92 Ill. App. 441.

A declaration averring a failure furnish props and prop the roof so t it should not fall does not show a vi tion of this provision. *Consolid Coal Co.* v. *Yung* (1887) 24 Ill. 255.

The implication from this provis that, where no timberman is emplo it is the duty of the miners, as a of their employment, to observe fully the roof under which the working from day to day, and set p wherever they seem to be needed. *solidated Coal Co.* v. *Scheller* (189 Ill. App. 619.

It is proper to refuse to direct a diet for the defendant, where it app that plaintiff's intestate had info the "pit boss" that a rock was hab fall and was dangerous, and that he dered props for it, which the boss p ised to send, but failed to send, and rock fell on plaintiff's intestate. *ern Anthracite Coal & Coke Co. Beaver* (1902) 192 Ill. 333, 61 N 335, Affirming (1900) 95 Ill. App. 9

Where the custom established by fendant was for miners to write blackboard placed near the mouth the shaft for the purpose, the num of props and caps desired, when wanted, and when furnished they sent down and delivered at the min room, and there was evidence that plaintiff had for three successive before his injury placed his order on board, and the props and caps were furnished to him, a trial judge was tified in instructing the jury that pl tiff had made a demand for such p and caps. *Donk Bros. Coal & Coke* v. *Peton* (1901) 192 Ill. 41, 61 N 330, Affirming (1900) 95 Ill. App.

The miner himself is the one to d mine the length and dimensions of props and cap pieces necessary to p erly secure his safety, and if he or props and cap pieces of one dimen and length, it is not a compliance the statute for the owner to furnish props which must be spliced or s before they can be used. *Western thracite Coal & Coke Co.* v. *Be*

(1901) 192 Ill. 333, 61 N. E. 335, Affirming (1900) 95 Ill. App. 95.

A miner cannot complain that the props supplied were not of the precise length that he wanted, unless he informed the defendant what lengths were required. *Sugar Creek Min. Co.* v. *Peterson* (1898) 177 Ill. 324, 52 N. E. 475, Reversing (1897) 75 Ill. App. 631.

In an action for negligently causing decedent's death by failing to furnish the timber, after several witnesses have testified that when timber was on hand it was kept at the bottom of the shaft, the question asked witnesses, whether there were props on hand at the bottom of the shaft at the time, is not erroneous, though the statute does not require them to be kept in any particular place. *Mt. Olive & S. Coal Co.* v. *Beabeacher* (1901) 190 Ill. 538, 60 N. E. 888, Affirming (1900) 92 Ill. App. 442.

Under the provision of the act of 1872 which requires that a "second escapement" shall be provided, it was held that liability attached, though the fire which occurred on the occasion when the need of the second escapement was experienced was accidental and implied no fault in the mine owner. *Wesley City Coal Co.* v. *Healer* (1876) 84 Ill. 126.

Section 3 of the act of 1877, prescribing the construction of escapements, and fixing a time within which they shall be constructed, is kept in force by the proviso in § 3 of the act of 1879, which repeals all the earlier act except those parts which are covered by the proviso. *Hamilton* v. *State* (1882) 102 Ill. 367.

Section 3 of the act of May 28, 1879, requiring the construction of escapements, is not intended for the benefit of the owners of mines, but was designed to protect the health and insure the safety of the persons employed in the mines. A court has no power under it to direct a mine owner to leave open the passages between his own mine and an adjoining one, so that an escapement constructed by him may serve for both mines. *Loose* v. *People* (1882) 11 Ill. App. 445.

Indiana.—Act June 3, 1891, § 9 Burns's Rev. Stat. 1894, § 7469; Horner's Rev. Stat. 1897, § 5480j), requires owners and operators of coal mines to cover the cages with ¼-inch boiler plate, for the safety of persons ascending and descending the shaft. Burns's Rev. Stat. 1890, § 7473 (Horner's Rev. Stat. 1897, § 5480n), authorizes an action against such an owner or operator for an injury resulting from a failure to comply with the act. Since the purpose of the act is to protect all persons working in coal mines, a miner employed at the bottom of a shaft to run cars into the cage is not prevented from recovering for an injury resulting from a violation of the statute by the fact that he was not ascending or descending. *Bond* v. *Rural Block Coal Co.* (1900) 25 Ind. App. 651, 58 N. E. 870.

Burns's Rev. Stat. 1901, § 7479, provides that the operator of a coal mine shall employ a competent mining boss to constantly watch over the airways, etc. Section 7472 requires such boss to visit and examine every working place in the mine at least every alternate day, and to examine roofs so that such places are properly secured by props, and that safety is assured. A complaint alleging that a boss appointed by an operator failed to examine the mine in which plaintiff worked, as required, and, unknown to plaintiff, the walls between the places where coal was mined became so thin that a charge of powder used in mining blew one out, and plaintiff was injured is not demurrable. *Cascade Block Coal Co.* v. *Wells* (1901) 29 Ind. App. 1, 61 N. E. 236.

Iowa.—By McClain's Iowa Code, §§ 2463, 2465, it is provided that, if any employee in a mine neglects or refuses to securely prop the roof of coal entries under his control, he shall be deemed guilty of a misdemeanor; it is made the duty of the agent, owner, or operator to keep on hand a sufficient supply of timber to be used as props, and send the same down to the workmen when required. This provision does not apply in the case of an injury to any employee injured in a sloping entry of a coal mine through which coal is brought to the surface, where such employee is not in control of the entry. This is not a case where the keeping of the place of work in repair is incidental to the labor which is to be performed. The duties of the laborer have no connection with the preparation of the entry, which is a completed piece of work as far as he is concerned. *Corson* v. *Coal Hill Coal Co.* (1897) 101 Iowa, 224, 70 N. W. 185.

A servant cannot recover under the provision requiring the furnishing of props, where there is no evidence that he called for any props which were not furnished. *Gibson* v. *Maple Grove Coal & Min. Co.* (1901) 115 Iowa, 74, 87 N. W. 736.

A jury is justified in finding that a

mine owner was guilty of an actionable breach of the provision (§ 2188) of the Iowa Code respecting the ventilation of mines, where the evidence tends to show that the room where the plaintiff worked was filled with poisonous gases to such an extent that to breathe it was dangerous to the health. *Wagstore* v. *Zumbleson Coal Co.* (1899) 110 Iowa, 169, 81 N. W. 227.

Iowa Laws 1880, chap. 202, § 13, which declares it to be a misdemeanor to ride upon a loaded car or wagon in a shaft or slope, does not apply to a servant who, as conductor, accompanies a train of cars which is being hauled out of the mine. The prohibition is aimed merely at intermeddlers. *Crabill* v. *Wapello Coal Co.* (1886) 68 Iowa, 751, 28 N. W. 56.

Kentucky.—The provision of Ky. Stat. § 2732, making it a misdemeanor for any person employed in a mine to intentionally or wilfully neglect or refuse to securely prop the roof of a working place under his control, and providing that any employee who neglects or refuses to obey an order by the superintendent of the mine in relation to the security of the bank where he is at work shall be liable to a fine, refers to persons actually engaged as miners in taking out coal and thereby removing the natural props of the roof, and has no application to an employee employed as track layer along the roadways of the mine, which are no more under his control than that of any other general employee; and his failure to prop the roof of such roadways is not such contributory negligence as will prevent a recovery for his death. *Ashland Coal & I. R. Co.* v. *Wallace* (1897) 101 Ky. 620, 13 S. W. 207, Denying Rehearing in (1897) 101 Ky. 644, 42 S. W. 744.

Missouri.—A mine owner, being by § 14 liable only for wilful violations of the statute, cannot be sued for a breach of § 16, respecting the supply of timber for props, unless he knew that the props were necessary. *Leslie* v. *Rich Hill Coal Min. Co.* (1892) 110 Mo. 31, 19 S. W. 308. Compare decisions on Illinois mining acts.

Under § 6 of the Missouri act of 1881, which provides that the owner, etc., of every coal mine shall provide a cage for lowering or hoisting the miners, and that the cage shall have a spring catch, the actual owner is liable for an injury caused by a breach of the statute as to the hoisting cage, although the person injured was in the employ of a contractor opening the mine. *Fell* v. *Rich Hill Coal Min. Co.* (1886) 24 Mo. Ap 216.

Under § 16, which provides that owner, etc., of a mine shall keep a su cient supply of timber to be cut props, and send down the props required, the owner is liable, the injured servant was employed by who had contracted with the own take out the coal at so much a t The only way in which the owner relieve himself of the duty is to trans the control and occupancy of the m by lease or other contract. *Les Rich Hill Coal Min. Co.* (1892) 110 31, 19 S. W. 308.

A miner's continuance of work a his demand for props has been re does not relieve the employer of re sibility for such accidents as may s quently be caused by a want of p ping, if there was no patent danger the demand was made out of reas caution merely. *Idams* v. *Kans T. Coal Co.* (1900) 85 Mo. App. 18

A person employed as cager at bottom of the shaft of a coal mine w is injured in the performance of duty by a lump of coal falling from top of the shaft into an uncovered is entitled to recover damages un the provisions of the Missouri act March 23, 1881, requiring the cage to covered "so as to keep safe, as far possible, persons descending into ascending out of said shaft," altho he may not be strictly within the ter of the clause. *Durant* v. *Lexi Coal Min. Co.* (1888) 97 Mo. 62, 1 W. 484.

New Mexico.—The operator of a m is required to use reasonable efforts secure the requisite ventilation for miners, under the act of Congress March 3, 1891, requiring operators provide adequate ventilation of not than a specified number of cubic fe air per minute for so many men, and force the same through the mine proper appliances. *Cerrillos Coal Co.* v. *Deserant* (1897) 9 N. M. 49, Pac. 807.

New York.—By Laws 1890, chap. 7 §§ 9, 10, and Laws 1897, chap. § 122, it is provided that the own and operators of mines shall cause th mines to be properly timbered, and roof and sides of each working pl thereof to be properly secured, and t no person be permitted to work in unsafe place and under dangerous terial except to make it secure. In action under this provision, a ver for the plaintiff was warranted by

ence that his intestate was killed by the fall of a pillar of tale while engaged defendant's mine; that defendant's managing agent had notice of the dangerous position of the pillar, and of its liability to fall, previous to the accident; that timbers had been procured for protecting it, which had not been used; and that water had accumulated on the upper side of the pillar, and, by seeping down between the crevices of the layers of tale, softened the greasy material, causing it to slide. *Tetherton v. United States Tube Co.* (1901) 165 N. Y. 665, 59 N. E. 1131, Affirming (1899) 41 App. Div. 613, 58 N. Y. Supp. 1.

Ohio.—By Rev. Stat. § 6371 (which is substantially copied from the act of April, 1872), it is made a criminal offense for a person employed in a mine to neglect or refuse to prop securely the roof and entries under his control. It is also provided that the owner . . . shall keep a supply of timber constantly on hand, and deliver the same to the working place of the miner; and it is declared that no miner shall be liable for accidents which occur in mines where this provision has not been complied with. All that is necessary to establish negligence under this section is to show that the timber was not delivered. The miner is not required to ask for it, or give notice to anyone. *Pittsburgh & W. Coal Co. v. Estivenard* (1895) 53 Ohio St. 43, 40 N. E. 725.

Pennsylvania.—The act of March 3, 1870, providing for the health and safety of persons employed in mines, and requiring inspection, etc., took effect immediately. *Com. v. Conyngham* (1870) 66 Pa. 99.

In an action to enforce the penalty provided by the section of the act of March 3, 1870, prohibiting the working of mines not having two shafts for every seam of coal worked, with a proviso that this shall not apply to opening a new mine or making communications between shafts, so long as not more than twenty persons are employed in such new mine, the operating of the first and third seams in a certain mine simultaneously with the opening of the fifth, which had but one outlet was held not to be unlawful, as the fifth seam was simply in preparation for working. *Haddock v. Com.* (1883) 102 Pa. 243.

The provision as to ventilation in the act of March 3, 1870, does not apply to an air shaft until a communication is formed between it and the mine, where such shaft is being constructed by an independent contractor, and the mine owner only supervises to see if it is according to contract. *Welsh v. Lehigh & W. Coal Co.* (1886; Pa.) 3 Cent. Rep. 386.

Under the act of 1870, requiring the mining boss to have main doors attended and guarded to prevent their being left open, he has no discretion. *Com. v. Reynolds*, 1 Kulp, 218.

A mining boss for each opening need not be employed under the act of June 30, 1885, requiring the employment of a competent boss since a coal mine means such territory, whether one or more drifts, as lies compactly adjacent, and in its working constitutes but a single operation. *Com. v. Wigton* (1886) 2 Pa. Dist. R. 51.

A mine owner is not relieved from compliance with the Pennsylvania statute by the fact that in a particular mine certain requirements are unnecessary. *Com. ex rel. Williams v. Kingston Coal Co.* (1891) 6 Kulp, 241.

Where an old mine has the statutory outlets and is then worked further several hundred feet along the seams, it becomes a new mine, and an outlet for ventilation and escape is required by the act of 1870. *Commonwealth ex rel. Williams v. Wilkesbarre Coal Co.* (1873) 15 Mining Rep. 31, 29 Phila. Leg. Int. 213.

A bucket 3 feet in diameter, 3 feet deep, and capable of holding four men, with no protector overhead and without a guard, swinging from side to side, and striking the sides and timber of the shaft when being raised or lowered, does not comply with the act of June 2, 1891, § 3, requiring a cage with the necessary buntings and guides, in the second opening of a shaft, with hand rails and efficient safety catches, and a sufficient cover overhead. *Com. v. Elk Hill Coal & I. Co.* (1898) 4 Lack. Legal News, 80.

In an action for death by negligence the question whether a manway required by the act of April 18, 1870, was sufficient, is one for the jury. *Cambria Iron Co. v. Shaffer* (1887; Pa.) 6 Cent. Rep. 608.

As to the status of foreman appointed under the Pennsylvania acts of 1870, 1877, and 1885, see § 520, note 1, subd. (o), *ante*.

Tennessee.—The provision in the act of 1881, chap. 170, § 7, that in no case shall a furnace be used inside a mine where the coal breaker and chute buildings are directly over and cover the top of the shaft, for purpose of producing a hot up-cast of air, is only applicable where the coal is taken out by a shaft,

and not where it is removed by a horizontal entry. *Coal Creek Min. Co.* v. *Davis* (1891) 90 Tenn. 711, 18 S. W. 387 (suffocation caused by the burning of the buildings at the entrance of the in-take).

(e) *Statutes relating to scaffoldings.*—By N. Y. Laws 1897, chap. 415, it is made the duty of the master to furnish safe and proper scaffoldings for employees to work upon.

Prior to the enactment of this statute a master was not liable for injuries to a mechanic resulting from a negligent use or selection from a proper supply furnished by the master, of material for a scaffold which it was the duty of such mechanic and his fellow mechanics to construct. *Banzhaf* v. *Ludwig* (1899) 28 Misc. 496, 59 N. Y. Supp. 535, Reversing (1899) 27 Misc. 821, 57 N. Y. Supp. 828 (see §§ 614 616, *ante*).

Its effect is to render a master responsible for a defective scaffold not sufficient to bear the burden placed upon it because of failure to brace the uprights, notwithstanding that he furnished sufficient and proper material and intrusted its construction to competent employees. *Stewart* v. *Ferguson* (1898) 34 App. Div. 515, 54 N. Y. Supp. 615, (1899) 44 App. Div. 58, 60 N. Y. Supp. 429. On a third appeal it was laid down that the collapse of a scaffold having thereon only the weight required for the purpose for which it was constructed was prima facie evidence of the employer's negligence. (1900) 52 App. Div. 317, 65 N. Y. Supp. 149.

An employer is not only bound to furnish a safe scaffold, but must maintain it in such condition during the work. *Healy* v. *Burke* (1901) 35 Misc. 254, 71 N. Y. Supp. 1027.

The statutory provision refers to a completed scaffold. *Pursley* v. *Edge Moor Bridge Works* (1901) 168 N. Y. 589, 60 N. E. 1119, Affirming (1900) 56 App. Div. 71, 67 N. Y. Supp. 719 (not applicable where a falsework fell while it was being constructed).

The question of whether or not a scaffolding was suitable, proper, and safe for the purpose for which it was intended, is for the jury. *McLaughlin* v. *Eidlitz* (1900) 50 App. Div. 518, 64 N. Y. Supp. 193.

The fact that the servant who erected the scaffold, and the servant who was injured, were both engaged in the same work for which the scaffolding was used, did not make them fellow servants so that the master was relieved from liability for such injuries. *Kuss* v. *Freid* (1900) 32 Misc. 628, 66 N. Y. S. 487.

(f) *Statutes regulating the employment of children.*—The occupiers of a spinning mill are liable to a fine under the English factory and workshop act 1878, § 3 providing therefor where a young person is employed contrary to its provisions, where a young person in their employ during the time allowed for a meal oils part of the machinery notwithstanding he does so contrary to orders and for his own amusement. *Prior* v. *Shaithwaite Spinning Co.* [1900] 1 Q. B. 881, 78 L. T. N. S. 532, 67 L. J. Q. B. N. S. 615, 46 Week. Rep. 488, 64 J. P. 358. The position was that the servant, in doing what he would have done if he had been acting under orders was "working" at a forbidden time within the meaning of the act.

A newspaper stall consisting of a board laid on trestles, at a country railway station, at which a boy is employed for a few hours daily, his principal place of employment being at the bookstall of the railway junction 2 miles distant, is not a "shop" within the shops act of 1892, and the notice required by § 4 of that act need not be exhibited upon it. *Smith* v. *Kyde* (1900) 1 K. B. 286, 71 L. J. K. B. N. S. 16.

Where a boy twelve years old, employed as a messenger, is directed by his master to work in the factory in violation of N. Y. Laws 1897, chap. 415, § 70, prohibiting the employment of children under fourteen years of age, and the child is injured, there is sufficient evidence of the master's negligence to take the case to the jury. *Wagner* v. *Lehmaier* (1901) 62 App. Div. 43, 70 N. Y. Supp. 790.

The owner of a factory is guilty of negligence in putting a girl whom he employs as a "full-timer," in contravention of the same act (§§ 11, 12, 96) to do such dangerous work as keeping a carding machine free from tow. He must respond in damages if she is injured in attempting to clean it while in motion, although she has been expressly directed not to do this. *Sharp* v. *Parkhead Spinning Co.* (1885) 12 Sc. Sess. Cas. 4th series, 574.

The employment of a child under twelve to work an elevator for the benefit of a manufacturing concern being made illegal by the factories act of Ontario (Ont. Rev. Stat. chap. 208, § 6, subsec. 1; § 2, subsec. 1; § 15, subsec. 4), it is held that the employer, besides being subject to the penalty provided, has to exercise more than ordinary precaution

for the well being and safeguarding of minors who have been taken into factory work contrary to the provision of the legislature. *O'Brien* v. *Sanford* (1892) 22 Ont. Rep. 137, per Boyd, Ch. The conclusion of the court was that the case should not be withdrawn from the jury, as there was evidence tending to show that the injured person,—a child under the statutory age of employment,—was not competent to manage an elevator, the construction of which was unusual if not dangerous.

The words "after due notice," in the Michigan statute prohibiting the employment of children under fourteen years of age without the written permission of the parent or guardian (3 How. Anno. Stat. § 1997, cl. 7), mean after notice by the inspector mentioned in the preceding section; and until such notice is given the statutory liability does not exist. *Borck* v. *Michigan Bolt & Nut Works* (1896) 111 Mich. 129, 69 N. W. 254.

The proprietors of a planing and saw mill are not prohibited from employing a child under fourteen years of age to work in the lumber yard from which the lumber for the mill is supplied, under N. Y. Laws 1889, chap. 560, providing that no child under fourteen years of age shall be employed in any manufacturing establishment, and N. Y. Laws 1892, chap. 673, defining "manufacturing establishments" to mean any mill, factory, or workshop where one or more persons are employed at labor. *Murphy* v. *Bennett* (1896) 11 App. Div. 298, 42 N. Y. Supp. 61.

A minor cannot recover in an action under N. Y. Laws 1876, chap. 122, "To Prevent and Punish Wrongs to Children," unless the master is guilty of some specific negligence. Hence, a master who hires a boy of fifteen to work at a stamping machine is not responsible for such personal injuries as he may receive after proper precautions have been taken and adequate instructions given. *Hayes* v. *Bush & D. Mfg. Co.* (1886) 102 N. Y. 648, 5 N. E. 784.

It has also been held that this act has no application to productive industries, or to a useful or necessary business or occupation. The meaning of the words "business" and "vocation," as used in the list of employments within the statutory prohibition, is held to be limited by the context and the general scope of the statute to employments which are either vicious in themselves, or which partake of the character of an amusement. *Hickey* v. *Taaffe* (1885) 99 N. Y. 204, 52 Am. Rep. 19, 1 N. E. 685, Reversing (1884) 32 Hun, 7, and overruling *Cooke* v. *Lalance Grosjean Mfg. Co.* (1884) 33 Hun, 351,—a second decision of the supreme court rendered while the appeal in the first one was still pending. The following passage sufficiently indicates the nature of the act and the reasoning relied upon by the court of appeals: "The first section declares that 'any person having the care, custody, or control of any child under the age of sixteen years, who shall exhibit, use, or employ . . . such child . . . in or for the vocation, occupation, service, or purpose of singing, playing on musical instruments, rope or wire walking, dancing, begging, or peddling, or as a gymnast, contortionist, rider, or, acrobat, in any place whatsoever; or for or in any obscene, indecent, or immoral purpose, exhibition, or practice whatsoever; or for or in any business, exhibition, or vocation injurious to the health or dangerous to the life or limb of such child; or who shall cause, procure, or encourage such child to engage therein,—shall be guilty of a misdemeanor.' The next section provides that 'every person who shall take, receive, hire, employ, use, exhibit, or have in custody any child under the age and for any of the purposes mentioned in the first section of this act, shall be guilty of a misdemeanor.' The fourth section is in these words: 'Whoever, having the care or custody of any child, shall wilfully cause or permit the life of such child to be endangered or the health of such child to be injured; or who shall wiltully cause or permit such child to be placed in such a situation that its life may be endangered or its health shall be likely to be injured, shall be guilty of a misdemeanor.' . . . The scope of the act cannot be broader than its title: 'To Prevent and Punish Wrongs to Children.' To that end it prohibits, first, their employment in certain specified avocations intended for the amusement of the public, and which, however unprofitable to them and dangerous to the actor, are at least in themselves innocent; second, in the most general terms, 'any purpose, exhibition, or practice' which is either obscene or has an indecent or immoral purpose; and, third, their employment 'for or in any business, exhibition, or vocation injurious to the health' or 'dangerous to the life or limb of such child.' Here are three clauses, the first implying a service or exhibition attractive to the spectator, because of personal skill or dexterity of the performer; the second,

practices which, tending to degrade and corrupt, are against good morals; the third, 'any business, exhibition, or vocation which is injurious or dangerous.' The word 'vocation' appears in the first clause, where its meaning is illustrated by an enumeration of pursuits literally within the mischief of the act; the word 'exhibition' fitly describes those pursuits, and, if they stood alone in the third clause, although preceded by the word 'any,' would, within well-settled rules of construction, embrace only things of the same kind or class as those with which they were first connected. The other word, 'business,' is, it is true, used for the first time. In general use it has a broader significance than either of the others and might include any a fair, however serious or trivial, in which volition entered. But here it used with words of limited meaning which have received in the same ac particular application, and, upon same principles of construction, must referred to things of the same kind those specified, and to which the o words are referred. (*Wakefield* v. *P* [1882] 90 N. Y. 218.)"

See also *Evans* v. *American Ice Tube Co.* (1890) 42 Fed. 519, cited § 799, note 10, *supra*; *Queen* v. *Ivy Coal & I. Co.* (1895) 95 Tenn. 45 L. R. A. 82, 49 Am. St. Rep. 935, W. 460, cited in §§ 799, note 2, and 800, note 7, *supra*.

CHAPTER XLII.

CAUSATION.

802a. Introductory.

A. General principles.

803. Necessity of proving that the negligence alleged was the cause of the injury.

804. —and also the proximate cause of the injury.

805. Provinces of court and jury.

B. Intervening causes.

806. Generally.

807. Operation of nonresponsible agencies.

808. Nonculpable acts of responsible actors.

809. Culpable acts of responsible actors: negligence of coservants.

810. Same subject continued: negligence of injured servant himself.

811. Master liable where his own negligence intervenes, as a proximate cause, between a delinquent coservant's negligence and the injury.

812. —or between the negligence of the plaintiff himself and the injury.

C. Concurrent causes.

813. Generally.

814. Master liable where his own antecedent negligence and a subsequent delinquency of a coservant are both efficient causes of the injury.

a. Generally.

b. Illustrative cases.

815. Master liable where he or his vice principal directed the details of the work.

For a general discussion of the subject of causation, see 1 Beven, Neg. pp. 93–116; Shearm. & Redf. Neg. §§ 25 *et seq.*; Cooley, Torts, pp. 68–79; Wharton, Neg. §§ 87–149.

As to the burden of proving that the negligence alleged was the proximate cause of the injury, see § 836, *post*.

802a. Introductory.—A considerable part of the preceding chapters has been devoted to an exposition of the various aspects of the question which first presents itself for determination in every case in which a servant is claiming compensation for an injury received in the course of his employment, *viz.*, whether the acts or omissions complained of were such as imported culpable negligence, either on the part of the employer himself, or on the part of some agent for whose

defaults he is responsible.[1] Under the general principles of the law of negligence, that question receives an affirmative or a negative answer, according as it is shown that, in the given instance, the employer did or did not owe the injured person a duty to prevent the existence of the conditions, or the occurrence of the event, to which the injury is alleged to be traceable.[2]

[1] Under the maritime law the principle that recovery is conditional upon its being proved that the injury resulted from the negligence of the employer or his representative is subject to the qualification that, where the action is *in rem*, the absence of negligence will not entirely absolve the ship from liability. Thus, a mariner who is injured in the service of a ship is entitled to be cured at the expense of the ship, though no one is in fault. *Brown* v. *The Readish Johnson* (1873) 1 Woods, 301, Fed. Cas. No. 1,992.

[2] "The ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract. Negligence is simply neglect of some care which we are bound by law to exercise towards somebody." *Thomas* v. *Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, per Bowen, L. J.

"Actionable negligence exists from an omission to perform the duty of observing due care, according to the circumstances, to prevent injury to the person or property of one who has a right to expect the duty will be performed." *Caniff* v. *Blanchard Nav. Co.* (1887) 66 Mich. 638, 11 Am. St. Rep. 541, 33 N. W. 744.

Failure of a railroad company to ballast, storage or switch tracks is not negligence as respects a brakeman injured by having his foot caught between ties on such tracks, while attempting to make a coupling, since railroad tracks are not ballasted for the purpose of making them safe for brakemen to walk upon, but to make them firm and safe for the passage of trains. *Finnell* v. *Delaware, L. & W. R. Co.* (1892) 129 N. Y. 669, 29 N. E. 825.

The blocking of guard rails being intended only to prevent feet from being caught, the failure to block a guard rail will not render a railway company liable to a switchman who is thrown from a car and has his arm caught and crushed between the rail and the guard rail. *Rutledge* v. *Missouri P. R. Co.* (1892) 110 Mo. 312, 19 S. W. 38.

A rule of a railroad company that wild trains must run cautiously around curves and over grade crossings, lookout for trackmen, will be regarded as having been made with reference to the safety of the train, and not the trackmen, where there is evidence that trackmen had no other means of protection against wild trains except to take care of themselves. *Sullivan* v. *Fitchburg R. Co.* (1894) 161 Mass. 125, 36 N. E. 751.

A railroad company is not liable for the death of an employee by the throwing of cars through defects in its track while he was walking along the track on his way from his employment. *O'Donnell* v. *Duluth, S. S. & A. R. Co.* (1891) 89 Mich. 174, 50 N. W. 801.

A master is liable for injuries to a servant in the exercise of due care, from the negligent and improper performance of a duty which he voluntarily assumes, although he owed no obligation to the servant in respect thereto in the first instance. *Consolidated Coal Co.* v. *Scheiber* (1897) 167 Ill. 539, 47 N. E. 1052, Affirming (1896) 65 Ill. App. 30.

A mere error of judgment on the part of the master or of an employee for whose acts he is responsible will not create any actionable liability. *Moul* v. *Delaware & H. Canal Co.* (1891) 14 Pa. 532, 21 Atl. 733.

Still less can he be called to account for an occurrence which comes under the description of accident or casualty. *Unger* v. *Atlantic, M. & O. R. Co.* (1882) 4 Hughes, 192, 88 Fed. 773, (part of bridge got out of plumb and fell); *Hoosier* v. *Illinois C. R. Co.* (1854) 15 Ill. 550 (principle recognized in discussion of sufficiency of complaint); *Curtis* v. *Chicago & N. W. R. Co.* (1897) 95 Wis. 460, 70 N. W. 665 (switchman slipped or stumbled against the arm of a guard rail while coupling cars); *Johnson* v. *Galveston, H. & S. A. R. Co.* (1895) (Tex. Civ. App.) 30 S. W. 95 (employee fell off an engine as the result of his mistake of judgment as to the amount of force required to lift a drawbar); *Armour* v. *Ryan* (1895) 61 Ill. App. 315 (servant injured by striking his

In the present chapter it is proposed to discuss, so far as seems desirable for the purposes of this treatise, the second prerequisite to the maintenance of the action, that is to say, the establishment of the proposition that the negligence proved was the legal cause of the injury received. Not a few of the cases in which masters have been sued by their servants, and in which this point has been considered, are, in a real and essential sense, illustrative of the scope of some of the characteristic doctrines of the law of employers' liability. Other cases of this type do not, in anywise, involve those doctrines. In a strictly logical point of view, perhaps only the former class of decisions should be here discussed. But the decisions in the latter class are so useful from the practitioner's point of view that they cannot well be passed over.

finger against a hook, while attempting to hang meat upon another hook): *Buckley* v. *Gutta Percha & Rubber Mfg. Co.* (1889) 113 N. Y. 540, 21 N. E. 717 (master not liable for an injury to a boy twelve years old, whose hand was crushed in cogwheels, not because he did not know the cogs were dangerous, but because he slipped and fell by a mere accident, and instinctively threw out his hand to recover himself).

Either contributory negligence or pure accident is the legal cause of injuries sustained by a railway employee owing to the fall of a crowbar, which caught his foot and threw him upon the rails in front of a moving hand car, where it was his duty to properly place the implement on the car. *Freyermuth* v. *South Bound R. Co.* (1899) 107 Ga. 31, 32 S. E. 668.

A shipowner is not liable to a longshoreman precipitated into the water while wheeling freight on board a steamship along a platform shown to be in good order, where the injury was occasioned either by a swell from some passing vessel, or the omission of the workmen to change the fastenings as the tide fell. *Hudson* v. *Ocean S. S. Co* (1888) 110 N. Y. 625, 17 N. E. 312.

Prima facie a master is not liable for injuries caused to a servant by the unauthorized acts of strangers. *Bennett* v. *Long Island R. Co.* (1897) 21 App. Div. 25, 47 N. Y. Supp. 258 (stranger opened switch); *Reilly* v. *Parker* (1895) 11 Misc. 68, 31 N. Y. Supp. 1011 (persons not under master's control carried a heavy beam across a temporary structure and so caused it to fall on plaintiff); *Barnes* v. *Kansas City, Ft. S. & M. R. Co.* (1895) 129 Mo. 41, 31 S. W. 347 (obstruction placed on walk by contractor's servants); *Gulf, C. & S. F. R. Co.* v. *Wittig* (1896; Tex. Civ. App.) 35 S. W. 857 (unauthorized removal, by someone unknown, of a flag placed to guard a car on which repairers were at work); *Dalton* v. *Atlantic, M. & O. R. Co.* (1882) 4 Hughes, 180, Fed. Cas. No. 3,550 (brakeman swept off car by wire stretched across track by persons not under the defendant's control); *Wire* v. *East Louisiana R. Co.* (1901) 12 La. Ann. 385, 7 So. 473 (train derailed by plank laid across track by unknown person).

In *Godbois* v. *Chicago, M. & St. P. R. Co.* (1888) 75 Iowa, 530, 39 N. W. 871, an action for injuries received by a car repairer as a result of a collision of moving cars with the one on which he was at work, the court, while not denying the correctness of the general rule laid down in the above cases, held that the material question was whether the cars were moved in a proper manner and at a proper time, and as the fact that the cars were started in response to a signal given by a person not in the employ of the company had no legitimate bearing upon that question, it was error to instruct the jury that they might consider evidence showing that such a signal was given, as explanatory of the manner in which the cars were moved.

Where the proximate cause of the death of a car repairer was the unauthorized removal by some unknown person of a red flag used as a signal of danger, the question whether a flag of that color was a sufficient warning, or whether a flag of some other color would have been more suitable, are immaterial.

A. General principles.

803. Necessity of proving that the negligence alleged was the cau of the injury.— The servant must, in the first place, prove that h injury was caused by the alleged negligence.[1] There can be no re

Abel v. *Delaware & H. Canal Co.* (1890) 31 N. Y. S. R. 356, 10 N. Y. Supp. 154 (after the retrial ordered in 1886) 103 N. Y. 581, 57 Am. Rep. 773, 9 N. E. 325.

The rule exemplified in the cases just cited is, of course, subject to exception in cases where the master had notice, actual or constructive, of the dangerous conditions for which he was not originally responsible. See § 129, *antc.*

[1] "It is necessary for the plaintiff to establish, by evidence, circumstances from which it may fairly be inferred that there is a reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to." Willes, J., in *Daniel* v. *Metropolitan R. Co.* (1868) L. R. 3 C. P. 216, 223, 591, 37 L. J. C. P. 280.

A master cannot be held liable for an injury to a servant, due to the combination and co-operation of a number of causes for no one of which he is liable. *Creswell* v. *Wilmington & N. R. Co.* (1899) 2 Penn. (Del.) 210, 43 Atl. 629, where the wrong was caused partly by the negligence of a fellow servant, and partly by conditions the risks of which the plaintiff understood.

A servant who shows that his injury was caused by the defective condition of a certain appliance is not bound to show specifically by what particular defect it was caused. *Mangum* v. *Bullion, B. & C. Min. Co.* (1897) 15 Utah, 534, 50 Pac. 834; *Norton Bros.* v. *Szepurak* (1897) 70 Ill. App. 686.

Allegations that a master was negligent in failing to cover and keep in repair a machine by which a servant's injuries were inflicted are insufficient to justify recovery, where there is no averment or showing that the injuries were caused by such negligence. *Lafayette Carpet Co.* v. *Stafford* (1900) 25 Ind. App. 187, 57 N. E. 944.

A petition in an action to recover for an injury resulting from the master's negligence in employing an incompetent servant is fatally defective, where it does not allege that such servant was careless or unskilful at the time of the accident, and that the carelessness or unskilfulness caused the injury co plained of. *Kersey* v. *Kansas City J. & C. B. R. Co.* (1883) 79 Mo. 362.

A charge embodying the principle the text is proper. *Wright* v. *New York C. R. Co.* (1858) 28 Barb. 80 firmed in (1862) 25 N. Y. 562.

It is error to give an instruct which permits the jury to infer that defendant was liable if it was guilt any negligence whatsoever, even tho the accident would have occurred wi out such negligence. *Hall* v. *Cop town & S. Valley R. Co.* (1888) 9 H 373, 3 N. Y. Supp. 584.

It is error to charge in effect t where an uninstructed, inexperie employee is set to work at a dang machine which he does not unders and uses ordinary care, a recovery follow. *Craven* v. *Smith* (1894 Wis. 119, 61 N. W. 317.

An instruction to the effect that master might be held liable simply on proof that he did not use ordin care is erroneous. *Guinard* v. *K Stout & Co. Co.* (1895) 90 Wis. 42 N. W. 625.

It is proper to refuse a charge to effect that the mere fact that an ployer engaged an unlicensed engi to manage a steam boiler, in viol of law, will render him liable to other employee injured by the explo of the boiler. *Birmingham* v. *P* (1892) 21 D. C. 209.

Where defendant's section foreman clared that the car by which plain was injured was unfit for use, and previous to the accident he had repe ed the road master to furnish anot an instruction which submitted the sue to the jury whether or not the left the track because of its defe condition was not objectionable as supported by the evidence. *Combs* v. *Omaha, K. C. & E. R. Co.* (1899 Mo. App. 175.

It is error to give an instru which contravenes the principle that master's failure to report an appli which he knew, or should have kn to be defective, and to notify the ant of its condition, is not actio negligence, unless it was the proxi

ery where the evidence, so far as any certain deductions can be drawn from it, tends to prove that the accident was not caused by the defect complained of.[2] The nonexistence of a legal connection between the negligence and the injury is predicable whenever, for aught that appears, the accident might have happened even if the defects in question had not existed, or if the precautions which were omitted had been taken.[3] The master cannot be held liable if his negligence was merely a condition, as opposed to the efficient cause of the injury.[4]

ause of the injury complained of. *Boelter* v. *Ross Lumber Co.* (1899) 103 Wis. 324, 79 N. W. 243.

An instruction that, if an employee violated a rule of his master, of which he had knowledge, and such violation caused the injury, and it was not contributed to by the negligence of the defendant in regard to certain appliances, then the employee could not recover, was erroneous, as not allowing him to recover, though the injury may have been contributed to by other negligence of defendant. *Texas & P. R. Co.* v. *Waupin* (1901) 26 Tex. Civ. App. 385, 63 S. W. 346.

An instruction in an action for the death of a railroad employee that if specified acts of the conductor in charge of the train constituted negligence the jury should find the company liable unless the deceased contributed to the injury by his own negligence, without requiring the negligence of the conductor to have occasioned the injury, is reversible error. *Gulf, C. & S. F. R. Co.* v. *Wilhelm* (1897) Tex. Civ. App. 39 S. W. 967.

In *Fordyce* v. *Yarborough* (1892) 1 Tex. Civ. App. 260, 21 S. W. 121, a charge was disapproved which failed to indicate that the liability of a railway company for its negligent omission to inform its servants of extra hazards to arise from the use of a car of an unusual and more than ordinarily dangerous construction depended on whether the injury was caused by that omission.

It is error to instruct the jury that they should find for the plaintiff if he was not provided with proper implements, and did not understand the danger of working with the implements furnished. *Hillsboro Oil Co.* v. *White* (1897) Tex. Civ. App. 41 S. W. 871.

Where two causes of an injury are assigned, it is error to give an instruction from which the jury may infer that the defendant is not liable, if it is proved that the plaintiff had full knowledge of the conditions which constituted one of those causes. *Galveston, H. & S. A. R. Co.* v. *Cowsill* (1901) 26 Tex. Civ. App. 160, 25 S. W. 486.

A special verdict which fails to show that the injury was caused by some act or omission in respect to which negligence was imputable to the defendant will not support a judgment for the plaintiff. *Phillips* v. *Rosona Oolitic Stone Co.* (1898) 19 Ind. App. 344, 49 N. E. 467.

Colvill v. *Hilton* (1887) 106 N. Y. 512, 13 N. E. 339.

[2] "The question is, Was it *causa sine qua non*, a cause which, had it not existed, the injury would not have taken place?" *Hawes* v. *Michigan C. R. Co.* (1884) 111 U. S. 228, 241, 28 L. ed. 410, 415, 4 Sup. Ct. Rep. 369.

A servant who seeks to recover on the ground that his injury was due to the careless driving of his master must show that the accident would not have happened but for some incident directly traceable to that cause. *Moffatt* v. *Bateman* (1869) L. R. 3 P. C. 115, 22 L. T. N. S. 140, 6 Moore P. C. C. N. S. 369.

[3] "The violation of a borough ordinance regulating the speed of electric cars is not the legal cause of an injury to a motorman, immediately caused by a tree falling upon the car as it passed under it, although but for such violation, the car would have been at another point." *Berry* v. *Sharp Mt. Notch* (1899) 191 Pa. 345, 43 Atl. 240. The court said: "That his head brought him to the place of the accident, was the merest chance, and a thing which no foresight could have predicted. The same thing might as readily have happened to a car running slowly, or it might have been that a high speed alone would have carried him beyond the tree to a place of safety."

In *Hope* v. *Tall River Coal Co.* (1896) 3 App. Div. 70, 38 N. Y. Supp. 1040,

In the note below are collected a number of cases showing the manner in which these general principles have been applied, either to the advantage, or to the disadvantage, of the servant. For other cases see the following sections.[5]

804— and also the proximate cause of the injury.— The servant's

the plaintiff's contention was that the track where he was coupling cars was rendered dangerous "upon the instant" by an unusually thick cloud of steam from a defective valve, and that this vapor from the defective valve was of such density, irrespective of the vapor from the relief valve, as to greatly impair his vision, and the jury, accepting this explanation, had then drawn the conclusion that the vapor was the immediate or proximate cause of the plaintiff getting his hand between the buffers. The court, however, said: "This vapor was not the cause of the accident, but was a condition under which it occurred, and that condition was wholly unexpected and not likely to be foreseen;" also that "the discharge of steam is a usual or necessary concomitant of the use of the engine; and a switchman must be expected to be enveloped in more or less steam, irrespective of any defect in the valves."

In a case where a railway servant, after unsuccessfully attempting to uncouple two cars by means of a lever which was out of order, tried to draw the coupling pin with his hand, and while walking between the moving cars caught his foot between the rail and an unblocked guard rail, an instruction submitting to the jury the question whether the defendant was negligent in leaving the space open and unblocked, and of such a width that an employee's foot might be caught and held by it long enough to sustain injury from a train in motion, was held not to be objectionable as omitting to mention defendant's negligence with regard to the lever. Under the circumstances that negligence was merely incidental to, and not the proximate cause of, the injury. *Trott* v. *Chicago, R. I. & P. R. Co.* (1901) 115 Iowa, 80, 86 N. W. 33.

Many other cases illustrating this phase of the subject are cited in the next note.

[5](a) *Breach of statutes and ordinances.*—On the ground that there was no evidence to connect the injury with the defendant's disregard of a statutory duty the action has been held not maintainable in cases where the statute violated was one which prohibited the employment of children under a certain age. *Kutcher* v. *Goodwillie* (1895) 93 W. 448, 67 N. W. 729; *White* v. *Witbeck Lithographic Co.* (1890) 58 Hun, 38, 12 N. Y. Supp. 188; *Evans* v. *American Tube & Tube Co.* (1890) 42 Fed. 5[illegible]; *Belles* v. *Jackson* (1892) 4 Pa. Dist. [illegible] 194. And in a case where the plaintiff relied on the Pennsylvania act of 1[illegible] (Pub. Laws, 217, §§ 15, 17), rendering mining companies liable for employing a mining boss who had no certificate of competency. *Chrastener* v. *Peabody & E. L. Coal Co.* (1892) 146 Pa. 67, 23 Atl. 221. And in a case where machinery was not fenced, in compliance with the provisions of a factory act, [illegible] v. *Burgess* (1897) 27 Can. S. C. 56[illegible] And in a case where a guard rail [illegible] not been blocked and filled, as required by statute. *Utley* v. *Wabash R. R.* (1889) 41 Fed. 193.

An employer is not rendered liable [illegible] injuries to an employee under sixteen from a properly guarded buzz saw, by failure to observe the New York statute (Laws 1886, chap. 409), requiring notice of the hours of labor required from employees under sixteen to be posted, with a list of such children, and affidavits as to their ages and dates of birth to be kept, and prohibiting the employment of children unable to read or write. *Stephen* v. *Stevens* (1894) [illegible] N. Y. S. R. 850, 21 N. Y. Supp. 721.

The failure of a contractor to comply with N. Y. Laws 1897, chap. 415, § 20, requiring contractors in constructing a building, the plans and specifications of which require the floors to be arched between the beams, to [illegible] the flooring as the building progresses, is not such negligence as will render him liable for an injury to an employee by a falling scaffold, where the open floors did not contribute to the injury. *Stewart* v. *Ferguson* (1898) 34 App. Div. 515, 54 N. Y. Supp. 615.

A recovery cannot be had for the death of plaintiff's intestate killed in a mine by the fall of a cloud of dirt on the ground that the defendant mine owner failed to examine the mine as required by Ill. Rev. Stat. chap. 93, § 14 before

must, in the second place, prove that the alleged breach of duty was the proximate cause of the injury. As will be seen by consulting the

the men began work, when a subsequent examination was made in good faith, prior to the accident, and its cause not discovered. *Missouri & I. Coal Co.* v. *Schwalb* (1898) 77 Ill. App. 593.

Under the act of July 1, 1872, providing for liability for wilful failure to provide two outlets to mines where more than fifteen miners are employed, the company is liable where the second shaft is not provided, and at an alarm of fire a miner fell down a shaft, in the effort to escape, for fear his outlet would be cut off, although if he had remained at his post there would have been no danger. *Wesley City Coal Co.* v. *Healer* (1876) 84 Ill. 126.

Evidence that at the place where gas exploded the miners had worked some two or three hours, with an open lamp, before the accident occurred, shows that the failure to examine the place with a safety lamp in the morning, as required by statute, in no manner contributed to the accident. *Coal Run Coal Co.* v. *Jones* (1886) 127 Ill. 379, 8 N. E. 865, 20 N. E. 89.

A requested instruction which in effect holds, as matter of law, that there was no causal connection between the accident to plaintiff and the omission of the defendant to provide automatic doors at an elevator well, as required by N. Y. Laws 1887, chap. 462, § 8, is properly refused where there is a theory having some support in the evidence, which embraces such a causal connection. *Simmons* v. *Peters* (1897) 20 App. Div. 251, 46 N. Y. Supp. 800.

Evidence that an employee was found dead near ungnarded wheels driven with great rapidity is sufficient to go to the jury on the question of the negligence of the employer in failing to guard the wheels, in accordance with the statute, although there is evidence that such employee had previously crossed the trench in which the wheels were situated on planks placed over it, had been cautioned not to do so, and that the planks were there at the time of the accident. *Kerrin* v. *Canadian Coloured Cotton Mills Co.* (1896) 28 Ont. Rep. 73. Affirmed in (1898) 25 Ont. App. Rep. 36.

See also note 4, *supra*.

(b) *Defective condition or arrangement of inorganic instrumentalities.*— The want of a "telltale" to warn train hands of the proximity of a low overhead bridge is not the cause of an injury received by a brakeman who is struck by the bridge, after climbing on to the car at a place which would have been between the bridge and the "telltale," if there had been a telltale. *Allen* v. *Boston & M. R. Co.* (1898) 69 N. H. 271, 39 Atl. 978.

The fact that a switch engine leaked steam so badly as to prevent the engineer from seeing a signal to stop made by a switchman, who had caught his foot in a frog, and who was run over and injured, cannot be found to be the proximate cause of the injury, if it appears that the cars were so close to the man when the signal was given that they could not have been stopped in time to prevent it, even if the signal had been seen and obeyed. *Hunt* v. *Kane* (1900) 40 C. C. A. 372, 100 Fed. 256.

A brakeman injured by reason of his foot becoming caught in a frog, while moving along with the train, attempting to couple cars, cannot recover on the ground that the drawheads of the cars were not perfectly matched and did not couple readily, since that was not the proximate cause of the injury. *Williams* v. *Central R. Co.* (1876) 43 Iowa, 396.

The different heights of couplings is not the cause of the crushing of plaintiff's hand, where it would have been crushed, even if the couplings had been exactly opposite each other. *Krause* v. *Chicago, M. & St. P. R. Co.* (1892) 82 Wis. 588, 52 N. W. 755.

The failure of a railroad company to furnish an employee with a coupling stick does not make it liable to him for injuries in attempting to draw a pin from a coupling, for which purpose the stick could not have been used. *Welch* v. *New York C. & H. R. R. Co.* (1892) 43 N. Y. S. R. 958, 17 N. Y. Supp. 312.

That the drawheads of two cars which a brakeman is trying to couple do not meet on the same level does not render the company liable for an injury to the brakeman caused by the drawheads striking against each other, and not by their passing one over the other. *Ekhall* v. *New England R. Co.* (1897) 18 App. Div. 216, 45 N. Y. Supp. 959.

In an action to recover for the death of a fireman, caused by the tender's leaving the track at a certain place, but not through the spreading of the rails, it is immaterial whether the rails were

treatises which deal with the law of negligence as a whole, the authorities are very far from being harmonious either with regard to the

properly spiked at other places, or at that place, since the object of spiking is to prevent the ties from spreading. *Kuhns* v. *Wisconsin, I. & N. R. Co.* (1887) 70 Iowa, 562, 31 N. W. 868.

The fact that a red lantern to be used in signaling trains in case of danger was not furnished a section hand who was sent to watch a cut and was run over by a train is immaterial in an action brought against the railroad company for his death, where the evidence does not show that any occasion existed for the use of a red light, or that the injury was received while the deceased was endeavoring to signal the train. *Wallbaum* v. *Newport News & Miss. Valley R. Co.* (1892) 14 Ky. L. Rep. 759, 20 S. W. 783.

Where a brakeman's clothes caught on a switch handle and threw him under a car, as he was attempting to board the caboose after having thrown a switch, but the switch, as constructed, had been used five years without previous accident, the natural inference from all the proofs was that the accident was the result of a misstep, and not liable to occur again. *Bates* v. *Georgia P. R. Co.* (1892) 96 Ala. 325, 11 So. 68.

Failure to provide a sufficient platform for plaintiff to stand on would not impute negligence to defendant, where the evidence failed to show that the width of the platform aided in producing the injury. *Yarraghath* v. *Stephens* (1899) 104 Wis. 343, 80 N. W. 443.

The failure to provide a safety valve and steam gauge is not the cause of an explosion, where there is no evidence to show that, under the circumstances, these appliances would have prevented the accident. *Green* v. *Lawrence Cement Co.* (1901) 57 App. Div. 264, 68 N. Y. Supp. 7.

The failure of an employer to furnish additional live rollers upon the bench of a slab saw, as promised, does not render him liable for an injury sustained by a workman, who, while trying to dislodge with a hook a slab too short to go over the rollers, slipped back into the saw slit when the hook gave way. *Olson* v. *Doherty Lumber Co.* (1899) 102 Wis. 264, 78 N. W. 572. The court said that the additional rollers would have moved timbers further down the roller bench, but would not have obviated the danger of a blockade's being formed, as the one in question was formed.

The failure of the master to supply an apparatus for stopping a machine, in order to prevent his servants being from being drawn between moving parts, will not render him liable to an injury received in this way, where sufficient time elapsed in the consummation of the injury is so short that it was apparatus had been supplied would have been no opportunity to use it. *Gordon* v. *Reynolds' Card Mfg. Co.* (1888) 47 Hun, 278.

A verdict in favor of a workman whose hand was caught in a running belt on which he was applying pressure with an iron rod is not sufficient the theory that the belt was loose and he was required to expose himself to danger where his act was not necessary to the operation of the machine, and the proximate cause of the injury was the striking of the rod from his hand by something on the surface of the pulley not its looseness. *Phillips* v. *Eureka Oolitic Stone Co.* (1898) 19 Ind. App. 341, 49 N. E. 467.

The fact that a ladder had cleats or grappling-irons on the top or spikes on the bottom will not make an employer liable for injury to an employee by the slipping of the ladder and its catching into a pulley and throwing him upon a belt, from which he struck upon the knives of a machine, while he was engaged in shifting to place a belt upon a pulley, and the work required such a strain upon the ladder as to cause it to move. *Lonergan* v. *Burlington Wire Mattress Co.* (1889) 79 Iowa, 415, 44 N. W. 693. The court said: "It does not appear that the structure of the ladder caused plaintiff to fall, but, rather, that the work he was doing required such a strain upon the ladder as to cause it to move, which threw defendant upon a belt. The fact that the accident resulted while plaintiff was using the ladder, and the nature of its structure, do not authorize the conclusion that it was negligence in defendant to furnish the ladder for plaintiff's use. There is no ground for the conclusion that, if the ladder had been differently constructed, the accident would not have happened."

In *Killman* v. *Robert Poland & Son Shipbuilding & M. R. Co.* (1900) 12

precise meaning of the phrase "proximate cause," or as to the circumstances under which this phrase is a correct description of the

A. 281, 102 Fed. 224, recovery was denied on the ground that the only defect in an eye bolt of which the master had notice had no causal relation to the injury.

In *The Harry Buschman* (1888) 33 Fed. 558, the slackness of the rudder ropes was held not to have been the cause of a seaman's being thrown over the wheel when a heavy sea struck the rudder.

See also *Western & A. R. Co.* v. *Essinger* (1895) 95 Ga. 734, 22 S. E. 580 (defects in plank crossing immaterial, since the employee did not lose his footing at the place where it was defective); *Wabash R. Co.* v. *Brown* (1878) 2 Ill. App. 516 (trainman injured by derailment of train which collided with cattle on the track, held unable to maintain an action on the ground that the fence was defective, unless it should be proved that the cattle came through the fence at the place where it was defective); *Limoski* v. *Susquehanna Coal Co.* (1893) 157 Pa. 153, 27 Atl. 576 (injury caused by caving in of the roof of a mine, through accumulated water, not actionable, when it is not shown that such water came from the accumulation of culm on the surface of the ground, or that the culm added was in any way the cause of the injury); *McClarnon* v. *Chicago, M. & St. P. R. Co.* (1891) 80 Wis. 277, 49 N. W. 963 (derailment of car not shown to have been caused by accumulation of ice and snow between the tracks).

In an action for personal injuries received by the plaintiff while at work upon a mule spinning machine alleged to be defective for want of a catch to hold the belt shipper there was evidence that at the time of the accident the machine was in charge of a machinist sent by a machine company to repair it, and the plaintiff was detailed to assist him; that in so doing the plaintiff stood between the roller beam and the carriage, which was drawn out and at rest; that the belt was still on the drawing-out pulley, and the spindles were revolving; that the machinist had occasion to stop the spindles, and took hold of the shipper to throw the belt on the loose pulley, but his hand was greasy and the shipper slipped from it and carried the belt beyond the loose pulley onto the drawing-in pulley; that thereupon the carriage was drawn in and the plaintiff injured; and that a catch previously provided to hold the shipper after the belt was thrown had disappeared. Held that the absence of the catch did not contribute in any way to cause the accident, and that the plaintiff was not entitled to go to the jury. The court said: "Swain lifted the shipper to stop the machine; it slipped from his hand, which was greasy, and threw the belt on to the drawing-in pulley, and caused the injury to the plaintiff. If there had been a catch,—and the absence of one is the only defect suggested,—it is impossible to see what good it would have done. It would not have rendered it unnecessary for Swain to take hold of the shipper, or have prevented the shipper from slipping out of his hand, and it was that which caused the accident." *Sullivan* v. *Hoosatta Mills* (1892) 155 Mass. 200, 29 N. E. 516.

A railway company which permits the brakes upon a freight car to be and remain out of order is liable for the death of a brakeman who, while applying the brakes in an effort to stop the train, was struck by an overhead bridge to which his back was turned, when if the brakes had been in good order the train would have been stopped before the bridge was reached. *Beard* v. *Chesapeake & O. R. Co.* (1893) 90 Va. 351, 18 S. E. 559.

Where a brakeman catches his foot in a tie, and an engine, defective in that it could not be quickly stopped, runs over his foot, a jury is justified in finding that the defect in the engine was the cause of the injury. *Bayes* v. *Syracuse, B. & N. Y. R. Co.* (1884) 31 Hun, 153.

A railway company is liable for injuries to a brakeman whose foot was caught, while he was uncoupling cars, by a brake-beam which hung only 3 inches from the rails when it should have hung at least 6 inches therefrom, where the accident would not have occurred if it had hung at the usual height. *Texas P. R. Co.* v. *White* (1891) 82 Tex. 513, 18 S. W. 178.

Where a servant is injured by the automatic starting of a machine, evidence that the injury could only have been caused by the shifting of a belt from the loose to the fixed pulley warrants a finding that a proper adjustment of the

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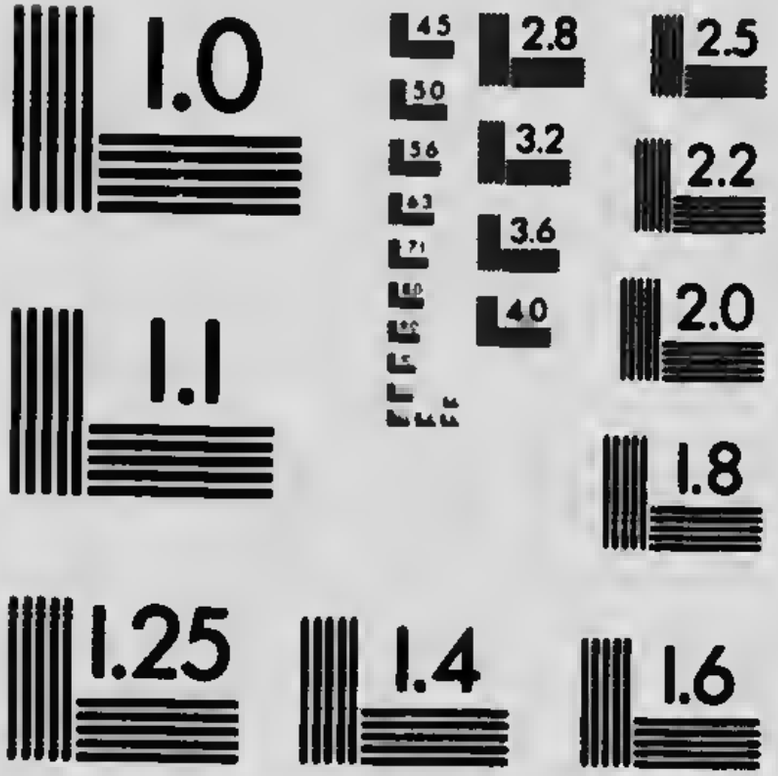

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relation between a given culpable act and the wrong complained o
But in a treatise like the present it would be out of place to dis-cu

pulleys and belt would have prevented such a catastrophe. *Donohue* v. *Drown* (1891) 154 Mass. 21, 27 N. E. 675.

(c) *Incompetency of fellow servant.*—No recovery can be had on the ground of the incompetency of a negligent fellow servant, where there is no sufficient evidence to connect the injury with the incompetency. *Baltimore Elevator Co.* v. *Neal* (1886) 65 Md. 438, 5 Atl. 338; *Snodgrass* v. *Carnegie Steel Co.* (1896) 173 Pa. 228, 33 Atl. 1104; *Kersey* v. *Kansas City, St. J. & C. B. R. Co.* (1883) 79 Mo. 362; *Harvey* v. *New York C. & H. R. R. Co.* (1882) 88 N. Y. 481 (momentary inattention, not incompetency, held to be cause of injury).

To enable a brakeman to recover for injuries on the ground that an incompetent fireman was temporarily left by the engineer in charge of the engine, it must be established that the fireman was so inexperienced as not to be fit for the position, that he mismanaged the engine, and that the mismanagement caused the injury. *Core* v. *Ohio River R. Co.* (1893) 38 W. Va. 456, 18 S. E. 596.

Where a collision in which a locomotive fireman is injured results from the failure of the engineer to see a signal, and not from the failure of a servant known by the company to be incompetent to give the proper signal, the company is not liable therefor. *Baird* v. *New York C. & H. R. R. Co.* (1901) 64 App. Div. 14, 71 N. Y. Supp. 734.

The incompetency of a fireman, as regards understanding and transmission of signals by a brakeman, while coupling, cannot be found to be the cause of the latter's being injured, where the uncontradicted evidence of the engineer is that no instructions were communicated to him. *Catlin* v. *Michigan C. R. Co.* (1887) 66 Mich. 358, 33 N. W. 515.

Where the evidence shows that the management of those parts of a hoisting apparatus from the operation of which the injury resulted were entirely under the control of the plaintiff himself, it is immaterial whether the coservant who was running the engine was competent or not. *Aiken* v. *Smith* (1892) 4 C. C. A. 654, 2 U. S. App. 618, 54 Fed. 896.

A railroad fireman cannot recover from the company for injuries received from a collision occurring because the engineer of the engine upon which he was employed placed it upon a switch too near the main track, on the ground that such engineer's vision was defective, where, within 350 feet, his vision was good. *Engelhardt* v. *Delaware, L. & W. R. Co.* (1894) 78 Hun, 588, 29 N. Y. Supp. 425.

A recovery cannot be had on the ground of the incompetency of the negligent coservant, if, notwithstanding the latter's lack of proper qualifications, he performed the operation in question carefully and prudently, and as skilfully as a competent employee of ordinary care and prudence would have performed it under the circumstances. *Galveston, H. & S. A. R. Co.* v. *Parr* (1897; Tex. Civ. App.) 40 S. W. 19; *Gulf, C. & S. F. R. Co.* v. *Schrab* (1892) 1 Tex. Civ. App. 573, 21 S. W. 706.

An employee may not recover of his employer for injuries received during his employment by reason of the negligence of a fellow servant, although it is shown that the employee was in the habit of becoming intoxicated, when it is not clearly shown that the employee was negligent, or that his intoxication had anything to do with the injury. *Welsh* v. *Pennsylvania R. Co.* (1899) 192 Pa. 69, 43 Atl. 402.

No action can be maintained on the theory that an intemperate employee was hired or retained in the employment, where he was neither intoxicated nor performing his duties negligently at the time of the accident. *East St. Louis Connecting R. Co.* v. *Shannon* (1893) 52 Ill. App. 420; *Cosgrove* v. *Pitman* (1894) 103 Cal. 268, 37 P. 232.

In *Engelhardt* v. *Delaware, L. & W. R. Co.* (1894) 78 Hun, 588, 29 N. Y. Supp. 425, recovery was denied on the ground that an engineer had not drank on the day of the accident, and that his drinking habit had not rendered him physically or mentally incompetent to discharge his duties when sober.

Evidence as to the intoxication of the foreman of a mine is inadmissible to show negligence on the part of the employer, where the intoxication is in no way connected with the accident complained of, even though such foreman's unfitness and incompetency are alleged in the complaint. *Miller* v. *Bullock Beck & C. Min. Co.* (1898) 18 Utah, 358, 55 Pac. 58.

A railroad company is not liable

this subject at length, and we shall merely collect in a note the decisions which have been rendered for or against the servant, with

injuries to a fireman caused by the rear portion of a train coming down upon and wrecking the forward portion, on the ground that the conductor of such train was a man of intemperate habits, where the conductor had no knowledge that the rear part of the train had been detached by the orders of the engineer, given without his direction and consent. His want of such knowledge was not negligence. *Campbell* v. *Wing* (1893) 5 Tex. Civ. App. 431, 24 S. W. 360.

The rule that, where the incompetency alleged is the excessive use of strong liquors, the plaintiff cannot recover unless he shows that the injury was caused by the intemperate habits of the negligent servant, is also recognized in *Pabst* v. *Delamater* (1885) 100 N. Y. 266, 3 N. E. 184 (fireman injured by act of conductor); *Crew* v. *St. Louis, K. & N. W. R. Co.* (1884) 20 Fed. 87; *Barrington* v. *New York C. & H. R. R. Co.* (1888) 19 N. Y. S. R. 20, 4 N. Y. Supp. 640; *Bonner* v. *Whitcomb* (1891) 80 Tex. 178, 15 S. W. 899.

In *Johnston* v. *Pittsburgh & W. R. Co.* (1886) 114 Pa. 443, 7 Atl. 184, where a brakeman was injured through the negligence of the conductor and engineer, and it was asserted that the conductor was sick and unfit to take out the train, and the engineer had been on continuous duty so that he was unfit for duty, liability was denied on the ground that it was not shown that the injury was due to their condition.

A railway company is not liable for an accident caused by a weakly servant's stepping into an open space between the ties of a bridge, and thus throwing the whole weight of a guard rail upon the injured person. Bodily strength would not have prevented such an accident. *Bonet* v. *Galveston, H. & S. A. R. Co.* (1895) 89 Tex. 72, 33 S. W. 334. This conclusion, however, would be justifiable only on the hypothesis that the excessive weight did not tend to make the servant more unsteady on his legs. The liability of the company, therefore, ought apparently to have been treated as a question for the jury.

The incompetency of an engineer may be found to be the cause of an injury caused by the excessive oscillation of his train, if the evidence shows that, at the time of the accident, it was running down grade at an undue speed. *Illinois C. R. Co.* v. *Jewell* (1867) 46 Ill. 99, 92 Am. Dec. 240. In *Coppins* v. *New York C. & H. R. R. Co.* (1890) 122 N. Y. 557, 19 Am. St. Rep. 523, 25 N. E. 915, it was urged that the neglect of the incompetent servant was not a proximate cause of the accident, the argument being that, inasmuch as the servant had left the switch open, but believed that he had closed and locked it, so that trains could pass west on the main track, it did not follow that, if he had remained in the yard, he would have again examined the track,—especially as it was in evidence that on some occasions he failed to signal the train which was derailed, because he was engaged elsewhere in the yard. The court, however, said: "We are of the opinion, however, that the jury were warranted in assuming that had Schram [the delinquent servant] remained in the yard, he would have complied with the rule and performed his duties in reference to signaling the train. . . . If he had remained in the yard his duty would have been to have examined the switches again before the passenger train arrived, and before his signal was displayed, to see that they were properly set. The presumption that he would have done so must prevail. Here was an accident caused by the failure of a servant to perform a particular duty, because of his absence from his post. We cannot assume that had he been at the yard, he would have neglected that which he was there to perform."

(d) *Insufficient number of servants.*—Failure of a railroad company to observe a custom to have a brakeman stationed on the rear of a train which is being backed, for the protection of employees on the track and to warn them of danger, does not render it liable for the death of an employee killed on the track, where the smoke was so dense at the time that such employee could not have been seen by a brakeman if one had been on the train. *Moore* v. *Great Northern R. Co.* (1897) 67 Minn. 394, 69 N. W. 1103.

A master is not liable to a servant injured upon an elevator for want of an employee to give signals to start, where the servant himself gave the signal to start, and the injury did not arise from the starting. *Riordan* v. *Ocean S. S.*

special reference to the question whether proximity, in the legal se of the word, was predicable in respect to the cause to which the a

Co. (1891) 124 N. Y. 655, 26 N. E. 1027.

No recovery can be had on the ground that an excessive number of duties were imposed upon the servant whose act was the immediate cause of the injury, where the evidence shows that the act or omission of the servant which caused the injury did not arise from any inability on his part to perform the work he was set to do, but was the result of inattention and carelessness. *Harvey* v. *New York C. & H. R. R. Co.* (1882) 88 N. Y. 481. There the delinquent servant had himself testified that he left the switch and went to the telegraph office, sat down on a box, and was sitting there engaged in a conversation with the operator when the train on which the deceased was a fireman passed him. "This," said the court, "proves that his failure to close the switch cannot be attributed to the fact that, at this instant of time, he was called to the discharge of some other and conflicting duty. Having sufficient time to properly adjust the switch, and knowing well how to operate it, he went away, leaving it open."

That a servant cannot recover unless the insufficient number of servants was the cause of his injury is also recognized in *Johnson* v. *Ashland Water Co.* (1888) 71 Wis. 553, 5 Am. St. Rep. 243, 37 N. W. 823.

(e) *Vicious animals.* — A plaintiff's injury cannot be attributed to any vicious habit or conduct of a mule, where it appears that he stopped the animal to release him from a coal car which was about to be allowed to drop down a grade by its own momentum, and before he had time to detach the stretcher the mule started, and the plaintiff was struck by, and thrown under, the car. The inference is that the animal started, not in order to run away, but because the car was still in motion, an occurrence which was likely to happen however gentle he might have been: or that, being in the habit of finding himself free within a certain time after stopping, he stepped forward in order to get out of the way of the car and allow it to drop down the grade. *Pittston Coal Co.* v. *McNulty* (1888) 120 Pa. 414, 14 Atl. 387.

(f) *Defective system.*—The failure of an employer to establish or enforce a regulation for the removal of scrap does not affect his liability for an injury to an employee at a time when scrap iron is shown to have been [illegible]ent. *Cunningham* v. *Bath Iron W[illegible]* (1899) 92 Me. 501, 43 Atl. 106.

Where a train running ahead of regular time comes into collision another, an employee injured by collision cannot recover damages on theory that the system of running tr was defective, unless the train's run ahead of its time is the direct cau the accident. *Relyea* v. *Kansas C Ft. S. & G. R. Co.* (1892) 112 Mo. 18 L. R. A. 817, 20 S. W. 480.

Failure of a railroad company to scribe a rule confining the giving of nals to some one person connected the making up or movement of a fre train will not render it liable to a br man injured by the starting of the t upon a signal given by another br man who supposed that the forem work of uncoupling cars had been c pleted, in the absence of anything show that the same mistake would have been made had the brakeman ing the signal been the only person thorized to signal. *Cole* v. *Rome, O. R. Co.* (1893) 72 Hun, 467, 25 N Supp. 276.

Where the locomotive of a fre train on a main track is unexpect set in motion and comes into colli with one standing on a side track c to the junction between the two tra thereby crushing to death the firema the latter who is engaged in oiling wheels, the want of a proper system signaling is not the efficient cause of accident, where it appears that the nal required by the rules of the comp was not, as a matter of fact, given, that the signal in obedience to w the locomotive was actually put in tion was misunderstood by the engi *Peaslee* v. *Fitchburg R. Co.* (1890) Mass. 155, 25 N. E. 71.

Where a special order of the comp prohibits the running of trains greater rate of speed than 20 miles hour at a given switch point, the c does not err in charging the jury follows: "If . . . [the engin was not running faster than 20 m per hour when he passed the switch, ought to find that he did not violate bulletin order mentioned, even tho

he ran faster than that a [illegible] further back on the track." [illegible] & A. R. Co. v. *Bussey* (1894) [illegible] 584, 23 N. E. 207.

Nor is it error in view of the existence of such an order, to refuse a request to charge that it was the duty of the engineer to "slacken" the speed of the train at such point,—the request leaving out of consideration the rate of speed at which the train in question was actually being run at such given point at the time the collision occurred which resulted in the injury complained of. *Ibid.*

Failure of an employer to make and promulgate rules for operating a machine does not render him liable for an accident to an employee from her hand being caught between revolving cylinders while cleaning the same, owing to the inherent danger of the work, and not to any action or failure to act on the part of her fellow servants, which proper rules might have prevented. *Delong* v. *Irving* (1896) 5 App. Div. 499, 38 N. Y. Supp. 1089.

A ship owner cannot be held liable on the theory that the master of the ship treated in an improper manner a seaman who was frost bitten, where there is no evidence to show that the treatment which it is declared that he should have adopted would have been effective. *Johnson* v. *Holmes* (1899) 173 Mass. 514, 53 N. E. 1000.

(g) *Failure to instruct or warn.*—Where an injury to a lamp trimmer of an electric light company was caused by the live wires of another company coming into contact with those which he had to handle, and not by the dampness of the latter, his employers cannot be held liable on the ground that they failed to instruct him as to the increased danger in working on pole lamps in wet weather. *Carr* v. *Manchester Electric Co.* (1900) 70 N. H. 308, 48 Atl. 286.

A minor servant cannot recover on the ground that he was not instructed as to the dangers of his employment, where the injury resulted from a mere accident, from which no amount of cautioning would have saved him. *Buckley* v. *Gutta Percha & Rubber Mfg. Co.* (1889) 113 N. Y. 540, 21 N. E. 717 (plaintiff slipped, and in making an instinctive movement to recover himself put his hand between revolving cog wheels).

The negligence of a master in putting a common laborer at work about a machine, without instructing him as to its operation, does not render him liable for an injury to the latter which does not result from his unskillfulness. *Arizona Lumber & Timber Co.* v. *Mooney* (1895; Ariz.) 42 Pac. 952.

The master is not at fault in failing to communicate a fact which is immaterial to the servant's safety, and which, if he had known it, would not have affected his action. *Henderson* v. *Williams* (1891) 66 N. H. 405, 23 Atl. 365, where the court held that a verdict for the plaintiff based on the theory that the defendant's superintendent was negligent in not informing him that an unexploded charge which he was ordered to drill out had a wet fuse could not be sustained, as there was no evidence going to show either that it was more dangerous to extract a charge which had failed to ignite on account of the wetness of the fuse than one which had failed to ignite owing to one of the several causes from which such an occurrence may result, or that the method of extracting the charge would have been at all different if the failure to explode had been due to some other cause than the wetness of the fuse.

A boy about fourteen years old, who was injured by coming into contact with uncovered cogwheels revolving alongside a narrow passage, through which his duties took him, is not entitled to have the jury charged as follows: "If no instruction was given the plaintiff as to the route in going to and from the machine at which he was injured, except 'to do as the other boy before him did,' and he did so and was injured, there was negligence on the defendant's part." It might have been that, though thus injured, he was injured by no negligence on the part of the defendant, but by negligence on his own part. *Sullivan* v. *India Mfg. Co.* (1873) 113 Mass. 396.

In all those cases in which the existence of a duty to instruct a servant is denied, on the ground that he appreciated the risk in question, it is possible to regard the evidence as being also indicative of the conclusion that, even if a breach of duty could be inferred, the want of instruction cannot be regarded as having contributed to an accident which, *ex hypothesi*, would not have been prevented by the giving of the instruction. The correlation of these points of view is noticeable in the course which the reasoning of the court takes in *Palmer* v. *Harrison* (1885) 57 Mich. 182, 23 N. W. 624, where it is in the first place declared that the danger was manifest, the inference drawn from this fact being that there was no negligence

dent was alleged to be due. Other decisions bearing upon this question are collected in the two succeeding subtitles of this chapter.[1]

on the defendant's part, and it is then observed, as an additional reason for denying recovery, that a warning would not have prevented the accident.

(g) *Negligence in regard to the details of the work.*—The improper action of a section foreman, in requiring a section man to hold a keg of beer while riding on a plank placed across a hand car, does not render the company liable for his death, where the accident was due to the fact that the plank was struck by the lever of a drawbridge which had been left in an upright position, the result being that the section man was thrown off the bridge. *Illinois C. R. Co.* v. *Bishop* (1899) 76 Miss. 758, 25 So. 867.

The speed of a train is immaterial upon the question of the liability of a railroad company to a switchman injured by its derailment, due to the presence of a horse upon the track, where the speed had nothing to do with causing the accident. *Bowes* v. *Hopkins* (1898) 28 C. C. A. 524, 56 U. S. App. 217, 84 Fed. 767.

Where defendant's tracks along the side of certain coke ovens were frequently covered by smoke, and plaintiff's intestate was killed while on a hand car, which proceeded along such track behind a train coming into such yard, and collided with a switch engine, which came onto the track after such incoming train had passed, the fact that on the side of the track on which the hand car was approaching there was a siding on which the switch engine might have been standing, and from which it might have gone onto the main track as soon as the incoming train passed, and gone immediately into the smoke, from which a collision would have resulted, will not warrant the direction of a verdict for the defendant, if it appears that the engine was not on the siding in question. *Woodward Iron Co.* v. *Herndon* (1901) 130 Ala. 364, 30 So. 370.

Where the complaint of a switchman alleges that his injury was due to the fact that two cars which he was coupling came together with excessive force, as a result of the failure of his foreman to repeat to the engineer the signal which he had given that the cars should approach slowly, and the evidence showed that the moving cars had been kicked on the track, the engine being detached, it was held to be error to refuse to charge that plaintiff could not recover, even though he gave the proper signal, which was negligently disregarded by the foreman, if the signal if it had been transmitted to the engineer, would not have prevented the accident. *Missouri, K. & T. R. Co.* v. *Baker* (1900; Tex. Civ. App.) 58 S. W. 964.

See also *Gould* v. *Chicago, B. & Q. R. Co.* (1885) 66 Iowa, 590, 24 N. W. 22, where the negligence of a conductor was held not to have been the proximate cause of the injury.

In an action by an employé for injuries alleged to have been occasioned while unloading certain boxes of cylinders from a push car, evidence that the boxes were improperly placed on the car by direction of the foreman, and that they could have been easily unloaded if properly placed on the car, and that the injury was occasioned while attempting to get them in position for unloading, which could have been readily done, without resort to a pry or lever if they had been properly placed, is sufficient to show that the improper placing of the boxes was the cause of the injury. *Devore* v. *St. Louis & S. F. R. Co.* (1900) 86 Mo. App. 429.

Negligence of a bridge gang in unloading timbers from a car, causing them to roll off and strike the conductor of the train in which such car is placed, without any contributory negligence on his part, is the cause of the injury. *Missouri, K. & T. R. Co.* v. *Hines* (1897; Tex. Civ. App.) 40 S. W. 152.

In an action for an injury to an employee while cutting down a tree, by which another tree is felled, by order of a foreman who promised to tell him when it became dangerous for him to chop, an instruction that if the jury believe that plaintiff received notice by the screeching of the tree that it was about to fall at the same time such superior did, and started to run immediately, the failure to receive notice from such superior cannot be said to have conduced to the injury, is properly refused, as omitting all inquiry whether such superior was negligent in not sooner discovering plaintiff's danger. *Postal Teleg. Cable Co.* v. *Hulsey* (1897) 115 Ala. 193, 22 So. 854.

[1] (a) *Liability denied.* The violation of the rules of a railroad company lim-

It is worthy of remark that the facts involved in cases like those just cited are sometimes such that, by a slight change in the point of view, they may be considered as bearing, not upon the question of

ating the rate of speed of trains under certain conditions does not constitute a ground of liability for injuries due to the fact that the limb of a tree fell across the track and caused a derailment, owing to its being caught up by the engine and thrust against the blocking and rails at a switch. *Cox* v. *Chicago & N. W. R. Co.* (1897) 102 Iowa, 711, 72 N. W. 301.

The circumstance of a conductor's losing his hold of a heavy box which he is helping the plaintiff to unload from a car, owing to his accidentally putting his foot through a hole in the floor of the car, is not the proximate cause of an injury which the plaintiff receives through the falling of the box. *Louisville, N. A. & C. R. Co.* v. *Southwick* (1896) 16 Ind. App. 486, 44 N. E. 263 (peculiar and unusual accident, not to have been anticipated).

The negligence of a railroad company in running a train at a prohibited rate of speed within the railroad yard is not deemed to be the proximate cause of the death of an employee who is run over by that train unless, under all the attending circumstances, ordinary prudence would have admonished those operating the train that such excess of speed would probably result in injury to someone in the yard. *Houston, E. & W. T. R. Co.* v. *Powell* (1897; Tex. Civ. App.) 41 S. W. 695.

The omission to comply with the provisions of a statute forbidding employers to hire a child under fourteen years of age in a factory, without receiving the written permission of the parent or guardian, is not the proximate cause of the child's being injured through falling upon uncovered cogs, while scuffling with another employee. *Borck* v. *Michigan Bolt & Nut Works* (1896) 111 Mich. 129, 69 N. W. 254 (construing 3 How. Anno. Stat. chap. 3, § 1997). See, however, *Iles* v. *Trewarn Welsh Flannel Co.* (1886; Q. B. Div.) 2 Times L. R. 547. Cited in subd. (b) of this note.

An altercation between a road master and a laborer under him, in which improper and unbecoming language is used, is not such negligence as will render the employer liable for an injury to another employee half an hour after the close of such altercation, caused by other employees, who heard the altercation, dropping one end of a steel rail without notice to the employee injured, who was helping to carry the other end. *Burlington & M. River R. Co.* v. *Budin* (1895) 6 Colo. App. 275, 40 Pac. 503 (mental perturbation lasting half an hour from such a cause, not a result reasonably to have been anticipated).

The failure of an employer to furnish competent employees does not render him liable for an injury to a fellow servant of such employees, who has not assumed the risk caused by such incompetency, unless he ought reasonably to have apprehended that the retention of the incompetent servant would probably imperil his coemployees. *Maitland* v. *Gilbert Paper Co.* (1897) 97 Wis. 476, 65 Am. St. Rep. 137, 72 N. W. 1124.

Negligence in respect to the employment of an unfit person cannot be predicated in a case where the injury was a "remote consequence of the evil use of his tongue" by a quick-tempered servant. *Robertson* v. *Chicago & E. R. Co.* (1896) 146 Ind. 486, 45 N. E. 655 (plaintiff strained himself in attempting to lift a heavy weight in compliance with an order given in violent and profane language).

Where an injury to a minor employee occurred from an accident which no human being could have thought of as possible to occur, resulting from an apparently safe act, it cannot be said that it arose from any lack of knowledge on his part, even though he received no instructions. *Hickey* v. *Taaffe* (1887) 105 N. Y. 26, 12 N. E. 286. There an employee's finger caught in the button hole of a collar, and was dragged between the rollers of a mangle before it could be extricated.

A master is not bound to give warning and instructions to a young and inexperienced servant concerning danger of the employment, where they are of such a nature as to render injury very improbable, and only come from negligence which the master has no reason to expect. *Siddall* v. *Pacific Mills* (1894) 162 Mass. 378, 38 N. E. 969.

Negligence in failing to instruct a boy seventeen years of age as to the danger of his work cannot be predicated of a case where he falls off a hand car in running it back to a switch to get out of the way of an approaching train,

from which, as it has been properly flagged, the men on the hand car are in no danger. If his fall was caused through his head being affected by his position, that is a result which the employer was not bound to anticipate. *Briggs* v. *Newport News & M. Valley Co.* (1894) 15 Ky. L. Rep. 618, 24 S. W. 1069.

In *Kerrigan* v. *Hart* (1886) 40 Hun, 389, a laborer shoveling dirt stood between the tail of his cart and the edge of a bank. Owing to a defect in a hook in the harness, the horse got his head cramped, which made him back, forcing the laborer over the bank. It was held that on no theory could the master be charged with liability, the court saying: "Assuming the hook was not properly made, it is clear that the defect was not the proximate cause of the injury. . . . No human foresight could anticipate that a horse would throw his head around so far as to catch his bridle upon this hook and back straight back and squeeze a man against a bank. That such a thing is possible is proved by the happening of the accident in this case, but that such a thing was probable or likely to occur is absurd."

In *Benfield* v. *Vacuum Oil Co.* (1894) 75 Hun, 209, 27 N. Y. Supp. 16, the plaintiff was injured by an explosion caused by the contact of the flame of his lamp with gas which escaped from a tank of paraffine oil when he opened it. The court, in commenting on the testimony of the plaintiff, that he had been in the habit, during the whole of his experience with the paraffine tanks, of doing the work assigned to him in the same way as on the night in question, and that no explosion had ever before ' remarked: "If this is true— d habitually raised the lid of k with his lantern in his hand, ing on his arm, and done so with y, then the inference is unavoidthat the conditions present on the night in question were materially different from those which usually prevailed, and the only reason for that difference which is suggested by the evidence is that the heat in the tank was greater than it ordinarily was when the lid was raised, and that this was caused by leaving the steam on longer than was proper, and that the tank was opened too soon after the steam was shut off. This conclusion, if it afforded the correct hypothesis to account for the unusual and, indeed, unprecedented explosion, is important in two respects as bearing upon the question of the defendant's liability; for, first, it tends show that the danger here encounte wns one not reasonably to have b apprehended by the defendant, and nnd, it demonstrates either that the n ligence of the fellow servant, the gineer, who devolved his own duty u plaintiff, or of the plaintiff himself who undertook the performance of t duty, or of both, contributed to occa the accident and to produce the inju complained of, nnd in either case th could be no recovery in this action."

See also *Hope* v. *Fall Brook Coal* (1896) 3 App. Div. 70, 38 N. Y. Sup 1040, cited in § 803, note 4, *supra*.

If the accident was caused by breaking of a shaft, nnd the de proved is the deficiency of a jour there can be no recovery, unless proof shows that the deficiency had tendency to cause the break, and th such tendency was sufficient to ch the master with notice. *Breen* v. *Louis Cooperage Co.* (1892) 50 Mo. A 202.

Where a railroad servant has been injured by a sudden subsidence of t track, it is error to refuse to subm to the jury the special question, "D the defendant have any reason to app hend such a sinking of the roadbed track thereon?"—where in a spec question actually asked there is nothi which is calculated to elicit a findi upon that issue. A question in answ to which it is found that the defend could by the exercise of ordinary c and prudence have discovered and paired the cause of the accident bef the accident occurred is not of its sufficient, inasmuch as it leaves the qu tion of proximity of cause untouch and still at large. *McGowan* v. *Chica & N. W. R. Co.* (1895) 91 Wis. 147, N. W. 891.

An affirmative answer to the questi whether the defendant was guilty negligence which caused the accident not a sufficient finding as to proxima cause, since it leaves undetermined t question whether the injury was natural and probable consequence of t negligence. *Maitland* v. *Gilbert Pa Co.* (1897) 97 Wis. 476, 65 Am. St. R 137, 72 N. W. 1124.

A special verdict in an action by servant for injuries alleged to have be caused by the master's negligence is n sufficient to support a judgment f plaintiff, unless there is a finding th the negligence of the master was t proximate cause of the injury. *Gro*

v. *Thomann* (1901) 110 Wis. 488, 86 N. W. 178.

A special verdict merely finding that the defendant ought to have anticipated the danger of a boy's getting his hand into the knives of a planer is insufficient to support a judgment in plaintiff's favor. It should also state whether the failure of the defendant to guard the machinery or to instruct the boy as to his duties and the dangers was the proximate cause of the danger. *Kneeen v. Merrill Lumber Co.* (1895) 91 Wis. 637, 65 N. W. 374; *Kutchera v. Goodrich* (1896) 93 Wis. 448, 67 N. W. 729.

(b) *Liability affirmed.*—Where a roadbed is softened by water at a certain place, it is a natural and probable consequence that it will sink suddenly if a car is run on to it, and that, if this happens, a brakeman's foot may slip. *Louisville & N. R. Co. v. Kemper* (1899) 153 Ind. 618, 53 N. E. 931.

A railroad company which has notice that the flanges of the wheels of a tender are so worn that there is danger of its running off the track is liable for injuries resulting from the wreck of a train which the evidence shows to have been caused by the derailment of the tender. *Illinois C. R. Co. v. Pirtle* (1893) 47 Ill. App. 498.

A defective brake is the proximate cause of the death of a fireman from collision with the car, where such car was blown from a siding upon the main track, and would not have moved had such brake been adequate. *France v. Rome, W. & O. R. Co.* (1898) 25 App. Div. 315, 49 N. Y. Supp. 566; Former Appeal (1895) 88 Hun, 318, 34 N. Y. Supp. 408.

The omission of a railroad company to have a hand-hold upon the top of a freight car is the proximate cause of an injury to an employee by being crushed against another car standing on a switch too near the main track, where he would have avoided the injury if such hold had been provided. *International & G. N. R. Co. v. Sipole* (1895; Tex. Civ. App.) 29 S. W. 686.

A complaint alleging that a car without air brakes was placed in the middle of a train, in which all the other cars were provided with such brakes, that the train was divided by the breaking of the coupling on that car, and that a brakeman was injured by a subsequent collision between the two sections, states a cause of action, as the proximate cause of the injury lay in segregating the automatic system, leaving the end of the train beyond the control of the engineer. *Crandall v. Great Northern R. Co.* (1901) 83 Minn. 190, 85 Am. St. Rep. 458, 86 N. W. 10.

The defective handle to a hand car, which broke and let a pole on working it fall from the car, in consequence of which he was run over by another hand car closely following, is the proximate cause of the injury. *Banks v. Wabash Western R. Co.* (1899) 10 Mo. App. 158.

If a structure erected by a brewing company is being used by its permission by an ice-machine company doing business on the same premises, it is a probable contingency that the employees of the ice-machine company will be obliged to work on or about the tank, and, if the structure is insufficient and unsafe, it is a consequence to be apprehended that the tank will fall, and in its fall carry down and injure those at work on or about it. *Consolidated Ice Mach. Co. v. Keefer* (1888) 26 Ill. App. 666.

Where the wall between places where coal was mined was blown down by a blast, the mine owners were held liable on the ground that such a result was one which the inspector, appointed in compliance with a statute, might reasonably have anticipated, with the knowledge of the conditions which he possessed. *Eureka Block Coal Co. v. Wells* (1901) 29 Ind. App. 1, 61 N. E. 236.

The negligence of a mine owner in permitting a slab of stone to remain in the roadway of the mine may be deemed a proximate cause of an injury to an employee who was kicked from the tail chain of a car by a mule and fell against the slab and rolled under the car, where he could have escaped the car if it had not been for the stone. *Pocono Coal Co. v. Royce* (1898) 79 Ill. App. 469.

That the absence of a guard to a jointer in a saw mill was the proximate cause of the injury complained of may be legitimately inferred from a finding that a board fell and struck the plaintiff's hand, and so caused his hand to strike the knives. *Godwin v. Newcomb* (1901; C. A.) 1 Ont. L. Rep. 525.

Where a sewing machine of standard make was found, after certain repairs had been made, to be loose in the needle bar, so that the needle would strike the side of the plate through which it passed, an accident that is to be anticipated is that the needle may break and that a fragment may strike the person of the operator. *Methe v. Walter* (1901) 31 Misc. 474, 70 N. Y. Supp. 335.

A master is liable for an injury caused by the contact of a young child

with machinery which had not been fenced as the factory act required, although the accident would not have happened if the plaintiff had not been playing with a companion. *Hes* v. *Abercarn Welsh Flannel Co.* (1886; Q. B. Div.) 2 Times L. R. 547. See, however, *Borek* v. *Michigan Bolt & Nut Works* (1896) 111 Mich. 129, 69 N. W. 254, cited in subd. (n) of this note.

A railroad company is chargeable with negligence towards an employee on account of the depletion of train crew, where the schedule under which the train is run renders it necessary for some of the members to absent themselves for meals, and this negligence is the proximate cause of any accident which may occur in consequence of the train's being under-manned, although the absence of the trainmen was a breach of the company's rules. *Pennsylvania Co.* v. *McCaffrey* (1894) 139 Ind. 430, 29 L. R. A. 104, 38 N. E. 67.

Sickness and paralysis are a natural and probable consequence of a master's negligence in sending a servant to work in a region where he will be exposed to snow storms, and compelled to sleep with insufficient covering and with nothing but damp pine branches between him and the wet or frozen ground. *Clifford* v. *Denver, S. P. & P. R. Co.* (1886) 9 Colo. 333, 12 Pac. 219.

Where a workman falls from a defective ladder negligently supplied by his employer, and strikes another workman, the injury received by the second workman is a natural and probable consequence of the master's negligence. *Ryan* v. *Miller* (1883) 12 Daly, 77.

Where the servant of a corporation does acts in obedience to its orders which are in violation of an injunction restraining such acts, or which amount to a trespass, and such servant has no notice of the injunction or the invalidity or wrongfulness of such acts, or of any liability or danger of arrest likely to be incurred in the performance thereof, and such liability and threatened danger are known to his principal, but concealed from him, the principal is bound to indemnify him for the dangers suffered by him as the natural result of his acts done in obedience to the orders of his superiors. *Guirney* v. *St. Paul, M. & M. R. Co.* (1890) 43 Minn. 496, 19 Am. St. Rep. 256, 46 N. W. 78.

Where a foreman pulled on one of the ropes holding a derrick and the stake to which the guy rope was tied was pulled up, letting the derrick fall, it was held proper to give an instruction that such foreman negligently pulled the rope, but that the defendant should not be liable unless, in the exercise of ordinary care, he ought reasonably to have foreseen that a pull on the rope in such a manner would cause the derrick to fall. *St. Louis S. W. R. Co.* v. *Smith* (1901; Tex. Civ. App.) 63 S. W. 1064. But this instruction could properly be held correct everywhere. See Shearm. & Redf. Neg. § 93, note 5.

A jury is justified in finding that the omission of a conductor to inform the brakeman of the fact that a coupling was broken was the proximate cause of an injury received by such brakeman while making a coupling with a car, though the conductor was no longer on the train when the accident occurred. *Donahoe* v. *Old Colony R. Co.* (1901) 175 Mass. 356, 26 N. E. 808. The argument by which the defendant undertook to support the theory, viz.: that it was not to be expected that the plaintiff would attempt to uncouple the car without specific order from the conductor, was thus disposed of by the court: "The jury were not bound to assume that the conductor expected the whole train to stop because he had temporarily left the train for the purpose stated. The jury might well find that what was done by the plaintiff and the other members of the train was done in the ordinary course under the circumstances, and that the injury to the plaintiff was a natural and proximate result of the omission to inform him of the broken drawbar. It was admitted at the trial that the plaintiff 'was injured in attempting to uncouple the cars from the engine, so that the engine might go and do something else.'"

The following decisions illustrate the rule that a defendant is not absolved merely because the actual result which ensued was unusual or unlikely, and the particular injury received was one which could not have been foreseen by him.

Where a brakeman was riding in the cab of an engine with a defective pilot, and the engine sank on a soft part of the track, and the pilot, striking against some gravel on the roadbed, threw up a stone and broke the cab window, it was held that an injury to the eye of the brakeman, due to a fragment of the window striking him, was a legal consequence of the abnormal conditions which existed. *Baker* v. *Great Northern R. Co.* (1901) 83 Minn. 181, 86 N. W.

In *Illinois C. R. Co.* v. *Cowles* (1895) 63 Ill. App. 165, an engine

proximate cause, but upon the preliminary issue of negligence *vel non*. Compare, generally, §§ 140-146, *ante*.[2]

who injured himself by a successful effort to reverse the lever of a defective engine furnished to him, in order to prevent a collision with a passenger train, was allowed to recover.

Where a piece of coal flew off of a passing train, and injured a section hand, who was standing near the track, it cannot be contended that the company was not liable because the injury was not such a result of defendant's negligence as might reasonably have been anticipated. *Gulf, C. & S. F. R. Co.* v. *Wood* (1901; Tex. Civ. App.) 63 S. W. 164.

The negligence of railroad employees in running a hand car at a high rate of speed on a down grade and a slippery track, only 60 feet behind another hand car, is the proximate cause of an injury to an employee on the foremost car caused by his falling off and being run over by the car in the rear. *Christianson* v. *Chicago, St. P. M. & O. R. Co.* (1896) 67 Minn. 94, 69 N. W. 640; former Appeal (1895) 61 Minn. 249, 63 N. W. 639.

Where one of the handles on the front end of the rear one of two cars which had come into contact while being propelled in the same direction was broken off, and because of its absence the other handle on the same end of that car caused the preceding car to be pushed laterally and derailed, it was held that, as the defective handle might have been the proximate cause of the injury, the company was responsible for the injury resulting from the derailment, though it may not have anticipated the particular injury which occurred. *Walters* v. *Eastern R. Co.* (1902) 83 Minn. 149, 54 L. R. A. 481, 86 N. W. 76.

[2] In *McGowan* v. *Chicago & N. W. R. Co.* (1895) 91 Wis. 147, 64 N. W. 891, where it was held error to refuse an instruction to the effect that the defendant was not liable for its failure to keep its track in repair, unless "a person of ordinary intelligence and prudence would have expected as the result therefrom that the injury in question would occur," the court said: "It was not enough to entitle plaintiff to recover to show that his injury was in fact the natural consequence of the act or omission of the defendant, but it must have appeared that under all the circumstances it might reasonably have been expected that such an injury would result. A mere failure to guard against a result which could not reasonably have been expected is not negligence. (*Atkinson* v. *Goodrich Transp. Co.* [1884] 60 Wis. 141, 156, 50 Am. Rep. 352, 18 N. W. 764.) The plaintiff was not entitled to recover merely because the injury he had received was in consequence of the defendant's track and roadbed having not been maintained and kept in repair. In order to warrant a recovery it must have appeared that its failure in this respect was the result of negligence on its part, and that a person of ordinary intelligence and prudence might have expected, as the result of such negligence, that such an injury would have occurred. It is only by proof of these indispensable facts that an unbroken connection between the wrongful act and the injury can be established, and so constitute a continuous succession of events so connected as to make a natural whole, and show that the defendant's negligence and the injury of the plaintiff stand in the relation of cause and effect. The gist of the action is negligence on the part of the defendant, and such relation of cause and effect could be established only by thus showing that the negligent act or omission of the defendant caused the injury and was its proximate cause."

In another case it was laid down that "negligence is the cause of an accident, in the legal sense, only when it is of such a character that men of ordinary prudence, judgment, and experience might reasonably, in the light of the attending circumstances, to have foreseen that it was likely to produce such an accident." *Rysdorp* v. *George Paukratz Brewing Co.* (1897) 95 Wis. 622, 70 N. W. 7.

In another case, where the ruling was that it is negligent for railway servants to permit a coupling pin to be upon the platform of a car in motion, without being secured in its place; and that if such pin falls on the wheels, throws it from the track, and an employee of the company standing without the limits of the track to let the train pass is injured thereby, the company is liable, the court argued as follows: "It may be true that the accident in the precise form and with the precise surrounding circumstances which resulted in plaintiff's injury, could not have been expected to happen from the

805. Provinces of court and jury.— Whether the breach of d
tablished in the given case was the proximate cause of the inju
mixed question of law and fact.[1] It is, therefore, primarily
the jury to determine under proper instructions.[2] A court s
undertake to settle it in any case where it involves the weigh
conflicting evidence, the balancing of probabilities, and the dr
of inferences.[3]

falling of the pin from the car upon the track. The reason of imagination is unable to determine just the effect of an obstruction upon the track of a railroad. The result may be unusual, unexpected, indeed, a surprise to the most experienced,—never before heard of by anyone—yet the act of putting the obstruction on the track is none the less negligent, for it threatens danger in many directions, and is liable to produce many familiar results which would cause injury. Now, surely, if it causes an injury in any way that may be expected,—if the result is [illegible] before been seen,—it cannot be said not to be negligent because the result was before unheard of, and not within the observation of anyone, or even not anticipated in the exercise of reason or imagination. The negligence in this case produced an effect never before observed. It cannot, therefore, be said that it was the exercise of care." *Doyle* v. *Chicago, St. P. & K. C. R. Co.* (1889) 77 Iowa, 507, 4 L. R. A. 420, 42 N. W. 535.

[1] *Aldrich* v. *Concord & M. R. Co.* (1892) 67 N. H. 280, 36 Atl. 252.

[2] *McGill* v. *Maine & N. H. Granite Co.* (1900) 70 N. H. 125, 85 Am. St. Rep. 618, 46 Atl. 684; *Nicoud* v. *Wagner* (1900) 106 Wis. 67, 81 N. W. 999; *Hill* v. *Southern P. Co.* (1901) 23 Utah, 91, 63 Pac. 814; *Hayes* v. *Michigan C. R. Co.* (1881) 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369.

[3] *Whitcher* v. *Boston & M. R. Co.* (1900) 70 N. H. 242, 46 Atl. 740. There a freight conductor, alighting from a moving train when there were 2 inches of sleet on the ground, struck his foot on some hard object, causing him to slip and fall. The exact spot where his foot touched the ground could not be determined, but a mark made on the rail to indicate the spot where he fell was found to be opposite four ties projecting a foot beyond the regulation ties, and far enough out so that one alighting from a train would step on them. Waybills which he held in his hand, and blood from his injuries, were found on and about the ties. There were [illegible] objects on which he could have s[illegible] The question whether the projecti[illegible] were the cause of the injury wa[illegible] to be for the jury.

Where a switch was left open by [illegible] known party, and a train ran into [illegible] is for the jury to say whether [illegible] of the company in unnecessarily p[illegible] the switch behind a water tank, s[illegible] the danger signal could not be [illegible] the train was within 60 feet [illegible] whereas it could have been plac[illegible] that it could be seen 600 or so[illegible] away, affording time for stopping [illegible] train, was a proximate cause of th[illegible] cident. *Young* v. *Syracuse, B[illegible] Y. R. Co.* (1899) 45 App. Div. 29[illegible] N. Y. Supp. 202.

A verdict will not be set aside w[illegible] finds that a defective switch w[illegible] causes a car loaded with lumber to [illegible] off the track, thereby weakening [illegible] cross-ties holding the lumber on the [illegible] was the proximate cause of an in[illegible] to an employee caused by the gi[illegible] way of the stakes and the fall of [illegible] lumber, while he was attempting to [illegible] the car back on the track. *Aldri[illegible] Concord & M. R. Co.* (1892) 67 N. [illegible] 280, 36 Atl. 252.

A switch engine wi[illegible] tub pilot [illegible] front and a tank and [illegible] pilot beam [illegible] had iron hand-holds 18 inches long [illegible] tached to each end of the base of [illegible] pilot, leaving a space 3½ feet over [illegible] main part of the pilot without a ha[illegible] hold. Plaintiff in stepping on the fo[illegible] board to make a coupling, stepped [illegible] air hose lying on the footboard, a[illegible] in putting out his hand to the drawh[illegible] the hand-hold being behind him, he l[illegible] his balance, and fell, and his leg w[illegible] cut off. It was held to be a possi[illegible] hypothesis that the injury would ha[illegible] been avoided if there had been a c[illegible] tinuous hand-hold. *White* v. *Burli[illegible] ton, C. R. & N. R. Co.* (1899) 109 Iow[illegible] 557, 80 N. W. 679.

In a case where plaintiff's intest[illegible] was engineer on the head engine of [illegible] train pulled by two engines throug[illegible]

On the other hand, if the court, upon a review of the whole ence, is of the opinion that reasonable men can come to only ... nclusion, the liability or nonliability of the master may be declared

row drifts, the head engine controlling the train by means of air brakes and governing the second engine by means of whistles, the testimony of one witness was to the effect that, 250 feet before reaching a switch, the head engine sounded the whistle for the second engine to shut off steam, left the track, and, on reaching the switch, followed the switch, and fell over on its side, killing the engineer and fireman, while the second engine followed the main track through off the rails. According to the testimony of one witness, the head ... not working when it reached ..., but the second one seemed to ... and the engineer was looking out of the window watching the snow. The brakes were found applied on the head engine. The whole distance traveled by the head engine after its trucks left the track was 525 feet. Held, that the evidence was sufficient to justify the jury in believing that the action of the second engineer in failing to shut off steam as soon as the whistle was sounded was the proximate cause of the accident. *McGrath* v. *Great Northern R. Co.* (1900) 80 Minn. 450, 83 N. W. 411.

A jury is warranted in finding that a brakeman's death was caused by his being crushed between two cars, where his death took place four months after the accident, and his wife testified that he had never recovered from the injury, while the physician who attended him in his last illness testified that he died of pneumonia, and the physician who attended him for the injury testified that, while it was a severe one, he had recovered about a month before his death. *Illinois C. R. Co.* v. *Harris* (Miss.) 29 So. 760.

Where an employee was proceeding to close the door of an elevator, as it was his duty to do, but was directed by the foreman to wait a moment, and the plaintiff, not observing that the door was open, backed through while engaged in his work, and fell down the shaft, it was held that the question whether the failure of the employee to act with promptness in closing the door was the negligence of a fellow servant, or of the defendant, as being caused by the command of the foreman, was a question for the jury. *H. Channon Co.* v. *Hahn* (1901) 189 Ill. 28, 59 N. E. ... affirming (1900) 90 Ill. App. 250.

Where a servant was injured by the fall of a derrick, due either to inherent weakness, improper ballasting, or violation of defendant's order not to hoist two loads at the same time on the same side of the derrick, the jury having found against the last cause, a verdict for the plaintiff is not against the evidence, where the testimony tended to show that there was no visible weakness in the derrick, but that the accident might have been caused by a change of ballast, for which defendant would be responsible. *Sherman* v. *J. W. Bishop Co.* (1901) 23 R. I. 6, 49 Atl. 30.

A jury is warranted in finding that the explosion of a steam cooker in a canning factory was due to the want of a safety valve between the cooker and the boiler from which the steam was admitted, where the evidence is that the cooker could withstand only one half the pressure of steam that could be safely kept up in the boiler, and that the gauge and thermometer by which the temperature and pressure of the cooker were regulated were not affected quickly enough to give an indication of danger, when steam was freely admitted from the boiler. *Empson Packing Co.* v. *Vaughn* (1899) 27 Colo. 66, 59 Pac. 749.

The question whether an explosion which occurred while a fireman was opening the blow-off cock of a boiler was at the joint of a "plunger union" joining the two portions of a pipe used in connection with the blow-off cock for the discharge of mud and water from the boiler is for the jury upon evidence tending to show that there had been some defect and leaking of water at the union a few days before the explosion, and that repairs had been made thereon, and that such a union was an unsafe and dangerous construction and liable to give way and cause an explosion, in the absence of evidence on the part of the owner to show the character of the explosion and what part of the pipe, if any, was broken. *Sullivan* v. *Union R. Co.* (1896) 7 App. Div. 238, 40 N. Y. Supp. 81.

Where a fire occurred in an upper room of a malt-grinding mill, and very shortly afterwards the fine dust ex

a matter of law.[4] This principle is manifestly taken for granted all the cases in which courts have declared the action to be, as ma ter of law, not maintainable. See notes to the last two sections.

B. Intervening causes.

806. Generally.— It frequently happens that the crucial questi upon which the proximity or remoteness of causation hinges whether or not the legal connection between the negligence alleg and the injury received was broken by some intervening occurren This question is an extremely complex and difficult one, and the tempts to solve it under various circumstances have produced a m titude of decisions which it is impossible to reconcile.[1] For the p

ploded in a room on the floor below, which was connected with the upper room by a chute, and it was shown that the safety appliance in the chute which the employer had provided to prevent the spread of fire was out of order, the jury was held to be warranted in finding that the explosion was due to the employer's neglect to perform his duty of keeping this appliance in order. *Wiedeman* v. *Everard* (1900) 56 App. Div. 358, 67 N. Y. Supp. 738.

In an action by a servant for injuries sustained in the operation of machinery, evidence that the shaft was at rest when plaintiff was called to sharpen the knives of the machine of which the shaft was a part, and while so doing the shaft was set in motion by the belt slipping from the dead pulley onto a live one, and plaintiff was thereby hurt, is sufficient to send to the jury the issue of the proximate cause of the injury. *Stalzer* v. *Jacob Dold Packing Co.* (1900) 84 Mo. App. 565.

The inference that defendant's neglect caused the injury to plaintiff for which suit is brought is justified by evidence that the front wheels of a car used in defendant's coal mine were of different sizes, and that the car jumped the main track for which the switch was set, to a side track on which the plaintiff was standing to be out of the way. *Southwestern Coal & Impror. Co.* v. *Rohr* (1897) 15 Tex. Civ. App. 404, 39 S. W. 1017.

In an action by a railway servant against a company other than that which employed him, the question whether negligence of defendant's flagman in giving, without cause, a signal to the engineer of a long train of empty cars to stop, in acting on which sig as it was the duty of the engineer to the cars were piled up and thrown o the adjoining track, into which pile t train on which plaintiff's testate engineer (belonging to, and operat like, the other train, by another th defendant), then coming along, and occasioned his death, was the pro mate cause of the accident, was held be for the jury. *Thomas* v. *Central Co.* (1900) 194 Pa. 511, 45 Atl. 344.

In an action by a brakeman agai an express company, it was held th the question, whether or not an inju received while he was standing in t door of a baggage car, from bei struck by a chute used to transfer ba gage from one train to another, as end came in contact with a car up another track, was the proximate res of allowing the end to project beyo the car, was for the jury. *Americ Exp. Co.* v. *Risley* (1899) 179 Ill. 2 53 N. E. 558, Affirming (1898) 77 App. 476.

See also *Pidgeon* v. *Long Island Co.* (1895) 87 Hun, 43, 33 N. Y. Sup 870, where it was held that the evide sustained the verdict of the jury th the want of repairs on a track caus a derailment.

[4] *McGill* v. *Maine & N. H. Granite* (1900) 70 N. H. 125, 85 Am. St. R 618, 46 Atl. 684.

[1] According to a recent case in t Federal court of appeals, "the indepe ent intervening cause that will preve a recovery on account of the act or om sion of a wrongdoer must be a cau which interrupts the natural sequen of events, turns aside their cour e, p vents the natural and probable res

poses of the present treatise, it will be unnecessary to do more than show the actual effect of the cases in which the liability of employers has been considered under this particular aspect. The general principles involved may be ascertained by consulting the standard works on the law of negligence.

The cases may be conveniently classified under three categories indicated by the headings of the following sections.

807. Operation of nonresponsible agencies.—The class of cases which presents the fewest difficulties is that which involves subsequent occurrences resulting from the operation of some nonresponsible agency. Under such circumstances the sole question to be determined is whether the result produced by the negligence was one which might reasonably have been anticipated.[1]

808. Nonculpable acts of responsible actors.—Another and less simple class of cases is that which turns upon the effect of a subsequent occurrence which was the result of the nonculpable act of a responsible actor, either the injured servant himself or another person. Considering that the ultimate test of liability is whether the consequences flowing from the negligence charged were such as might reasonably

of the original act or omission, and produces a different result, that could not have been reasonably anticipated." *Union P. R. Co.* v. *Callaghan* (1893) 6 C. C. A. 205, 12 U. S. App. 541, 56 Fed. 988. In the same case it is pointed out that "the proximate cause is not always, nor generally, the act or omission nearest in time or place to the effect it produces," and that, "in the sequence of events, there are often many remote or incidental causes nearer in point of time and place to the effect than the moving cause, and yet subordinate to, and often themselves influenced, if not produced, by it."

If the evidence is such as to warrant the inference that the legal connection was broken by an intervening cause, it is not sufficient merely to instruct a jury that "the proximate cause is the event or thing which causes the accident, not the thing without which it would not have happened." It should also be stated that the proximate cause of the injury is to be referred to the nearest responsible agency from which the accident followed, as a proximate result, and that, if there was any wrongful or negligent act in the chain of causation, producing the disaster, that wrongful or negligent act should be found to be the proximate cause of the accident, unless clearly too remote. *Pudsey* v. *Dominion Atlantic R. Co.* (1895) 27 N. S. 498.

[1] A railroad company is liable for personal injuries sustained by an employee who, while free from negligence and in his proper place, performing his duties as a servant of the company, was struck by the body of a trespasser who was killed by being thrown from the track by an engine, where the engineer saw the trespasser upon the track in time to stop before striking him, but carelessly, negligently, and recklessly allowed the train to run at a dangerous rate of speed, without giving any signal of its approach, or making any effort to check its speed. *Western & A. R. Co.* v. *Bailey* (1898) 105 Ga. 109, 31 S. E. 547.

Where defendant negligently cut an electric wire, and, because of the crossing of other electric wires, decedent, a lineman, received a shock resulting in his death, a finding that the cutting of the wires was the cause of the lineman's death was proper, though it operated through the consequent crossing of other wires. *Brought* v. *Southern New England Telephone Co.* (1899) 72 Conn. 617, 49 L. R. A. 404, 45 Atl. 435.

have been expected, the decisions under this head cannot easily be reconciled upon the facts.[1]

[1](a) *Liability denied.*—Negligence of the engineer of one railroad train in moving his engine towards the crossing of another railroad before a train on the crossing has entirely passed is not the proximate cause of an injury to a fireman on the former train resulting from the latter train suddenly and unexpectedly backing after having cleared the track. *Kansas City, M. & B. R. Co.* v. *Lackey* (1896) 114 Ala. 152, 21 So. 444.

Failure of the yard master to properly make up a train, and to inspect the cars and remedy the condition of the angle cock and the air hose of one of the cars, is too remote to furnish a ground of recovery against the company by a freight conductor, for injuries sustained in attempting to close a defective angle cock while rearranging the train and putting the air cars together, by the engine pushing the cars back against the one he was working upon. *St. Louis & S. F. R. Co.* v. *Nelson* (1899) 20 Tex. Civ. App. 536, 49 S. W. 710.

Where a switchman, acting under a sudden impulse, and in the mistaken belief that a switch is wrongly set for a train approaching on the main track, manipulates it so as to throw that train on a siding, thereby causing the death of an engineer, it is not error to refuse to submit to the jury the question whether the company was negligent in failing to adopt a rule requiring switches to be locked, and switchmen to be at their posts when trains were passing on the main track. *Burke* v. *Syracuse, B. & N. Y. R. Co.* (1893) 69 Hun 21, 23 N. Y. Supp. 458.

A declaration alleging that the master negligently erected a hoarding in a street, and left a machine in a position in which it was likely to cause danger to the workmen, and that a cart accidentally ran against the hoarding, and knocked down the machine against the plaintiff, does not show that the injury was the proximate result of the negligence specified. *Assop* v. *Yates* (1858) 2 Hurlst. & N. 768, 27 L. J. Exch. N. S. 156.

The fact that the hanger of a sliding door is defective and consequently difficult to move is not, in law, the proximate cause of an injury to the leg of an employee who, while moving it with the help of a coemployee, loses his balance and falls from a stool which he has mounted in order to be in a more advantageous position for pushing it, *ley* v. *American Exp. Co.* (1895) 8 352, 32 Atl. 965.

The fact that sawdust is allow accumulate upon a boiler is no proximate cause of an injury to a ant who, while climbing a ladder t purpose of removing the same, re reason of the defective condition ladder. *Lamotte* v. *Boyce* (1895) Mich. 545, 63 N. W. 517.

Sending an employee away and his work by a smaller and weaker is not the proximate cause of an i to another employee from the fal post which they were engaged in se where the post did not fall becau his lack of strength, but because o slipping of such employee through character of the ground on whic was obliged to stand. *Hunter* v. *K City & M. R. & Bridge Co.* (189 C. C. A. 206, 54 U. S. App. 653, 8 379.

No causal connection between the ligence charged and the injury is sh by a complaint in which the abne risks specified were that a passag only 19 inches in width was provide tween a crane and a deep moulding and that the pit was left uncovered which the injury was alleged to h been received, owing to the fact the plaintiff stumbled, while walk along the narrow passage, and, in endeavor to regain his balance, ca his hand in the wheels of the crane. court based its ruling on the theory t the stumbling was the proximate c of the accident; that, as the pas was not insufficient for the purpose which it was used, and was not enc bered or obstructed through the defe ant's fault, this stumbling must h been caused by pure accident or by n ligence on the plaintiff's part, and t it did not appear that the result wo have been different if the pit had b covered. The suggestion that, if t pit had been covered, the plaintiff wo not have grasped the crane for supp but would have allowed himself to f on the cover, was rejected as being m speculation, and not averment; but was declared that, if this had be averred, the complaint would still ha been bad. *Greer* v. *Turnbull* (1891) Sc. Sess. Cas. 4th series, 21.

Where a servant engaged in moving derrick across the uncovered girders

809. Culpable acts of responsible actors; negligence of coservants.—In a third class of cases the intervening occurrences, the effect of which is in question, resulted from the culpable acts of responsible actors. The negligent acts which the courts have considered from

the first floor of a building, after the master had promised to furnish more planks, fell into the cellar by reason of his foot slipping from the girder upon which he had placed it without apprehending any danger therefrom, it was held that no action could be maintained, since, under such circumstances, the fall was not caused by the insufficiency in the number of the planks, or a defect in the crowbar or the derrick, but simply by a miscalculation on his part as to his position, and his accidental slip from the girder. *Holloran* v. *Union Iron & Foundry Co.* (1896) 133 Mo. 470, 35 S. W. 260.

The violation of a municipal ordinance as to the speed of a street railway car, or as to the space required to be maintained between two cars driven in the same direction, did not render the company liable for an injury, which was due to the fact that a switchman, fearing a kick from the horses of an approaching car, stepped back suddenly, and, miscalculating the distance in his confusion, got too near the other track and was struck by a passing car. *Thompson* v. *Citizens' Street R. Co.* (1899) 152 Ind. 461, 53 N. E. 462.

(b) *Liability affirmed.*—Recovery has been allowed where the plaintiff, owing to an act of misjudgment, caused a heavy piece of machinery to fall upon himself. *Schultz* v. *Bear Creek Ref. Co.* (1897) 180 Pa. 272, 36 Atl. 739.

Where an engineer was obliged to reverse his engine, which was leaving the track because of the defective condition of the track, and was thereby injured, the neglect of the company to keep its track in repair was the proximate cause of the injury, and plaintiff may recover. *Knapp* v. *Sioux City & P. R. Co.* (1887) 71 Iowa, 41, 32 N. W. 18. Former Appeal (1884) 65 Iowa, 91, 50 Am. St. Rep. 1, 21 N. W. 198.

In *Finley* v. *Richmond & D. R. Co.* (1893) 59 Fed. 419, where defects in the engine brake and the reversing of the lever caused injury to a brakeman, while coupling, it was held that the engineer might have controlled the movements of his engine by means of the tender brake; but he was held to be justified in acting on the assumption that by using caution he might make the defective appliances work properly.

Where the evidence was that plaintiff's intestate, who was employed as switchman in defendant's yard, went in between two cars to make a coupling, and, having completed it, attempted to step out upon the planking in a highway crossing; that the planks were so uneven that his foot caught or slipped thereon, and he was thrown under the cars; that, as he slipped, he grasped the grab-iron, and endeavored to jump out from under the car, and was about to accomplish this, when his foot slipped into a hole between the ends of two ties, and he was run over by the cars and killed,—it was held the court properly left it to the jury to determine whether the condition of the plank at the crossing was the proximate cause of the injury. *Herrick* v. *Quigley* (1900) 41 C. C. A. 294, 101 Fed. 187. The court took the position that such evidence tended to show that the servant never recovered from the dangerous situation in which he had been placed by the defective planking.

A jury is warranted in finding that there was no interposition of any new and independent cause which would relieve the defendant company from liability for defects in its track, where the evidence tended to show that a train, while running down a grade, parted owing to those defects, and it was proved that a tank of gasoline was burst open by a subsequent collision between the two sections, and that the conductor, when he came forward with his lantern, was killed by an explosion. *Chicago G. W. R. Co.* v. *Price* (1899) 38 C. C. A. 239, 97 Fed. 423.

It is not negligence for a fellow servant to operate machinery on the assumption that it is in good condition. Hence the defective condition of the bumper of a freight car, and not the engineer's act, is the proximate cause of an injury due to the deadwoods meeting and crushing plaintiff, where the moving car was being backed at a rate of speed which would not have brought the deadwoods together if the bumper had been in order. *Goodrich* v. *New York C. & H. R. R. Co.* (1889) 116 N. Y. 398, 5 L.

this point of view have been either those of fellow servants or t
of the injured servant himself.

In a few decisions courts have recognized, more or less explic

R. A. 750, 15 Am. St. Rep. 410, 22 N. W. 397.

The servants of a mining company have the right to assume that a permanent platform built for their use upon one of the levels of the mine, and likely to be subjected to the strain caused by explosions in the shaft beneath it, will stand the test to which the ordinary operations of the mine subject it. Such ordinary operations cannot be regarded as constituting an intervening cause. *Smizel* v. *Odanah Iron Co.* (1898) 116 Mich. 149, 74 N. W. 488.

The fact that the immediate cause of a servant's coming into contact with machinery which should have been guarded was a slip or a stumble will not render the master's negligence a remote cause of the injury. *Lore* v. *American Mfg. Co.* (1901) 160 Mo. 608, 61 S. W. 678; *Swift & Co.* v. *Holoubek* (1900) 60 Neb. 784, 84 N. W. 249 (judgment reversed on rehearing [1901] 62 Neb. 31, 86 N. W. 900, but not on this point). See, however, the previous subdivision of this note, where some cases involving the similar circumstance of a slip are cited.

The fact that the surgeon who acted for the employ and amputated an injured employee's leg may have been mistaken as to the necessity of such amputation will not prevent a recovery against the employer, where the servant himself was guilty of no negligence in obtaining or submitting to the amputation. *St. Louis & S. F. R. Co.* v. *Doyle* (1894: Tex. Civ. App.) 25 S. W. 461.

A railway company's nonperformance of its duty to furnish an employee, who had been sent out to repair a wrecked car, with the means of transportation to some place where he could procure food and shelter, was held to be the proximate cause of a sickness contracted while he was walking by night, in extremely cold weather, to a village 9 miles distant. *Schumaker* v. *St. Paul & D. R. Co.* (1891) 46 Minn. 39, 12 L. R. A. 257, 48 N. W. 559. The court said: "There was no intervening independent cause of the injury, for all of the acts done by the plaintiff, in his effort to seek protection from the inclement and dangerous weather, were legitimate, and compelled by defendant's failure to reconvey him to the city. Had he remained at the caboose, and los hands or his feet, or, perhaps, his by freezing, no doubt could exist o defendant's liability. It must no permitted to escape the consequenc its wrong because the injuries we ceived in an effort to avoid the th ened danger, or because they diff form or seriousness from those w might have resulted had the pla made no such effort."

The employer is not allowed to e responsibility where the intervening which was the immediate cause o injury was done under the influenc mental perturbation induced by the gerous conditions complained of. pare §§ 358–361d, *ante*.

A railway company is not excus the fact that the plaintiff, an engi in his excitement jumped from his gine, when, had he remained upo he might, perhaps, have escaped in from a collision due to the negli of an incompetent switch-tender. *Tennessee, V. & G. R. Co.* v. *G* (1883) 12 Lea, 46.

It cannot be said, as matter of that the unlawful rate of speed at w an engine is running is not the p mate cause of an injury received laborer, who, in seeking to get o the way of an engine which comes h him suddenly, slips upon some snow ice near the track and is struck by engine. *Crowley* v. *Burlington, & N. R. Co.* (1885) 65 Iowa, 65 N. W. 467, 22 N. W. 918.

That a boy killed by a projecting in a stone quarry falling from above crushing him, in the excitement of moment lost his presence of mind, in an honest effort to save his life mistake pursued the course to los is no excuse for the negligence of foreman in not removing the rock w caused the disaster. *McMillan Mf Co.* v. *Black* (1890) 89 Tenn. 118 S. W. 479.

In an action against a railroad personal injuries, defendant's negli was the proximate cause of the inju if the fireman of one of defend trains, apprehensive of danger bec the train did not stop when signale do so, caused the injuries by jum from the engine against the plai while he was engaged in repairing

the principle that a master is not protected by the fact that the injury was immediately due to the negligence of a fellow servant, if the commission of that negligence might reasonably have been anticipated.[1] The difficulty of fixing the boundary between the area of

fendant's tracks. *Jackson* v. *Galveston, H. & S. A. R. Co.* (1897) 90 Tex. 372, 38 S. W. 745, Affirming (1896) 14 Tex. Civ. App. 685, 37 S. W. 785.

The fact that a fireman jumps from an engine in order to avoid the effects of a collision, which he sees to be impending, with an obstruction on the track, does not break the chain of causation between the injury and the negligence to which the obstruction was due. *Vetiraic* v. *Texas & P. R. Co.* (1898) 50 La. Ann. 466, 69 Am. St. Rep. 450, 23 So. 461.

A railway employee injured by falling from a car without fault on his part, while obeying the conductor's direction to run forward and give warning to prevent a collision that has become imminent because of the company's negligence, is not prevented from recovering therefor against the railway company, on the ground that such negligence is too remote. *Simmons* v. *East Tennessee, V. & G. R. Co.* (1893) 92 Ga. 653, 18 S. E. 999.

The failure to give proper warning of the approach of a train by sounding the whistle, as was required by a rule under the circumstances, is the proximate cause of an injury to a section hand which was immediately due to the fact that one of his coservants, in the excitement of the moment, let go his hold of a hand car which the gang were lifting off the track. *International & G. N. R. Co.* v. *Newburn* (1900; Tex. Civ. App.) 58 S. W. 542. Judgment Affirmed in (1901) 94 Tex. 310, 60 S. W. 429 (only points of practice discussed).

Where a servant was standing on a narrow space, oiling a lathe, and being startled by the foreman's suddenly setting the machine in motion without warning, made a sudden effort to escape from his dangerous position, and in doing so, stumbled so that his arm was thrown onto the knives, the question whether the foreman's negligence was the proximate cause of the injury was held to be for the jury. *Wellibon* v. *National Wheel Co.* (1901) 128 Mich. 1, 87 N. W. 75.

The fact that a winchman, as a result of the fright produced by the alarm raised when a seaman was caught in the fall of the winch owing to the want of a light, runs the machine faster, instead of stopping it, does not break the causal connection between the want of the light and the injury. *The Manhasset* (1893) 69 Fed. 843.

The act of an engineer of one company in jumping from his engine to escape a collision with a train negligently moved by another company does not break the chain of causation so as to exempt the second company from liability for such injuries as the locomotive, thus left uncontrolled, may inflict on other employees. *Nary* v. *New York, O. & W. R. Co.* (1890) 29 N. Y. S. R. 630, 9 N. Y. Supp. 153.

See, however, the case cited at the end of the previous subdivision of this note.

[1] In *McCauley* v. *Norcross* (1892) 155 Mass. 584, 30 N. E. 464, where it was held that placing heavy iron beams near an open hole in the floor, and leaving them there for two or three days in such a position that, on being pushed by a person desiring to pass, one of them toppled over and fell into the hole, is such evidence of negligence on the part of the master as will sustain a verdict in favor of a servant who was injured by the falling beam. The court said: "If the beams were so left that one of them would be liable, as a natural consequence, from some intervening cause or agency, to be so moved that it might fall though the floor, the fact that an intervening act or agency occurred, which directly produced the injurious result, would not necessarily exonerate the defendants from responsibility. Superintendence is necessary in order to guard against injuries from such intervening and inadvertent acts of careless persons as are likely to happen and ought to be guarded against. The question is whether the moving of a beam was so likely to occur that it ought to have been provided against by the superintendent. It might be found that the beams were negligently left near the hole in the floor, where they were likely or liable to be toppled over so that one of them might fall through the hole, and thus injure someone below, and that this was the proximate cause of the plain-

facts which would properly be covered by such a principle, a
which would be covered by the doctrine of common employm
sufficiently manifest. Stated with reference to the test supp
the conception of anticipation or nonanticipation, the practica
of that doctrine is simply that, whenever the negligence of a co
was the proximate, and not merely a concurrent, cause of the
(see § 814, *infra*),[2] the general rule applied in this class of
simply that the existence of abnormally dangerous conditions
from the negligence of the master or his representative will
title an injured servant to recover, where his injury was the
not of those conditions, but of the negligence of a coservant in
to the manner of performing the work,[3] that is to say, where the
promoting cause of the injury was the negligence of a fellow se

This way of putting the judicial situation shows that the
principle which declares that the chain of causation is not br
a negligent act which might reasonably have been anticipated"
be admitted into the law of employers' liability without gre
stricting the right of the defendant to rely on the doctrine as
servants. Indeed, it is quite evident, from a perusal of chapters
XXXII., *ante*, that the restriction thus indicated has never receiv
serious consideration in a multitude of cases in which it might
the evidence, have been treated as an element in the inquir
would seem, therefore, that the principle referred to at the beg
of this section is, for practical purposes, ignored in actions
vants against their masters, and that the se[illegible]ance of the ch

tiff's injury, although some careless person came along and toppled them over."

In an action by a railroad employee to recover for injuries sustained by the act of a coemployee who released a part of the track being repaired, so that it fell upon and crushed the plaintiff's foot, where recovery is sought because of exposure to peculiar hazard, the defendant is not entitled to the direction of a verdict on the ground that no connection is averred or shown between the fellow servant's negligence and the alleged extraordinary haste of the work, when evidence was admitted without objection from which the jury might infer that the expectation of an approaching train led to the negligent act of the fellow servant. *Anderson* v. *Great Northern R. Co.* (1898) 74 Minn. 132, 77 N. W. 240.

By an independent wrongful act which operates so as to break the chain of causation is meant one which was not induced by the act of the master, which did not so operate on the tions created by the master as t them to produce the injury. *N C. & St. L. R. Co.* v. *Perriguey* 138 Ind. 414, 34 N. E. 233, 37 N.

[2] A negligent act of a master, does not cause an injury to a or concur with the wrongful a fellow servant as a cause of the cannot be coupled with such w act, so as to be made the basis covery. *New York, C. & L. R. Perriguey* (1893) 138 Ind. 414, E. 233, 37 N. E. 976.

[3] See the language used in *Ha New York C. & H. R. R. Co.* (18 N. Y. S. R. 817, 10 N. Y. Supp. 6

[4] *Trewatha* v. *Buchanan Gold Mill. Co.* (1892) 96 Cal. 495, 2 571, 31 Pac. 561 (disapproving el

[5] See, generally, Shearm. & Red §§ 34, 35; 1 Beven, Neg. pp. 98, 1

causation is almost invariably assumed to be a rigid inference of law, which takes effect as soon as it is shown that the injury proximately resulted from the negligence of a coservant. Numerous cases in which the propriety of this presumption was virtually taken for granted have been cited in the earlier chapters just mentioned. The decisions collected in the note below deal with evidence which directly raised the question whether the negligence of the master or the negligence of a coservant was the proximate cause of the injury. In many instances it is extremely difficult, not to say impossible, to reconcile these decisions, in view of the facts involved, with those in which the master has been held liable on the ground that his negligence was not a remote, but a concurrent, cause of the injury. There is, in fact, a considerable body of authorities which can scarcely be said to embody any other principle than that an action can never be maintained where a coservant's dereliction of duty operates upon, and renders actively mischievous, the physical conditions previously created by the master's antecedent breach of his obligations. Yet it is manifest that any such principle is directly antagonistic to that which is exemplified by the cases collected in § 814, *infra*. A judicial exposition of the diagnostic elements of each class of cases seems to be urgently needed.[6]

[6](a) *Liability denied.*—The plaintiff has been held unable to recover for injuries caused by the breaches of duty indicated by the headings of the following paragraphs:

Acts of employees for whose negligence the master is responsible.—The manner in which the fellow servants of a laborer engaged in construction work lifted the rail which injured him, and not the order of the superintendent, is the proximate cause of the injury, although, after the men had lifted a rail which produced an injury to a fellow servant, and had carried it forward to a car, and while there holding it, awaiting the word of command to lift it further and throw it on the car, the superintendent failed to give the word of command in such a way as to produce concert of action in the men, but, on the contrary, ordered them to get the rail on the car in any way they could, and hurried the men and used oaths, whereby they became confused and failed to act in concert. *Coyne* v. *Union P. R. Co.* (1890) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 282.

In *Northern P. R. Co.* v. *Paisley* (1897) 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741, Reversing (1895) 15 C. C. A. 52, 29 U. S. App. 583, 67 Fed. 881, it was held that the negligence of a conductor of a "wild" train in violating rules regulating the running of trains, and not the negligence of the train dispatcher, was the proximate cause of a collision. The court considered that it would be mere conjecture to deduce from the fact that the train was "wild" the inference that the conductor was acting under the control of the train dispatcher.

The failure of a railroad company to give notices of the movements of trains to the employees upon other trains is not the proximate cause of a collision which would not have occurred but for the gross negligence of the engineer of one train in not keeping his engine within control, and of the crew of the other train in failing to place torpedoes upon the track in the rear of such train when it stopped, and station a flagman at a proper distance. *Little Rock & M. R. Co.* v. *Barry* (1898) 13 L. R. A. 347, 28 C. C. A. 644, 56 U. S. App. 37, 84 Fed. 944.

A train dispatcher's failure to notify the engineer of a regular train that a

810. Same subject continued; negligence of injured servant hin
—Viewed with reference to the test of anticipation or ne
ticipation, the essential significance of the doctrine as to contribu

special has the right of track does not render the railroad company liable for an injury to the engineer of the special, occasioned by a collision with the regular, which would not have occurred but for the violation by the engineer of the regular train of a rule regulating the speed at which the passing station should be approached. *Bryant* v. *New York C. & H. R. R. Co.* (1894) 81 Hun, 164, 30 N. Y. Supp. 737.

The proximate cause of the injuries received by a fireman in a rear-end collision with the train of another company, halted at night at an unusual place without display of signals, is the negligent act of such trainmen, and not the fact that the engineer of the locomotive on which the fireman was employed ran his engine at a higher rate of speed than the company's regulations authorized. *Smithson* v. *Chicago G. W. R. Co.* (1898) 71 Minn. 216, 73 N. W. 853.

Where a train dispatcher has issued instructions as to the operation of a train, which, if they had been observed by the conductor and engineer, would have prevented a collision with another train, the employees on the latter train cannot recover damages for injuries resulting from disobedience to those instructions. *Chicago, St. L. & N. O. R. Co.* v. *Doyle* (1883) 60 Miss. 977.

If the coemployees of a conductor killed by the collision of his train with another, in consequence of the negligence of an agent of the railway company, for whose acts it must answer, are also negligent, no action will lie against the company in favor of his representatives. *Chicago & N. W. R. Co.* v. *Snyder* (1886) 117 Ill. 376, 7 N. E. 604 (instruction disapproved, which left it open to the jury to infer that proof of the negligence of the company's agent and the conductor's freedom from negligence would alone justify a verdict against the company).

The proximate cause of a collision being shown to be the negligence of a brakeman in failing to set the brakes and thereby prevent the cars running backwards, a recovery cannot be based on the negligence of the train master in running the two trains too close together, in the absence of any proof that they were dangerously near if proper care had been taken; nor on the g of negligence in insufficiently ma the train, it appearing that one could have set the brakes in time he done his duty. *Belger* v. *A City & Ft. S. & W. R. Co.* (1892 Mo. 86, 18 L. R. A. 817, 19 S. W

The negligence of an engineer sponding to a yard master's s back some cars, without first ing whether a switchman, who undertaken to couple two of th which were to be moved, was clea cars, breaks the causal connecti tween the signal and an injury by the switchman, owing to hi caught between the cars when they together a second time. *Chicago & P. R. Co.* v. *Touhy* (1887) App. 99.

That the superintendent of an tric railway company called to g sistance, for the purpose of re trolley car, the conductor and m in charge of another car, does not the company liable, where the la negligently failed to set the ha that the car ran down an incline collided with another car to the i of an employee. Such a call cannot construed as an order to leave t without adjusting the brakes. *H* v. *Carbon County Electric R. Co.* 191 Pa. 146, 43 Atl. 74.

Dangerous conditions in the pla work.—A brakeman employed lessee railway company cannot re against the lessor company for inj alleged to have been sustained coupling cars, by being crushed bet the train and a platform constructed the lessor so near to the track th man could not stand between where his own pleading shows that proximate cause of the injury was fact that the train was in motion that the negligence, if any, was the fellow servants who were also serv of the lessee company, for whose n gence the lessor would not be li *Evans* v. *Sabine & E. T. R. Co.* (Tex.) 18 S. W. 493.

The proximate cause of the injur the negligence of a fellow servant, w a collision of a switch engine wi train was caused by the negligence the brakeman in manipulating switch, and the water tank of the

negligence is that such negligence is never a contingency which the master is bound to take into account or look forward to as a possibility

gine, insufficiently secured to withstand the shock of the collision, was thereby thrown forward on to a brakeman riding on the engine. *Lisetich* v. *Southern P. Co.* (1899) 126 Cal. 587, 59 Pac. 129.

The failure of a fellow servant to block a car on a side track constructed on a gradient, and not the company's failure to provide a safety switch, is the proximate cause of a collision caused by the fact that the car, although the brakes were set, was set in motion by a strong wind and ran on to the main track. *Illinois C. R. Co.* v. *Woolley* (1900) 77 Miss. 927, 28 So. 26.

A municipal corporation is not liable to an employee engaged in wheeling dirt up a "run," for injuries sustained by a collision with other workmen, by which he was thrown from the run, such collision being caused by the stopping of another workman to replace a loose board at the end of the run, which had been placed there by a workman to prevent the jar resulting from rolling wheelbarrows off the end of the run to the ground. The negligence, if any, in permitting the board to be placed where it was, was not the proximate cause of the injury. *McGough* v. *Bates* (1899) 21 R. I. 213, 42 Atl. 873.

In *Allen* v. *New Gas Co.* (1876) L. R. 1 Exch. Div. 251, 45 L. J. Exch. N. S. 668, 34 L. T. N. S. 541, a company had on its premises gates which were safe when open and wedged up, but liable to fall when closed. The attention of the manager had been directed to the unsafe condition of the gates, and orders had been given, but not carried out, to remedy this. A workman in the employ of the company passed through the gates when open, but on his return one of them was closed, and shortly afterwards, while he was working near the gates, they fell on and injured him. There was no evidence to show how this happened, nor any evidence that the manager and other persons employed by the company were incompetent. Held, that the company was not liable, as the negligence, if any, which caused the accident was that of a fellow workman. "We think," said Huddleston, B. "that the mischief in this case arose from the conduct of the plaintiff's fellow workmen, as such, and not from the defendant's default, nor from the default of any manager or vice proprietor, and that, therefore, the defendants are not liable. The gates were dangerous when shut, not dangerous when against the wall and wedged up. Now, either some workman, as such, moved the gates, or the wind did so, and then the workman ought to have replaced them. It was, therefore, by the improper moving of the gates by a workman or by their being improperly left open by the workman that the mischief happened. The case is like this,—there is an unsafe ladder; it is shut up and not used; a workman takes it out and does not replace it, and then another workman uses it and is hurt; the master would not be liable."

In *Collier* v. *Pennsylvania R. Co.* (1886) 49 N. J. L. 59, 6 Atl. 438, where the plaintiff's claim was based on the theory that a heavy door was defectively constructed, the court, without discussing the question of concurrent negligence, refused to allow recovery for the reason that a fellow servant was negligent in handling the door.

The negligence of an employer in allowing a large hole to remain under the track of a railway, and not providing any light for it, is not the proximate cause of an injury which a servant receives through being caught in the hole while coupling cars against which the engineer has pushed back his locomotive without warning. *Robertson* v. *Linlithgow Co.* (1891) 18 Sc. Sess. Cas. 4th series, 1221.

Even on the assumption that an unduly rough roadbed on a half finished railway betokens negligence, which was denied, the company is not liable for an injury to one of its servants employed on a construction train, occasioned by the running of the train by the engineer at a reckless rate of speed. *Evansville & R. R. Co.* v. *Henderson* (1893) 134 Ind. 636, 33 N. E. 1021.

Where a log is thrown off a car by an excessive jolting upon a rough roadbed, and the car is consequently derailed, the inference from evidence that the jolting was aggravated by an undue rate of speed is that the negligence of the engineer was the efficient cause of the wreck, and none of the other trainmen can recover for injuries resulting therefrom. *Conger* v. *Flint & P. M. R. Co.* (1891) 86 Mich. 76, 48 N. W. 695.

In *Sammon* v. *New York & H. R. Co.*

to be provided against. Hence, the legal connection between wrongful act and the injury is invariably deemed to have been bro

(1875) 62 N. Y. 251, the defendant was held not liable for an accident which occurred, owing to the fact that an ill-fitting pin fell out of the lever of a switch while a train was passing, and allowed two cars to run onto wrong tracks. The court took the position that, as the switchman, when he found that the lever would not work properly, had neither resorted to use of a crowbar to move the rail, as he had been doing before the switch was put in, nor held the lever himself, nor signaled the train to stop, nor taken steps to have the hole enlarged, the accident was attributable to the switchman's negligence alone.

If the owner of a mine has negligently allowed fire-damp to accumulate, and it is ignited by a servant who goes into it with a lighted lamp, instead of a safety lamp, contrary to the owner's orders, and another servant is injured by an explosion, the latter has no remedy against the owner. *Burns* v. *Gaston Gas Coal Co.* (1885) 27 W. Va. 285, 55 Am. Rep. 304.

Where an employee in a mine, a shaft of which was divided by a framework of posts into two compartments, one of which was provided with a ladder for the use of the employees, was injured while ascending the ladder, by a timber negligently thrown into the shaft by a fellow employee, the mine owner is not liable, although the partition between the compartments may have been defectively constructed, or insufficient in other particulars. *Keyern* v. *Providence Gold & Silver Min. Co.* (1886) 70 Cal. 392, 11 Pac. 740.

Contractors engaged in laying a slope-retaining wall upon the bank of a canal are not liable for the death of an employee killed by the fall of a heavy stone from the bank above although they had told the teamster who unloaded the stone to put it as near the edge of the bank as he could without having it roll over. *Rhodes* v. *Lauer* (1898) 32 App. Div. 206, 53 N. Y. Supp. 162.

In *Hoffman* v. *Clough* (1889) 124 Pa. 505, 17 Atl. 19, the defendant asked the court to instruct the jury "that, if they believed that some coemployee of the plaintiff, without the knowledge of the defendant, had left the covering off the well and in a dangerous condition, and the plaintiff fell in, the defendant has not been guilty of negligence and t fore the plaintiff cannot recover." answer of the trial judge was a lows: "I decline to affirm that because I can easily conceive that an employee may contribute to th jury, yet, if there is negligence defendant, he would be respons The court said: "There are two tions to this answer. In the first when taken as a whol it is no sponsive to the point. Instead o claring the law applicable to the assumed, it dealt with other facts the learned judge regarded as con able, but which were not brought t attention, and which were inconsi with those embodied in the point. the next place, if regard be had to part of the answer which is respec it is clearly wrong. The general true that an employee cannot loo his employer for an injury resu from the negligence of a coemploy well settled."

Defects in railway rolling stock, chinery, etc.—Supposing the use car with an unusually short draw be negligence on the part of a rai (which was denied) a brakeman w injured while obeying the order o conductor to detach the car cannot cover, since the order is the negli of a coservant and the proximate of the injury. *Whitman* v. *Wisco & M. R. Co.* (1883) 58 Wis. 408, 1 W. 124.

A defective coupling which c the separation of a train is not the p imate cause of an injury afterward ceived by a brakeman through the l ing of the forward part of the t upon him while he was engaged in r edying the defect. *Course* v. *New L. E. & W. R. Co.* (1888) 17 N. Y. S 715, 2 N. Y. Supp. 312.

The defective condition of a draw on a freight car, allowing the deadwo to come together, will not render a r road company liable to a switchm whose arm is crushed between the de woods, where just before the accid his arm was thrown between them consequence of his having stumbled u a piece of coal left upon the tr through the negligence of fellow s ants. *Cincinnati, N. O. & T. P. R.* v. *Mealer* (1892) 1 C. C. A. 633, 6 U. App. 86, 50 Fed. 725.

whenever the evidence shows that the negligence of the injured servant himself was an efficient cause of the injury. The exertion of

A railroad brakeman cannot recover from his employer on the ground that the cars he was ordered to couple were of unequal height, even if the use of such cars be negligence, where the proximate cause of his injury was the negligent movement of the train by a fellow servant, while he was attempting to make the coupling. *Norfolk & W. R. Co.* v. *Brown* (1896) 91 Va. 668, 22 S. E. 496.

The negligence of a railroad company in furnishing a defective coupling pin causing the parting of a train, and in not furnishing proper means of communicating the fact between the engineer and rear brakeman, is not the proximate cause of a collision between the two parts of the train after running several miles, where it would not have occurred but for the failure of deceased, his fellow brakeman, or the engineer, to comply with the rules of the company prescribing the precautions to be observed, after he or they knew or ought to have known of the parting of the train. *Richmond & D. R. Co.* v. *Tribble* (1896) 97 Va. 495, 24 S. E. 278.

A railroad company is not liable to a fireman for injuries from a collision of trains caused by the engineer's disobedience to orders as to the speed at which a station should be approached, where, although one of the brakes was out of order, the evidence was that the train could have been stopped without the brakes on the cars, if the engineer had shut off steam at the point at which he should have done this. *Bull* v. *Mobile & M. R. Co.* (1880) 67 Ala. 206.

The negligence of section hands in placing a water cask on the front end of a hand car in such a position that a jolt due to the car's going out of repair throws it off, the consequence being that the car is upset, is the negligence of fellow servants, and not of the section boss, where the latter gave mere general direction to prepare to return to the section house with the working tools and water cask. The want of repairs is not the efficient cause of such an accident, as it is due to the intervention of a new and distinct cause. *Rose* v. *Gulf, C. & S. F. R. Co.* (1891; Tex.) 17 S. W. 785.

On the ground that the master is not liable for the defective condition of instrumentalities which are harmless until they are rendered active for mischief by the independent wrongful act of a

[illegible] injured [illegible] it was held that the negligence [illegible] company in not furnishing [illegible] lights is not the proximate [illegible] collision caused by the [illegible] the engineer in leaving the [illegible] siding out on the main track, in violation of [illegible] orders. *New York, L. E. & W. R. Co.* v. *Pennington* (1891) 129 Ind. 114, 34 N. E. 233, 37 N. E. 976. The court said: "The movement of the train under the management of Ferris [the engineer] was the independent wrongful act of a responsible person; such act of Ferris was not induced by the act of [illegible], nor did he act [illegible] of Ferris [illegible] of the appellant [illegible] to produce [illegible] ated, accompanied [illegible] cited, especially [illegible] the appellee [illegible] negligent [illegible] injury. [illegible] to the appellee [illegible] lision."

The p[illegible] of [illegible] ceived [illegible] by his [illegible] to w[illegible] which has [illegible] foreman's [illegible] tened, as [illegible] that the negligent [illegible] and if [illegible] that he [illegible] that the [illegible] [illegible] [illegible] *Kelly* curred [illegible] *C. N.* v. *[illegible]* 27[illegible] [illegible] A[illegible] the [illegible]'s in pu[illegible] the [illegible] in [illegible] ing [illegible] by [illegible] which [illegible] workman [illegible] against the common [illegible] *Philadelphia Iron* [illegible] *Davis* (1886) 111 P[illegible] [illegible] Rep. 305, 4 Atl. 513.

An employee [illegible] by [illegible] from piece of iron [illegible] to [illegible] in operation may [illegible] recover [illegible] his employer for the injury. The negligence in the case, if any, was that the foreman of the [illegible] prop[illegible] erly seeming the [illegible] *Pabst* v. *Parlish Mfg. Co.* (1889) 12 Pa. 387, 17 Atl. 621.

Where an engineer hoisted a bucket with plaintiff in it from a shaft, with

this rule is not qualified by any doctrine analogous to that which will be shown in the following sections, will often enable a s

such speed as to throw it against the shore, the court said that this was negligence, irrespective of whether the bucket contained a man or not, and that it was, therefore, immaterial that the machinery for passing hoisting signals from the miners to the engineer was out of order and failed to work. *Trewartha v. Buchanan Gold Min. & Mill. Co.* (1892) 96 Cal. 495, 28 Pac. 571, 31 Pac. 561.

Where a foreman of a stevedore, having full charge of the loading and unloading of a vessel, called the attention of the mate of the ship to the unsafe character of a sling furnished by the vessel, and used in lowering cotton, the fact that the man at the gangway, whose duty it was to warn the men below when the cotton was on its way, failed to do so, is not, in admiralty, matter in discharge of the liability of the vessel, but only in mitigation of damages. *The Plover* (1888) 34 Fed. 760.

If an employee continues to use machinery after he knows it is unsafe, the master is relieved from responsibility for damages resulting therefrom to his fellow employees. *Philadelphia Iron & Steel Co. v. Davis* (1886) 111 Pa. 597, 56 Am. Rep. 305, 4 Atl. 513.

A master cannot be held liable for an injury received by a servant through the act of a fellow servant in operating, without the master's knowledge and against his orders, worn out machinery which he had condemned as being unfit for service. *Dargin v. Munson* (1864) 9 Allen, 400, 85 Am. Dec. 770, where this illustration is given, *arguendo*, to indicate the dividing line between injuries attributable to the personal negligence of the master and the negligence of a fellow servant.

In *Groves v. Wimborne* [1898] 2 Q. B. 402, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47 Week. Rep. 87, Vaughan, L. J., argued as follows: "Suppose a case in which the master has provided the most perfect and efficient fencing for the machinery that could be, but some person on a particular occasion deliberately leaves the fencing off, or removes it. An obvious answer to an action against the master in such a case would be that the cause of the damage to the plaintiff was not the failure by the master to perform his statutory duty, but the particular action of someone else. I am not satisfied that, if it could be shown that it was a fellow ser the person injured whose conduct dealing with the fencing was t of the injury to the plaintiff. fense of common employment w apply."

No liability arises under March 3, 1870, Pamph. Laws viding for fencing off dangerous ery in mines), where proper was made and the fence wa by a coemployee. *Honor v.* (1880) 93 Pa. 475.

Unfitness of the delinquent A coupler run over by cars whi being switched on to a siding cover on the ground of the in of his foreman, where the evidence that the proximate cause of the was the carelessness of a fellow in prematurely cutting them off. *Coal Co. v. Keegan* (1897) 97 105, 51 U. S. App. 189, 82 Fed.

An employer cannot be held liable an injury to a servant, on the that it was due to the incompetency a fellow servant, where the fitness such servant to start machinery is legal to be the cause of the injury, the evidence is that the foreman st it, and that the servant was subsequently injured by having his arm caught certain cogwheels. *McGourty v.* (1894) 161 Mass. 51, 36 N. E. 682.

The negligence of a conductor in s ing his train in violation of a rule quiring him to await orders at a tion, and not his sickness, is the pro mate cause of a collision which re from the setting of the train. *Jo ston v. Pittsburgh & W. R. Co.* (18 144 Pa. 443, 7 Atl. 181.

A conductor's ignorance of the con of the road over which he was leading train is not shown to have had any b connection with an injury received his fireman in a collision with which escaped from a siding, where evidence is that they would not ha done this if a fellow servant of plaintiff had not violated a rule of company in leaving them on the sid without setting the brakes. *Cooper New York, O. & W. R. Co.* (1898) App. Div. 383, 49 N. Y. Supp. 18

Inadequate number of servants.— T insufficiency of the number of men on train will not render a railway compa liable, where a brakeman is injure through the carelessness of anothe

brakeman. *Hayes* v. *Western R. Corp.* (1849) 3 Cush. 270.

That the failure of a railway company to have the usual number of brakemen on a train at the time plaintiff, while making a coupling, was injured in consequence of a wagon's being left too near the track, was the proximate cause of the injury cannot be predicated of a case where it was in full view of the fireman, and he might, if he had chosen, have warned the plaintiff. *Connors* v. *Elmira, C. & N. R. Co.* (1895) 2 Hun. 339, 30 N. Y. Supp. 926.

A collision which would have been avoided if a conductor had been sent with the train will not render the company liable to a servant injured by the collision, where the immediate cause of the accident was the fact that the engineer attempted to run to a certain station contrary to instructions. *Gulf, C. & S. F. R. Co.* v. *Compton* (1899) 75 Tex. 667, 13 S. W. 667.

Defective regulations.—The failure of a railroad company to provide, in addition to the usual night signal of waving a lantern, a system of oral orders for starting trains, cannot be made a ground of action, where the evidence is that such an order was in fact given, and was not understood by the negligent servant. *Peaslee* v. *Fitchburg R. Co.* (1890) 152 Mass. 155, 25 N. E. 71.

The omission of a railroad company to make a rule prohibiting "running switches" cannot be regarded as the efficient cause of an injury to a brakeman, who, with a full knowledge of the movement of a car which is being side-tracked by this method, puts himself in front of it to arrange the couplings, and, catching his foot in a frog, is knocked down and run over. The injury under such circumstances is due to his own negligence. *Sheets* v. *Chicago & I. Coal R. Co.* (1894) 139 Ind. 682, 39 N. E. 154.

The death of a brakeman and baggage master by collision is caused by the negligence of the engineer, and not by an unsafe schedule or defective rules, where the engineer of the colliding train received an order to run two hours late, but the schedule of the train struck would interfere with such order, and the general rule requires following trains to run ten minutes behind the time of the train followed. The consideration relied upon was that it was the duty of the trainmen of the colliding train to look out for the train in advance, although there was no special order. *Kennelly* v. *Baltimore & O. R. Co.* (1895) 166 Pa. 60, 30 Atl. 1014.

(b) *Liability affirmed.*—The act of the fellow-servant was held not to have broken the chain of causation in the cases cited below:

Acts of employee for whose negligence the master is responsible.—Where an inexperienced workman attempts, in obedience to orders, to start an engine which has crossed upon the center, by prying it off with an iron bar, and is injured by the engine starting quickly under great pressure of steam, catching him on the bar and throwing him into the gearing, the proximate cause of the injury is his obedience to the order and direction of the person who gave the order, and not the act of another workman who had previously opened the throttle valve so as to give the full force of steam. *Cartsale Coal Co.* v. *Turk* (1893) 147 Ill. 120, 35 N. E. 467, Affirming (1893) 47 Ill. App. 332.

Where an engineer in charge of the second of two engines drawing a train was injured in a collision, in an action to recover for his injuries it is proper to instruct the jury that, though the engineer on the first engine of plaintiff's train was negligent in running past the block signal, he was entitled to recover if the proximate cause of the injury was the gross negligence of the train dispatcher in disobeying a rule that there should always be at least one station between those at which opposing trains received meeting orders. *Cincinnati, N. O. & T. P. R. Co.* v. *Roberts* (1901) 23 Ky. L. Rep. 264, 62 S. W. 901.

The premature loading of the second platform of a freight elevator under the direction of the master's representative, and not the giving of a signal by some coservant to start the elevator while the loading was in progress, is the proximate cause of an injury caused by the dropping of a part of the load upon a workman who had been sent to repair the guides of the elevator. *Wells* v. *Bourdages* (1899) 88 Ill. App. 473.

The act of the superintendent of a mill in starting machinery while an employee is engaged in oiling it is the proximate cause of the injury to such employee, rather than the starting by another employee of an independent portion of the machinery, which would not interfere with the oiling. *Huehlett* v. *Ozark Lumber Co.* (1893) 53 Mo. App. 87.

The proximate cause of an injury sustained by the fall of a beam is the negligence of the foreman who removed the props, and sent the injured employee into a position of danger, and not the

carelessness of a fellow servant who accidentally stepped on the beam and caused it to fall. *Kansas City Car & Foundry Co.* v. *Secrist* (1898) 59 Kan. 778, Appx. 54 Pac. 688.

The negligence of an engineer in running so rapidly that a brakeman is unable to get down and act as a flagman after setting brakes to control the movement of a portion of a train which has broken apart, while backing down to couple on to the detached portion, is not the proximate cause of injury to such brakeman in attempting to pass from one car to the other, by their separating through a defective coupling pin. *Terre Haute & I. R. Co.* v. *Mansberger* (1895) 12 C. C. A. 574, 24 U. S. App. 551, 65 Fed. 196. Rehearing Denied in (1895) 14 C. C. A. 506, 24 U. S. App. 687, 67 Fed. 67.

The act of an engineer, who left an engine in a dangerous position in charge of an inexperienced fireman, may justifiably be found by a jury to be the proximate cause both of an act of the fireman in putting the engine in motion, and of an injury to a conductor who was thrown off while endeavoring to stop the train. *Mexican Nat. R. Co.* v. *Mustte* (1893) 7 Tex. Civ. App. 169, 24 S. W. 520. Affirmed in (1894) 86 Tex. 708, 24 L. R. A. 642, 26 S. W. 1075.

Dangerous conditions in the place of work.—In an action by a railroad brakeman against the company for injuries from coming in contact with the chain of a derrick allowed to swing across the track, proof that, upon the completion of the derrick, the mechanic who constructed it, and whose authority or relation to the company is not further shown, explained to the station agent and others who expected to use it, the manner of its working and of fastening it when not in use, is not conclusive that the derrick was thereby placed by the company in the care of the station agent, so as to relieve the company from liability on the ground that the injury was caused by the negligence of a fellow servant. *Gates* v. *Chicago, M. & St. P. R. Co.* (1892) 2 S. D. 422, 50 N. W. 907.

The negligence of a fellow servant in placing an oil car in close proximity to the locomotive of a train is not a defense to actions against the company for the death of the fireman and engineer by the giving away of an embankment across a marsh, although the oil ran into the cab of the engine after the accident, and, in burning, destroyed their bodies. *Farmers' Loan & T. Co.* v. *Toledo, A. A. & N. M. R. Co.* (1895) 67 Fed. 73 (defective track held
been the sole cause of the derai

Where the misplacing of a
due to its not being properly
against intermeddlers, is the gr
of the complaint, the fact that
gineer may have run the train
has no such direct connection w
failure to guard the switch that
or a jury is obliged to hold that
cessive speed was the proximate
of the accident. *Rombough* v.
(1900) 27 Ont. App. Rep. 32.

Where there was some evidence
employees were smoking cigarett
scuffling in a caboose in which
plosion of dynamite occurred, by
plaintiff was injured, the refu
give an instruction that, if the
found the explosion might have
caused thereby, and that there wa
as much probability that it hap
in that way as by sparks from t
gine coming through the open do
the caboose, then they should fin
the defendant, was not error, sin
railway company had not exercise
highest degree of care imposed on
reason of its custody of such a d
ous explosive. *Rush* v. *Spokane*
& N. R. Co. (1900) 23 Wash. 50
Pac. 500. This case seems to have
really one of concurrent negligen
the part of the master and the co
ants. See § 814, *infra*. But the
made no reference to this possible th
of the evidence.

Defects in railway rolling stock.
Ellis v. *New York, L. E. & W. R.*
(1884) 95 N. Y. 546, where the wa
a buffer caused an injury to a brak
while he was trying to escape fro
caboose when a collision was impend
the court, in holding the dismiss
the complaint to be erroneous, rea
thus: "It was the duty of the def
ant [a railway company] to provid
car properly fitted, not only with
ning apparatus,—as, wheels,—stopp
apparatus,—as, a brake,—but with
fers of some kind to protect the car
its servants necessarily or lawfu
thereon from the effect of a collis
Ordinary and usual care in the eq
ment and running of a road requi
this last appliance, or some equival
contrivance, as much as it does eit
of the others. There was, in effect,
buffer, nor anything to take its place
the car upon which the intestate w
employed. Upon the evidence it may
said that its absence was the proxim
cause of the injury. It was literal
the *causa causans*. The immediate

to recover, although the negligence of a coemployee may have been a partial cause of the injury.[1]

In chapters XVII., XIX., *ante*, a large number of decisions have been collected in which the courts, assuming the correctness of the rule just stated, have discussed the question whether the act of the servant was or was not a negligent one. The cases cited below bear upon the question whether certain acts of the injured servant, which were admitted to be negligent, were the proximate cause of his injury.[2]

fect of its absence was to put the car in such condition that in case of collision of the rear its body must inevitably be impelled against the preceding car with a force to which it could offer no resistance. The death of the decedent was, therefore, caused by the omission of the defendant to place buffers where they belonged. For any useful or usual purpose the ones in question might as well have been placed on the top or at the side of the car as where they were."

Where a switchman while running to a switch was run over by cars making a "flying switch" on a dark night, and the evidence is that only one of them was provided with a brake in good working order, that there was no light on the front car, and that the company had promulgated no rules regarding "flying switches," the inference is that the company's omissions of duty in these respects, and not the negligence of the trainmen, were the proximate cause of the accident. *Chicago & A. R. R. Co.* v. *Taylor* (1873) 69 Ill. 469 (holding that the doctrine of common employment was not applicable to the facts).

Unfitness of the delinquent coservant. —A master is liable for an injury sustained by an employee because of the incompetence of a foreman who negligently directed machinery to be set in motion, although the accident was due to the direct act of a workman who started the machinery in obedience to the foreman's command. *O'Donnell* v. *American Sugar Ref. Co.* (1899) 41 App. Div. 307, 58 N. Y. Supp. 640.

The causal connection between the negligence of a road master in removing the brake rods of several cars, and leaving them heavily loaded with rails upon an inclined side track, where they are liable to be struck by other cars and set in motion, is not interrupted by the act of a conductor who, desiring to avert a derailment of the cars, opens a switch and allows them to get on the main line, where they come into collision with a train. *Breeding* v. *Wabash Western R. Co.* (1894) 124 Mo. 55, 24 S. W. 741. Affirmed in 27 S. W. 644.

[1] An instruction in an action by an employee for personal injuries that, although the plaintiff was negligent, he is not precluded from a recovery unless his negligence was "the" proximate cause of the injury, is erroneous, since the jury can infer from the use of the definite "the" that the plaintiff, though guilty of negligence which could be called "a" proximate cause of the injury, should not be barred unless his negligence was the sole cause of the injury. *Wastl* v. *Montana Union R. Co.* (1900) 24 Mont. 159, 61 Pac. 9.

[2] The negligence of the engineer of an extra train was held to be the proximate cause of his death, resulting from a collision with the rear end of a work train, where the evidence showed that he could and should have seen the signal made by a brakeman from the work train when 700 feet distant, within which distance he could have stopped, and that he was running in disregard of an order which required him to run slowly and carefully at the place of collision. *Beaumont* v. *Northern P. R. Co.* (1901) 48 C. C. A. 529, 109 Fed. 532.

The failure to give signals from a train to persons on a hand car on the track in front of the train, and of the foreman in charge of the car to warn those on board of the approach of the train, will not render the railroad company liable for injuries inflicted upon them, if they knew of the train's approach and reached the ground in time to get out of the way before the train struck the car. *Texas & P. R. Co.* v. *Pason* (1899) 34 C. C. A. 530, 92 Fed. 553.

A railroad engineer who on stopping his train in a cut failed to blow the whistle as required by the rules of the company as a signal to the brakemen to take position so as to prevent collision

811. Master liable where his own negligence intervenes, as a mate cause, between a delinquent coservant's negligence and the i
—The action is not barred by the defense of common e
ment, where the evidence shows that the master or his repres
might, by the exercise of reasonable care, have secured the in
person against the danger created by the negligence of the delin

with another train is guilty of such contributory negligence as will prevent a recovery for his death caused by such a collision, although the conductor subsequently failed in his duty to see that the brakeman went back to signal the approaching train. *Culp Jr* v. *International & G. N. R. Co.* (1897) 90 Tex. 627, 40 S. W. 388. Affirming (1897; Tex. Civ. App.) 38 S. W. 848.

A railroad employee who voluntarily places himself in front of moving cars while a kicking switch is being made cannot recover for injuries caused thereby, on the ground that the company had failed to make a rule prohibiting kicking switches unless absolutely necessary. *Sheets* v. *Chicago & L. Coal R. Co.* (1894) 139 Ind. 682, 39 N. E. 151.

Failure of a railroad company to give an employee at work on its tracks notice of the approach of a train, and the running of the train at a prohibited rate of speed, does not render the company liable for the death of such employee, where he at first got out of the way, and afterwards got in front of the engine when it was only a few feet distant. *East St. Louis Connecting R. Co.* v. *Eggman* (1895) 58 Ill. App. 69.

In *Gibson* v. *Oregon Short Line R. Co.* (1893) 23 Or. 493, 32 Pac. 295, it was contended that the rules to protect track walkers from the dangers of an approaching train, while in the discharge of their duties, were defective in not providing that the engines should whistle at frequent intervals before approaching bridges or trestles on which trackmen might be walking. It was held, however, upon the evidence disclosed by the record, that the injury was not owing either to the fact that the engine did not whistle, as required by the rules, or to the fact that the rules were defective in not requiring the engine to whistle at more frequent intervals, inasmuch as the plaintiff saw the approaching train half a mile ahead, and had ample time to retreat or step from the bridge to the cars, and there remain in safety until the train passed.

A servant cannot recover on the ground that the drawheads of tw
which he had to couple in the ya
a manufacturing company were
ferent heights, where the evidence
that the cause of the accident
he failed to withdraw his hand q
enough, after the coupling had b
cessfully made. *Dolan* v. *Rutl
Co.* (1901) 62 App. Div. 545, 71
Supp. 145.

Although contributory negligen
not predicable merely of the act
tempting to rescue an assistant fr
dangerous position in which he had
placed by reason of the defective
tion of a belt, yet a servant who re
an injury under such circumstance
not be allowed to recover, where
shown that the accident would not
happened but for the negligence of
employees in attempting to place
belt on a pulley without instruc
and without its being in the li
their duty. *Sann* v. *H. W. Johns
Co.* (1897) 16 App. Div. 252, 44 N
Supp. 641.

Where the evidence showed that
employee in a laundry was at work
an ironing machine which was op
by the pressure of her feet on a tre
throwing it into and out of g
control of the power operating the l
dry; that, in operating the machine
clothing being ironed became wrap
about the rollers of the machine;
that, while endeavoring to disengage
without removing her feet from
treadle, her hand was drawn between
rollers and burned, the pressure of
feet on the treadle of the machine w
held to be the cause of her injury, a
that she could not recover. *Doolittle
Pfaff* (1900) 92 Ill. App. 301.

An employee ordered by a foreman
assist a porter in loading boxes of gla
and injured by several boxes of gl
which the porter directed him to su
port falling upon him, cannot recov
of his employer on the ground that a
insufficient number of men were em
ployed to do the work, when there w
several employees handling boxes ne
by, and no request for assistance wa

observant. That is to say, the master's subsequent breach of duty i in law, regarded as the proximate cause of the injury, if he or his representative had actual or constructive notice of the abnormal peril introduced into the plaintiff's environment by the careless performance of the details of the work, and those precautions which a prudent man would have taken under the circumstances were omitted. See, generally, chapters X., XI., *ante*.) In this point of view the injured servant may recover on the ground that he was not warned of the

made by the plaintiff or by the porter. *Roberts* v. *Bache* (1893) 69 Hun, 255, 23 N. Y. Supp. 502.

It has been held that there was a failure to prove that the plaintiff's own heedlessness was not the cause of the injury, where the evidence was to the effect that the defendant's dye room contained four vats, each 4 feet long by 5 wide, and 2 feet 7 inches in height above a planking which circled the vat at the floor; that the planks were 8 to 10 inches wide, lying flatly on the floor, and leveled off from the vat; that there was an open frame, fitted with slats, in the vat, and a hoisting gear connected with it, by which the frame loaded with wool was lowered into and raised out of the hot dye; that to raise the frame up from the vat, two men (plaintiff and another) had to connect certain hooks and rings together in the gearing above the vat; and that, while they were leaning over the vat, on opposite sides of it, in an attempt to effect the coupling, the plaintiff slipped on the wet floor, fell into the vat, and was badly scalded. *Bessey* v. *Norichawanick Co.* (1900) 94 Me. 61, 46 Atl. 806.

The negligence of a master in failing to sufficiently caution a youth as to the proper method of operating a planer and in instructing him to operate it in a particularly hazardous manner does not render him liable for injuries to the latter while so employed, where he was guilty of contributory negligence in allowing his attention to be diverted to some girls who were passing. *Adams* v. *Clymer* (1893) 1 Marv. (Del.) 80, 36 Atl. 1104.

No recovery can be had under the English factory act of 1878 for the death of a child, caused by her own deliberate act in removing a board set up for the special purpose of guarding moving machinery, even though her employment under the circumstances was a violation of the act. Between such violation and such an accident there is no legal connection. *Morris* v. *Beaseley* (1895) 22 Sc. Sess. Cas. 4th series, 355.

The breach of a statutory provision prohibiting or regulating the employment of children will not render the master liable for an injury resulting from a risk which the child in question comprehended, and could have avoided, if he had exercised ordinary care. *Evans* v. *American Iron & Tube Co.* (1890) 42 Fed. 519.

The violation of the Michigan statute prohibiting the employment of children under fourteen years of age without the written permission of the parent or guardian will not make an employer liable for injuries to a child from falling into machinery of which he knew the danger, in a scuffle between him and another boy. *Burck* v. *Michigan Bolt & Nut Works* (1896) 111 Mich. 129, 69 N. W. 254.

The evidence tends to show that an employee properly latched the lever of a movable car used to convey molten slag from a furnace to a dump, where the lever remained in place while the car was drawn a distance of 20 rods upon a side over a rough track, and the construction of the appliance is such that it must dump instantly when the latch is released. *Forker* v. *Buffalo Furnace Co.* (1899) 41 App. Div. 84, 58 N. Y. Supp. 223, Appeal Dismissed in 160 N. Y. 665, 55 N. E. 1095.

No action can be maintained for a breach of a statute requiring mine owners to fence the tops of shafts securely, where it is shown that the servant's injury would not have been received if he had been paying proper attention to what he was doing. *Spica* v. *Osage Coal & Min. Co.* (1887) 88 Mo. 68.

The master's knowledge of the incompetency of the culpable servant is immaterial, where the efficient cause of the injury is the negligence of the plaintiff himself in voluntarily and knowingly exposing himself to the danger created by the act of the incompetent servant.

existence of the peril in question,[1] or on the ground that the physi conditions were not so altered as to remove that peril.[2]

Sheets v. *Chicago & I. Coal R. Co.* (1891) 139 Ind. 682, 39 N. E. 154, where a brakeman was killed in coupling cars which he knew to be moving at a dangerous rate of speed, and it was held that the master was not liable, although he knew that the engineer was unfit for his position.

[1] *Stoumbridge* v. *Brooklyn City R. Co.* (1896) 9 App. Div. 129, 41 N. Y. Supp. 128.

[2] "If a part of the road should become unsafe because of the neglect of such employees to make repairs, and should so continue for a length of time sufficient to induce the presumption that the company knew of it, or ought to have known of it, then it is negligent and careless, and is liable to other employees for injuries resulting therefrom." *Howd* v. *Mississippi C. R. Co.* (1874) 50 Miss. 178.

Where it appears that an employee having general charge of the tracks of a railroad company had notice that an accident had previously occurred at the place where the plaintiff, a brakeman, was injured it is error to give instructions implying that the company is not liable on the ground that the neglect to repair the track was that of the section foreman, a fellow servant of the plaintiff. Such an instruction fails to take into account the possibility of the injury being due to the company's breach of its nondelegable duties of inspecting its track, and repairing it after notice that it is defective. *Anderson* v. *Michigan C. R. Co.* (1895) 107 Mich. 591, 65 N. W. 585.

A railway company is liable if it has improperly suffered a deposit of sand to remain near the track, if the fact of its being there had been, or ought to have been, known to the corporate agents. *Robinson* v. *Houston & T. C. R. Co.* (1877) 46 Tex. 540 (conceded).

The fact that it was the plaintiff's fellow servants who erected a derrick so close to a railway track as to produce a dangerous obstruction if it fell will not excuse the company for injuries due to its falling, if it had suffered the apparatus to remain standing for an unreasonable length of time. *Holden* v. *Fitchburg R. Co.* (1880) 129 Mass. 268, 37 Am. Rep. 343.

A railway company may be held liable if a pile of ashes has been left so long on the track that the higher officials are chargeable with knowledge of conditions. *Hughes* v. *Boston & N. R. Co.* (1880) 27 Minn. 137, 6 N. 553 (evidence held not to justify inference of knowledge).

A railway company which once have known of the defective con of a plank crossing is not excused by fact that it has furnished the sec foreman with materials, and instru him to make repairs. *Pluber* v. *Shore & M. S. R. Co.* (1890) 121 M 212, 80 N. W. 23.

A railway company is liable for i ries caused by defects in a bridge, w it failed to repair after being not of their existence. *Mansfield Coa Coke Co.* v. *McEnery* (1879) 91 Pa. 36 Am. Rep. 662.

The fact that the improper adj ment of a brake rod, after loading a was due to the negligence of a coserv will not excuse the company w there was afterwards an ample op tunity for inspection. *Galveston, S. A. R. Co.* v. *Templeton* (1894) Tex. 42, 26 S. W. 1066.

A laborer injured by the fall steel ingot from a mass of such ing carelessly piled by his coservants, recover of the employer, if the e or his agents knew of the dangerous dition of the pile. *Nash* v. *Nashua & Steel Co.* (1882) 62 N. H. 406.

An employer whose duty to an ployee engaged in dressing stone in stoneyard requires him to place stone on a solid and steady surface, cure and safe to work upon and ab cannot escape liability for an injury the employee, caused by the falling on him of a stone next to that which he is working, negligently set on its edge, on the ground that omission occurred through the fault a fellow servant. *Bloodin* v. *Quarry Co.* (1894) 11 Ind. App. N. E. 812. It was considered that stone which was shown to have been securely placed and negligently suffe to remain in that condition, in c oxinity to where the appellant at work, was as much a part of place where such work was being as would have been a dangerous pit of which the plaintiff had not been prised."

In *The Frank and Willie* (1891) Fed. 494, the evidence showed that mate, after notice of the dangerous

812. — or between the negligence of the plaintiff himself and the injury.—The employer's liability cases which illustrate the rule that the negligence of the injured servant will not preclude him from recovery if the actual proximate cause of the injury was a subsequent

dition of a pile of lumber, which his own unskilfulness or negligence had brought about, and after complaint made at least an hour before the accident, refused to take the usual precautions to make the pile safe, and, in effect, required the libellant to continue work in this dangerous situation, the court said: "This was a breach of a duty owed by the ship and owners to the seaman, for which the ship and owners are liable. . . . The master was absent and the mate was not only temporarily in command, but, as mate, he was the officer having charge in unloading the cargo,—the representative of the ship and owners in the supervision of that work. His attention was specially called to the dangerous situation, its correction was requested, and the libellant was practically helpless. I do not hold the ship liable for the mate's mere negligence as a fellow workman in producing the dangerous situation, but for his refusal to remedy it when complaint was made, and the danger pointed out to him."

. . . negligence of a fellow servant in using insufficient material for, or in putting up, a scaffold from the falling of which a carpenter sustained injury, will not defeat a recovery, if the employer or his superior servant having charge of the construction of the scaffold was informed that it was not safe. *Davies* v. *Griffith* (1892) 27 Ohio L. J. 180.

In *Nereu* v. *Sears* (1892) 155 Mass. 303, 29 N. E. 472, it was held that one sued for personal injuries to a stone mason in his employ, caused by the explosion of dynamite left unexploded in a block of stone which plaintiff was dressing, is chargeable with knowledge of those facts as to the use of dynamite at his quarry which he either knew or ought to have known. His employment of competent quarrymen, and his furnishing them with proper means for preventing any dangers consequent on the use of dynamite, would not, it was said, justify him in relying on his actual want of knowledge that there had been carelessness at the quarry, as an excuse for furnishing a dangerous stone for the plaintiff's use, if, knowing all that had happened at the quarry, he would then have had reason to believe that unexploded cartridges might remain in the blocks removed therefrom. An instruction was, therefore, held correct which left the jury to say whether, considering the knowledge which the master had, or ought to have had, of what occurred at the quarry, each block should have been examined for dynamite when it was transported from the quarry or first appropriated for the work on which the plaintiff was engaged.

In *Coates* v. *Boston & M. R. Co.* (1891) 153 Mass. 297, 10 L. R. A. 769, 26 N. E. 861, the court, in commenting upon evidence that a jaw-strap had been gone for some time from which it might be inferred that the company knew of its absence, said: "We do not put our decision on the identification of master and servant, and a union of the knowledge of the corporation and the command of the conductor in one person, by a fiction. But we think the jury might have found, at least, this negligence on the part of the corporation,—that, knowing the condition of the car, it put a conductor there with men under him, having reasonable ground to anticipate that such orders would be given as were given, without warning either him or the men."

The fact that the floor of a mill has been in a dangerous condition for three hours by reason of grease left thereon by employees in the mill, is insufficient to charge the master with notice of the defect, so as to render him liable for failure to furnish safe premises. *Burke* v. *National India-Rubber Co.* (1893) 21 R. I. 446, 44 Atl. 397.

See also *Rogers* v. *Leyden* (1890) 127 Ind. 50, 26 N. E. 240 (failure after notice of conditions, to secure the roof of a mine, the unsafety of which was due to the negligence of the "mine boss"); *Lehigh Valley Coal Co.* v. *Warrick* (1898) 28 C. C. A. 540, 55 U. S. App. 637, 84 Fed. 866; *Walker* v. *Chicago & G. T. R. Co.* (1892) 90 Mich. 239, 51 N. W. 370; *Dodge* v. *Boston & A. R. Co.* (1892) 155 Mass. 148, 29 N. E. 1086; *Yaskow* v. *Gilbert* (1896) 165 Mass. 443, 43 N. E. 199; *White* v. *Eidlitz*

act of negligence on the part of the master himself or of an em
for whose defaults he was responsible, have been collected in
ante. The right to maintain the action under such circumst
established by evidence which warrants the conclusion that
in question was a culpable one, and that if it had not been com
the injury would not have been received.[1]

C. Concurrent causes.

813. Generally.— Where several causes concur to produce
results, any of them may be termed "proximate," provided it a
to have been an efficient cause.[1] The general rule applicable
cases illustrating this situation, except those in which the contri
negligence of the servant himself is involved (see § 810, *supr*

(1897) 19 App. Div. 256, 46 N. Y. Supp. 184; *Cowan* v. *Umbagog Pulp Co.* (1897) 91 Me. 26, 39 Atl. 310.

In *Bryant* v. *New York C. & H. R. R. Co.* (1891) 81 Hun. 154, 30 N. Y. Supp. 737, the material elements discussed were the engineer's violation of a rule as to speed at switches, and the company's knowledge of habitual violation of such rule, and failure to take appropriate precautions. The actual decision was that the company was not negligent.

A nonsuit is erroneous where plaintiff offered to prove that defendant knew of the insecurity of the place of work, caused by the coservant's negligence. *Wallin* v. *California Horseshoe Co.* (1894) 105 Cal. 77, 38 Pac. 535.

[1] Leaving a switch turned upon a track on which freight cars are standing, in the ordinary manner, does not render the railroad company liable for the death of a section hand, caused by his jumping off a "push car" while going down a steep grade to avoid running into the freight cars, where the switch is not ordinarily used by a push car. In the ordinary use of such a car it could make no difference upon which track the switch was turned, as it was commonly lifted from one track to another. *York* v. *Kansas City, C. & S. R. Co.* (1893) 117 Mo. 405, 22 S. W. 1081.

A railroad company is not liable for an injury to an employee who was guilty of contributory negligence, merely because other employees, not fellow servants, saw the former after he had placed himself in a perilous position, but not under such circumstances as necessarily to apprise them of t
that his position was perilous
souri, K. & T. R. Co. v. *Collins*
15 Tex. Civ. App. 21, 39 S. W.

The servant is not debarred f
covering for injuries directly d
specific wilful act of the maste
principal, merely because he kn
similar acts had previously be
mitted by the same man. *Gulf,*
F. R. Co. v. *Brentford* (1891)
619, 23 Am. St. Rep. 377, 15 S
(intoxicated superintendent h
shouts prevented the plaintiff
hearing properly his foreman's w
command by which the loading o
was being regulated). The cour
"When the cause of the injury is
rect act of the master or his repr
tive, it cannot be said that the
remaining in the employment
proximate cause of the injury
though the servant may have
that the master or his represe
had frequently done the same or
acts, which imperiled his safet
the act which in such case causes
jury is the wrongful act of the
or of his representative, the re
the exercise of the will of the one
other, and hence the proximate c
the effect from which the master
not to be permitted to go free fr
bility on the ground that the
knew he had, before the happeni
the injury, done acts such as that
which the injury resulted, but st
mained in his service."

[1] *Young* v. *Syracuse, B. & N.*
(1899) 45 App. Div. 296, 61 N. Y.
202.

that, in order to establish the right of action, it is merely necessary to show that one of the co-operating causes of the injury was a culpable act or omission for which the master was responsible.[2] This rule holds good whether the other causes were also defaults for which he was responsible,[3] or were due to some event or some conditions for which he was not required to answer.[4]

[2] "If the injury is the result of the negligence of the defendant and of a third person, or if an inevitable accident or an inanimate thing has contributed with the negligence of the defendant, the plaintiff may recover if the negligence of the defendant was an efficient cause of the injury. *Pullman Palace Car Co.* v. *Leach* (1892) 143 Ill. 245, 18 L. R. A. 215, 32 N. E. 285.

"It is no defense in an action for a negligent injury that the negligence of a third person, or an inevitable accident, or an inanimate thing contributed to cause the injury of the plaintiff, if the negligence of the defendant was the efficient cause of the injury." *The Joseph B. Thomas* (1897) 81 Fed. 578. In this case it was expressly decided that the rule is the same in admiralty as it is at common law.

"If the negligence of the company contributed to, it must necessarily have been an immediate cause of, the accident, and it is no defense that another was likewise guilty of wrong." *Grand Trunk R. Co.* v. *Cummings* (1882) 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493.

"One is liable for an injury caused by the concurring negligence of himself and another to the same extent as for one caused entirely by his own negligence." *St. Louis, I. M. & S. R. Co.* v. *Needham* (1895) 16 C. C. A. 457, 32 U. S. App. 635, 69 Fed. 823.

Where the evidence was sufficient to support a finding that the negligence alleged was a proximate cause of an injury to a servant, without which the injury could not have occurred, it was error not to submit the case to the jury, though another defect was also a proximate cause of such injury. *Scandell* v. *Columbia Constr. Co.* (1900) 50 App. Div. 512, 64 N. Y. Supp. 232.

In *Murtaugh* v. *New York C. & H. R. R. Co.* (1888) 49 Hun, 456, 3 N. Y. Supp. 483, the following charge was held to present the doctrine of concurrent causes erroneously: "If the accident was the joint result of the internal construction [of the wheel] and of its being out of true, the joint result of those two causes, then the fact that the company might not or would not be responsible for it because of its being out of true would not relieve the company from the liability with reference to the other. That is to say, if a result happens jointly from two causes, and the defendant is chargeable with one of those causes, then, so far as that point could be concerned, so far the defendant would be liable unless the plaintiff himself was chargeable with the other cause. . . . The vice of this charge," said the court, "rests in the fact that the jury were instructed that the defendant was liable to the plaintiff for any act of negligence, which, concurring with another act for which it was not liable, produced the plaintiff's injury, although the accident might have occurred without the negligence for which defendant was liable."

[3] Proof of the negligence of a railroad company in failing to furnish a reasonably safe truck, which is charged in the petition as negligence and as the proximate cause of injury to plaintiff, is sufficient without proof of other acts of negligence which are also alleged to have been proximate causes of the injury. *Galveston, H. & S. A. R. Co.* v. *Tutts* (1897; Tex. Civ. App.) 42 S. W. 255.

"That the jumping of a tender from the track was not due to the company's negligence does not exculpate it from the liability for damages for the death of a brakeman caused by the derailment of the train, where the train would not have been derailed but for the rotten cross-ties and the consequent spreading of the tracks. *Wright* v. *Southern R. Co.* (1898) 122 N. C. 959, 30 S. E. 318.

If the accident was caused by both a patent and a latent defect the plaintiff is entitled to recover. *Hanary* v. *Parbury* (1887) cited in Queensland Digest, col. 177.

Where the engine of another railroad was called on to assist defendant's train, as was customary, and the negligence of the other company co-operated

814. Master liable where his own antecedent negligence and a quent delinquency of a coservant are both efficient causes of the

—*a. Generally.*— The most numerous instances of the predic adverted to at the end of the last section are furnished by th

with that of defendant to cause an accident whereby defendant's servant sustained injuries, defendant was held to be severally liable for such injuries as a joint tortfeasor. *Galveston, H. & S. A. Ry. Co.* v. *Adams* (1900) Tex. Civ. App.) 55 S. W. 803, Affirmed in 94 Tex. 160, 58 S. W. 831 (this point not discussed).

The fact that a switch through which a train ran was displaced by a trespasser will not absolve the company, where it appears that the accident would not have happened if a light had been replaced at the switch when it was brought into use again after having been closed for a time. *Town* v. *Michigan C. R. Co.* (1890) 84 Mich. 214, 47 N. W. 665.

A railroad company is liable to an employee for injuries caused by the escape of a freight car from a side track onto the main track, whereby a collision occurred, if the car was negligently allowed to remain without sufficient braking or blocking, though some unknown person contributed to the accident by unbraking the car. *Galveston, H. & S. A. R. Co.* v. *Johnson* (1900) 24 Tex. Civ. App. 180, 58 S. W. 622, holding that an instruction exonerating the company from liability if the jury found that there had been interference by a third person had been properly refused.

The fact that elevator cables put in by an independent contractor were pulled out from their fastenings was not alone the proximate cause of an injury sustained by an employee by the fall of the car, where the safety device was in a defective condition, and refused to work; but both of such defects contributed proximately to the injury. *McGregor* v. *Reid, M. & Co.* (1899) 178 Ill. 464, 69 Am. St. Rep. 332, 53 N. E. 323, Reversing (1898) 76 Ill. App. 610.

Recovery was allowed where a third person moved an elevator car to a higher floor, and the gate of the shaft, being in bad repair, did not close, as it should have done, when the car began to ascend, the consequence being that the plaintiff, not knowing that the car had moved, fell into the shaft. *Larkin* v. *Washington Mills Co.* (1899) 45 App. Div. 6, 61 N. Y. Supp. 93.

In a case where a complaint alleged that plaintiff was injured by the rock from the roof of a mine defendant failed to furnish a safe place for plaintiff to work, ligently allowed the roof of the remain in an unsafe condition failed to properly brace it, and was liable to cave in unless supported, and the evidence the roof of the mine was in a dangerous condition, but the slate was immediately caused by tempt of a mining engineer to a small portion of the slate in plug for a sight, it was held limit plaintiff's right of recover showing that the roof fell from weight, and not in connection wi other cause. *Freeman* v. *Sand Coal Co.* (1901) 25 Mont. 191, 347. The instruction was held misleading on the ground that the plaint did not, by its own terms logical inference, exclude all cept gravity pulling down unsup material.

In the following cases the servan held entitled to recover, where the ter's negligence co-operated wit event falling within the category cidents: *Taylor* v. *Felsing* (1896 Ill. 331, 45 N. E. 161 (injury partly by failure to provide mea throwing machinery out of gear partly by accidental slip); *Ro Mayfield* (1891) 82 Tex. 234, 18 305 (defective culvert under a r gave way, owing to the breaking dam on adjoining property abov culvert); *Bonner* v. *Wingate* (189 Tex. 333, 14 S. W. 790 (a case gr out of the same accident); *Hus Jacob Dold Packing Co.* (1894) 5 App. 322 (hot-water tank left unco —plaintiff slipped); *Springside Min Co.* v. *Grogan* (1896) 67 Ill. 487 (owner of a coal mine, who n gently left the mouth of an air to the mine unprotected,—held li for the death of an employee caus a barrel falling down the shaft though a sudden and violent gus wind contributed to the accident); *York, T. & M. R. Co.* v. *Green* (1 90 Tex. 57, 38 S. W. 31, Affirmin regard to this particular point (1 Tex. Civ. App.) 36 S. W. 812 (rail

in which one of the causes of the injury was the negligence of a co-servant of the injured person. It is well settled that a servant's action is not barred by the defense of common employment, where a breach of duty on the master's part contributed as a proximate cause to the injury.[1]

In many of the cases cited in chapter XXXII., *ante*, this rule is ad-

company liable for an injury to an engineer in an accident caused by collision with a yearling on the track, co-operating with a defect in the track); *Texas & P. R. Co.* v. *Mogrill* (1897) 15 Tex. Civ. App. 355, 40 S. W. 188 (railroad company held liable for the death of an employee caused by the tipping over of an engine, because of the rottenness of the railroad ties, although it had previously been derailed by collision with a horse without any negligence on the part of the company).

Where plaintiff was injured in a collision between a passenger train and a freight car which had been blown out of a siding by a high wind, it is proper to charge the jury that, if they find that the negligence of defendant in leaving the car on the siding without its wheels blocked or brakes set, and the high and unprecedented wind storm, were concurring causes of the collision and plaintiff's injuries, then their verdict should be for the plaintiff. *Galveston, H. & S. A. R. Co.* v. *Lynch* (1899) 22 Tex. Civ. App. 336, 55 S. W. 389.

Where, in an action for the death of plaintiff's father by failing to supply suitable props to support the roof of the mine where he worked, there was some evidence that deceased had disease of the heart, which might cause his death if he received a severe shock, an instruction that if the jury believed that deceased had heart disease, and died of it, they must find for defendant, though they believed the fall of the roof hastened his death, was properly refused, since, if the fall of the roof produced a shock from which deceased did not rally, such fall was the proximate cause of death. *O'Fallon Coal Co.* v. *Laquet* (1900) 89 Ill. App. 13.

Where an employee is injured while engaged in an unusually dangerous service (here the repairing of cars) there is always a preliminary question to be settled, *viz.*, whether the master has used "all reasonable and necessary means to protect him against any superadded danger that might be reasonably expected to arise from extrinsic causes." *Missouri P. R. Co.* v. *Watts* (1885) 63 Tex. 549.

The rule that a servant takes the risk of the service, including the negligence of the coservants, presupposes that the master has procured proper servants and proper machinery for the conduct of the work; and if the master is negligent in these respects, and injury results to a servant from such neglect, the master is liable, although the immediate negligence is that of the fellow servant. *Craig* v. *Chicago & A. R. Co.* (1893) 54 Mo. App. 523.

Whenever the evidence suggests that the injury may have been caused by the combined operation of the negligence of the master and of a coemployee, the proper course is to submit the question of the master's liability to the jury under proper instructions. *Stringham* v. *Stewart* (1885) 100 N. Y. 516, 3 N. E. 575. Reversing on this ground (1882) 64 How. Pr. 5.

In *Grand Trunk R. Co.* v. *Cummings* (1882) 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493, an instruction was upheld which in effect declared that if the negligence of the defendant company contributed to, that is to say, had a share in producing,—the injury, the company was liable, even though the negligence of a fellow servant of the plaintiff was contributory also.

It is error to refuse an instruction embodying the principle stated in the text, if the evidence is susceptible of the construction that there was concurrent negligence. *Haupin* v. *Texas & P. R. Co.* (1900) 40 C. C. A. 234, 99 Fed. 49.

When it is alleged in the declaration that the plaintiff was injured by reason of a defective switch, and one of the defenses was that he was himself in fault in that he was violating the rules of the company by running at a forbidden rate of speed when he was passing switch, it is error to charge the jury that, if this increased speed was caused by the fault of other employees of the company, they should find for the plain-

verted to under what may be called its negative aspect, the c
merely stating in the course of their arguments that the evidence
not show any such ground of liability.[2]

tiff. Such a charge puts the case wholly on the question as to who was at fault for the speed with which the cars approached the switch, and leaves out of view altogether the other question, whether the master was at fault as to the switch, and tells the jury to find for the plaintiff if the increased speed was the fault of other employees than the plaintiff's husband. *Georgia R. & Bkg. Co.* v. *Cole* (1871) 52 Ga. 410.

In an action against a railroad for injuries to an employee, caused by a fireman jumping from an engine and striking against plaintiff, where plaintiff based his right of recovery on the negligence of the engineer in failing to obey a signal, and the negligence of defendant in equipping the train with insufficient brakes, the refusal of an instruction that, if the fireman jumped because of the negligence of a fellow servant of plaintiff (fireman) in displaying an improper signal, plaintiff could not recover, is not erroneous, since such instruction did not submit the question of the negligence of the engineer and the lack of sufficient brakes. *Galveston, H. & S. A. R. Co.* v. *Jackson* (1900) 93 Tex. 262, 54 S. W. 1023, Affirming (1899; Tex. Civ. App.) 53 S. W. 81.

In an action by a brakeman against a railroad company for injuries, an instruction that, if the negligence of a fellow servant in signaling the engineer to back the train concurred with the negligence of defendant in failing to maintain safe and sound couplings, in producing plaintiff's injury, the concurring negligence of the fellow servant did not affect the liability of the company, and it was liable for the injuries as theirs, if only was at fault, is properly refused, since it would allow a recovery without showing that the master's negligence proximately contributed to the injury. *McCoy* v. *Norfolk & C. R. Co.* (1901) 99 Va. 132, 37 S. E. 788.

On the other hand it is not error to refuse an instruction disregarding the rule stated above, where the facts are such that it may render the master liable. *Union Show Case Co.* v. *Blindauer* (1898) 75 Ill. App. 358; *International & G. N. R. Co.* v. *Zapp* (1899; Tex. Civ. App.) 49 S. W. 673; *Dodd* v. *Bell* (1897) 15 App. Div. 258, 44 N. Y. Supp. 198.

Where an accident is partly c
ly the fact that an appli
fective and partly by the
the plaintiff's fellow servants,
struction that plaintiff could not r
for any act of theirs is properly
Ohio & M. R. Co. v. *Stein*
Ind. 61, 39 N. E. 216; *Mor*
Hughes (1893) 65 Vt. 553, 27 Atl

An instruction to the effect th
the excessive speed of the train
uted to cause an accident, the
could not recover, is rightly
where an essential cause of the
was a defective wheel. *Houston*
C. R. Co.* v. *Kelly* (1896; Tex.
App.) 35 S. W. 878.

Where the plaintiff avers that he
injured through the negligence of
road receivers in failing to
sate track, and adduces evidence
port of his averment, it is not er
refuse an instruction to the
he cannot recover "if his injury
caused by the negligence of
neer." The word "solely" should
serted before "caused" to make
charge proper. *Missouri, K. & T.
Co.* v. *Woods* (1894; Tex. Civ. App.
S. W. 741.

There is no error in a charge to
effect that the plaintiff, a fire
entitled to recover for injuries
by the derailment of his engine, "if
of the proximate causes of the
without which it would not have
pened," was the unsafe condition of
wheel or a brake, "notwithstanding
negligence of the engineer or brak
may have contributed to the accident."
Such a charge does not amount to a
rection to find for the plaintiff und
the supposed circumstances, "although
the negligence of the fellow servant
may have caused the injury." *St.
Louis & S. F. R. Co.* v. *McClain* (1893
80 Tex. 85, 15 S. W. 789.

An instruction that a brakeman, i
jured while coupling, could not recover
if his injury was caused by the neg
gence of the engineer, and that no
bility attached unless the "defendan
alone was negligent," and "its negl
gence produced the injury," is sufficien
ly favorable to the defendant. *Wrig
v. Southern P. Co.* (1896) 14 Utah, 58
46 Pac. 374.

[2] For instances of this incidental re

In its positive form the rule has been enunciated in various ways. The subjoined statements will serve as sufficient examples of the phraseology employed.[3]

ognition of the rule with respect to the hiring of competent servants, see *Hall* v. *Johnson* (1865) 3 Hurlst. & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 13 Week. Rep. 111; *M'Carthy* v. *Bristol Shipowners' Co.* (1883) Ir. L. R. 10 C. L. 384; *Colton* v. *Richards* (1878) 123 Mass. 484; *Darst* v. *Carnegie Steel Co.* (1896) 173 Pa. 162, 33 Atl. 1102; *Crawford* v. *Stewart* (1887; Pa.) 6 Cent. Rep. 140, 8 Atl. 5; *Benn* v. *Null* (1883) 65 Iowa, 407, 21 N. W. 700; *Brady* v. *Norcross* (1899) 172 Mass. 331, 52 N. E. 528.

The fact that the master did not fail to supply a sufficient amount of materials for the preparation of the instrumentalities, supposing this to be the limit of his obligation, is referred to in *Kimmer* v. *Weber* (1897) 151 N. Y. 417, 56 Am. St. Rep. 630, 45 N. E. 869; *McConc* v. *Gallagher* (1897) 16 App. Div. 272, 44 N. Y. Supp. 697; *Crawford* v. *Stewart* (1887; Pa.) 6 Cent. Rep. 140, 8 Atl. 5; *Kelley* v. *Norcross* (1877) 121 Mass. 508; *Brady* v. *Norcross* (1899) 172 Mass. 331, 52 N. E. 528; *Donnelly* v. *Brown* (1887) 43 Hun, 470.

"It was the duty of Walker, as employer or principal, to provide the men employed to build this bridge with suitable machinery and appliances, to furnish materials sufficient in quantity and suitable in character, to employ men who were reasonably competent to do the work for which they were wanted, and to give them the benefit of the services of a reasonably competent foreman. All this, as we understand the evidence, was done. If so, the employer had filled the measure of his legal liability to his workmen." *Ross* v. *Walker* (1891) 139 Pa. 32, 23 Am. St. Rep. 160, 21 Atl. 157, 159.

[3] "Negligence of a servant does not excuse the master from liability to a coservant for an injury which would not have happened had the master performed his duty." *Coppins* v. *New York C. & H. R. R. Co.* (1890) 122 N. Y. 557, 19 Am. St. Rep. 523, 25 N. E. 915, Affirming (1888) 48 Hun, 292; *Cheeney* v. *Ocean S. S. Co.* (1893) 92 Ga. 732, 44 Am. St. Rep. 113, 19 S. E. 33.

"That a fellow servant may, by care and caution, operate a defective and dangerous machine so as not to produce an injury to others, does not exempt the master from his liability for an omission to perform the duty which the law imposes upon him of exercising reasonable care and prudence in furnishing safe and suitable appliances for the use of his servants. The rule which excuses the master under such circumstances presupposes that he has performed the obligations which the law imposes upon him, and that the injury occurs solely through the negligence of the coemployee." *Stringham* v. *Stewart* (1885) 100 N. Y. 516, 3 N. E. 575.

"Where the injury to the servant has been occasioned by the default of a fellow servant, concurring with the negligence of the master, the latter is liable as though he, only, were at fault." *Norfolk & W. R. Co.* v. *Nuckols* (1895) 91 Va. 193, 21 S. E. 342.

"We are not prepared to say that, if one uses a dangerous instrumentality without the safeguards which science and experience suggest, or the positive rules of law require, he is not to be responsible for an injury resulting from such use, because the negligence of one of his servants may have contributed to the result, or because a possible vigilance of the servant might have prevented the injury." *Coyzer* v. *Taylor* (1857) 10 Gray, 274, 69 Am. Dec. 317.

Contributory negligence of a fellow servant does not preclude recovery for an injury to an employee of which the proximate cause was the failure of the employer to furnish a suitable appliance. *Atchison, T. & S. F. R. Co.* v. *Lannigan* (1895) 56 Kan. 109, 42 Pac. 343.

A master is not relieved from liability for injury to a servant by the mere fact that the injury was partly caused by the negligence of a fellow servant, if it clearly appears that the accident would not have happened had not master himself been negligent. *Northern P. R. Co.* v. *P* (1885) 15 C. C. A. 52, 29 U. S. App. 583, 67 F. 881.

A master to be exempt from liability to a servant for negligence of fellow servants must himself have been free from negligence. *Baltimore & O. R. Co.* v. *McKenzie* (1885) 81 Va. 71.

Where the negligence of the master is an efficient cause of the servant's in-

Any complaint is good against demurrer if it alleges facts rea
ably susceptible of the construction that the injury was caused
the combined negligence of the master and a fellow servant.[1]

In order to establish a right to recover upon this theory, the serv
must show that the accident would not have occurred unless the
ter had been negligent,[5] and the jury should be so instructed.[6] A
charge the effect of which is to induce in the minds of the jury
belief that, if the master was guilty of any negligence whatever,
is liable, even though the accident would have occurred without s
negligence, is erroneous.[7]

b. Illustrative cases.—The cases cited below, in which the pr
ciples explained in the last section were applied, are classified un
headings indicative of the nature of the antecedent breach of duty
the master. The character of the fellow servant's delinquency is a
stated. Where nothing is said expressly as to the result of the de
sions it is to be understood that the servant was held to be entitled
recover.[8]

jury, it is not material how many others are also in fault. *McMahon* v. *Davidson* (1867) 12 Minn. 357, Gil. 232.

A master is not relieved from responsibility by the mere fact that a coservant knew of the abnormal conditions and did not report them. *Illinois C. R. Co.* v. *Swisher* (1895) 61 Ill. App. 611; *Mexican Nat. R. Co.* v. *Musette* (1894) 7 Tex. Civ. App. 169, 24 S. W. 529; *Noble* v. *Bessemer S. S. Co.* (1901) 127 Mich. 103, 54 L. R. A. 456, 89 Am. St. Rep. 461, 86 N. W. 520.

[4] *Young* v. *Shickle, H. & H. Iron Co.* (1890) 103 Mo. 324, 15 S. W. 771 (complaint held sufficient which showed that a platform was not protected by a railing and that a fellow servant ran against plaintiff and knocked him off).

A complaint which alleges in substance that a following train struck and splintered the car in which the plaintiff, a brakeman, was traveling, and that such car was improperly constructed, in that it had no doors or windows at the end, or cupola on the top, through which approaching danger could be seen, —is demurrable, since it fails to show in what way the construction of the car, as well as the negligence of the servants on the following train, was an efficient cause of the injury. For aught that appears from the averments, such an accident might have happened if the company had furnished the kind of car suggested by the plaintiff. *Lutz* v. *Atlantic & P. R. Co.* (1892) 6 N. M. 496, L. R. A. 819, 30 Pac. 912 (two judges dissented).

[5] *Whittaker* v. *Delaware & H. Co.* Co. (1888) 49 Hun, 400, 3 N. Y. Supp. 576.

[6] *McCabe* v. *Brainard* (1897) 17 App. Div. 45, 44 N. Y. Supp. 964.

[7] *Hall* v. *Cooperstown & S. V. R. C.* (1888) 49 Hun, 376, 3 N. Y. Supp. 58. In this case the court sustained an exception to a charge which was substantially to this effect: That if the jury found that there was negligence on the part of the delinquent coservant, and also negligence on the part of the defendant, then the defendant was liable for the reason that, if the injury was the result partially of the negligence of a coemployee, and partially by the omission of the defendant in not taking the necessary or proper precautions to protect the servant, then the negligence of the coservant would not relieve the defendant.

[8] (a) *Master held liable on the ground of concurrent negligence predicated in respect to an order, or other official act of one who was a vice principal by virtue of his rank.*—(As to the distinction between official and nonofficial acts, see generally, chapter xxix., ante.) Negligence of a fellow servant, which combined with a negligent order of the employer to produce an injury to an employee, will not relieve the employer

815. Master liable where he or his vice principal directed the details of the work.— The doctrine discussed in chapter XXXII., *ante*,

from liability. *Lapo* v. *Walsh* (1898) 98 Wis. 348, 74 N. W. 212; *Pittsburgh, C. & St. L. R. Co.* v. *Henderson* (1882) 37 Ohio St. 540 (by special order of the superintendent, which was unreasonable, a construction train was allowed to stand on the track, and through the negligence of a flagman sent to give warning of the approach of other trains was run into to the injury of a trainman).

A conductor's ordering a train to run by a station where a section foreman is waiting to give information of a defective bridge, after knowledge that there are disastrous floods and washouts upon the road, is the proximate cause of the breaking of the train through such bridge, notwithstanding the engineer fails to see a danger signal near the bridge, and himself stop the train at the bridge, where the engineer may have inferred, or does infer, that the conductor learned there was no more danger ahead and no need to stop and inquire. *Union P. R. Co.* v. *Colbaghan* (1893) 6 C. C. A. 205, 12 U. S. App. 541, 56 Fed. 988. The court said: "The negligence of the engineer was not an intervening cause that interrupted or turned aside the natural sequence of events, or prevented the natural and probable effect of the conductor' negligence. It simply failed to interpose the engineer's care to prevent this probable result, and left the natural sequence of events to flow on undisturbed to the fatal effect. It may be true that if the engineer had obeyed the danger signal on the track, or had seen the damage to the bridge and had stopped the train, the accident would not have happened; but his failure was but the co-existing or succeeding negligence of a servant, which permitted the conductor's breach of duty to work out, undisturbed, the disastrous result of which it was the primary and efficient cause."

A special finding that an injury was caused by the carelessness of a coemployee in assisting the plaintiff to carry out an order involving danger will not justify a court in entering judgment for the defendant in the face of a general verdict for the plaintiff. "It is not the law that, if a master wrongfully puts his servant in danger, to co-operate with another servant, that the carelessness of the latter, co-operating with the danger, discharges the master from responsibility." *Call* v. *Beckstein* (1898) 66 Ill. App. 478.

As a conductor has full control of his train, and is able to stop it if the engineer undertakes to run past a certain station in violation of the time-card rules, a collision which results from such negligence is deemed to be in part attributable to the conductor's breach of duty. *Illinois C. R. Co.* v. *Spencer* (1893) 93 Tenn. 173, 23 S. W. 211.

A railroad company is liable for an injury to an engine hostler caused by the negligence of the yard master in sending him toward with the engine on a track upon which the yard master has thrown some box cars in charge of a brakeman, although the negligence of such brakeman in bringing the cars too close to a switch on which such hostler is directed to take his engine contributes to the injury. *Norfolk & W. R. Co.* v. *Phelps* (1894) 90 Va. 665, 19 S. E. 852.

A railroad company is not liable for injuries sustained by a brakeman ordered by his superior to make a coupling, if the accident was occasioned by the negligence of the engineer or fireman in failing to heed signals; but if their negligence concurred with that of the superior, who had promised to stop the car in time to avoid harm to the brakeman, then the company is liable. *Louisiana Extension R. Co.* v. *Carstens* (1898) 19 Tex. Civ. App. 190, 47 S. W. 36.

An employee ruptured while attempting to support one end of a switch point being unloaded from a car may recover therefor, although the negligence of fellow servants in lifting too quickly contributed thereto, when the negligence of the foreman (a vice principal under the statute), who failed to give assistance as he had been doing, was a concurrent cause of the injury. *Missouri, K. & T. R. Co.* v. *Hannig* (1899) 20 Tex. Civ. App. 649, 49 S. W. 116.

See also *Augusta* v. *Owens* (1904) 111 Ga. 461, 36 S. E. 830 (superintendent negligently ordered plaintiff's fellow servant to do certain work, and the injury was caused immediately by the negligence of that fellow servant); *Davidson* v. *Cornell* (1890) 31 N. Y. S. R. 982, 10 N. Y. Supp. 521. Reversed in (1892) 132 N. Y. 228, 30 N. E. 573, but not on this point (unsafe method of constructing scaffold prescribed—

is manifestly no bar to a servant's action, where the particular
of the work which caused the injury was carried out under the

work negligently carried out by servants); *Norris* v. *Illinois C. R. Co.* (1900) 88 Ill. App. 614 (negligent order of a vice principal co-operated with a nonofficial act—i. e., failure to put out a signal light to warn incoming trains that track was obstructed); *Houston & T. C. R. Co.* v. *White* (1900) 23 Tex. Civ. App. 286, 56 S. W. 2d 4 (foreman of switching crew—a vice principal under Texas statute—signaled to pull a derailed car in the direction of plaintiff; concurring negligence was that of a switchman).

(b)—*in regard to the nonperformance of a statutory duty.*—The following extract from the opinion in *Cayzer* v. *Taylor* (1857) 10 Gray, 274, 69 Am. Dec. 317, is self-explanatory: "The very object and purpose of a safeguard like the fusible plug are protection against the occasional carelessness and negligence of the engineer. It is intended to be in some degree a substitute for his vigilance,—to keep watch if he nods. To say that the master should be responsible for an injury which would not have happened had a safeguard required by law been used, because the engineer was negligent, would be to say, in substance and effect, that he should not be liable at all for an injury resulting from the failure to use it."

See also *Morris* v. *Stanfield* (1898) 81 Ill. App. 264 (boy employed under the statutory age was pulled by a fellow servant into the position where he was injured).

(bb)—*in respect to the nonperformance of a personal, non-delegable duty.*—A railway company has been held liable for injuries caused partly by the negligence of an employee whose duty it was to inspect an appliance, and partly by the negligence of a coservant. *Kansas City, Ft. S. & M. R. Co.* v. *Becker* (1899) 67 Ark. 1, 46 L. R. A. 814, 77 Am. St. Rep. 78, 53 S. W. 406.

See also following subdivisions.

(c)—*in respect to a defective roadbed on railways.*—*Franklin* v. *Winona & St. P. R. Co.* (1887) 37 Minn. 409, 5 Am. St. Rep. 856, 34 N. W. 898 (negligence of railway company in not covering an open culvert where couplings had to be made concurred with negligence of conductor in requiring coupling to be made at that place); *Gulf, C. & S. F. R. Co.* v. *Pettis* (1888) 69 Tex. 689, 7 S. W. 93 (railroad company not excused breach of duty in allowing rotte to remain in its track, by the fa the trackmen were negligent in to notify it in time to avert an ac from the defect; it seems to hav assumed, though the point was n cussed, that the company had con ive knowledge of the defects); *M K. & T. R. Co.* v. *Woods* (1894 Civ. App.) 25 S. W. 741 (defective bed—disregard of signals by engi *Houston & T. C. R. Co.* v. *Kelly* Tex. Civ. App.) 35 S. W. 878 ment due to defective wheel and combined with fast running of tr *Trinity & S. R. Co.* v. *Brown* Tex. Civ. App.) 46 S. W. 926 lowed to accumulate on the track run at a reckless rate of speed); v. *Richmond & D. R. Co.* (1894) 394 (defective rail—undue spe train); *Smith* v. *Memphis & L. R* (1883) 18 Fed. 304 (similar fa *Stetler* v. *Chicago & N. W. R.* (1879) 46 Wis. 497, 1 N. W. 112 49 Wis. 609, 6 N. W. 303 (sim facts); *Morrisey* v. *Hughes* (1893 Vt. 553, 27 Atl. 205 (blocking of at the top of an incline was defect truck running on those rails was negligently).

A railroad company is liable for injuries to a brakeman who, while forming his duty of keeping a pass off the step, was struck by a train another track at a curve where tracks were too close together for safe passage of trains, although the gineer of one of the trains was negli in undertaking to pass at that po *Mulvaney* v. *Brooklyn City R.* (1892) 1 Misc. 425, 21 N. Y. Supp. In *Torian* v. *Richmond & A. R.* (1887) 84 Va. 192, 4 S. E. 339, a secti master was regarded as vice princip in respect to the repair of the track, a as a mere servant in respect to signali trains to slacken speed where the repa were going on. This is the theory the case as explained in *Norfolk & W. R. Co.* v. *Nuckols* (1895) 91 Va. 19 21 S. E. 342.

(d)—*in respect to defective switche —St. Louis, I. M. & S. R. Co.* v. *Needha* (1895) 16 C. C. A. 457, 32 U. S. App. 635, 69 Fed. 823 (injury caused b neglect of a railroad company to main tain a target upon a switch negligently

intendence, or by the direction, of the master himself, or of one of those employees who are deemed to be vice principals by virtue of

left open by fellow servants); *Bennett* v. *Long Island R. Co.* (1897) 24 App. Div. 25, 47 N. Y. Supp. 258 (train operated at excessive speed was run into an open switch not provided with a target); *Stucke* v. *Orleans R. Co.* (1898) 50 La. Ann. 188, 23 So. 342 (fellow servant allowed car to run onto siding through a defective switch, and hurt a car repairer who had not received any warning as to the risks arising from the condition of the switch); *Georgia R. & Bkg. Co.* v. *Oaks* (1874) 52 Ga. 410 (defective switch—negligent management of train); *Chicago & A. R. Co.* v. *House* (1898) 172 Ill. 601, 50 N. E. 154, Affirming (1896) 71 Ill. App. 447 (switch not provided with signal light was left open by coservant and run into by tram moving at an unlawful rate of speed); *Ellingson* v. *Chicago & A. R. Co.* (1895) 60 Mo. App. 679 (switch light was not provided—negligence of brakeman in misplacing switch and signaling for train to come on caused collision); *Monmouth Min. & Mfg. Co.* v. *Erling* (1892) 45 Ill. App. 111 (brakeman injured by the want of a lamp on a switchstand—engineer knew of defect, but failed to impart his knowledge to the plaintiff).

(e)—*in respect to dangerous objects close to railway tracks.*—*Howe* v. *St. Clair* (1891) 8 Tex. Civ. App. 101, 27 S. W. 800 (dangerous objects not removed—train negligently operated); *North Chicago Street R. Co.* v. *Dudgeon* (1899) 83 Ill. App. 528, Affirmed in (1900) 184 Ill. 477, 56 N. E. 796 (pile of stones left near track—gripman started car before plaintiff had got a proper footing thereon).

The fact that a track walker has failed to do his duty in giving notice of a possible danger to trains from the falling of a rock near the track will not excuse the company if it does actually fall. The company being bound to remove such a danger, a breach of its duty in this respect is not to be condoned because the servant deputed to look out for the danger has also failed in his duty. *Bean* v. *Western N. C. R. Co.* (1890) 107 N. C. 731, 12 S. E. 600.

Compare also last case cited in preceding subdivision, and *Gulf, C. & S. F. R. Co.* v. *Pettis* (1888) 69 Tex. 689, 7 S. W. 93, subd. C, *supra*.

(f)—*in respect to defective bridges.*—*Elmer* v. *Locke* (1884) 135 Mass. 575 (defective trestle gave way under train allowed to escape from control); *Carney* v. *Cuttaquet R. Co.* (1890) 29 N. B. 425 (road master ordered train to be taken over a defective bridge).

(g)—*in respect to the improper making up of trains.* *Moon* v. *Richmond & A. R. Co.* (1884) 78 Va. 745, 49 Am. Rep. 401 (train run at undue speed). This is the theory of the case, as explained in *Norfolk & W. R. Co.* v. *Nuckols* (1895) 91 Va. 495, 24 S. E. 342.

But the making up of trains is, by most of the authorities, deemed to be a mere detail of the work. See § 610, note 1, subd. (a), *ante*.

(h)—*in respect to the want of proper lighting of the place of work.*—*Irmer* v. *St. Louis Bowling Co.* (1897) 69 Mo. App. 47 (no proper arrangements for lighting a passageway, the result being that the plaintiff fell through a trap door left open by a fellow servant, which he might have discovered but for the obscurity); *Swift & Co.* v. *O'Neill* (1899) 88 Ill. App. 162, Affirmed in (1900) 187 Ill. 337, 58 N. E. 416 (plaintiff run down by a truck in an imperfectly lighted alley).

(i) *in respect to uncovered machinery.*—*Pullman's Palace Car Co.* v. *Harkins* (1893) 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. 932 (fellow servant ordered plaintiff to work near an unguarded shaft).

(j)—*in respect to defective scaffolds.*—*Drennie* v. *Hogan* (1891) 153 Mass. 29, 26 N. E. 237 (dropping of stone subjected a defective staging to an increased strain); *Cole* v. *Warren Mfg. Co.* (1899) 63 N. J. L. 626, 44 Atl. 647 (coservant lowered himself down onto a defective scaffold, which gave way); *Barnum* v. *Sunday* (1896) 68 Ill. App. 464 (failure of master to discover defect in scaffold concurred with negligence of fellow servant in throwing down a load of stones on it in such a violent manner as to make it fall).

(k)—*in respect to other abnormal dangers of the place of work.*—*Bourne* v. *Mesaba Iron Min. Co.* (1895) 128 Mo. 423, 31 S. W. 110 (plaintiff set to work in a place where stones were constantly falling fellow servant failed to keep watch for them); *Hancock* v. *Keene* (1892) 5 Ind. App. 108, 32 N. E. 329 (coemployee's negligence in blasting

caused injury to plaintiff, required to work in an unsafe tunnel); *Crowell* v. *Thomas* (1895) 90 Hun. 193, 35 N. Y. Supp. 936 (explosion occurred where steam was incautiously let into a barrel used for heating water, the vent of which, by the negligence of the defendant's manager, had been left plugged); *Lantee* v. *Duckworth* (1898) 19 Ind. App. 535, 48 N. E. 864 (steam negligently admitted into defective waste pipe); *Bagley* v. *Consolidated Gas Co.* (1895) 13 Misc. 6, 34 N. Y. Supp. 187 (negligence of foreman allowed a tank to move unsteadily while it was being hoisted, the consequence being that it dislodged some planks from a scaffold and they fell on plaintiff—superincumbency of the plank held to be a concurring cause of the accident); *Pzepka* v. *American Glucose Co.* (1895) 11 Misc. 131, 31 N. Y. Supp. 1049 (defective insulation of electric wires caused a fire—fellow servants were negligent in failing to put it out); *Tetherton* v. *United States Tele Co.* (1901) 165 N. Y. 665, 59 N. E. 1131, Affirming (1899) 41 App. Div. 613, 58 N. Y. Supp. 55 (excessive blast, put in when a new way was being opened for a track in a mine, brought down a large mass of rock); *Anthony* v. *Leeret* (1887) 105 N. Y. 591, 12 N. E. 561 (inadequately guarded trap door located in a passage was left open by coservant).

The continued flow of burning oil, which would have been at once checked except for the master's negligent failure to provide the usual facilities for cutting off the supply, is the proximate cause [illegible] will render him liable in case [illegible] resulting therefrom to a servant [illegible] as this would not have happened if a fellow servant had not also been negligent in failing to cut off the supply by the use of the less adequate facilities that did exist. *Pullman Palace Car Co.* v. *Lvark* (1892) 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285.

A mining company is not relieved from liability for an injury to one of its employees, caused by its negligence in failing to keep the roof of the mine in a reasonably safe condition, although the negligence of a fellow servant in performing the duties assigned to him in that regard contributed to the injury. *Island Coal Co.* v. *Risher* (1895) 13 Ind. App. 98, 40 N. E. 158, declaring that, in view of a finding that both the defendant and a mine boss had long known that the roof was unsafe, the question whether the boss was a vice princip[al] a mere fellow servant was immat[erial].

A master must respond in damag[es] an injury caused by a heavy [object] which was allowed to fall on the p[lain]tiff by a coservant, where the pl[ace] was set to work in a place where [there] was a danger of the fall of such obj[ect]. *The Magdaline* (1898) 91 Fed. 798; *Printing Press Co.* v. *Lewopke* (1[900]) 90 Ill. App. 427, Affirmed in (1901) 191 Ill. 199, 60 N. E. 968 (frame of p[rint]ing press, which had been insecu[rely] propped, fell on plaintiff).

(1) — *in respect to defective cars.*—*New Jersey & N. Y. R. Co.* v. *Young* (1892) 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. 723, Affirming (1[891]) 46 Fed. 169 (car run at improper s[peed] could not be stopped in time to av[oid] a collision, owing to its brakes b[eing] defective); *Lilly* v. *New York C. & H. R. R. Co.* (1887) 107 N. Y. 566, 14 N. E. 503 (coservants negligently ran c[ar] against a stationary one and so caus[ed] an injury which would not have b[een] received if the stationary car had [been] moved a considerable distance on [ac]count of its brake being defective); *Louis & S. F. R. Co.* v. *McCo[y]*, 7 (Tex.) 80 Tex. 85, 15 S. W. 789 (train w[ith] defective wheel was run too fast d[own] a grade); *Houston & T. C. R. Co.* v. *Kelly* (1896) Tex. Civ. App.) 35 S. W. 858 (car with defective wheel run [at] [illegible]); *Ransier* v. *Minneapolis & St. L. R. Co.* (1884) 32 Minn. 331, 20 N. W. 332 (use of defective brake by brakem[an] after discovering its condition caus[ing] collision between sections of train w[hich] had separated on a descending gr[ade]); *Illinois C. R. Co.* v. *Johnson* (1901) 95 Ill. App. 54, Judgment Affirmed in 193 Ill. 564, 61 N. E. 334 (car unsuitable for running switch was negligently used [in] coercion for that purpose); *Hoyt* v. *Whitwell* (1865) 3 Sc. Sess. Cas. 3d series, 506 (brakewagon of defective c[on]struction used in grading a railway, and improperly placed in the train to which it belonged); *Hollingsworth* v. *Long Island R. Co.* (1895) 91 Hun. 641, 3[6] N. Y. Supp. 1126 (car with defective [brake] negligently managed); *Missouri, K. & T. R. Co.* v. *Bains* (1897) Tex. Civ. App.) 40 S. W. 635 (servants negligently set cars with defective brakes in motion on an excessively steep grade); *International & G. N. R. Co.* v. *Sparks* (1895) Tex. Civ. App.) 29 S. W. 686 (injury caused partly by want of handhold and partly by leaving cars so close to the end or siding as to be dangerous

to men on trains on the main track); *Southern P. Co.* v. *Leash* (1893) 2 Tex. Civ. App. 68, 21 S. W. 563 (plaintiff working as fireman of pile-driver engine was thrown off by a jolt received from a moving car, because there was nothing to hold onto when the shock came).

Failure to furnish suitable appliances for coupling cars is actionable, although the negligence of a fellow servant also contributes to produce the injury. *Norfolk & W. R. Co.* v. *Ampey* (1896) 93 Va. 108, 25 S. E. 226 (injury to brakeman caused both by defective couplings and by excessive speed with which cars were brought together); *Gulf, C. & S. F. R. Co.* v. *Kissiah* (1893) 86 Tex. 81, 23 S. W. 578, Reversing 4 Tex. Civ. App. 362, 22 S. W. 110, 26 S. W. 242 (defect in air brakes, which allowed cars to start on a grade and roll against the car which plaintiff was repairing, combined with negligence of another car repairer or a brakeman in failing to secure the cars by hand brakes); *Donohue* v. *Brooklyn City R. Co.* (1891) 38 N. Y. S. R. 485, 14 N. Y. Supp. 639 (injury caused to coupler, partly by defective buffers, and partly by backing of engine with undue speed); *International & G. N. R. Co.* v. *Boaatz* (1898; Tex. Civ. App.) 48 S. W. 767 (defective couplings—engine negligently backed); *International & G. N. R. Co.* v. *Zapp* (1899; Tex. Civ. App.) 49 S. W. 673 (defective bumper beam—cars negligently managed); *Ellis* v. *New York, L. E. & W. R. Co.* (1884) 95 N. Y. 546 (brakeman trying to escape from an impending rear-end collision with a following train might have succeeded if the buffers between his own and the next preceding car had not been so defective as to allow the cars to come together and crush him when the collision occurred; case held to be for jury); *McMahon* v. *Henning* (1880) 1 McCrary, 516, 3 Fed. 353 (cars with defective bumpers were run together with dangerous speed); *Brinde* v. *St. Paul City R. Co.* (1893) 55 Minn. 63, 56 N. W. 461 (similar facts); *Chicago & N. W. R. Co.* v. *Gillison* (1893) 153 Ill. 264, 64 Am. St. Rep. 117, 50 N. E. 657, Affirming (1897) 72 Ill. App. 207 (accident caused partly by mismanagement of engineer in stopping the forward section of a train after it had separated owing to defects in a drawbar); *Galveston, H. & S. A. R. Co.* v. *Sweeney* (1896) 14 Tex. Civ. App. 216, 36 S. W. 800 (similar facts); *Richmond & D. R. Co.* v. *George* (1891) 88 Va. 223, 13 S. E. 429 (coupling was defective—engineer backed without a signal); *Terre Haute & I. R. Co.* v. *Mansberger* (1895) 12 C. C. A. 574, 24 U. S. App. 551, 65 Fed. 196 (accident due partly to a defective coupling pin and partly to the negligence of an engineer in backing cars too rapidly down grade); *Tacus* v. *Vicksburg, S. & P. R. Co.* (1885) 37 La. Ann. 630, 55 Am. Rep. 508 (use of cars of such unequal height as to render their buffers useless concurred with negligence of engineer in backing cars for coupling at an improper speed); *Browning* v. *Wabash Western R. Co.* (1894) 124 Mo. 55, 24 S. W. 731, Affirmed in 27 S. W. 644 (vice principal allowed brake-staffs to be removed, and left cars heavily loaded near the top of a heavy grade—negligence of fellow servant consisted in not seeing that the cars were all coupled before backing the engine against them, and in throwing the switch so that they ran onto the main line).

An employee who, while working upon the track, was struck by a fireman who sprang from a train, under apprehension of danger, as the train approached the place where repairs were being made, is entitled to recover, if the company was negligent in not having sufficient brakes on the train, and the flagman failed to give the slow signal, thereby increasing the fireman's alarm. *Galveston, H. & S. A. R. Co.* v. *Jackson* (1898; Tex. Civ. App.) 44 S. W. 1072.

In *Louisville, N. A. & C. R. Co.* v. *Berkey* (1894) 136 Ind. 181, 35 N. E. 3, where it was laid down that the negligence of a coemployee in failing to inspect the couplings on a train will not relieve a railroad company from liability for the death of a brakeman, due to defective couplings whose unfitness was known to the company or could have been known with reasonable diligence, the opinion seems to waver between the doctrine as to concurrent negligence and upon the rule that the employee performing the duty of inspection is a vice principal.

The negligence of employees of a freight train waiting upon a side track, in leaving the switch open and giving the signal that the track was clear by covering the headlight, without being signaled that the switch was closed, does not relieve the company from responsibility for the death of a fireman, on an approaching train, caused by the derailing of his engine, due to the failure to supply the red light customarily carried in the cupola of the caboose of the

freight trains, to be taken down when the train carrying it entered on a side track, which was the only red light which could be seen from the front, where the lamp specially constructed for this purpose was out of repair and had been taken to the company's shops to be repaired, and there were no other lamps in the caboose which could be used in the place provided for such light. *Denver & R. G. R. Co.* v. *Sapes* (1899) 55 Pac. 1093, 26 Colo. 17, First Appeal (1898) 23 Colo. 226, 47 Pac. 287.

(m)—*in respect to defective locomotives.*—Where a locomotive the valves of which have been leaking for several months, to the knowledge both of the company's superintendent and of the engineer, is left unattended by the latter without his taking certain precautions which would, as he knew, have prevented the escape of steam into the cylinder, the company is liable for injuries received by a car repairer as a result of the locomotive's being set in motion by such an escape of steam. *Cone* v. *Delaware, L. & W. R. Co.* (1880) 81 N. Y. 206, 37 Am. Rep. 491, Affirming (1878) 15 Hun, 172.

Where the plaintiff, while cleaning the ash pan of an engine, was injured through its sudden starting by reason of a leaking throttle, the mere fact that the accident would not have happened if a coservant had performed his duty of blocking the wheels will not prevent a recovery. *Atchison, T. & S. F. R. Co.* v. *Holt* (1883) 29 Kan. 149.

See also *San Antonio & A. P. R. Co.* v. *Harding* (1895) 11 Tex. Civ. App. 497, 33 S. W. 373 (railroad company held to be liable for the death of an engineer, caused in part by its negligence in failing to keep the headlight of switch engine in good condition, so that its position on track might be seen from an approaching train, although the yard hands may have been negligent in letting it stand upon the track); *Fowler* v. *Chicago & N. W. R. Co.* (1884) 61 Wis. 159, 21 N. W. 40 (accident caused partly by mismatched couplings and partly by negligence of engineer); *Hough* v. *Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612 (negligence of railway company in furnishing defective engine concurred with negligence of coservants in sending it out on the road); *Ohio & M. R. Co.* v. *Stein* (1891) 140 Ind. 61, 39 N. E. 246 (collision caused partly by defective condition of an engine and partly by mismanagement of the train); *Crutchfield* v. *Richmond & D. R. Co.* (1877) 76 N. C. (negligence of master in having a ive engine concurred with that engineer in using it); *Louisville R. Co.* v. *Kenley* (1893) 92 Ten 21 S. W. 326 (cars of train s jammed together by engineer warning, when brakeman was in of putting his foot upon a defectiv rest).

The liability of a railway co should be submitted to the jury an employee, while engaged in th formance of his duties, was injur a rear collision, partly owing to neglect of a fellow servant to pl tail light on the cars, and partly defective condition of the locom which disturbed the time arrange and rendered the shock of the col when it came, more severe. *Cf. Melbourne R. Co.* (1871) 2 Viet. L. (L.) 71.

(n)—*in respect to defective hand —Northern P. R. Co.* v. *Charless* (1 162 U. S. 359, 40 L. ed. 999, 16 Sup Rep. 848, Affirming (1892) 2 C. C. 380, 7 U. S. App. 359, 51 Fed. 562 (car with defective brake ran at exce speed—liability conceded, *arguendo*, posing this combination of facts to established); *Maupin* v. *Texas & P Co.* (1900) 40 C. C. A. 234, 99 Fed (same facts); *International & G. N. Co.* v. *Williams* (1896) Tex. Civ. Ap 34 S. W. 161 (same facts); *Chicago, M. & St. P. R. Co.* (1894) Wis. 284, 60 N. W. 180 (section fore was negligent in running hand car w a defective brake past a switch, a hearing warning signals).

(o)—*in regard to defective machine and tools of other kinds.*—*Pittsburg & G. Lumber Co.* (1900) La. Ann. 1109, 27 So. 654; *Murray R. Co.* v. *Murray* (1900) 42 C. C. 334, 102 Fed. 264 (breaking of defe hoisting machinery was followed by co tributory negligence of fellow servant *Anderson* v. *The Ashebrooke* (1899) Fed. 124 (fellow servants continued operate defective tackling with know ledge of its condition); *Monmouth M. & Mfg. Co.* v. *Erling* (1894) 148 I 521, 39 Am. St. Rep. 187, 36 N. E. 11 (negligence in operating defective ma chinery, for the proper repair of wh the master had not supplied proper ma terials); *Atchison, T. & S. F. R. Co.* v. *Lannigan* (1895) 56 Kan. 109, 42 Pac 343 (brakeman injured while coupling partly owing to his lantern furnishing insufficient light, and partly through the

negligence of the engineer in bringing the cars together with excessive speed); *Myers* v. *Hudson Iron Co.* (1889) 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631 (engineer negligent in operating hoisting apparatus of which brake was defective); *Craig* v. *Chicago & A. R. Co.* (1893) 54 Mo. App. 523 (assurance of safety by fellow servant, machinery being inadequate for work to be done); *Stringham* v. *Stewart* (1885) 100 N. Y. 516, 3 N. E. 575 (defective elevator); *McCabe* v. *Brainard* (1897) 17 App. Div. 45, 44 N. Y. Supp. 961 (defect in step of wagon negligently driven); *Lerkin* v. *Washington Mills Co.* (1899) 45 App. Div. 6, 61 N. Y. Supp. 93 (injury partly caused by the negligence of some third person in moving an elevator, and partly by defects in the elevator gate); *Strauss* v. *Huberman Mfg. Co.* (1898) 5 App. Div. 623, 18 N. Y. Supp. 1116 (defective part of a press, being left unfixed by foreman, fell on plaintiff's hand); *Auld* v. *Manhattan L. Ins. Co.* (1906) 185 N. Y. 610, 58 N. E. 1085, affirming (1898) 34 App. Div. 491, 54 N. Y. Supp. 222 (elevator door constructed so that it closed when a button was pressed, and could not be stopped after it had once been set in motion, was negligently raised by the operator); *Acosta* v. *Dietro & D. Sugar Ref. Co.* (1889) 24 N. Y. S. R. 748, 5 N. Y. Supp. 548 (failure to equip elevator with proper safety appliances combined with negligence of engineer in pushing it off when it had caught); *Missouri, K. & T. R. Co.* v. *Perch* (1898) 18 Tex. Civ. App. 46, 44 S. W. 317 (brake driver not properly inspected was operated with a leaky valve); *Williams* v. *New York L. E. & W. R. Co.* (1892) 2 Misc. 21 N. Y. Supp. 259 (co-servant selects defective tool from among a stock which comprised a good many which were known by the master to be defective); *Koiseo* v. *Flaccus* (1890) 138 Pa. 332, 22 Atl. 88 (shaft ran so loosely that the belt fell off and struck plaintiff—engineer was also negligent); *Dodd* v. *Bell* (1897) 15 App. Div. 258, 44 N. Y. Supp. 198 (defendant liable for injury caused by defective pulley on which belt ran, though coemployee may have been negligent in ordering plaintiff to work where such defect exposed him to danger); *Sherman* v. *Menominee River Lumber Co.* (1888) 72 Wis. 122, 1 L. R. A. 173, 39 N. W. 365 (edger-saw out of repair—feeder of machine careless in attempting to remove the plank which caused the injury).

(p)—*in respect to the employment of suitable servants.*—The negligence of a railway company in putting the delinquent servant in the position of extra man, who might be selected by the conductor to fill a vacancy, and not the negligence, if any, of the conductor in assigning him work, is the primary cause of an accident which results from his unfitness. *Mann* v. *Delaware & H. Canal Co.* (1883) 91 N. Y. 495 (negligence of the conductor said to be secondary and co-operative merely).

See also *Coppes* v. *New York C. & H. R. R. Co.* (1888) 48 Hun, 298 (derailment due partly to switch being left open by switchman known to be over-loss in the performance of his work, and partly to the negligence of the engineer).

There is also considerable authority for bringing within the scope of the rule under discussion the cases in which the negligence shown is that of the incompetent servant himself. *Galveston, H. & S. A. R. Co.* v. *Shipp* (1891) 81 Tex. 517, 17 S. W. 47; *Hockley* v. *Delaware Min. Co.* (1897) 15 Utah, 153, 62 Am. St. Rep. 936, 49 Pac. 295; *Cowan* v. *Chicago & A. R. Co.* (1893) 54 Mo. App. 523; *Oldaker* v. *New York C. & H. R. R. Co.* (1897) 27 N. Y. Week. Dig. 109, 9 N. Y. S. R. 384 (since patent engineer selected to run a disabled engine "without"); *Greer* v. *St. Louis, I. M. & S. W. R. Co.* (1884) 20 Fed. 87 (negligence of master as regards hiring of servants and framing of rules connected with the negligence of servants in operating train); *Terrell* v. *Russell* (1897) 16 Tex. Civ. App. 573, 42 S. W. 129 (negligent management of engine by incompetent engineer); *Kelley* v. *Doyle* (1891) 63 Fed. 172 (injury caused by the negligence of the master in putting a deckhand at the wheel of a tug, the consequence being that his negligence caused a collision).

Logically speaking, this is not an impossible view; but it seems preferable to regard such an infringement of duty as being, rather, the sole efficient cause of the injury in the same sense as similar negligence in respect to the provision and maintenance of the instrumentalities of work. This is the theory in a case where it was held that a workman may recover for injuries caused by the giving way of a defective brake-wheel, the result being that he was thrown off the car, where the fall was due to the oscillation produced by the sudden application of the brake while the train was being run at an excessive

rate of speed by an engineer whom the company could have known to be reckless and of intemperate habits if it had instituted proper inquiries. *Illinois C. R. Co.* v. *Jewell* (1867) 46 Ill. 99, 92 Am. Dec. 240.

In an action to recover damages sustained by the death of the plaintiff's intestate, killed, while engaged in the performance of his duties as a fireman, in a collision caused by the fact that the train, although the proper semaphore signal was not displayed, ran over an open switch from one track to another, on which it proceeded until the accident occurred, it is for the determination of the jury whether it was the duty of the switch tender (alleged to be incompetent) to display the light, whether he was negligent in that regard, and whether such negligence, together with that of the engineer, was the concurrent, proximate, and efficient cause of the accident; and nonsuit is improperly granted. *Hosford* v. *New York C. & H. R. R. Co.* (1899) 39 App. Div. 327, 56 N. Y. Supp. 933. Affirmed in (1900) 161 N. Y. 660, 57 N. E. 1112.

(p)—*in respect to the failure to employ an adequate number of servants.*—The negligence of an engineer in starting a train at the station where it is made up without seeing, as he is required by the rules to do, that the brakemen assigned to it, or a sufficient number, were aboard, will not absolve the company from the liability predicated upon its duty to see that the train does not start with an insufficient crew. *Booth* v. *Boston & A. R. Co.* (1878) 73 N. Y. 38, 29 Am. Rep. 97.

The fact that the employee who threw a bale into the hold of a ship was negligent in doing so when no "hatch tender" was there, without himself warning those in the hold, will not defeat the plaintiff's right to recover, if the defendant was negligent in failing to supply a "hatch tender." *Chesney* v. *Ocean S. S. Co.* (1895) 92 Ga. 732, 44 Am. St. Rep. 113, 19 S. E. 33.

See also *Swift & Co.* v. *Rutkowski* (1898) 82 Ill. App. 108 (negligence of coservant in handling machinery concurred with negligence in failing to employ a sufficient number of servants); *Craig* v. *Chicago & A. R. Co.* (1893) 54 Mo. App. 523 (assurance of safety by fellow servant, where there was an insufficient number of men); *Sincere* v. *Union Compress & Warehouse Co.* (1897; Tex. Civ. App.) 40 S. W. 326 (insufficient number of men furnished to handle bales of cotton, one of which fell to fall on plaintiff while it hoisted); *Wright* v. *Southe* (1896) 14 Utah, 383, 46 Pac. neer operating a defective e which, though it required a amount of attention to contro ments, the company had plac man who could observe the s brakeman engaged in coupling

Where plaintiff was injur the employ of defendant by re latter's failure to furnish su to do the work in safety it rial, so far as defendant's concerned, whether plaintiff man whom he was assisting servants. *Supple* v. *Ry.* Ill. 439, 61 N. E. 392. Reversin 89 Ill. App. 137.

(r)—*in respect to a defe tem.*—A railway employee's ri tion for injuries caused by the of a train at an illegal rate of not detected because he and charge of the train were fellow where the train was run pursu time-card promulgated by the employing him. *Bluedorn* v. *P. R. Co.* (1891) 108 Mo. 439, St. Rep. 615, 18 S. W. 1103.

See also *Hann* v. *New York C. R. Co.* (1894) 80 Hun, 71, 29 Supp. 897; *Paulmier* v. *Erie* (1870) 34 N. J. L. 151 (injury partly by arrangements requiring to be run frequently to a point trestle too weak to support a loc began, and partly by the negli the engineer in disobeying orders take his engine beyond that *Luebke* v. *Chicago, M. & St. P.* (1883) 59 Wis. 127, 48 Am. Re 17 N. W. 870 (want of proper for protection of car repairer, ering with negligence of foreman ting plaintiff to work without that he was protected); *Farer* v. (1887) 39 La. Ann. 1011, 4 A Rep. 256, 3 So. 363 (negligence servant in carrying out a faulty n of taking down a building); *P Southern P. Co.* (1899) 20 Utah, 58 Pac. 326 (no proper system fo tecting car repairers,—engineer gently backed a car against one repair).

(s)—*in respect to seeing that re tions are duly carried out.*—The m is liable where the injury compla of was caused partly by a coserv disregard of rules and partly by negligence of the master himself o

some employee for whose omissions of duty he is responsible. *Louisville, N. A. & C. R. Co.* v. *Heck* (1898) 151 Ind. 292, 50 N. E. 988 (collision due partly to the train dispatcher's neglect of rules and partly to a coservant's disobedience of other rules).

In an action by an engineer for an injury received in a collision alleged to have been due to the negligence of the train dispatcher, an instruction is properly refused, which authorizes a verdict for defendant upon a finding that the conductor had violated the rules, although the jury might further find that the negligence of the train dispatcher, either independently or concurrently with that of the conductor, was the proximate cause of the injury. *Baltimore & O. R. Co.* v. *Camp* (1900) 44 C. C. A. 451, 105 Fed. 212.

See also *Mexican C. R. Co.* v. *Glorea* (1901) 46 C. C. A. 334, 107 Fed. 356 (collision caused partly by order that two trains should meet at night at a "blind" siding, where there was no signal light, and partly by the negligence of the conductor and engineer of one of the trains in operating it without a light); *Felton* v. *Harbeson* (1900) 44 C. C. A. 188, 104 Fed. 737 (train dispatcher violated one rule, as to the delivery of an order with regard to the meeting of two trains.—engineer violated another rule by failing to have his train under control as he approached meeting point); *Cincinnati, N. O. & T. P. R. Co.* v. *Clark* (1893) 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125 (negligence of train dispatcher in moving trains.—negligence of engineer and conductor in running train too fast); *Cincinnati, I. St. L. & C. R. Co.* v. *Lang* (1889) 118 Ind. 579, 21 N. E. 317 (section hand killed by the negligence of those in charge of a "wild" train, of the danger of meeting which he had not been notified in any way when he received the special order under which he was traveling on a hand car along the track where he met the train); *Hunn* v. *Michigan C. R. Co.* (1889) 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502 (negligence of train dispatcher in failing to hold a train concurred with that of trainmen in running the train at undue speed); *Texas & P. R. Co.* v. *Eberhart* (1897; Tex. Civ. App.) 40 S. W. 1060. Affirmed in (1897) 91 Tex. 321, 43 S. W. 510 (negligence in regard to the enforcement of rules with regard to the protection of car repairers concurred with negligence of fellow servants in sending a moving car on the repair track).

(t)—*in respect to the failure to notify as to abnormal dangers.*—A superintendent who orders a trestle work above a dock to be torn down while men are at work under it, without notifying such men or their foreman that it is to be done, is guilty of negligence which will render the employer liable for injuries to one of such workmen from the tearing down of such trestle, notwithstanding the concurrent negligence of the foreman. *Northwestern Fuel Co.* v. *Danielson* (1893) 8 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 915.

An engineer injured by the derailing of his train caused by a partly open switch may recover, notwithstanding the switch was unlocked by a negligent fellow servant, where the negligence of the company in opening the switch for use after it had been abandoned for a long time, without putting on it any lights to warn the engineer of its presence or danger, was a concurrent cause of the accident. *Town* v. *Michigan C. R. Co.* (1890) 84 Mich. 211, 47 N. W. 665. "It is contended," said the court, "that the plaintiff cannot recover because the absence of the lights was not the proximate cause of the accident; that, if the switch had been locked the train would have passed safely by as it was, without any lights; and that the opening or unlocking of the switch was caused either by the intermeddling of some stranger or trespasser, or by the negligence of fellow servants of the plaintiff; that he could not recover in either event. But I do not so understand it. If the plaintiff's theory be true, the lights would have prevented any accident in the condition in which the switch was, as they would have warned the plaintiff in time to avoid the danger; so the negligence of defendant in opening this closed switch for use, without any lights to warn plaintiff of the presence of the switch or its danger, was just as much the proximate cause of the injury as was the turning of the switch rails. And it certainly was a concurrent cause; and the injury in any event under the plaintiff's theory and evidence was occasioned partly through the negligence of the defendant as to the switch lights, and partly by the condition of the switch rails, in which case the defendant would be liable."

See also *Jones* v. *Florence Min. Co.* (1886) 66 Wis. 268, 28 N. W. 207 (failure to instruct miner as to dangers of underground work in a mine.—carelessness of fellow servants in blasting in

their rank.[1] Under such circumstances his negligence must, events, be one of the efficient causes, and, in most cases, will p be the sole efficient cause, of the injury.[2]

jured such miner); *Costa* v. *Pacific Coast Co.* (1901) 26 Wash. 138, 66 Pac. 398 (injury received through an explosion of fire damp in a mine was caused partly by the failure of the defendant's agent to warn the plaintiff that there was gas in the mine and partly by the negligence of a coservant in brushing a small collection of gas in the direction of an open lamp held by the plaintiff).

Other decisions recognizing the doctrine stated in the text are the following: [illegible] v. *Central P. R. Co.* (1887) 76 Cal. 156, 1 Am. St. Rep. 22, 13 Pac. 141; [illegible] v. *Fitzpatrick* (1881) 80 Ind. 526; *Griffin* v. *Boston & A. R. Co.* (1889) 148 Mass. 143, 1 L. R. A. 698, 12 Am. St. Rep. 526, 19 N. E. 166; *Howe* v. *Sligo Furnace Co.* (1895) 62 Mo. App. 491; *Flanigan* v. *Guggenheim Smelting Co.* (1899) 63 N. J. L. 647, 44 Atl. 762; *Ill's* v. *New York, L. E. & W. R. Co.* (1881) 95 N. Y. 546; *Harvey* v. *New York C. & H. R. R. Co.* (1890) 32 N. Y. S. R. 817, 10 N. Y. Supp. 615; *Shields* v. *Robins* (1896) 3 App. Div. 582, 38 N. Y. Supp. 214; *Hollingsworth* v. *Long Island R. Co.* (1895) 91 Hun, 611, 36 N. Y. Supp. 1126; *Gulf, C. & S. F. R. Co.* v. *Johnson* (1892) 83 Tex. 629, 19 S. W. 151; *Gulf, C. & S. F. R. Co.* v. *Wagner* (1896) Tex. Civ. App.) 36 S. W. 118; *Paisley* v. *Dominion Atlantic R. Co.* (1895) 27 N. S. 498; *Texas & P. R. Co.* v. *Harpin* (1901) 26 Tex. Civ. App. 385, 63 S. W. 346.

[1] That superintendence is an official act of a vice principal, see §§ 541, 542, *ante*.

[2] An employer who fails to furnish safe and suitable lumber for the construction of a staging by the employees for use in their work, and who specially directs the use of a stringer in a specified place, is liable for an injury to an employee caused by the breaking of such stringer. *Stanwick* v. *Butler-Ryan Co.* (1896) 93 Wis. 430, 67 N. W. 723.

An employer is liable where he instructs his employees to build horses for a scaffold, to be used by the workmen in the construction of a house, from certain particular material, of which there is just enough for that purpose, and an employee is injured by the breaking of a horse made of defective material, the defect not being apparent to an ordinary observer. *Brown* v. [illegible] (1900) 46 App. Div. 516, 61 N. Y. 963. The theory of the case w the selection of the material left to the servants thereof, the express direction by the m to the material to be used cast sponsibility upon him.

That a railway company would ble if a heap of sand which injury had been deposited tr[illegible]s by its direct order wa in *Johnson* v. *Houston & T. C.* (1877) 46 Tex. 540.

A specific direction by the m a vice principal to place a [illegible] a position where it may be a servant will render the [illegible] for an injury caused by it. Bu eral order which merely mea points between which the pla will not affect him with liabil negligence of the servants who the order, in placing it so that servant receives an injury by into collision with it. *Nor. & W. R. Co.* v. *Bell* (1886) 112 4 Atl. 50.

A railway company fail[illegible] its duty to furnish a safe plac where a foreman of car repa[illegible] a car to be repaired so near leading to the repair track that ble to be struck by moving adjoining track. *St. Louis, [illegible] R. Co.* v. *Holman* (1895) 155 I 39 N. E. 573.

A master is responsible for t of a framework constructed u own supervision for the purpos ering a heavy article. *Bell Goodwin* (1886) 108 Ind. 286, 9 N 302.

In many cases where rec[illegible] been denied, the fact that there authority to do the particular caused the injury is mentioned of the grounds of the decision. example, *Curran* v. *Androscoggin [illegible]* (1897) 91 Me. 26, 39 Atl. 340; *Ann Maillard* (1858) 3 Bosw. 591.

Compare also the cases in which delinquency consists in using the instrumentalities in a manner not contemplated by the master (§ 606, *ante*), in disobeying his express orders (§ 60 *ante*).

CHAPTER XLIII.

EVIDENCE.

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816. Introductory.—The sufficiency of the evidence with reference to the specific issues which arise in actions against employers [illegible] discussed under a great variety of phases in the several parts of this [illegible] in which the doctrines determinative of those issues have been [illegible] and analyzed. In the present chapter it is proposed to give [illegible] the decisions which indicate the manner in which certain general principles of the law of evidence have been applied by the courts in cases involving injuries to servants. For a full discussion of these principles, the reader will of course consult the standard text books on the law of evidence.

A. Admissibility of Evidence.

817. Relevancy to the pleadings.—The rule which declares that evidence is admissible, or inadmissible, according as it has or has not some tendency to establish the allegations in support of which it is offered, is illustrated by the cases cited below.[1]

[1](a) *Evidence held admissible.*—Under a general allegation of negligence any evidence tending to establish circumstances contributing proximately to the injury is admissible. *Uren* v. *Golden Tunnel Min. Co.* (1901) 24 Wash. 261, 64 Pac. 174 (evidence offered was that rocks were allowed to roll down a gulch from a tunnel above the one where plaintiff was working).

Under a complaint alleging an injury caused by the defective condition of a track, evidence is admissible which shows that the accident was caused partly by the collision of the engine with a calf on the track, and partly by the defective condition of the track. *New York, T. & M. R. Co.* v. *Gre* (1896; Tex. Civ. App.) 36 S. W. 812.

Under a declaration alleging that reason of defendant's negligence in permitting the walls, roof, and supports of its mine to remain defective, and knowingly placing an incompetent and unskilful foreman in charge thereof and that in consequence of his lack ordinary competency and skill plaintiff's intestate was killed, plaintiff is entitled to introduce evidence to prove the foreman's incompetency. *Dingee* v. *Virginian* (1900) 98 Va. 247, 35 S. E. 794.

Evidence that it was impossible for one's foot to be caught in a switch frog provided with blocking such as was in

use by the defendant is admissible, in an action for the death of a switchman through having caught his foot in a frog, as tending to show that the blocking at the particular point in question was out of repair. *Paine* v. *Eastern R. Co.* (1895) 91 Wis. 340, 64 N. W. 1005.

Where the complaint alleges the negligent furnishing of defective "coupling appliances," evidence as to whether the brakeman injured had received a coupling stick is properly admitted under the allegations of the complaint, since "coupling appliances" would embrace a coupling stick, and absence thereof would make a defective set. *Youngblood* v. *South Carolina & G. R. Co.* (1901) 60 S. C. 9, 85 Am. St. Rep. 824, 38 S. E. 232.

Under a declaration alleging that defendant failed to keep "the earth, sand, and other substances" of the walls of a sewer excavation firmly in place, "by negligently suffering the excavation to remain in an unsafe condition," by suffering the earth, sand, etc., to remain in a "loose, water-soaked, and *dangerous* condition," evidence is admissible that the sides of the sewer were not properly or securely braced or shored. *LaSalle* v. *Kostka* (1901) 190 Ill. 139, 60 N. E. 72. Affirming (1900) 92 Ill. App. 91.

Where the complaint against a railroad for the negligent killing of an engineer alleges that the company failed to employ a sufficient number of men to operate its railroad in a manner safe and free from unnecessary danger to its employees engaged in operating engines or trains over its road, the plaintiff may prove that for some time previous to the accident the switch, from the negligent operation of which the accident resulted, had been operated by brakemen or trainmen whenever it was necessary to use the side track, and that the latter were seen to block it open, as it was found at the time of the accident, with a plank or iron bar, and then go away to uncouple cars. *Young* v. *Syracuse, B. & N. Y. R. Co.* (1901) 166 N. Y. 227, 59 N. E. 828. Affirming (1899) 45 App. Div. 296, 61 N. Y. Supp. 202.

Where the complaint alleges that defendant railroad company failed to give a warning, and to place a man on the front part of a car which it was dropping down a gravity in its switch yard, as was its usage and custom, which caused the car to strike plaintiff,—a clerk in the yards,—and injure him, evidence that it was the custom of the railroad company to place a man at the brake of such cars, which was sometimes in front and sometimes at the back of the car and to give a warning, should not be excluded. *Sears* v. *Duluth Northern R. Co.* (1900) 81 Minn. 337, 84 N. W. 114.

Where, in an action for negligently causing the death of a miner, by failing to furnish timber to be used as props, the declaration alleged that defendant wilfully failed to keep them at the bottom of the shaft, and was not concerned to, a question asked witnesses, whether there were any props at the bottom of the shaft at the time, was not improper, though the statute did not require them to be kept at any specified place. *Ill. Olive & S. Coal Co.* v. *Red-mocker* (1901) 190 Ill. 538, 60 N. E. 888, Affirming (1900) 92 Ill. App. 442.

In a case where an order in a mine was injured, while attending to a hot box, by having his arm caught in an unguarded gear wheel close to the farther side of the bridge tree on which the box rested, evidence that the light was a considerable distance from the box, and that there was a shadow over the box, is admissible as part of the *res gestæ* and as bearing on the question whether the plaintiff assumed the risk, and whether defendant was negligent in not guarding the wheel and in not warning the plaintiff of the danger, although the complaint did not charge insufficiency of the light as a ground of negligence. *Kucera* v. *Merrill Lumber Co.* (1895) 91 Wis. 637, 65 N. W. 374.

Where one of the issues in an action for injuries caused by the explosion of a locomotive was the cause of the explosion, any evidence was competent which tended to show what that cause was. Accordingly, the admission of evidence that it would not have occurred had the locomotive been equipped with a safety appliance was not error, though the complaint contained no allegation alleging defective construction as a ground for recovery, since any evidence tending to show the cause of the explosion was competent. *San Antonio & A. P. R. Co.* v. *De Ham* (1899) 93 Tex. 74, 53 S. W. 375.

A petition in an action to recover damages for injuries to a fireman alleging that "he was greatly, seriously, and permanently injured on his head, eye, right shoulder, hand, side, leg, hips, back, and spine, and was seriously and permanently injured for life," and that "as a result of his injuries he has become weak, inefficient and incapacitated

in his business of railroading, in which he is skilled," warrants the admission of evidence of vomiting and hemorrhages which followed soon after the injuries complained of. *Mexican C. R. Co.* v. *Glover* (1901) 46 C. C. A. 334, 107 Fed. 350.

In an action for causing the death of a railway employee, the language of an answer alleging that deceased was guilty of contributory negligence in so negligently unloading a car as to obstruct the passage of defendant's train, which was backing into the station, and that, but for said neglect, the accident would not have happened, is broad enough to warrant the admission of evidence that at the time of the injury the deceased was performing services not within his ordinary duties. *Marshall* v. *Charleston & S. R. Co.* (1900) 57 S. C. 138, 35 S. E. 497.

(b) *Evidence held inadmissible.* — Where the issue is whether the plaintiff had been sufficiently instructed as to the dangers of a machine, evidence that the machine might at a slight expense have been set up so as to be less dangerous is irrelevant. *Rock* v. *Indian Orchard Mills* (1886) 142 Mass. 522, 8 N. E. 401.

Where the petition did not charge defendant with negligence on account of the character of a switch used in its railroad yard, it was error to permit witnesses to testify as to what, in their opinion, was the safest switch to use. *Galveston, H. & S. A. R. Co.* v. *English* (1900; Tex. Civ. App.) 59 S. W. 626, Rehearing Denied in 59 S. W. 912.

Where the evidence does not indicate that plaintiff was under the influence of liquor when injured, it is error to permit evidence that he had been seen drinking, with a worthless character, two months before, or that once he had been seen intoxicated, or that he had taken a drink the morning of the accident. *Dowalt* v. *Houston, E. & W. T. R. Co.* (1900) 22 Tex. Civ. App. 493, 55 S. W. 534.

Where there is no allegation that the injury was caused by the negligence of a fellow servant, evidence on that point is not admissible. *Bowling Green Stone Co.* v. *Cupliaw* (1901) 23 Ky. L. Rep. 945, 64 S. W. 507.

Where the only negligence alleged in an action against a railroad company for injuries to an employee was its failure to carry a burning headlight or ring the bell or blow the whistle, it is error to admit testimony that the engine had no pilot or cowcatcher. *Tennessee Coal, Iron, & R. Co.* v. *Hansford* (1900) 24a. 349, 82 Am. St. Rep. 241, 2 45

Where a complaint charge[s] that defendant's servants in [the] the first section were negligent in giving decedent's section the [sig]n in not protecting the rear of [his] section by flagman, it is error to testimony to show negligence in run the two sections so close together in failing to apprise deceased of proximity of the first section. *Louisville & N. R. Co.* v. *Scrcelon* (1901) Ky. L. Rep. 1400, 60 S. W. 613.

In an action by an employee for injuries alleged to have been caused by defects in a paper cutting machine, admission of evidence of the size of paper which was being cut is error. *Howe* v. *Medaris* (1899) 183 Ill. 488, N. E. 724, Reversing (1899) 82 Ill. 515.

Defendant's evidence that the track, where an injury was received, was ballasted in the usual and [ordinary] manner, is properly excluded where there is no complaint as to the condition of the ballast, but it is alleged that there was a cattle-guard sion, surrounded by weeds, [which] a switchman. Plaintiff's intestate stepped, causing him to fall and be run over. *Lake Erie & W. R. Co.* v. *Wilson* (1901) 189 Ill. 89, 59 N. [E.] Reversing (1900) 87 Ill. App. 300.

Where the petition in an action for an injury to a fireman, caused by the explosion of the boiler of the [locomotive] engine, alleges the generally defective condition of the fire box, and [contains] specific averments as to [defects] therein, but does not mention the absence of a "soft plug," evidence [in] relation to the want of [such] plug is inadmissible. *San Antonio & A. P. R. Co.* v. *De Ham* (1899; Tex. Civ. App.) 51 S. W. 395.

In an action against an employer for injuries, where plaintiff testified that he commenced work at 2 o'clock in the evening, which was long before dark at the time of the year when the injury occurred, and there was nothing in the complaint or in plaintiff's testimony indicating that any want of light contributed to the injury, or that it occurred in the night, the exclusion of evidence as to the lighting facilities in defendant's mill was proper. *Kocher* v. *Wisconsin River Paper & Pulp Co.* (1901) 110 Wis. 645, 86 N. W. 662.

In an action to recover for the death of a fireman caused by the tender leav-

ing the track at a certain place, evidence that the train was running at a dangerous rate of speed is improper, where negligence of that kind is not pleaded. *Kahoe* v. *Wisconsin Cent. R. Co.* (1887) 70 Iowa, 561, 31 N. W. 868.

An allegation that it was the duty of defendants to employ a suitable engineer, and that they neglected to do so, does not authorize proof that a fireman, in the absence of the engineer, managed the locomotive, unless the petition also alleges that defendants authorized or allowed the fireman to do such act. *Harper* v. *Indianapolis & St. L. R. Co.* 1869) 41 Mo. 488.

A petition setting forth that plaintiff was injured through the negligence of the company in "using defective machinery," and "in running its cars," etc., cannot be supported by evidence that the injury was caused by a defect in a rail. *Waldhier* v. *Hannibal & St. J. R. Co.* (1880) 71 Mo. 514.

In an action for negligence in failing to keep the plant in a safe condition, evidence that the negligence was in employing incompetent servants, is not admissible without a specific allegation thereof. *Troughear* v. *Lower Vein Coal Co.* (1883) 62 Iowa, 576, 17 N. W. 775.

In *Dickson C. R. Co.* v. *Dolin* (1875) 32 Mich. 510, the special incompetence alleged in the proof was that, when the offending servant was awakened by the person whose duty it was to awaken and call the conductors who were to run trains, he told the caller he did not feel able to go, and the latter told him he would have to go because there was no one else to go. The court remarked that it was questionable whether the declaration averred anything which would authorize proof of general incompetence; but there was, in their opinion, no proof either that the servant was incompetent, or that there was any reason to suppose it; that question was regarded as immaterial.

Where a complaint of an employee alleging injury from a piece of hammer breaking off and hitting him charges negligence generally, and then specifies negligence in that the hammer was old and cracked, there can be no recovery on evidence that the hammer was new, and not cracked, but too highly tempered. *De La Vergne Refrigerating Mach. Co.* v. *Stahl* (1899; Tex. Civ. App.) 54 S. W. 40.

Where there is no allegation in the complaint that the defendant had been negligent in ascertaining the habits of its employee, or that it has failed to avail itself of the means of doing so, and for certain specific faults of character the proof of the general verdict tends that the plaintiff had ample means of knowledge of such habits, will be regarded as [illegible] ible the [illegible] by a court of review. *Louisville, N. O. & T. R. Co.* v. *Sheppard* (1891) 123 Ind. 240, 24 N. E. 240.

Evidence that a servant was charged to close doors of factory upon leaving it for meals, that the work would be performed is not admissible under a complaint which merely alleges an injury received from such doors on application. *Hahn* v. *Hahn* (1896) 5 Neb. 480, 66 N. W. 650.

In *Conrad* v. *Missouri P. R. Co.* (1888) 98 Mo. 62 the charge in the petition was that a hand hold was "improperly, defectively, and dangerously constructed, in this, that it was not fastened to the brake staff securely and safely," etc. The court said: "The plain meaning of this charge is that the hand hold was so constructed originally that the defect was in the design itself. Such being the cause of action alleged in order to make a good petition it was necessary to state that the company negligently or carelessly adopted that hand brake or continued to use it after ascertaining its unfitness. We are inclined to the opinion that the petition does not state any cause of action. But however that may be, it certainly was error to admit evidence that the hand brake was out of repair, and that the company neglected to repair it. No such cause of action was stated in the petition, and there was an entire failure of proof of the cause of action alleged. There was no evidence adduced by plaintiff tending to prove that the brake shod or hand hold was improperly, defectively, or dangerously constructed, but only that from use its fastening to the brake staff had been weakened."

Where plaintiff alleged that his injuries were caused by defects in machinery at which he worked, evidence that a former employee had attempted to remedy the defects while working at the same machinery is inadmissible, as it neither tended to prove defendant's negligence nor that the risk was obvious. *Smith* v. *Bromley* (1900) 175 Mass. 286, 56 N. E. 593. The court remarked that such evidence was objectionable as tending to confuse the jury by raising an immaterial issue involving the acts of third persons.

818. Materiality.— The subjoined note summarizes the effect of a few decisions turning upon the materiality of the evidence offered.[1]

819. Competency; generally.— As a general rule, any evidence is competent which tends directly to prove what the condition of the place of work or the appliance which caused the injury may have been at the time of the casualty, or which has a bearing upon the question whether, supposing that condition to have been abnormally dangerous, the employer was culpable in creating it or permitting its continuance.[1] But evidence is inadmissible where it merely goes to

[1] In an action for personal injuries occasioned to the plaintiff while in the defendant's employ by the falling upon him of a large iron pump which, loaded upon a truck, he with others was moving from one part of the defendant's works to another, if the plaintiff contends that the absence of washers on the truck constituted a defect, evidence that the purpose of washers was to prevent the wheels from rubbing against and working out the pins, and not to prevent the truck or its load from shaking, is rightly excluded as immaterial. *Gelcneck* v. *Dean Steam Pump Co.* (1896) 165 Mass. 202, 43 N. E. 85.

Testimony that knowledge of the dangerous character of a machine was brought to the attention of the master mechanic in a repair shop by the witness, within a year prior to the time of an accident to an employee for which a recovery is sought, is immaterial where the danger was obvious and therefore assumed. *Cunningham* v. *Lynn & B. Street R. Co.* (1898) 170 Mass. 298, 49 N. E. 410.

In an action against a railroad company, where the issue is whether a headlight was burning on the occasion of the accident, evidence as to defendant's custom of lighting the headlight on its engine is immaterial, and therefore inadmissible. *Tennessee Coal, Iron, & R. Co.* v. *Hansford* (1900) 125 Ala. 349, 82 Am. St. Rep. 241, 28 So. 45.

In an action for injuries received in a coal mine, where the negligence charged is that a particular pillar of coal was negligently suffered to become too thin for safely mining coal, and that shots placed in it were likely to, and did, break through and injure plaintiff, a question asked of defendant's witness as to who had charge of the laying off of rooms and pillars and work in the mine is immaterial, as the negligence thus alleged consists, in any event, of the breach of a non-delegable duty. *Eureka Block Coal Co.* v. *Wells* (1901) 29 Ind. App. 1, 61 N. E. 236.

[1] Evidence of the precautions taken for his own safety by a witness who worked in the same trench as the injured servant was admissible as bearing on the dangerous character of the trench, and to rebut any inference prejudicial to his testimony from his conduct in going into the trench. *Bartolomeo* v. *McKnight* (1901) 178 Mass. 242, 59 N. E. 804.

In an action to recover for the death of a servant, killed by the fall of a staging suspended from iron hooks, one of which broke, evidence that the owner of the hooks,—a man who had a practical knowledge of such appliances, and had tested and used them,— recommended them to the defendant's foreman, is admissible to show the extent of care exercised in selecting them. *Little* v. *Read & D. Co.* (1898) 69 N. H. 494, 43 Atl. 619.

In an action to recover damages for the death of the plaintiff's intestate, killed while descending a ladder in a mine, testimony that the witness informed the superintendent of the mine of the unsafe condition of the ladder several days before the accident, and that the latter promised to repair it, is admissible as tending to show knowledge on the part of the defendant of the unsafe condition of the ladder prior to the accident. *Reese* v. *Morgan Silver Min. Co.* (1899) 17 Utah, 489, 54 Pac. 759.

In an action for injuries sustained through the falling of a wheel from a tackle block, owing to the pin working out, if there is a conflict of evidence as to the position of the head of the pin at the time of the accident and whether it was up or down, it is error to exclude evidence offered by the employer tending to show the position of the tackle block and how it was fastened to the mast which held it. *Houston* v. *Brush* (1894) 66 Vt. 331, 29 Atl. 380.

Evidence as to the manner in which

show the existence of facts which, even if they should be established to the satisfaction of the jury, would not warrant the inference that the defendant was negligent in the premises.[2]

machinery might easily have been remedied is admissible in an action for personal injuries caused by defects in such machinery. *Belle of Nelson Distilling Co.* v. *Riggs* (1898) 20 Ky. L. Rep. 499, 45 S. W. 99.

Where employees were injured by the failing of a derrick, evidence that they saw no one inspect it, or go up the mast to oil the parts, or for any purpose, is admissible to show want of inspection. *McMahon* v. *McHale* (1899) 174 Mass. 320, 54 N. E. 854.

Evidence that a railroad company had no car inspector in a town of 7,000 or 8,000 people, through which three railroad companies jointly use a track, and in which a great deal of switching is done, is admissible as tending to negative the claim that the railroad had exercised proper care in discovering and remedying defects in cars. *Missouri, K. & T. R. Co.* v. *Crowder* (1899; Tex. Civ. App.) 55 S. W. 380.

Where plaintiff was injured by reason of an alleged defective step on a locomotive on March 31st, it is not error to permit defendant's witness to testify that on the 17th of May, and for two months before, he had observed the step, and that it was in good condition. *Powers* v. *Boston & M. R. Co.* (1900) 175 Mass. 466, 56 N. E. 710.

Before a custom of other employers can affect the rights of parties, it must be shown to be so general that their knowledge of it may be presumed. *Couch* v. *Watson Coal Co.* (1877) 46 Iowa, 17. But with that proviso it is competent on the question of the employer's negligence. See § 13, *ante*.

Evidence of a custom in a mining district, that an operating company should look after the safety of roofs of entries to the mines, and of the company's responsibility for the condition of such roofs when notified of their defects, is admissible in an action for injuries resulting from the falling of a roof. *Taylor* v. *Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 219.

Evidence that the system of block signals in use on defendant's trolley road was the same as that which had been adopted on a large number of electric railways, and was generally regarded as a sufficient protection to the servants operating the cars thereon, is competent. *Bergen County Traction Co.* v. *Bliss* (1898) 62 N. J. L. 410, 41 Atl. 837.

Evidence as to the practice of timbering up in mines similar to defendant's is competent. *Bergquist* v. *Chandler Iron Co.* (1892) 49 Minn. 511, 52 N. W. 137.

As regards a customary practice of the employer himself, it is clearly competent to prove that he departed from it in the given instance. Such departure implies an abnormality of conditions which, under some circumstances at all events, will import negligence, whether or not the practice was one which the employer was originally bound to adopt. Thus, in an action to recover for injuries caused by an blocked frog, a servant may introduce evidence that it was the custom of the defendant company to block all its frogs. *Coates* v. *Burlington, C. R. & N. R. Co.* (1883) 62 Iowa, 491, 17 N. W. 760.

[2] Where the risk arising from the position of machinery at which plaintiff was injured was obvious, evidence that the machinery was not placed in the proper manner was inadmissible, since it was of no consequence that the business might have been conducted more safely. *Smith* v. *Beaudry* (1903) 175 Mass. 286, 56 N. E. 596.

In an action for the death of a brakeman, caused by the fact that drawheads slipped and allowed the cars to come together, evidence that there were safer couplers of a different pattern from those used by defendant, is inadmissible. *Chicago & P. I. R. Co.* v. *Dinan* (1889) 81 Ill. App. 383.

Evidence of the unusual speed of a freight train is inadmissible in an action against a railway company to recover for the death of a brakeman who, while sitting on the top of one of the freight cars with his feet over the side, was knocked from the car by a mail bag suspended from a "mail crane." *Louisville & N. R. Co.* v. *Milliken* (1899) 21 Ky. L. Rep. 489, 51 S. W. 796. The court said: "Appellant had a right to run its train at any rate of speed it chose, and if, from the oscillation of the train, the intestate's feet were swung out in contact with the mail bag, by reason of the unusual speed of the train, this was one of the risks incidental to the business."

Evidence that new ties were put into a track before the accident is not com-

It is proper to admit evidence which tends to support or negativ either the conclusion that a servant for whose defaults the master wa responsible was culpable in respect to the particular act which wa the immediate cause of the injury,[3] or the conclusion that one of th defenses available to an employer was or was not open to him.[4]

petent upon the issue of a railroad company's negligence, unless it tends to show that the repairs were made at the place of the accident. *Knapp* v. *Sioux City & P. R. Co.* (1887) 71 Iowa, 41, 32 N. W. 18.

See also § 821, note 4, *post*.

[3] It is not error to admit in evidence a rule from a railroad company's book of rules providing that "a lamp swung across the track is the signal to stop," where the issue involved is whether the engineer was negligent, in failing to perceive upon the track an employee who had fallen down and become unconscious by reason of sickness. *Helton* v. *Alabama Midland R. Co.* (1893) 97 Ala. 275, 12 So. 276.

[4] Where it is alleged that the injury resulted from the failure of a railway company to discharge its duty to its employees by neglecting to provide rules for signals to engineers of switch engines in the yard, where there were many tracks and where two or more engines were employed near each other at night, and it is disputed whether the injury was caused by the engineer in charge of the engine causing the injury mistaking a signal intended for another engineer, or whether the intestate gave the signal for the purpose of coupling cars, evidence showing that the intestate knew that the coupling could not be made is relevant to the issue. *Louisville & N. R. Co.* v. *York* (1901) 128 Ala. 305, 30 So. 676.

Evidence that plaintiff in an action for injuries received while in defendant's employ recommended for appointment as a conductor another employee through whose recklessness plaintiff was injured has no tendency to show that plaintiff knew the latter to be a reckless and careless man. It rather tends to show the contrary, as it will be presumed that he would not recommend an unfit man. *Texas & P. R. Co.* v. *Johnson* (1897) 90 Tex. 304, 38 S. W. 520, Denying Writ of Error in (1896) 14 Tex. Civ. App. 566, 37 S. W. 973.

Evidence that it was customary, when men were to lower or hoist a mechanism by the use of falls, for them to make the hitch in such way as they saw fit, is incompetent, unless it was shown that deceased knew of the custom. *Keegh* v. *Overman Wheel Co.* (1899) 174 Mass. 455, 54 N. E. 890.

In an action by a brakeman who was injured by falling between the cars in attempting to pass from the roof of one freight car to that of another, the accident being attributed by the company to the fact that he was not using the running board in the middle of the car but walking on the roof of the car, it was held that evidence regarding the usual condition of the running boards as compared with the roofs of the freight cars off the running boards, such evidence being offered for the purpose of justifying plaintiff's failure to use the running board on the car in question, was incompetent, in the absence of any evidence or contention that the running board of the car in question was out of repair. *Benson* v. *New York N. H. & H. R. Co.* (1901) 23 R. I. 147, 49 Atl. 689.

Evidence as to the custom of many electric roads with reference to the number of men employed to operate a car under conditions similar to those shown in the case under review is inadmissible upon the question of the negligence of the company in employing but one man to operate the car. *Redfield* v. *Oakland Consol. Street R. Co.* (1896) 112 Cal. 220, 43 Pac. 1117.

As bearing on the question of his contributory negligence, it is competent to show that a servant adopted the course usually followed by other employees of his class under similar circumstances (*Whitsett* v. *Chicago, R. I. & P. R. Co.* [1885] 67 Iowa, 155, 25 N. W. 104; *McKean* v. *Burlington, C. R. & N. R. Co.* [1880] 55 Iowa, 192, 7 N. W. 505); or that the act of a fellow servant which caused the injury was one of such an unusual character that he had no reason to anticipate it (*Jeffrey* v. *Keokuk & D. M. R. Co.* [1881] 56 Iowa, 546, 9 N. W. 884).

The admission in evidence in an action for personal injuries to a brakeman while coupling a train, of a rule holding conductors and engineers equally responsible for the violation of any rules

The exclusion even of evidence which, if it had been admitted, would have been decisive as to a certain issue, is not prejudicial error, if evidence of substantially the same import has already been admitted.[5]

Whether evidence the probative force of which depends upon the existence of a substantial similarity between the conditions to which it relates and the conditions prevailing at the time or place of the accident is admissible without some specific testimony tending to show that there is such a similarity must be determined with reference to the circumstances of each particular case.[6]

820. Condition of the given instrumentality before the accident.— The significance of testimony showing that the given instrumentality had discharged its functions properly during the period anterior to the accident has already been discussed, in so far as it has a bearing upon the question whether the employer was chargeable with notice of the existence of the defects which caused the accident (§§ 136–138, *supra*). In the present section the effect of such testimony in its relation to the question whether the instrumentality was a proper one to use under the circumstances will be considered.

a. Condition; generally.— In one case the doctrine was adopted that evidence of the condition of an appliance at times prior to the accident is not admissible for the purpose of proving that it was in a dangerous condition when the injury was received.[1] But a more logi-

governing the safety of their trains, and requiring them to take every precaution for the protection of their trains, even though not provided for by rule, is harmless to defendant. *Galveston, H. & S. A. R. Co.* v. *Henning* (1897; Tex. Civ. App.) 39 S. W. 302, Affirmed in (1897) 90 Tex. 656, 40 S. W. 392.

[5] As, where the court in an action by a brakeman refused to admit in evidence a rule of the railroad forbidding brakemen to ride on the engine, and the record showed that evidence had been given of the promulgation of a rule forbidding them to leave their posts of duty, or take any position on the train other than that assigned to them. *Norfolk & W. R. Co.* v. *Marpole* (1899) 97 Va. 594, 34 S. E. 462.

[6] In an action for injuries caused by the explosion of the boiler of a locomotive in charge of plaintiff, when the question of contributory negligence depends somewhat upon the time taken to run over the section of the road on which the explosion occurred, old timetables of the defendant company, not in effect at the date of the accident, are inadmissible for the purpose of showing that no unusual danger was incurred by violating the requirements of the existing timecard, when it is not first shown that the conditions were the same at the date of the time-tables and the time of the accident. *Knold* v. *Rio Grande W. R. Co.* (1900) 21 Utah, 379, 81 Am. St. Rep. 693, 60 Pac. 1021.

As the condition of sand at various times affects its weight, a servant injured by the caving in of a trench in which he was at work cannot be permitted to show the weight of a cubic foot of sand taken from the trench, without showing the time when it was taken and weighed. *Laporte* v. *Cook* (1901) 22 R. I. 551, 48 Atl. 798.

In an action for injuries alleged to have been caused by the excessive speed of a train, it is competent to introduce testimony as to the rate of speed at a place 1½ miles from the scene of the accident. *Louisville & N. R. Co.* v. *Woods* (1894) 105 Ala. 561, 17 So. 41.

See also cases cited in the following sections.

[1] Evidence that the state mining in-

cal theory is embodied in the statement th.t, in an action by an employee against an employer for an injury caused by a defect in plant, it is not necessary to adduce evidence of the condition of plant at the precise moment the casualty occurred, and that i enough to prove such a state of facts so shortly before or after casualty as will induce a reasonable presumption that the condi was unchanged.[2] Especially is such evidence competent when injury resulted from the manner in which the plant was arranged constructed, and the conditions thus created were essentially per nent in their nature.[3]

b. Nonoccurrence of accidents.—It is not disputed that the n occurrence of accidents during a long period under conditions si lar to those which prevailed when the injury was received is evide which tends strongly to show that the defendant was free from ne gence.[4] But there is some conflict of opinion as to the precise qual of such evidence when considered with reference to the power o court to direct or review the finding of a jury.

The New York doctrine has been thus formulated: "As a gene rule, where an appliance, machine, or structure not obviously dang ous has been in daily use for years, and has uniformly proved a quate, safe, and convenient, it may be continued without the imput

spector on an occasion prior to the accident in question found the safety catches removed from the cages used in the mine was held inadmissible upon the question as to whether the safety catches were in a defective condition at the time of the fall of the cage. *Diamond Block Coal Co.* v. *Edmonson* (1896) 14 Ind. App. 594, 43 N. E. 242.

[2] *Little Rock & Ft. S. R. Co.* v. *Eubanks* (1885) 48 Ark. 460, 3 Am. St. Rep. 245, 3 S. W. 808 (railway track).

A jury is warranted in finding that a machine was defective at the time the injury was received, when there is evidence that it had been defective for several months, and had remained in that condition up to a day or so before the accident, and the defendant has offered no proof that the defect had been remedied during the period not covered by the direct evidence. *Pioneer Cooperage Co.* v. *Romanowicz* (1900) 186 Ill. 9, 57 N. E. 864, Affirming (1899) 85 Ill. App. 407.

Cases in which the prior condition of an appliance is submitted as a circumstance bearing upon its condition at the time of the accident are distinguishable from those in which the same evide is viewed as one of the elements wh point to the conclusion that the ma was negligent in not having remedi defect of which he had notice. *H* v. *Quigley* (1900) 41 C. C. A. 294, Fed. 187.

[3] Where there was no change in t general conditions and character of passageway adjoining the carriage a circular saw in a mill from the time machinery was placed therein until a er an employee was injured by con with the saw, and there was evidence an action for the injury that the on the carriage when the injury o curred was not unusually large, th mony of witnesses in defense, as to the use of the passageway, should not limited to those who were then wh the plaintiff was, he having testi that the passageway was never s ea reasonably convenient. *Lafl Plumley* (1900) 175 Mass. 304, 56 N. 281.

[4] In all the cases cited in the follow ing notes this is assumed to be the co rect doctrine.

tion of negligence."[5] A similar doctrine possibly prevails in Georgia.[6]

In other cases the fact that a certain instrumentality had been used, or a certain system had been in operation, for a long time before the accident, without disclosing any unsafe qualities, has been treated as one which merely tends to negative culpability, and is not conclusive in the master's favor.[7]

The latter of these theories would appear to be the more reasonable and logical. In most of the cases in which the right of recovery was denied as a matter of law, the instrumentality in question was one which was in common use; and in a large number of jurisdictions this circumstance alone is deemed conclusive in the master's favor (see § 44, *ante*). But if this element is assumed to be abstracted, it is dif-

[5] *Lafflin* v. *Buffalo & S. W. R. Co.* (1887) 106 N. Y. 140, 60 Am. Rep. 433, 12 N. E. 599. To the same effect are the cases of *Burke* v. *Witherbee* (1885) 98 N. Y. 562 (two judges dissenting); *Stringham* v. *Hilton* (1888) 111 N. Y. 196, *sub nom. Stringham* v. *Stewart*, 1 L. R. A. 483, 18 N. E. 870; *Dingley* v. *Star Knitting Co.* (1890) 34 N. Y. S. R. 989, 12 N. Y. Supp. 31. Affirmed in (1892) 131 N. Y. 552, 32 N. E. 35; *Kaye* v. *Rob Roy Hosiery Co.* (1889) 51 Hun, 519, 4 N. Y. Supp. 571.

For a decision of the supreme court embodying a different doctrine, see note 7, *infra*.

[6] See *Riverside Cotton Mills* v. *Green* (1900) 98 Va. 58, 34 S. E. 963.

[7] *Myers* v. *Hudson Iron Co.* (1889) 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631 (disapproving of the unqualified doctrine enunciated in New York); *Illinois C. R. Co.* v. *Jones* (1882) 11 Ill. App. 324; *Ferris* v. *Bernheim Bros.* (1899) 51 La. Ann. 178, 24 So. 771 (servant had passed frequently down a defective stairway); *Cosselman* v. *Dunfee* (1901) 59 App. Div. 467, 69 N. Y. Supp. 271 (hook from which heavy bucket was suspended bent after being safely used for some time).

In an English case the fact that a turntable had been operated for about five years without any accident was said to point to the conclusion that it was constructed with due care. But the decision was really based on the absence of any evidence that the persons constructing it were incompetent, and it is perhaps doubtful whether, apart from this fact, the court would have taken upon itself to negative liability. *Potts* v. *Port Carlisle Dock & R. Co.* (1860; Q. B.) 8 Week. Rep. 524, 2 L. T. N. S. 283.

In *Mellors* v. *Shaw* (1861) 1 B. & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, 9 Week. Rep. 718, the defendants were held liable in spite of evidence that the shaft which caused the injury had been safely used for six years before the accident; but the precise effect of the evidence was not discussed by the judges.

An instruction that when a machine not obviously dangerous had been in daily use for a long time, and had uniformly proved safe and efficient, its use might be continuous without imputation of negligence, was properly refused. *Silveira* v. *Iversen* (1900) 128 Cal. 187, 60 Pac. 687.

On the ground that a person should not be relieved of the consequences of carelessness simply because no injury had resulted from former carelessness, it has been held that an instruction, in an action by a stevedore for injury from lumber which was being lowered through a hatchway into the hold of the vessel where he was stowing it away, falling on him, that if it was customary to station a man at the hatch to give a warning cry, and, on hearing the signal, it was customary for the men to get to a place of safety, and this means of warning the men "had theretofore been found to be" a safe and sufficient mode for the protection of the men so working in the hold, and that all these precautions had been taken by defendant, the verdict should be for defendant, was properly modified by inserting the word "was" for the words "had theretofore been found to be." *Hennessey* v. *Bingham* (1899) 125 Cal. 627, 58 Pac. 200.

ficult to perceive any satisfactory ground upon which a court can justified in drawing a legal inference of noncalpability from the b fact that the instrumentality in question had never caused an ac dent until the plaintiff was injured.

Under any view of the master's obligations it is manifest that lo user of an obviously dangerous instrumentality indicates nothi more than good fortune in respect to the avoidance of an accident."

c. *Occurrence of accidents.*—"Where the sufficiency or safety the instrument which is claimed to have caused the accident is issue, evidence of similar accidents resulting from the same cause competent. Such facts are in the nature of experiments to show actual condition of the instrument and how it served its purpose wh put to the use for which it was designed, and that the common ca of these accidents was a dangerous and unsafe thing."[9] This rule of course, not applicable where the imperfections indicated by th prior unsatisfactory operation were wholly different from those whi eventually caused the accident.[10] Nor can it be adduced to the di

[8] *Monaghan* v. *Pacific Rolling Mill Co.* (1889) 81 Cal. 196, 22 Pac. 590.

[9] *Morse* v. *Minneapolis & St. L. R. Co.* (1883) 30 Minn. 465, 16 N. W. 358; *Doyle* v. *St. Paul, M. & M. R. Co.* (1889) 42 Minn. 82, 43 N. W. 787; *Clapp* v. *Minneapolis & St. L. R. Co.* (1886) 36 Minn. 6, 4 Am. St. Rep. 629, 29 N. W. 340 (other trains derailed at same switch); *Daley* v. *American Printing Co.* (1889) 150 Mass. 77, 22 N. E. 439 (belt had frequently come off of a pulley); *Auhl* v. *Manhattan L. Ins. Co.* (1898) 34 App. Div. 491, 54 N. Y. Supp. 222 (persons had been caught in automatically closing door of elevator); *Findlay Brewing Co.* v. *Bauer* (1893) 50 Ohio St. 560, 35 N. E. 55 (barrels had frequently fallen out of an elevator while it was being operated); *Whitelaw* v. *Moffat* (1849) 12 Sc. Sess. Cas. 2d series, 431 (chain which gave way had broken twice before).

Other cases to the same effect are cited in Shearm. & Redf. Neg. § 60b.

In an action by an employee of a railroad for injuries caused by an explosion of dynamite carried in the caboose, the question whether evidence that "sparks were flying all the time" tended to show that the engine was in a defective condition was a question for the jury. *Rush* v. *Spokane Falls & N. R. Co.* (1900) 23 Wash. 501, 63 Pac. 509.

Evidence of the happening of accidents to other persons working about the machinery, under such conditions and circumstances as attended the accident in question, was held competent to show that the employer could reasonably have apprehended the happening thereof, and should therefore have guarded against it, or instructed the employees in regard to the danger, it not being apparent. *Wyman* v. *Orr* (1900) 17 App. Div. 136, 62 N. Y. Supp. 195.

Evidence that an undercut machine which, when in proper working order would make but one cut, and then stop was reported to defendant's foreman about two years before the injury to plaintiff, as repeating itself, and starting from a stop, and that plaintiff also reported that the machine repeated on the day he was injured, by reason of the machine starting from a dead stop, is sufficient proof of defendant's negligence to go to the jury. *Packer* v. *Thomson-Houston Electric Co.* (1900) 175 Mass. 486, 56 N. E. 704.

Evidence that a horse by which an employee was kicked had, on two previous occasions, viciously and without provocation, kicked in a dangerous manner, is competent on the question of the vicious character of the animal. *Knickerbocker Ice Co.* v. *Finn* (1897) 25 C. C. A. 579, 51 U. S. App. 256, 80 Fed. 183.

[10] *Kern* v. *De Castro & D. Sugar Ref. Co.* (1890) 125 N. Y. 50, 34 N. Y. S. R. 363, 25 N. E. 1071.

advantage of the employer, where the instrumentality in question was not defective in such a sense as to import culpability.[11]

821. Condition of the given instrumentality after the accident.—According to some of the authorities, the mere fact that an appliance was found to be defective after the accident is not evidence sufficient to sustain a verdict for a plaintiff who bases his right of action upon the failure of the company to keep the appliance in good condition.[1]

Another theory is that such evidence is admissible if it relates to a time not long after the occurrence of the accident, and, for aught that appears, there has been no change in the conditions during the intervening period.[2]

Whichever view is taken, such evidence is certainly incompetent where the defects discovered were such that they may reasonably be supposed to have been the result of the accident itself,[3] or where the

[11] *Benedict* v. *Schrader* (1891) 38 N. Y. S. R. 201, 14 N. Y. Supp. 888.

[1] *Popp* v. *Michigan C. R. Co.* (1895) 103 Mich. 130, 65 N. W. 808 (railway car); *Darcy* v. *New York, N. H. & H. R. Co.* (1897) 168 Mass. 179, 47 N. E. 418 (switch stand which plaintiff struck was found to be leaning towards the track); *Ketterman* v. *Dry Fork R. Co.* (1900) 48 W. Va. 606, 37 S. E. 683 (brake of a car which ran away found to be slightly out of order).

A verdict for the plaintiff was set aside where there was no other direct testimony on the part of the defendant's car inspector to the effect that he had examined the car which caused the accident the morning before that accident occurred, and found all appliances in good condition, and all the evidence tending to prove knowledge here referred only to the condition of the car after the accident. *Johnson* v. *Chesapeake & O. R. Co.* (1882) 36 W. Va. 73, 14 S. E. 432.

[2] Evidence of the condition of the brakes of a car twenty minutes after an accident alleged to have been caused by the defective adjustment of the brakes was held admissible, as there was no proof of any alteration in that time. *Woods* v. *Long Island R. Co.* (1899) 159 N. Y. 546, 54 N. E. 1095, Affirming (1896) 11 App. Div. 16, 42 N. Y. Supp. 140.

Evidence going to show that a hand-hold on a railway car was defective after the accident was held admissible for the purpose of proving the nature and character of the conditions which caused the injury. *Gutridge* v. *Missouri P. R. Co.* (1887) 94 Mo. 468, 4 Am. St. Rep. 392, 7 S. W. 476, (1891) 105 Mo. 520, 16 S. W. 943.

In an action for injuries due to the breaking of a defective brake staff, evidence that defendant's car repairer, shortly before the accident, repaired the car in question, and a week after the accident examined the brake appliances and broken pieces, and identified them as those he had put on the car, which lacked a necessary and usual part to make them safe, was held to have been properly admitted. *St. Louis, P. & N. R. Co.* v. *Dorsey* (1899) 89 Ill. App. 555, Affirmed (1901) 189 Ill. 251, 59 N. E. 593.

A witness who visited a mine four days after an accident, and was shown by the shift boss the ladder from which the deceased fell, may testify as to its rotten condition, as against an objection that he only knew it was the ladder in use at the time of the accident by hearsay. Under such circumstances there is an adequate identification of the ladder. *Reese* v. *Morgan Silver Min. Co.* (1899) 17 Utah, 489, 54 Pac. 759.

It may be mentioned in the present connection that evidence of the condition of machinery shortly after the term of a lease has begun to run has been held competent to show its condition at the commencement of the term. *McCulloch* v. *Dobson* (1892) 133 N. Y. 114, 30 N. E. 641.

[3] As, where an elevator fell 30 feet, and some parts of the machinery were subsequently found to be out of place and loosened. *Robinson* v. *Charles Wright & Co.* (1892) 94 Mich. 283, 53 N. W. 938.

circumstances are otherwise of such a nature as to show conclu
that, even if the defect did actually exist at the time of the acci
the defendant was not negligent.[4]

822. Condition of the given instrumentality both before and afte accident.— Evidence that the machine which caused the accid
in good condition at the time of the trial, and at other times
before and after the accident, and that it worked properly before
after the accident, is admissible as having a tendency to show its
dition and how it worked at the time of the accident.[1] Such evid
may even be conclusive in the master's favor.[2]

823. Condition of parts of the plant other than that which caused injury.— *a. Generally.*—The supreme court of Minnesota has
down the doctrine that evidence of the existence of defective co
tions at a place on the employer's premises other than that at wh
the injury was received is not admissible for the purpose of estab
ing the existence of similar conditions at the place where the acci
occurred, unless testimony is also introduced which tends to s
that the former conditions were the result of a cause which was
sumptively operative at the place of the casualty also, or unless
other defects may themselves have been the cause of the defect wh
produced the injury.[1] This doctrine would seem to be the only

[4] Opinions as to the existence of a defect, and the negligence of the master in failing to discover it, are of no weight where it is apparent that they are based on an examination after the accident and the defect is of such a nature that none of the usual tests would have revealed it. *Indianapolis, B. & W. R. Co.* v. *Toy* (1879) 91 Ill. 474, 33 Am. Rep. 57.

Where a servant's eye was struck by a fragment which flew from a cold-chisel used by him in cutting steel rails, and the chisel was shown to have been made by a reputable foundry, and to have been inspected and pronounced sound by defendant's inspector, and also considered sound by plaintiff, himself,—a man of many years' experience with such tools,—the evidence of experts who examined it after the accident, that it was defective, was held inadmissible. *Kent* v. *Yazoo & M. Valley R. Co.* (1899) 77 Miss. 494, 78 Am. St. Rep. 534, 27 So. 620.

[1] *Tremblay* v. *Haruden* (1894) 162 Mass. 383, 38 N. E. 972.

When evidence of the condition of the instrumentality in question before and after the accident is first offered, the trial judge may, without an abuse of discretion, reject it, unless the plain also offers to show that the cond was practically the same at the time the accident. If the testimony sub quently takes such a course that the dence ought to be admitted if offe it is for the plaintiff to renew the of If he omits to do so, he has no gro upon which to predicate prejudicial ror as regards the original rejecti *Powers* v. *Boston & M. R. Co.* (1900 175 Mass. 466, 56 N. E. 710.

[2] Thus, it has been held that where mangle is shown to have run steadi both before and after an accident, a its construction is such as would ha prevented it from running unsteadily, jury is not warranted in finding that was running unsteadily at the time the accident, and that this unsteadine was the cause of the injury receive Testimony to the contrary by the serv ant himself was characterized as bein either intentionally or unintentionall false. *Groth* v. *Thomann* (1901) 11 Wis. 488, 86 N. W. 178.

[1] *Morse* v. *Minneapolis & St. L. R. Co* (1883) 30 Minn. 465, 16 N. W. 353 where the injury was caused by a broke rail and an imperfect switch, and it wa held error to admit evidence of other de

cal one; but it is not easy to reconcile on such a basis the cases in which such evidence has been declared either admissible or inadmissible.[2]

fects at other places on the road, there being nothing to show that they had any connection with the accident.

[2](a) *Evidence not admissible.*—Testimony as to the condition of the track at places other than that of the accident was held incompetent in *Grand Rapids & I. R. Co.* v. *Huntley* (1878) 38 Mich. 540, 31 Am. Rep. 321; *Louisville & N. R. Co.* v. *Fox* (1875) 11 Bush, 495.

In an action against a lumber company for an injury alleged to have been partly caused by the roughness of the roadbed on which its trains were operated, it was held proper for the plaintiff to prove on his own behalf that any part of the road on which the train had run on the trip in question was rough and uneven, but evidence going to show the general condition of the road in other respects in other localities was held not admissible. *Haley* v. *Jump River Lumber Co.* (1892) 81 Wis. 412, 51 N. W. 321, 956. The court, however, thought that such evidence might be competent to some extent on cross-examination.

Evidence as to the unblocked condition of the frogs in yards on defendant's road other than that in which the accident in suit occurred is not admissible for the purpose of charging the plaintiff with constructive knowledge of the condition of the frogs which caused his injury. *Trott* v. *Chicago, R. I. & P. R. Co.* (1901) 115 Iowa, 80, 86 N. W. 33.

The admission of evidence in an action by an employee against his employer for injuries sustained by the falling of a metal "mandrel," alleged to have been caused by negligently permitting a clamp device which held it in place to become out of order, that several other mandrels similarly placed had fallen on previous occasions, is reversible error, where such falls were occasioned by causes not affecting the attachment whose defect caused the fall in question. *Gaar, S. & Co.* v. *Wilson* (1898) 21 Ind. App. 91, 51 N. E. 502.

In an action by a stranger it was held that the condition of telegraph poles 40 or 60 rods away from those which fell was inadmissible, where there was no evidence to show that the former were of the same kind as the latter, put up at the same time, and equally exposed to decay. *Western U. Teleg. Co.* v. *Lewis* (1874) 47 Ind. 552.

(b) *Evidence admissible.*—In a case where a defective track was alleged to have wrecked a train, evidence tending to show the condition of the roadbed just prior to and contemporaneously with the accident, at places other than that where the wreck occurred, was held admissible. *Tanner, B. & H. R. Co.* v. *Taylor* (1890) 79 Tex. 101, 23 Am. St. Rep. 316, 14 S. W. 918.

It is competent, for the purpose of charging an employer with negligence in the use of a pulley which broke and injured an employee, to show that another pulley of the same form of construction and material, and used for the same purpose and in the same way, as the one in question, broke a short time before, in connection with evidence that both pulleys were driven by a tight belt, and that the tightness of the belt and the danger of its breaking the pulley were called to the employer's attention. *Shute* v. *Ex Oz Mfg. Co.* (1898) 69 N. H. 210, 40 Atl. 304.

Where the timbers supporting the roof of a drift in a mine gave way, evidence showing the construction of other parts of the roof adjacent to the place of the accident, so far as such other parts can be shown to have been constructed in a similar manner, is properly admitted on the issue whether the timbers which fell were or were not negligently placed in the roof. *Sampson Min. & Mill Co.* v. *Schaad* (1899) 15 Colo. 197, 25 Pac. 89.

Where it is alleged that a locomotive boiler, including the flues, was in a generally worn-out condition, and that because of such condition as to the shell the boiler exploded, evidence of the condition of the flues, as well as other parts of the inside structure of the boiler, is admissible as bearing on the question whether the defendant knew or ought to have known of the existence of defects in the shell. *Baxter* v. *Chicago & N. W. R. Co.* (1898) 101 Wis. 307, 80 N. W. 614.

In a case where injury was received by an employee owing to a defect in a dock on which he was working, it is competent to introduce evidence showing that the dock was defective by reason of holes at many other places be

The fact that several appliances belonging to the same lot as to which the one which caused the accident belonged were de[fective] sometimes admissible as evidence tending to show that a certain defect of manufacture runs through the entire lot. Whether defect is of such a character as to warrant the reception of such dence depends upon circumstances.[3]

b. Nonoccurrence of accidents.— In two cases it has been held a master cannot be held liable on the ground of having furnished ans[wer] appliance, where similar appliances have for a long time put to the same use without the occurrence of any accidents.[4] In instance the propriety of treating such a fact as a basis for a sion of law would seem to be as questionable as it is where simi evidence is proffered with regard to the instrumentality which ca the injury.

c. Occurrence of accidents.—Evidence that accidents simila that which caused the injury had occurred in the use of parts of plant which were of the same kind as the one in question is adm ble where those accidents were due to circumstances which may have been operative at the time when the injury was received.[5]

824. Alterations in the plant or system after the accident; evidential import of.— Evidence which shows that, after the accident, the plant or the system of the employer was altered and improved such a manner as to eliminate the particular risk which caused injury, is undoubtedly competent to show that defective condition existed at the time of the accident.[1] But, according to the weight of authority, such evidence is not admissible for the purpo

sides that at which the accident occurred. *Propsom* v. *Leatham* (1891) 80 Wis. 895, 50 N. W. 586.

Evidence that telegraph poles and wires had been down at other places and times within a few miles of the scene of an accident is competent, but not conclusive, on the question of an employer's negligence in maintaining an unsafe line. *Randall* v. *Northwestern Telg. Co.* (1882) 54 Wis. 142, 41 Am. Rep. 17, 11 N. W. 419.

[3] *De Dora* v. *White* (1896) 9 App Div. 521, 41 N. Y. Supp. 628, the court, while recognizing that there are cases in which such evidence is admissible, rejected the testimony offered, as it related only to a single appliance,—an eye bolt of the same pattern as that which broke,—and the defect proved was merely bad welding.

[4] *La Pierre* v. *Chicago & G. T. R. Co.* (1891) 99 Mich. 212, 58 N. W. 60; *Hall & C. Mfg. Co.* v. *Tina* (1899) 85 App. 310. In the latter case the master was absolved, although experts testified that the appliance was constructed unscientifically, and was weak for the purpose for which it was used.

Cavanagh v. *O'Neill* (1895) 27 App Div. 48, 50 N. Y. Supp. 267 (other appliances had fallen under circumstances similar to those which prevailed when the servant was injured by the one in question).

[5] *Mercer* v. *Atchison, T. & S. F. R. Co.* (1895) 55 Kan. 250, 38 Pac. 778; *Atlas* v. *Atlas S. S. Co.* (1899) 37 Fed. 426; *St. Louis & S. F. R. Co.* v. *Ivie* (1886) 35 Kan. 112, 11 Pac. 105, 57 Am. Rep. 156; *Atchison, T. & S. F. R. Co.* v. *McKee* (1887) 37 Kan. 62, 2 Pac. 184.

of establishing negligence on the employer's part in respect to the existence of the conditions which created that risk.[2]

Where it is a question of the propriety of a temporary expedient adopted for preventing an accident, after the discovery of certain dangerous conditions, evidence of what was done after those condi-

[2] The reasons of the doctrine thus adopted are clearly explained by the court in *Morse* v. *Minneapolis & St. L. R. Co.* (18—) 30 Minn. 468, 16 N. W. 358, where the court, after referring to the decisions cited in the last note, proceeded thus: "If competent, such evidence is only so as an admission of the previous unsafe condition of the thing repaired or removed, and, to render it admissible as such, the act must have been done so soon after the accident and under such circumstances as to indicate that it was suggested by the accident, and was done to remedy the defect which caused it. All courts who admit the evidence at all so hold. In the present case the change in this switch was made over a year after the accident, and after it had been removed to another place. Under such circumstances the repairs were, presumptively, merely an ordinary betterment. Under such a state of facts such evidence would not be admissible under any rule, and its admission was therefore error. But, on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong; not for the reason given by some courts, that the acts of the employees in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so; and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence."

This statement of principles is adopted as correct in *Columbus & P. S. R. Co.* v. *Hawthorne* (1892) 144 U. S. 202, 36 L. ed. 405, 12 Sup. Ct. Rep. 591.

To the same effect is the following passage in the judgment of the court in *Matey* v. *Pickle Marble & Granite Co.* (1896) 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 155. "Evidence that after the accident the master repaired his machinery, or adopted a different method of conducting his business, is inadmissible to prove his negligence at the time of the accident, because a rule that such evidence is competent would impose a penalty upon the master for making such repairs and changes, would constitute them a confession on his part of a prior wrong, and would thus deter him from improving his machinery and his methods. Such evidence is also inadmissible because it has no legitimate tendency to prove that the machinery and methods were not reasonably safe and suitable for use in the conduct of the business at the time of the accident."

The doctrine thus laid down has also been approved in the following cases: *Hart* v. *Lancashire & Y. R. Co.* (1869) 21 L. T. N. S. 261; *Atchison, T. & S. F. R. Co.* v. *Parker* (1893) 5 C. C. A. 220, 12 U. S. App. 132, 55 Fed. 595; *Norris* v. *Atlas S. S. Co.* (1889) 37 Fed. 426; *Colorado Electric Co.* v. *Lubbers* (1888) 11 Colo. 505, 7 Am. St. Rep. 255, 19 Pac. 479; *Morris* v. *Winchester Repeating Arms Co.* (1901) 73 Conn. 680, 49 Atl. 180; *Weber Wagon Co.* v. *Kehl* (1891) 40 Ill. App. 585; *Chicago & E. R. Co.* v. *Lee* (1897) 17 Ind. App. 215, 46 N. E. 543; *Harter* v. *Atchison, T. & S. F. R. Co.* (1895) 55 Kan. 250, 38 Pac. 778; *St. Louis & S. F. R. Co.* v. *Weaver* (1886) 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; *Missouri, K. & T. R. Co.* v. *Young* (1896) 4 Kan. App. 219, 45 Pac. 963; *Cherokee & P. Coal & Min. Co.* v. *Britton* (1896) 3 Kan. App. 292, 45 Pac. 100; *Ducey* v. *New York, N. H. & H. R. Co.* (1897) 168 Mass. 479, 47 N. E. 418; *Downey* v. *Sawyer* (1892) 157 Mass. 418, 32 N. E. 656; *Hipsley* v. *Kansas City, St. J. & C. B. R. Co.* (1885) 88 Mo. 348; *Alcorn* v. *Chicago & A. R.*

tions had caused an injury is admissible for the purpose of ing what could have been done to prevent the casualty.[3]

825. Habitual course of conduct.— Evidence that an employ bitually pursued a certain course of action or behaved in a c way is not admissible for the purpose of showing what he ac did at the time of the accident.[4]

826. Employer's insuring himself against injuries to servants.— fact that the defendant had taken out a policy of insurance secured him an indemnity for such compensation as he might be pelled to pay to injured servants is not competent evidence action by one of those servants. The fact of the insurance may sibly tend to lessen the strength of his motives for being careful, the question is not how much or how little motive the defendant for being careful, but whether he did in fact exercise proper c But the admission of evidence of a conversation between the plai and defendant, in which reference was made by the latter to the that he was insured against accident, will not be regarded as p dicial error, where the trial judge expressly stated that this fact

Co. (1891) 108 Mo. 81, 18 S. W. 188; *Friel* v. *Citizens' R. Co.* (1893) 115 Mo. 503, 22 S. W. 498; *O'Donnell* v. *Baum* (1889) 38 Mo. App. 245; *Delaney* v. *Hilton* (1883) 18 Jones & S. 341; *Virginia & N. C. Wheel Co.* v. *Chalkley* (1900) 98 Va. 62, 34 S. E. 976; *Kreider* v. *Wisconsin River Paper & Pulp Co.* (1901) 110 Wis. 645, 86 N. W. 862; *Rudd* v. *Bell* (1887) 13 Ont. Rep. 47 (p. 55). Citing *Wyman* v. *The Duart Castle* (1899) 6 Can. Exch. 387.

The making of changes may show rather a desire to remedy defects as they become apparent, than that the defects had before been apparent. *Ragotte* v. *Canadian P. R. Co.* (1889) 5 Manitoba L. Rep. 365.

The Minnesota case cited at the beginning of this note overrules the three following decisions: *O'Leary* v. *Mankato* (1874) 21 Minn. 65; *Phelps* v. *Mankato* (1877) 23 Minn. 276; *Kelly* v. *Southern Minnesota R. Co.* (1881) 28 Minn. 98, 9 N. W. 588.

[3] *Willey* v. *Boston Electric Light Co.* (1897) 168 Mass. 40, 37 L. R. A. 723, 46 N. E. 395, where a wire from which the insulating substance had been burned off by lightning was not put into a safe position until after the plaintiff had received a shock.

[4] Evidence that a conductor was a careful man, and had long been in the continuous employ of a railroad, is not relevant upon the question as to whether he complied with a rule that, in of a train stopping between station should require the flagman to go a certain distance. *Fromfelker* v. *Ware, L. & W. R. Co.* (1900) 48 Div. 206, 62 N. Y. Supp. 840.

The mere fact that there is a cu to inspect all foreign cars will not tify the inference that any partic car was inspected. *Eddy* v. *Pec* (1894) 8 Tex. Civ. App. 58, 27 S. 1063.

On the ground that the case did fall within the principle that evid that a person is habitually careles not competent to establish his lack care at a particular time, it was that where plaintiff and another moving a locomotive tender by mean pinch bars, and, on plaintiff's compet withdrawing his bar from under a wh of the tender, plaintiff attempted to l the tender by means of his bar, but started back and ran over him, plaintiff might show the general cor tion of the bars kept at the shop at t time, he having been ordered to sele bar from among a number. *Cahoon Chicago, R. I. & P. R. Co.* (1901) Iowa, 226, 84 N. W. 1056.

[4] *Sawyer* v. *J. H. Arnold Shoe* (1897) 89 Me. 369, 38 Atl. 332; *B rett* v. *Bonham Oil & Cotton Co.* (19 Tex. Civ. App.) 57 S. W. 602; and t case cited in note 2, *infra*.

not competent to show an admission of liability, and in his charge repeated this statement, and told the jury that it was for them to say, without any regard to this fact, whether the conversation imported such an admission.[2]

827. Models and photographs.— Where a machine is set up in court for the purpose of enabling the jury better to understand how the accident happened, and the plaintiff desires to show something else through its operation, a request should first be made to the presiding judge. The defendant should have an opportunity to object to this additional use, as well as an opportunity to test the evidence thus produced, and the experiment should be made under the supervision of the presiding judge. If the experiment is made before the objections of the defendant have been heard, and in the presence of the jury only, the presiding judge not being informed of what is being done, the evidence produced may be ruled out.[1]

The fact that a photograph of the place where a brakeman was injured did not contain a set of guard rails, removed since the accident, is admissible to show the condition of the place where the accident occurred, and the manner in which it happened.[2]

828. Best and secondary evidence.—Where it is a question whether a coemployee for whose negligence a statute makes the master responsible violated a rule, parol proof that the master's rules required the performance of the act which the employee is alleged to have omitted is admissible, where it does not appear that there is any better evidence of such rules.[1]

829. Statements, admissions, and declarations.— *a. By other employees.*—In the subjoined note are collected a number of decisions illustrative of the circumstances under which the statements, admissions, and declarations of employees have been affirmed or denied to be competent evidence in actions against employers.[1]

[2] *Anderson* v. *Duckworth* (1894) 162 Mass. 251, 38 N. E. 510.

[1] *Probert* v. *Phipps* (1889) 149 Mass. 258, 21 N. E. 370.

[1] *Himber* v. *Iowa C. R. Co.* (1901) 114 Iowa, 551, 87 N. W. 505.

[1] *Sobieski* v. *St. Paul & D. R. Co* (1889) 41 Minn. 169, 42 N. W. 863.

[1](a) *Held admissible.*—In an action by a servant for injuries sustained from defective scaffolding, a conversation between two foremen, tending to show that each had notice of the condition of the scaffolding, is admissible as such notice. *Brady* v. *Norcross* 174 Mass. 112, 54 N. E. 87

Where plaintiff was injured by the caving of a gravel pit, a conversation between the street commissioner under whom plaintiff was working and another employee, which occurred a few minutes before the accident, and in the absence of plaintiff, as to the existence of a crack in the wall of the gravel pit, is admissible to show that the commissioner had notice of the dangerous condition of the pit. *Colorado City* v. *Linfe* (1901) 28 Colo. 468, 65 Pac. 630

Evidence that plaintiff, while employed as a [illegible] company, was in [illegible] the cogs in a [illegible] a heavy [illegible] and that

Where the complaint in an action for causing the death of a vant contains no allegation that the defendant was negligent in

another employee had had a conversation with the defendant's foreman about its defects a few hours before the accident, requires submission to the jury of the question of the defective condition of the jack, and of defendant's knowledge thereof. *Missouri, K. & T. R. Co.* v. *Young* (1896) 4 Kan. App. 219, 45 Pac. 963.

In *Chapman* v. *Erie R. Co.* (1874) 55 N. Y. 579, it was objected that the trial court had erred in admitting in evidence a declaration by the defendant's superintendent that he had heard that the negligent servant had been "off on a spree, drinking;" that the servant did not deny it, and that the superintendent reprimanded him for it. The court of appeals, however, said: "As evidence of the fact of the habit of drinking, it [the declaration] was not admissible, within the general rule, that the declarations of an agent will not bind the principal unless made at the time of doing some act within the scope of the agency, and which in fact constitutes a part of the act itself (*Luby* v. *Hudson River R. Co.* [1858] 17 N. Y. 131; *First Baptist Church* v. *Brooklyn F. Ins. Co.* [1863] 28 N. Y. 153). But we think this evidence was competent to prove notice to Fisk [the superintendent]. Other evidence was produced that Allison [the negligent servant] was in the habit of drinking to excess, and the remark, if it had reference to such habit, was pertinent to establish that he knew it. It would be competent to prove that a third person told him of it; and it is more satisfactory to establish the fact that he admitted such knowledge at the time. It is evidence of a material fact. An admission afterward that he had known the fact would stand upon a different footing. It is not error to receive evidence, if competent for any purpose."

In a case where the injury was caused by the fall of a bank of gravel which the servant was assisting to excavate, it is not error to permit a witness to testify that the foreman, at the moment when the accident occurred, uttered an exclamation which indicated his knowledge of the dangerous condition of the bank, and his apprehension that it might fall. *Elledge* v. *National City & O. R. Co.* (1893) 100 Cal. 282, 38 Am. St. Rep. 290, 34 Pac. 720.

Admissions or statements of the eral manager of a railroad com made directly after an accident, the condition of a road, while he the line of his duty and upon being formed by an agent of the road of wreck, are admissible, both as sho knowledge of the corporation as to improper construction and condition the road before the accident, and because it is his business, as the *ego* of the company, to know the co tion of the road, and what he says der such circumstances is said *dum vet opus*. *Krogg* v. *Atlanta & W. P Co.* (1886) 77 Ga. 202, 4 Am. St. 79.

(b) *Held not admissible.* — Decl tions of an agent of the master, a after an accident, will not bind the m ter unless they are of such a chara as to show that he had previous kn edge of the defect in the machin *Baker* v. *Allegheny Valley R. Co.* (18 95 Pa. 211, 40 Am. Rep. 631.

A declaration of defendant's road m ter some days after an accident, that section foreman whose negligence can the plaintiff's injury was incompete is not admissible as evidence to cha the company with knowledge of such competency. *McDermott* v. *Hannibal St. J. R. Co.* (1881) 73 Mo. 517, 39 A Rep. 526.

Statements of the employees of a m ing company as to how another employ lost his life are inadmissible in an a tion for his death, unless they we made immediately after and at t place of the killing. *Lexington & C. Min. Co.* v. *Huffman* (1895) 17 Ky. Rep. 775, 32 S. W. 611.

Statements of a conductor relating a collision, an hour after its occurren are inadmissible as *res gestæ*. *Norfo & C. R. Co.* v. *Suffolk Lumber C* (1896) 92 Va. 413, 23 S. E. 737.

The declarations of an employee of railroad company, charged with th duty of keeping the bridges and trestl in proper repair, with reference to a accident to an employee under him, no constituting part of the *res gestæ*, a not admissible against the company *Garrick* v. *Florida C. & P. R. Co.* (1898 53 S. C. 448, 31 S. E. 334.

A declaration of the general superin tendent of a railway, that the freigh conductor who was alleged to hav

employment of the servants who had control over the deceased, the declaration of a "general boss," since deceased, that he had been in the employment of the defendant for only a short time, and did not know what were the duties of the injured servant, is not admissible as a declaration of a deceased agent.[2]

b. By the injured servant himself.—An employee's declarations or statements are not usually admissible in his own behalf,[2a] though they may be so when made as part of the *res gestæ*.[3]

caused by his negligence the death of plaintiff's decedent, and who had been employed by the superintendent himself, had disobeyed orders, is inadmissible where it was made the day after the accident. *Huntingdon & B. T. Mountain R. & Coal Co.* v. *Decker* (1876) 82 Pa. 123.

A declaration of a car repairer that he knew of the defective condition of the car which caused the injury is not admissible, unless it was made while he was engaged in the performance of his duty as repairer, and had relation to the subject-matter in his charge. A declaration that he knew the car was in bad order is not admissible, where it was made while he was in the position of a mere spectator appearing at the scene of the catastrophe some minutes after it had occurred. *Verry* v. *Burlington, C. R. & M. R. Co.* (1877) 47 Iowa, 549.

The declarations of the superintendent of a corporation, made several days after the occurrence of an accident by the breaking of an appliance and away from the place of business, that the appliance had been condemned and should not have been used, is not admissible in an action for personal injuries against the corporation. *Giberson* v. *Patterson Mills Co.* (1896) 174 Pa. 369, 34 Atl. 563.

In an action by a brakeman against a railroad company to recover for a personal injury, where it is shown as a defense that at the time of the injury plaintiff was not in the place required by a rule of the company, testimony of the division superintendent that he would discharge any employee who persistently violated such rule to his knowledge is not a statement of fact, and is incompetent to disprove a waiver of the rule by the company. *Tullis* v. *Lake Erie & W. R. Co.* (1901) 44 C. C. A. 597, 105 Fed. 554.

As to matters of mere opinion, a master is not bound by the declarations of his foreman in regard to the cause of an accident to a servant under his orders. Accordingly, in an action for personal injuries sustained by a boy between eighteen and nineteen years old, in the defendant's mill, the plaintiff, after testifying that he told the foreman immediately after the accident that it was caused by a machine at which he was set to work by the sub-foreman, cannot be permitted to testify that the foreman then said to the plaintiff that it was just like the sub-foreman to set him at work at a dangerous machine he did not know anything about. *Loistritz* v. *American Zylonite Co.* (1891) 154 Mass. 382, 28 N. E. 294.

Evidence that defendant's foreman stated after the injuries for which suit is brought, alleged to have resulted from a broken window, that he ought not to have allowed plaintiff to go where he did while the window was broken, and that he told defendant's president a week before that the window was broken and ought to be fixed, is incompetent. *Fisher* v. *Nubian Iron Enamel Co.* (1895) 60 Ill. App. 568.

[2] *Smith* v. *Bibb Mfg. Co.* (1900) 112 Ga. 680, 37 S. E. 861.

[2a] Neither a report by the plaintiff himself, stating the manner in which his injuries were received, such report being submitted in compliance with a rule, nor his letters in which he made a claim for damages, are admissible as evidence in his own favor. *Howard* v. *Savannah, F. & W. R. Co.* (1890) 84 Ga. 711, 11 S. E. 452.

The admission of plaintiff's statements which were made to a fellow servant who had direction of the work as agent of the principal, as to how the injury complained of was received, and which were communicated on the understanding that they should not be repeated to the principal,—is prejudicial error. *Miles* v. *Chicago, R. I. & P. R. Co.* (1898) 76 Mo. App. 484.

[3] A statement by an employee of a rail-

c. By the employer.—The general rule allowing proof of a
sions against interest entitles an employee to put in evidence the
ployer's admissions against himself.[4]

830. Opinions as evidence.— *a. Not admissible.*—A well-recogn
doctrine as to the admissibility of evidence is that a witness
state facts, and not opinions.[1] As applied to that particular des

road company, run over and killed while uncoupling cars, made to his brother, while still under the car, as to the cause and manner of the injury, is admissible as part of the *res gestæ*, in an action by his administrator for damages. *Little Rock, M. R. & T. R. Co.* v. *Leverett* (1886) 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50.

[4] Admissions made by defendant to several persons on different occasions, to the effect that he knew of the existence of a fissure in a shaft before plaintiff went down, and knew it was dangerous, but thought it would hold until the work was done, are sufficient evidence to justify submitting the question of his negligence to the jury. *Strahlendorf* v. *Rosenthal* (1872) 30 Wis. 674.

[1] *Chicago G. W. R. Co.* v. *Price* (1899) 38 C. C. A. 239, 97 Fed. 423.

It is not error for the court to refuse to allow a witness to be asked whether a certain danger was one of the risks of the service assumed by the plaintiff. *Alton Lime & Cement Co.* v. *Calvey* (1892) 47 Ill. App. 343.

A witness should not be allowed to state his opinion as to whether a crib or partition in coal storage bins was or was not safe. *Davis* v. *New York, L. E. & W. R. Co.* (1893) 69 Hun, 174, 23 N. Y. Supp. 358.

The sufficiency of a rule is not a matter as to which a witness can express an opinion. *Nary* v. *New York, O. & W. R. Co.* (1890) 55 Fed. 612, 9 N. Y. Supp. 153.

A witness cannot give his opinion as to whether there was time for an engineer to signal the approach of a train, and whether, if he had given the signal, the deceased could have escaped being run down. *Dowdy* v. *Georgia R. Co.* (1891) 88 Ga. 726, 16 S. E. 62. Nor as to whether a certain person who did not hear any signal from an approaching train could have heard it if it had been given. *Eskridge* v. *Cincinnati, N. O. & T. P. R. Co.* (1889) 89 Ky. 367, 12 S. W. 580.

A witness, not an expert, cannot give an opinion as to whether a train could have been stopped in time to have a
ed the accident if it had been ru
slower. *International & G. N. R.*
Kuehn (1893) 2 Tex. Civ. App. 2
S. W. 58.

The question, "If the engineer
paid attention to the signals which
given him, and stopped the train, w
this man have been killed?" is o
tionable. *Kendrick* v. *Central R. &*
Co. (1892) 89 Ga. 782, 15 S. E. 6

A witness cannot give his conclu
or opinion as to carelessness of an
ployee, when it is an issue in the
Stoll v. *Daly Min. Co.* (1899) 19 U
271, 57 Pac. 295; *Elliott* v. *Chicago*
& St. P. R. Co. (1889) 5 Dak. 523,
R. A. 363, 41 N. W. 758; *Mosnat* v.
cago & N. W. R. Co. (1901) 115 I
151, 86 N. W. 297; *McKean* v. *Bar*
ton, C. R. & N. R. Co. (1880) 55 Io
192, 7 N. W. 505.

A witness cannot be asked whethe
certain train was backed carefully
the occasion of an accident. *Centra*
& Bkg. Co. v. *Ryles* (1889) 84 Ga. 4
11 S. E. 499.

A plaintiff, whether testifying as
expert or not, should not be permit
to give an opinion as to the propriety
his own conduct at the time when
injury was received. *Hudson* v. *Ge*
gia P. R. Co. (1890) 85 Ga. 203, 11
E. 605.

A servant cannot be allowed to test
that he did a certain act cautious
Mayfield v. *Savannah, G. & N. S. R.*
(1891) 87 Ga. 374, 14 S. E. 459.

An opinion as to the competency
skill of an employee should not be a
mitted. *Stoll* v. *Daly Min. Co.* (189
19 Utah, 271, 57 Pac. 295; *Butler*
Chicago, B. & Q. R. Co. (1893) 87 Iow
206, 54 N. W. 208.

Opinion testimony as to the comp
tency of a motorman is not permissib
but such fact should be established
showing his experience as a motorma
and his opportunity for familiarizin
himself with the work and learning th
method of performance. *Langston*
Southern Electric R. Co. (1898) 14
Mo. 457, 48 S. W. 835, following *Boet*

tion of opinions which is ordinarily spoken of as expert testimony, this doctrine takes such forms as these:—that such testimony is not admissible as to matters within the experience or knowledge of persons of ordinary information;[2] that the opinion of an expert who neither knows nor can know more about the subject-matter than the jury, and who, in order to form his opinion, must draw his deductions from facts in the possession of or accessible to the jury, is not admissible;[3] that the question whether a certain act or omission imported negligence under the given circumstances is not one which can be determined by expert testimony.[4] In the subjoined decisions this doctrine was applied under one or other of the aspects indicated by the phraseology of these statements. A comparison of these decisions with the rulings collected in note 8, *infra*, shows that the authorities are far from being harmonious.[5]

ger v. *Scherpe & K. Architectural Iron Co.* (1896) 136 Mo. 536, 38 S. W. 298.

At the trial of an action under the Massachusetts employers' liability act (see chapter XXXVII., *ante*), for causing the death of an employee, alleged to have been due to the negligence of a person in the defendant's service intrusted with "superintendence," a fellow employee cannot be asked, "Have you ever noticed anything with regard to the care or the method which the superintendent used in his work?" and, "Have you noticed whether or not the superintendent in directing the work has any tendency either to show great care or to rush work?" *Gunn* v. *New York, N. H. & H. R. Co.* (1898) 171 Mass. 417, 50 N. E. 1031.

It has been held that a nonexpert witness, after stating the facts, may state his opinion, based upon such facts, as to the health and mental condition of an injured employee. *Price* v. *Richmond & D. R. Co.* (1892) 38 S. C. 199, 17 S. E. 732.

Questions with regard to the speed of trains are not properly of a scientific nature, nor beyond the competency of ordinary witnesses, provided they have the means and habits of observation. *Detroit & M. R. Co.* v. *Van Steinburg* (1868) 17 Mich. 99; *Grand Rapids & I. R. Co.* v. *Huntley* (1878) 38 Mich. 540, 31 Am. Rep. 321.

Testimony of an employee which does not go to modify or vary a rule, but merely indicates the practical construction placed upon it by the employees whom it concerned, is admissible on the question whether a certain employee had the authority to do a certain act. *Gulf, C. & S. F. R. Co.* v. *Pierce* (1894) 7 Tex. Civ. App. 597, 25 S. W. 1052. Affirmed in (1894) 87 Tex. 144, 27 S. W. 60 (brakeman whose incompetency was known to the company left a switch open, and the conductor of another train was injured).

See also the cases cited in note 5, *infra*.

[2] *Southern R. Co.* v. *Mauzy* (1900) 98 Va. 692, 37 S. E. 285.

[3] *Lincoski* v. *Susquehanna Coal Co.* (1893) 157 Pa. 153, 27 Atl. 577.

[4] *Bergquist* v. *Chandler Iron Co.* (1892) 49 Minn. 511, 52 N. W. 136.

[5] An expert should not be allowed to give his opinion as to whether defendant's road was prudently managed (*Louisville & N. R. Co.* v. *Hall* [1888] 87 Ala. 708, 4 L. R. A. 710, 13 Am. St. Rep. 84, 6 So. 277); nor as to the propriety of a given method of operating trains (*Jeffrey* v. *Keokuk & D. M. R. Co.* [1881] 56 Iowa 546, 9 N. W. 881).

A witness cannot be allowed to express an opinion as to whether a person could walk safely between an obstruction and a building (*Brunker* v. *Cummins* [1892] 133 Ind. 143, 32 N. E. 732); nor as to whether the fencing of a railway track at a certain point would endanger the safety of the employees (*Toledo, St. L. & K. C. R. Co.* v. *Jackson* [1892] 5 Ind. App. 547, 32 N. E. 793).

Trainmen cannot be permitted to testify that a certain train was being handled in a "careful and cautious manner," or "carefully and cautiously." *DeWalt* v. *Houston, E. & W. T. R. Co.*

b. Admissible.—The above-stated doctrine is subject to an ex
tion which arises out of the necessity of the case, and which is
firmly established and as well known as the doctrine itself. T
exception is embodied in the rule that the opinion of witnesses

(1900) 22 Tex. Civ. App. 403, 55 S. W. 534.

Expert testimony by a yardmaster that the manner in which a brakeman employed in the yard attempted to make a coupling was dangerous and improper is inadmissible. *Seese* v. *Northern P. R. Co.* (1888) 39 Fed. 487.

A brakeman cannot be asked: "What is the proper way to couple cars when timber projects?" as the opinion called for does not pertain to a matter of skill, science, trade, or the like, upon which experts are permitted to give opinions, but merely bears upon the question whether the plaintiff exercised due care. *Hamilton* v. *Des Moines Valley R. Co.* (1872) 36 Iowa, 31.

A witness cannot be asked to state whether, if the drawheads or bumpers of cars are properly matched, there is danger of one overriding the other, or crushing a person making a coupling. If the construction of the cars, the position and area of the impinging surface of the bumpers, the speed with which the cars come in contact, and the position of the brakeman while making the coupling are shown, it needs no especial skill or study to tell what danger he would incur by attempting to make the coupling. *Muldowney* v. *Illinois C. R. Co.* (1873) 36 Iowa, 462.

In an action for damages for the death of a brakeman killed by the separation of the train on a ridge, the opinion of an expert as to how the brakes should have been applied is inadmissible. *Burns* v. *Chicago, M. & St. P. R. Co.* (1886) 69 Iowa, 450, 58 Am. Rep. 227, 30 N. W. 25.

Whether a locomotive of a certain model exhibited to the jury can be safely coupled to a car of a certain model, also exhibited in court, is not a question upon which expert testimony is admissible, as the jury, when they have the relation of the various parts explained to them, can have no difficulty in determining the extent of the danger incident to coupling them. *Way* v. *Illinois C. R. Co.* (1875) 40 Iowa, 341.

A witness cannot be asked whether it was not more dangerous to ride on a cross beam in front of the engine than on top of the cars (*Warden* v. *Louisville & N. R. Co.* [1891] 94 Ala. 277. 14 L. R. A. 552, 10 So. 276); whether it was proper to ride on ladder of a railway car (*Johnston Oregon Short Line R. Co.* [1892] 23 94, 31 Pac. 283).

A witness may not give his opi that it is not improper, or an act carelessness, for a brakeman to si top of a freight car with his feet the side. *Louisville & N. R. Co.* v. *liken* (1899) 21 Ky. L. Rep. 489, 5 W. 796.

In a suit by a railroad employee injuries, it is error not to exclude testimony of witnesses as to whethe switch would have been safer with without a light thereon. *Galveston, & S. A. R. Co.* v. *English* (1900) T Civ. App.) 59 S. W. 626. Rehear Denied in (1900) 59 S. W. 912.

An expert witness cannot give, as opinion, that the kind of block sig used on a trolley road are not such to insure reasonable safety to the ployees operating the cars, where he pointed out, as he might properly defects in the system and suggested i provements, and there is evidence th the system is used on a large number electric roads, and is generally reg a sufficient protection to those operati the cars thereon. *Bergen County Tra tion Co.* v. *Bliss* (1898) 62 N. J. L. 4 72 Am. St. Rep. 685, 41 Atl. 837.

Where one employed as a helper defendant's shops was engaged, togeth with a fellow servant, in moving a loc motive tender by means of pinch bar and, on plaintiff's companion withdraw ing his bar from under a wheel of th tender, it started backward and ran ov plaintiff, the question whether two me were sufficient to move the tender wit safety is not a subject for expert test mony. *Cahow* v. *Chicago, R. I. & P R. Co.* (1901) 113 Iowa, 224, 84 N. W 1056.

In an action against a railroad com pany for injuries received while loadin car wheels on a flat car, it is error t permit witnesses to give opinions as t the best and safest method of loadin such wheels. *Southern R. Co.* v. *Mann* (1900) 98 Va. 692, 37 S. E. 285.

Expert testimony that a lumber wagon with a seat is safer than one without, and that long lines are safe

sessing peculiar skill or knowledge of the subject-matter may be received in evidence, whenever the facts are such that inexperienced persons are likely to prove incapable of forming a correct judgment without such assistance."[6] Or, as the doctrine has also been stated, "where the question under investigation so far partakes of the nature of science as to require a course of study or a previous habit of special practice, in order to the attainment of a correct knowledge of the subject, the opinion of witnesses competent to speak should be received."[7]

for driving than short ones, is inadmissible in an action by a teamster for injuries received because the wagon furnished by defendant was without a seat, and the lines were too short. *Limberg* v. *Glenwood Lumber Co.* (1900) 127 Cal. 598, 49 L. R. A. 33, 60 Pac. 176.

An expert cannot be asked whether the particular facts stated showed that sufficient precautions had been taken in a certain mine. *Bergquist* v. *Chandler Iron Co.* (1892) 49 Minn. 511, 52 N. W. 136.

In an action for injuries sustained by reason of a charge of powder blowing out a pillar of coal in a mine, where evidence as to the pillar's thickness, the time when it was drilled, and the result of the explosion is before the jury, it is not error to exclude an opinion of a witness to the effect that such pillar was safe and proper. *Eureka Block Coal Co.* v. *Wells* (1901) 29 Ind. App. 1, 61 N. E. 236.

An expert witness should not be allowed to testify that, under the facts stated in the hypothetical case, a prudent man would have discontinued the use of a wire cable which broke as a result of the friction to which it was subjected. *Bruce* v. *Beall* (1897) 99 Tenn. 303, 41 S. W. 445.

The breaking strength and safe working strain of a manilla rope having been determined by practical tests and recorded in tables recognized over the whole civilized world, the question of the master's negligence in supplying the rope in question, and its sufficiency for the purpose for which it was used, is not a matter to be determined by the opinions of expert witnesses. *Hunt* v. *Kile* (1899) 38 C. C. A. 641, 98 Fed. 49.

Whether the injured person was careless at the time when he received his injury cannot be settled by expert testimony. *McCarragher* v. *Rogers* (1890) 120 N. Y. 526, 24 N. E. 812.

Expert testimony that the act of a conductor in going between cars, and pounding the angle cock at the end of the air hose, in order to close it, was not safe and prudent, but a dangerous and improper thing for him to do, is inadmissible. *St Louis & S. F. R. Co.* v. *Nelson* (1899) 20 Tex. Civ. App. 536, 49 S. W. 710.

The question whether the appearance of machinery would suggest to a prudent man the necessity of an examination is not one for an expert witness, but is for the jury to determine. *Goodsell* v. *Taylor* (1889) 41 Minn. 207, 4 L. R. A. 673, 16 Am. St. Rep. 700, 42 N. W. 873.

Whether a defect would have been discovered if a proper examination had been made is not a question upon which expert evidence is admissible. *Allen* v. *Union P. R. Co.* (1891) 7 Utah, 239, 26 Pac. 297.

It is error to allow a witness to be asked, as an expert, whether a proper inspection would have disclosed an obvious defect in an appliance. *Gutridge* v. *Missouri P. R. Co.* (1887) 94 Mo. 468, 4 Am. St. Rep. 392, 7 S. W. 476.

The sufficiency of the inspection of a brake is not a matter as to which a witness can give his opinion. *Schneider* v. *Second Ave. R. Co.* (1892) 133 N. Y. 583, 30 N. E. 752.

In an action for injuries sustained by a miner through the explosion of a missed shot, the negligence alleged being defendant's failure to discover and remove the missed shot, it is error to allow a witness to testify as to whether a man ought not to find such shots if he used ordinary care in looking for them, after he has testified that such missed shots are ordinarily easily detected, and were detected in a mine belonging to witness. *Holy Cross Gold Min. & Mill Co.* v. *O'Sullivan* (1900) 27 Colo. 237, 60 Pac. 570.

[6] *Chicago G. W. R. Co.* v. *Price* (1899) 38 C. C. A. 239, 97 Fed. 423.

See, generally, Rogers, Expert Testimony; Greenl. Ev. ed. 1899, § 441.

[7] *Louisville, N. A. & C. R. Co.* v.

The decisions cited below illustrate the manner in which this has been applied in actions against employers.[8]

Frawley (1886) 110 Ind. 18, 9 N. E. 594.

[8]An expert may give his opinion as to the merits or demerits of whipping straps as warning signals in the vicinity of low overhead bridges or railways, and may state whether or not they are generally used on roads regarded as being well managed. *Louisville & N. R. Co.* v. *Hall* (1888) 87 Ala. 708, 4 L. R. A. 710, 13 Am. St. Rep. 84, 6 So. 277.

Evidence that mail trains may be run with safety on a well-ballasted track at the rate of 60 miles an hour is admissible. *Ft. Worth & D. C. R. Co.* v. *Thompson* (1893) 2 Tex. Civ. App. 170, 21 S. W. 137.

Witnesses who have had several years' experience in track work are competent to testify that a certain track is not properly constructed. *Ft. Worth & D. C. R. Co.* v. *Wilson* (1893) 3 Tex. Civ. App. 583, 24 S. W. 686.

The question whether the rough and uneven condition of a railroad track would be likely to cause a coupling pin to be thrown out while a train was going down grade over such track, and thus part the train, is a proper one for expert testimony; and the opinion of an experienced railroad engineer shown to have been familiar with the track at the time may be received as that of one better qualified to form an opinion than the members of the jury. *Chicago G. W. R. Co.* v. *Price* (1899) 38 C. C. A. 239, 97 Fed. 423.

On the trial of an action against a railroad corporation, after several experts called by the plaintiff had testified, upon a statement of the facts and circumstances of the accident what in their opinion threw the cars from the track, it was held proper to permit the defendants to ask a machinist who had been connected for many years with railroads and with the running of cars and engines upon them, and who was in the cars at the time of the accident, and saw all these facts and circumstances, "What in your judgment threw off the baggage car at the time of the accident?" *Seaver* v. *Boston & M. R. Co.* (1860) 14 Gray, 466.

An experienced trainman is competent to testify as to the consequences which follow when a car, heavily loaded or empty, runs rapidly over a switch improperly set. *Louisville & N. R. Co.* v. *Mothershed* (1893) 97 Ala. 261, 12 714.

Where the train was running b ward at the time of an accident, there was evidence that the track in the same condition at that time when it was seen by an expert witn it is proper for the expert to st whether, if the track was in the sa condition, it would be more dangerou run the train backward than forwa *Kuhns* v. *Wiscousin, I. & N. R.* (1887) 70 Iowa, 561, 31 N. W. 868.

A car coupler injured while making coupling was held to have been prope allowed to testify that the cars by wh he was caught were coming back fast, and that this was the sole ca of the accident. *Georgia R. Co.* *Bryans* (1886) 77 Ga. 429.

An experienced brakeman may testi as to whether a railway track was proper place for a brakeman to sta when signaling a train. *Helton* v. *Lamar Midland R. Co.* (1893) 97 A 275, 12 So. 276.

A qualified witness may state wh is the proper and general rule for engineer with regard to awaiting a s nal from a brakeman engaged in cou ling cars before putting them in motio *Galveston, H. & S. A. R. Co.* v. *H* (1897) 90 Tex. 656, 40 S. W. 392, A firming (1897; Tex. Civ. App.) 39 S. W 302.

In an action to recover for injuri suffered by a brakeman in attempti to make a coupling with a link and pi alleged to be defective, old and experi enced brakemen are competent to giv their opinions as to the safety of coup ling one car to another, where the pi was so bent that it could not be take out, and the coupling had to be made with the link fast in the drawhead o the standing car. *Goins* v. *Chicago, R I. & P. R. Co.* (1891) 47 Mo. App. 174.

The evidence of experienced train hands as to the increased danger in volved in coupling cars with double deadwoods, instead of single, is properly received. *Louisville, N. A. & C. R. Co.* v. *Frawley* (1886) 110 Ind. 18, 9 N. E. 594.

An expert witness may be asked what advantage double deadwoods afford to cars; what effect, if any, they would have in protecting the cars from being drawn together in the course of trans-

In all cases where an opinion is competent as evidence, a foundation must be laid for its introduction by showing that the proposed

poration; and whether, with a higher degree of caution, cars so equipped could be coupled with safety. *Baldwin* v. *Chicago, R. I. & P. R. Co.* (1879) 50 Iowa, 680.

In an action by a brakeman for injuries received in coupling cars, evidence is admissible to show that brakemen frequently get their hands injured while so engaged. *Cincinnati, N. O. & T. P. R. Co.* v. *Lewallen* (1895; Ky.) 32 S. W. 958.

Where an engineer sued to recover for injuries caused, as he alleged, from a defective engine, but, according to the theory of the defendants, by plaintiff's own negligence, it was held that plaintiff, being himself an expert, might state what were his duties; that he might testify that he had complied with all instructions given him; that another expert engineer might relate the circumstances under which he had once stopped an engine, the relation being relevant and by way of illustration; that the conductor, having authority over the engineer, might testify as to the duties of the latter; and that the exclusion of such testimony was a substantial, and not merely a technical, error. *Augusta & S. R. Co.* v. *Dorsey* (1881) 68 Ga. 228.

An experienced railway man may state his opinion as to the different degrees of danger involved in using an ordinary road engine as a yard engine, with or without a flat car attached to it. *Mobile & O. R. Co.* v. *George* (1891) 94 Ala. 199, 10 So. 145.

Where plaintiff was injured in the making up of a train, it was not error to allow the trainmen to state that it was made up in the usual manner. *De Walt* v. *Houston, E. & W. T. R. Co.* (1900) 22 Tex. Civ. App. 403, 55 S. W. 534.

A brakeman who for five years has had opportunities of observing the making up of freight trains in a yard is competent to testify as to the respective duties of the conductors and other train hands in making up and moving the trains. *Price* v. *Richmond & D. R. Co.* (1892) 38 S. C. 199, 17 S. E. 732.

The opinions of witnesses are competent to show the distance at which a horse car can be seen along a railway track, if all the details bearing upon the question cannot be submitted to the jury. *East Tennessee, V. & G. R. Co.* v. *Watson* (1890) 90 Ala. 41, 7 So. 813.

In an action for negligently causing the death of a brakeman, testimony of other brakemen which relates to the duties of such employees in examining appliances, and as to the duties of the car inspector in this regard, and embraces the statement that a brakeman is not expected to get under a car, while it is in motion, to make such examination, is admissible as relevant to plaintiff's contention that decedent was injured by reason of a defective coupling appliance. *Missouri P. R. Co.* v. *Fox* (1900) 60 Neb. 531, 83 N. W. 744.

Expert evidence to show how a railroad track could have been made safest for the use of employees is admissible to show whether or not defendant company used proper care to furnish a reasonably safe track, although it was not required to furnish the safest track that could be constructed. *Galveston, H. & S. A. R. Co.* v. *Pitts* (1897; Tex. Civ. App.) 42 S. W. 255.

In an action against a railroad company, where it is shown that the injuries were sustained while the plaintiff's intestate was assisting in placing a derailed car back upon the track, and that, in order to do this, jack screws were being used, it is competent to show by a witness, who testified that he had for ten years worked upon a section of a railroad, that a car jacked up with two track jacks under the same end of the car would be likely to fall. *Louisville & N. R. Co.* v. *Jones* (1901) 130 Ala. 456, 30 So. 586.

A person who has had abundant experience in the use of a mechanical appliance is competent, although not familiar with its construction, to testify as to whether such appliance was reasonably adapted for the purpose for which it was used and also as to its condition at the time when an injury was received. *Alabama Co. Coal & Coke Co.* v. *Pitts* (1893) 98 Ala. 285, 13 So. 135.

In an action by an employee to recover for an injury sustained by falling earth while excavating for the foundation of a building near a high chimney, for which cuts were made under the foundation of the chimney, a civil engineer may give his opinion, in answer to a hypothetical question based on the evidence as to the manner of performing the work, that the method employed was not a proper one. *Finn* v. *Cassidy*

(1901) 165 N. Y. 584, 53 L. R. A. 877, 59 N. E. 311, Affirming (1899) 39 App. Div. 641, 57 N. Y. Supp. 1138.

A person who has made a special study of the strength of materials and the proper mode of building structures to sustain weight may be allowed to give his opinion as to whether a staging erected in a specified way can safely be trusted to carry a particular load. *Prendible* v. *Connecticut River Mfg. Co.* (1893) 160 Mass. 131, 35 N. E. 675; *Fox* v. *Buffalo Park* (1900) 163 N. Y. 559, 57 N. E. 1109, Affirming (1897) 21 App. Div. 321, 47 N. Y. Supp. 788; *Westland* v. *Gold Coin Mines Co.* (1900) 41 C. C. A. 193, 101 Fed. 59.

The evidence of a carpenter as to the nature and character of hemlock lumber and its strength as material to be used in scaffolding is admissible in an action for the death of an employee, caused by the giving way of a scaffolding composed of such material. *Kuhn* v. *Delaware, L. & W. R. Co.* (1895) 92 Hun, 74, 36 N. Y. Supp. 339.

The opinion of a house painter, of extended experience, as to the sufficiency of iron hooks to suspend a staging of a given weight, is competent where he has repeatedly used and tested them. *Little* v. *Head & D. Co.* (1899) 69 N. H. 494, 43 Atl. 619.

Evidence of a coemployee that he thought the situation of a belt and pulley would cause a strain on the pulley in the direction of the engine is not incompetent. *Knight* v. *Overman Wheel Co.* (1899) 174 Mass. 455, 54 N. E. 890.

Where negligence in failing to furnish proper rope and tackle was in issue, an objection to a question as to the manner of determining whether a rope had become rotten and unsound was properly overruled, since defendant's negligence depended to some extent on the question whether such defect was discernible. *Silveira* v. *Iversen* (1900) 128 Cal. 187, 60 Pac. 687.

The weakness arising from the crystallization of iron being a defect which cannot be discerned by an external examination, a servant who is injured owing to the breaking of a hook from that cause after a few months' use is, as a matter of law, unable to recover damages where, according to expert testimony, the breaking strain of a sound hook of the same cross-section is about four times as great as that to which it was being subjected when the accident occurred. *Lyons* v. *Knowles* (1893; Cal.) 32 Pac. 883.

An expert witness may give his opinion as to the effect of the breaki strands of wire upon the ult strength of the cable, or the proc crystallization, the result of time friction, and as to the probable li a cable under given circumsta *Bruce* v. *Beall* (1897) 99 Tenn. 30 S. W. 445.

It is not error to permit a man has been in the hardware busines testify that, in his opinion, a trac in a brake staff was an old one. v. *Northern P. R. Co.* (1891) 46 M 106, 24 Am. St. Rep. 194, 48 N. W.

In a case where an employee was injured by the breaking of the clamp which a derrick guy rope was faste and the clamp had been forged in fendant's shops from material furnis by it, expert testimony that the b could have been caused only by the of defective material in making clamp, or the subsequent overstrain of the derrick, was received. *Welsh Cornell* (1900) 49 App. Div. 203, 63 Y. Supp. 44.

In an action for injuries caused a defective elevator, where the evide showed that it had been put up by experienced and incompetent workm and that no safety appliances had b introduced, it was proper to admit t testimony of an expert builder of e vators, for the purpose of showing th an elevator without safety appliance was unsafe, and that an ordinary ca penter or machinist would not be a person to construct, repair, or put u an elevator. *Bier* v. *Standard Mfg.* (1889) 130 Pa. 446, 18 Atl. 637.

A question calling for the opinion a witness as to the competency of coservant of the injured person is n objectionable after a sufficient predica has been laid. *Buckalew* v. *Tennes Coal, Iron & R. Co.* (1895) 112 Al 146, 20 So. 606, where it was held tha the evidence of an expert miner who wa well acquainted with the work done b the delinquent coservant—the foreman of a gang of convicts—was admissible.

The testimony of an experienced rail road man, though not an engineer, tha a certain engineer had no idea of speed that he would pull a train down hill a fast as he could turn a wheel, and di so on trains on which the witness wa a conductor, is admissible upon the issue of the general negligence and incompe tency of the engineer. *Galveston, H. & S. A. R. Co.* v. *Davis* (1898) 92 Tex 372, 48 S. W. 570, Reversing (Tex. Civ. App.) 45 S. W. 956.

Upon the issue whether a defect in a

witness possesses the qualifications of an expert in regard to the subject-matter.[9]

machine was so patent that one who worked on it after knowing thereof assumed the risk of injury from it, a witness who has stated that the machine would have been perfectly safe but for such defect may be asked whether, with the experience he has had, he would have known that the defect made the machine more dangerous to work upon. *Blumenthal* v. *Craig* (1897) 26 C. C. A. 427, 55 U. S. App. 8, 81 Fed. 320.

An expert may properly testify that a dump car may be in perfectly good order and still lly buck by reason of the fault of those who dump it, and that he had seen it done. The latter statement serves to show more clearly the value and weight of his opinion. *Donahoe* v. *New York & N. E. R. Co.* (1893) 159 Mass. 125, 34 N. E. 87.

Where a witness who was on a hand car with deceased at the time it was run down by a train had testified to all the facts, it was competent to ask him whether the deceased had ample time to jump from the hand car before the collision. *Quinn* v. *New York, N. H. & H. R. Co.* (1888) 56 Conn. 44, 12 Atl. 97.

Where the negligence alleged is that an inexperienced boy was set to work without proper instruction, a witness of experience is properly allowed to testify as to the dangers incident to the use of a machine, what precautions were necessary to avoid those dangers, that the men usually employed about such a machine were adults, and that, before being set to work, those men were ordinarily instructed carefully in its use. *New York Biscuit Co.* v. *Rouss* (1896) 20 C. C. A. 555, 45 U. S. App. 45, 74 Fed. 608.

[9] Witnesses introduced in a personal injury case, for the purpose of showing a coal company's negligence in not blocking its railroad switch rails, may, to show their experience as railroad men, testify that switches were blocked before and after the accident in certain railroad yards where they worked. Nor is it a valid objection to their testimony, that they acquired their experience from work at ordinary railroad yards, and not at switch tracks about coal shafts. *Hamilton* v. *Rich Hill Coal Min. Co.* (1891) 108 Mo. 364, 18 S. W. 977.

The conductor of an electric street car, who has been so employed for two months, is a competent witness to testify within what distance such a car, going at a stated rate of speed, can be stopped. *Watson* v. *Minneapolis Street R. Co.* (1893) 53 Minn. 551, 55 N. W. 742.

A witness who is an expert in regard to the subject-matter, and has made a personal examination of the place where the accident occurred, may, after he has described it, state his opinion regarding its dangerous nature. *McVeaney* v. *Reading City* (1892) 150 Pa. 611, 25 Atl. 57.

The testimony of a witness as to the speed of trains is properly admitted, where it has been shown that he is a resident of the particular district through which they passed, is familiar with the running of trains, and has formed an opinion as to the speed of those under discussion. *Pence* v. *Chicago, R. I. & P. R. Co.* (1890) 79 Iowa, 389, 44 N. W. 686.

The fact that a witness did not know how many feet or rods there are in a mile was held not to be a sufficient reason for excluding his testimony as to the speed of a certain train, where it was shown that he lived near the scene of the accident, and had seen many trains pass. *Ward* v. *Chicago, St. P. M. & O. R. Co.* (1893) 85 Wis. 601, 55 N. W. 771.

A fireman is not competent to testify as an expert respecting the necessity of a safety switch at the point where a train was derailed. *Ballard* v. *New York, L. E. & W. R. Co.* (1889) 126 Pa. 141, 19 Atl. 35.

No one should be allowed to testify as to the condition of electrical apparatus, or as to the cause of an injury received in making repairs thereon, unless he has first shown himself to be an expert, and also has sufficient knowledge of the facts connected with the appliance used to enable him to form an intelligent and reliable opinion. *Schweitzer* v. *Citizens' General Electric Co.* (1899) 21 Ky. L. Rep. 608, 52 S. W. 830.

The exclusion of testimony by defendant's manager as to his knowledge of the use, purpose, and necessity of a certain improved form of appliance in defendant's paper mill, is not error where he has testified that he is not a practical machine man, and other evidence by a competent witness on the subject is undisputed. *Kreider* v. *Wisconsin River*

Prejudicial error is deemed to have been committed if the hy
thetical state of facts upon which an expert was asked to give
opinion did not correspond with that which was actually involve
the case.[10]

831. Judicial notice.— The extent to which judicial notice will
taken of certain facts which have actually been, or may well be, ma
rial in employers' liability cases, is indicated by the subjoined n
The decisions, especially those which are concerned with the functi
and duties of servants, are anything but consistent.[1]

Paper & Pulp Co. (1901) 110 Wis. 645, 86 N. W. 602.

[10]A question put to an expert, asking his opinion as to whether danger would be increased by running an engine backwards over the track at a higher rate of speed, supposing such track was so badly out of line that it was plainly visible to the eye, was held to be improper because there was no issue as to the improper rate of speed, and the question was indefinite as to the condition of the track. Slight as well as serious defects may be seen. The extent of the visible defect should be stated, for if this is done, the expert may not regard it as a defect at all. *Kuhns* v. *Wisconsin, I. & N. R. Co.* (1887) 70 Iowa, 561, 31 N. W. 868.

[1](a) *Judicial notice taken.*—A court will take judicial notice of the functions of ticket agents and conductors. *Dye* v. *Virginia Midland R. Co.* (1891) 9 Mackey, 63. Of the extent of the authority of a general superintendent of a railway in conducting its ordinary business operations. *Sacalaris* v. *Eureka & P. R. Co.* (1883) 18 Nev. 158, 51 Am. Rep. 737, 1 Pac. 835. Of the fact that a conductor's authority does not extend to carrying passengers gratuitously. *Condran* v. *Chicago, M. & St. P. R. Co.* (1895) 28 L. R. A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522. Of the fact that it is the duty of a section master to keep both track and right of way in proper condition. *Mobile & O. R. Co.* v. *Stinson* (1896) 74 Miss. 453, 21 So. 14, 522. Of the fact that a brakeman on a train which is out on the road has other duties to perform besides those of inspection. *Matchett* v. *Cincinnati, W. & M. R. Co.* (1892) 132 Ind. 334, 31 N. E. 792. Of the facts that trainmen often walk along by the side of trains, that they must go between cars in coupling and uncoupling them, that this is frequently done while the cars are in motion, and that it is quite a general practice for brake
to go ahead of trains and open switc
for them to enter on side tracks.
dianapolis, D. & W. R. Co. v.
(1891) 4 Ind. App. 282. Of the
that conductors of passenger tra
must not only enter their trains w
in motion, but leave them before th
come to a full stop. *Dailey* v. *Profe
Masonic Mut. Acci. Asso.* (1893)
Mich. 289, 26 L. R. A. 171, 57 N.
181, 50 N. W. 694.

Courts know judicially that loadi
railroad iron on flat cars pertains to
service of an employee. *Indianapolis
St. L. R. Co.* v. *Johnson* (1885) 102 I
352, 26 N. E. 200.

In a much-discussed case the Supre
Court of the United States held th
judicial notice would be taken of t
fact that, subject to the general rul
and orders of the directors of the co
pany, a conductor has entire control o
management of his train. *Chicago,
& St. P. R. Co.* v. *Ross* (1884) 112
S. 377, 28 L. ed. 787, 5 Sup. Ct. Re
184. This particular ruling has n
been reversed by *New England R. C
v. Conroy* (1899) 175 U. S. 323, 44 L
ed. 181, 20 Sup. Ct. Rep. 85, though, a
already stated (§ 549, note 1, *ante*)
the later case qualifies the earlier on
to the extent of discarding the theor
on which it was decided, viz., that th
court was justified in saying, from such
common knowledge as it might be sup
posed to possess, that the nature o
the control exercised by a conductor wa
such as to constitute him a depart
mental vice principal.

Where the jury have found for the
plaintiff on the theory that his injury
was caused by his head striking against
an arch in a tunnel while he was sitting
on the brake wheel of a box car, and it
is shown that this could not have oc
curred unless his forehead was 4 feet
7 inches above the wheel, the court will
take judicial notice of the fact that the

B. Burden of Proof with Respect to the Employer's Negligence.

As to the burden of proof in actions of negligence generally, see Shearm. & Redf. Neg. §§ 57-60; 1 Beven, Neg. pp. 127-147.

As to the burden of proof in cases where it is essential to determine whether a negligent coservant was or was not a vice principal, see §§ 512, 563, *ante*.

As to the presumptions entertained with regard to the adoption of the doctrine of common employment in a state other than that wherein the action is brought, see § 874, *post*.

832. Burden of proving negligence rests on the servant.—An injured servant, like all other persons who seek to recover damages on the ground of negligence, has the burden of proving by a preponderance of evidence that the defendant was culpable in the premises.[1] This

accident could not have happened, in the manner alleged, to a man of anything like normal height, and will set aside the verdict. *Hunter* v. *New York, O. & W. R. Co.* (1889) 116 N. Y. 616, 6 L. R. A. 246, 23 N. E. 9.

(b) *Judicial notice not taken.*—A court cannot take judicial notice of the rules and regulations of a particular railway company,—as, that the footboard of an engine, while being used for switching purposes, is the post of duty of the yardmaster. *Highland Ave. & Belt R. Co.* v. *Walters* (1890) 91 Ala. 435, 8 So. 357. Nor of the duties performed by trainmen, and the degrees of supremacy or subordination existing among them. *McGowan* v. *St. Louis & I. M. R. Co.* (1876) 61 Mo. 528. Nor of the extent of the duties and authority of a division superintendent of a railway. *Brown* v. *Missouri, K. & T. R. Co.* (1877) 67 Mo. 122 (action by stranger; the question being whether the company was bound by an order given for drugs required for an injured person). Nor of the functions of a general solicitor of a railway company. *Illinois C. R. Co.* v. *Pairpoint Mfg. Co.* (1894) 55 Ill. App. 231 (validity of service of summons). Nor of the extent to which a railway company is bound by the acts of a brakeman in respect to third persons. *Farber* v. *Missouri P. R. Co.* (1893) 116 Mo. 81, 20 L. R. A. 350, 22 S. W. 631 (ejection of passenger from train). Nor of the meaning of such technical and arbitrary terms as are used by railway employees to describe certain operations connected with the handling of trains. *Georgia R. & Bkg. Co.* v. *Fitzgerald* (1899) 108 Ga. 507, 19 L. R. A. 175, 34 S. E. 316. In the last-cited case, where the injury was alleged to have been caused by the negligent "kicking" of a car, and no evidence was introduced to show that a "running switch" and a "kick" were the same thing, it was held to be erroneous to admit in evidence against defendant one of its rules which related exclusively to running switches. *Georgia R. & Bkg. Co.* v. *Fitzgerald* (1899) 108 Ga. 507, 34 S. E. 316.

[1] *Robinson* v. *George F. Blake Mfg. Co.* (1887) 143 Mass. 528, 10 N. E. 314; *Flippen* v. *Kimball* (1898) 31 C. C. A. 282, 59 U. S. App. 1, 87 Fed. 258; *Texas & P. R. Co.* v. *Barrett* (1897) 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707; *Hodges* v. *Kimball* (1900) 44 C. C. A. 193, 104 Fed. 745; *Humphreys* v. *Newport News & M. Valley R. Co.* (1889) 33 W. Va. 135, 10 S. E. 39; *Painton* v. *Northern C. R. Co.* (1880) 83 N. Y. 7; *De Graff* v. *New York C. & H. R. R. Co.* (1879) 76 N. Y. 125; *St. Louis, I. M. & S. R. Co.* v. *Harper* (1881) 44 Ark. 521; *Mobile & O. R. Co.* v. *Thomas* (1868) 42 Ala. 672 (disapproving instruction which ascribed to the master an absolute duty to have suitable appliances); *Meyer* v. *Bapple Button Co.* (1900) 112 Iowa, 51, 83 N. W. 809; *O'Connell* v. *Baltimore & O. R. Co.* (1863) 20 Md. 212, 83 Am. Dec. 549; *Millar* v. *Madison Car Co.* (1895) 130 Mo. 517, 31 S. W. 571; *Smoot* v. *Mobile & M. R. Co.* (1880) 67 Ala. 13; *Corcoran* v. *New York, N. H. & H. R. Co.* (1901) 58 App. Div. 606, 69 N. Y. Supp. 73;

doctrine may be regarded simply as an illustration of the g
rule of procedure which is embodied in the maxim, *Ei incumb*

Peppett v. *Michigan C. R. Co.* (1899) 119 Mich. 540, 78 N. W. 900; *Donovan* v. *Harlan & H. Co.* (1899) 2 Penn. (Del.) 190, 44 Atl. 819; *Daniels* v. *Liebig Mfg. Co.* (1899) 2 Marv. (Del.) 207, 42 Atl. 447; *Chielonsky* v. *Hoopes & T. Co.* (1894) 1 Marv. (Del.) 273, 40 Atl. 1127; *Croker* v. *Pusey & J. Co.* (1900) 3 Penn. (Del.) 1, 50 Atl. 61; and cases cited *passim* in this subtitle.

"The burden must rest upon the injured servant to show by his complaint that some duty of the master has been violated. If that duty is one the discharge of which has been delegated to another, not only the duty, but the delegation of it, as well as its violation, must be shown." *New Pittsburgh Coal & Coke Co.* v. *Peterson* (1893) 136 Ind. 398, 43 Am. St. Rep. 327, 35 N. E. 7.

"It is not for the defendant to account for the accident on a theory consistent with due care, but for the plaintiff to account for it on a theory inconsistent therewith." *Breen* v. *St. Louis Cooperage Co.* (1892) 50 Mo. App. 202.

Any instruction is erroneous which makes the master's liability turn upon the existence of danger, not of negligence (*Lincoln Street R. Co.* v. *Cox* [1896] 48 Neb. 807, 67 N. W. 740); or which directs the jury to find for the plaintiff if they should determine that, in doing what he did with respect to the defective appliance in question, he was acting in the proper discharge of his duties, and while so acting took proper precautions (*Norfolk & W. R. Co.* v. *Mann* [1901] 99 Va. 180, 37 S. E. 849).

An instruction which makes the liability of a street railway company for an injury to an employee from coming in contact with a broken fire alarm wire which had fallen across the trolley wire depend upon the manner in which the wires were constructed and maintained, instead of upon the negligence of the company in so maintaining and constructing them,—is erroneous. *Lincoln Street R. Co.* v. *Cox* (1896) 48 Neb. 807, 67 N. W. 740.

Where a servant was injured in the master's shop by stepping into a barrel of hot water sunk into the ground so that the top was flush with the surface, and he contended that the injury was caused by the action of a vicious dog kept by the master, it was held that an instruction declaring that the plaintiff would be entitled to recover if the jury found that the action of the dog was not a risk assumed by the servant, and that such action was the cause of the injury, was erroneous, inasmuch as it did not require a consideration of the master's negligence in placing and maintaining the barrel, and the servant's freedom from negligence. *Mc... Roepple Button Co.* (1900) 112 Wis. 51, 83 N. W. 809.

In a case where the plaintiff proved the occurrence of the accident and introduced affirmative evidence tending to show that the defect had existed for a considerable time, it was held that an instruction that it is the duty of the employer "to exercise reasonable care in keeping such machinery and appliances in a reasonably safe condition for use" did not place the burden of disproving the neglect of duty upon him, and was not improper. *Chicago, R. & Q. ...* v. *Anthony* (1898) 55 Neb. 748, 76 N. W. 462, Modifying on Rehearing 55 Neb. 227, 74 N. W. 454.

Where the evidence tends to show that the plaintiff was injured entirely because of the carelessness and inattention of those who arranged a hoisting apparatus and fixed it and placed it in position, or because of defects in the apparatus itself, an instruction is erroneous which declares the plaintiff to be entitled to recover if the jury believe that the work in which the appliance was used was extra-hazardous. Such an instruction is not open to objection on the ground that it assumes the work to have been extra-hazardous, when there was no evidence of that fact except the accident itself. It merely directs the attention of the jury to the propriety of considering whether, under the circumstances, the plaintiff's right of recovery may not hinge upon the rule that the risks resulting from the failure of the master to furnish suitable machinery and prudent servants to operate it in the same are extra-hazardous and not assumed by a servant as part of his contract of service. *Consolidated Coal Co.* v. *Haenni* (1893) 146 Ill. 614, 35 N. E. 162, Affirming (1891) 48 Ill. App. ...

In a case where the case was tried by a judge sitting as a jury, it was

natio qui dicit, non qui negat.[2] Or it may be referred to the more particular proposition applicable only to actions for negligence that, as it is presumed, in the absence of evidence to the contrary, that any duty which the law imposes has been properly performed, a servant must, in order to make out a prima facie case which will entitle him to go to the jury, produce some evidence which tends to destroy the force of the presumption in the given instance.[3] Sometimes both these notions are adverted to in the same statement.[4]

From the principles explained in chapter x., *ante*, it follows that one of the essential elements which the servant has the burden of proving is the master's knowledge, actual or constructive, of the existence of the dangerous conditions which caused the injury.[5] But

town that, in order to charge a shipowner with liability on the ground of his failure to furnish a safe hook to hold a boom in use as a derrick, the injured person must furnish evidence of negligence sufficiently clear, distinct, and preponderating to convince the court, without resort to conjecture or surmise, that the shipowner was negligent. *The Baron Iwerdale* (1899) 93 Fed. 192. But in this case several witnesses had stated that the iron of the hooks was of very inferior quality, and that there was evidence of a flaw of which the shipowner should have known. Apparently, therefore, the case would have been for the jury if it had been tried in the ordinary manner.

[2] "The onus of proof is on the plaintiff. It is incumbent on him to show . . . fully all the elements of a right . . . ." *State use of Hamelin* v. . . . (1881) 57 Md. 287.

. . . authorities are agreed that it . . . upon the plaintiff to show the . . . or, in other words, . . . all the facts which constitute . . . apparent the alleged negli- . . . *Atchison, T. & S. F. R. Co.* v. . . . *Weber* (1885) 34 Kan. 326, 8 Pac. . . .

[3] This aspect of the principle is adverted to in the following cases: *Summerhaus* v. *Kansas P. R. Co.* (1875) 2 Colo. 484 (complaint not negativing want of care and knowledge, held bad on demurrer; *Murray* v. *Denver & R. G. R. Co.* (1887) 11 Colo. 124, 17 Pac. 484; *Bailey* v. *Garbutt* (1900) 112 Ga. 288, 37 S. E. 360; *Chicago & E. I. R. Co.* v. *Mucis* (1898) 83 Ill. App. 469; *Missouri P. R. Co.* v. *Chamberlain* (1896) 4 Kan. App. 232, 45 Pac. 967; *Ouellette* v. *Overman Wheel Co.* (1894) 162 Mass. 360, 38 N. E. 511; *Bublin* v. *Kansas . . . St. J. & C. B. R. Co.* (1891) 119 . . . 176, 24 S. W. 1011; *Sparks* v. *Chicago, R. & Q. R. Co.* (1895) 13 Neb. 720, 62 N. W. 98; *Scott & Co.* v. *Halsabel* (1900) 60 Neb. 781, 84 N. W. 247; *Potter* v. *New York C. & H. R. R. . .* (1892) 136 N. Y. 77, 32 N. E. 603; *Rose* v. *Boston & A. R. Co.* (1871) 58 N. Y. 217; *Mc Callan* v. *Saratoga & W. R. Co.* (1855) 20 Barb. 149; *Wright* v. *New York C. R. Co.* (1862) 25 N. Y. 562; *Malone* v. *Hathaway* (1876) 64 N. Y. 5, 21 Am. Rep. 573; *De Graff* v. *New York C. & H. R. R. Co.* (1879) 76 N. Y. 125; *Hanes* v. *Fortieth and Forty-second & G. Street Ferry R. Co.* (1881) 97 N. Y. 259; *Hoag* v. *Staten Island R. Co.* (1880) 81 N. Y. 373; *Sidener* v. *Kemp* (1895) 115 N. Y. 127, 20 N. E. 212; *Wall* v. *Delaware, L. & W. R. Co.* (1883) 34 Hun, 454, 7 N. Y. Supp. 709; *Grimont* v. *Hartman* (1886) 17 W. N. C. 252, 1 Cent. Rep. 928, 5 Atl. 312.

In the absence of an allegation that an employer was incompetent at the time he was employed, the court will presume that the master made all proper inquiries and investigations before hiring him. *Davis* v. *Detroit & M. R. Co.* (1870) 20 Mich. 105, 4 Am. Rep. 361.

[4] Negligence on the part of the employer is not to be presumed; and it rests on the plaintiff to aver and prove every fact essential to the existence of actionable negligence on the part of the employer. *Louisville, N. A. & C. R. Co.* v. *Sandford* (1888) 117 Ind. 265, 19 N. E. 770.

[5] *De Graff* v. *New York C. & H. R. R. Co.* (1879) 76 N. Y. 125; *Norfolk & W. R. Co.* v. *Jackson* (1888) 85 Va. 189, 8 S. E. 370; *Chicago, B. & Q. R. Co.*

v. *Montgomery* (1884) 15 Ill. App. 205; *Johnson* v. *Chesapeake & O. R. Co.* (1892) 36 W. Va. 73, 14 S. E. 432; *Arcade File Works* v. *Jutcau* (1896) 15 Ind. App. 461, 10 N. E. 818, 44 N. E. 326; *Disher* v. *New York C. & H. R. R. Co.* (1883) 91 N. Y. 622; *Mentzer* v. *Armour* (1883) 5 Met'tary, 617, 18 Fed. 375; *Mason* v. *Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 815, 32 Am. St. Rep. 814, 16 S. E. 698; *Columbus, C. & I. C. R. Co.* v. *Troesch* (1873) 68 Ill. 545, 18 Am. Rep. 578; *Stafford* v. *Chicago, R. & Q. R. Co.* (1885) 114 Ill. 244, 2 N. E. 185; *St. Louis, I. & T. H. R. Co.* v. *Corgan* (1891) 49 Ill. App. 229; *Snodgrass* v. *Carnegie Steel Co.* (1896) 173 Pa. 228, 33 Atl. 1104; *Condon* v. *Missouri P. R. Co.* (1883) 78 Mo. 567; *St. Louis, I. M. & S. R. Co.* v. *Gaines* (1885) 46 Ark. 555.

The cases cited in the chapters dealing with knowledge as an element of the master's liability all assume the doctrine to be correct.

See also § 128, *ante*.

From evidence that a defect existed it cannot be inferred that it could have been discovered. *Harnois* v. *Cutting* (1899) 173 Mass. 398, 54 N. E. 842.

In two cases in which the servant was suing under the North Carolina statute, which declares railway companies to be liable to their employees for injuries caused by "any defect in their machinery, ways, or appliances" (see chapter XXIX., *ante*), the court held that, when it was proved or admitted that the injury in question was caused by the unsafe condition of the track, negligence on the part of the company would be presumed, and that the burden of proving facts which would excuse the accident was then shifted to the defendant. *Marcom* v. *Raleigh & L. Air Line R. Co.* (1900) 126 N. C. 200, 35 S. E. 423; *Wilkie* v. *Raleigh & C. F. R. Co.* (1900) 127 N. C. 203, 37 S. E. 201. In the former case it was remarked that this is always the rule where a positive duty is imposed by law. No authorities for this statement were mentioned, nor does the court give any reason for the doctrine thus enunciated, although that doctrine is tantamount to a declaration that the principle which is recognized in the decisions collected at the beginning of this note is not applicable where the physical conditions from which the injury resulted did not satisfy a standard of safety which had been fixed by a statutory provision. The writer confesses his inability to perceive any rational ground upon which such a [illegible] tication of that principle can be [illegible] in the present instance. The co[illegible] position would rather seem to be [illegible] in the absence of some express p[illegible] sion like those discussed in § 839, [illegible] the statute in question simply render[illegible] railway company liable for a "de[illegible] under the same circumstances as w[illegible] warrant the inference of such lia[illegible] in a common law action; — that i[illegible] say, recovery is conditional upon it[illegible] ing shown that the company, ha[illegible] actual or constructive knowledge of[illegible] abnormal conditions, failed to rem[illegible] them. The adoption of this view o[illegible] ously involves the consequence that [illegible] burden of proving such knowledge [illegible] lie upon the plaintiff in an action u[illegible] the statute, and that the doctrine [illegible] plied in the North Carolina cases [illegible] erroneous. A similar conclusion is [illegible] dicated by the consideration that [illegible] doctrine seems to be essentially in[illegible] sistent with the rule laid down in [illegible] cases mentioned in § 800, *ante*, 112, [illegible] the imposition of a specific duty upo[illegible] master does not operate so as to re[illegible] him an insurer of the safety of [illegible] servants.

Another case which seems to be [illegible] posed to the general current of the [illegible] thorities is *Guthrie* v. *Maine C. R.* [illegible] (1889) 81 Me. 572, 18 Atl. 295, wh[illegible] the court held that having in a trai[illegible] car with defective appliances furni[illegible] prima facie evidence of an omission [illegible] duty on the part of the company, [illegible] that, if there was any explanation [illegible] was within the power of the company [illegible] give it. In *Carruthers* v. *Chicago, K. & P. R. Co.* (1895) 55 Kan. 683, 40 P. 915, an attempt was made to reco[illegible] this ruling with the more commonly [illegible] cepted doctrine upon the ground t[illegible] the defect in question (broken drawh[illegible] and bumper) was a patent one of wh[illegible] the company was bound to take noti[illegible] Possibly the case may be brought in h[illegible] with the other authorities to the ext[illegible] of its being consistent with them up[illegible] the actual facts in evidence. But t[illegible] Maine court, so far as can be discover[illegible] from its reported opinion, did not [illegible] tend to rely upon the patent chara[illegible] of the defect, or the presumption th[illegible] the company had notice of it. T[illegible] broad rule is laid down that "in [illegible] cases where a wrong, a fault, or [illegible] omission of duty even, is proved, fro[illegible] which damages result, the wrong, fau[illegible] or omission implies a neglect, in t[illegible] absence of other evidence, which

where the servant has shown that the master ought to have known of these conditions, the law does not put upon him the additional burden of showing that the master knew what it was his duty to know.[6]

A servant suing for injuries caused by the employer's negligent failure to furnish safe machinery is not bound to show the precise nature of the defect. It is sufficient to show that the accident occurred because of some defective condition of the machinery, caused by the latter's negligence.[7]

The presumption is that a servant of a railway company, who was injured while traveling on a car which belonged to the company and was ostensibly designed for the transportation of passengers, was on

quires explanation from the apparently guilty party.

Where it is shown that the negligence which caused the injury was that of a fellow servant, the plaintiff has the onus of showing that the fellow servant was incompetent, and that the defendant knew or ought to have known of that incompetency. *Byrne* v. *Fennell* (1882) Ir. L. R. 10 C. L. 397; *Mentzer* v. *Armour* (1882) 5 McCrary, 617, 18 Fed. 373; *Chicago & E. I. R. Co.* v. *Geary* (1884) 110 Ill. 383; *Stafford* v. *Chicago, B. & Q. R. Co.* (1885) 114 Ill. 244, 2 N. E. 185; *Ohio & M. R. Co.* v. *Dunn* (1893) 138 Ind. 18, 36 N. E. 702, 37 N. E. 546; *Baltimore Elevator Co.* v. *Neal* (1886) 65 Md. 438, 5 Atl. 338; *McDermott* v. *Hannibal & St. J. R. Co.* (1885) 87 Mo. 285; *Roblin* v. *Kansas City, St. J. & C. B. R. Co.* (1894) 119 Mo. 476, 24 S. W. 1011; *Murphy* v. *St. Louis, I. M. & S. R. Co.* (1879) 71 Mo. 202 (error to charge that the master has the burden of proving that he used due care in employing a servant shown to be incompetent); *O'Boyle* v. *Lehigh Valley Coal Co.* (1894) 161 Pa. 275, 28 Atl. 3088; *Snodgrass* v. *Carnegie Steel Co.* (1894) 173 Pa. 228, 33 Atl. 1101; *Southern Cotton-Oil Co.* v. *De Vaud* (1894; Tex. Civ. App.) 25 S. W. 43 (instruction erroneous which puts on defendant the burden of proving exercise of due care in selecting a servant); *Missouri P. R. Co.* v. *Christman* (1886) 65 Tex. 369; *M'Charles* v. *Horn Silver Min. & Smelting Co.* (1894) 10 Utah, 470, 37 Pac. 733; *Ragotte* v. *Canadian P. R. Co.* (1889) 5 Manitoba L. Rep. 365.

It is error to instruct a jury that, when the incompetency of the servant is established, the burden of proving that ordinary care was used in employing him lies on the master. *Murphy* v. *St. Louis, I. M. & S. R. Co.* (1879) 71 Mo. 202.

On the other hand, where it is manifest that the negligence, if any, amounted to the violation of a personal or non-delegable duty of the master, the plaintiff is not obliged in the first instance, and as a part of his case to show that the coemployee from whose acts or omissions the risk in question resulted was incompetent for his duties. *Gates* v. *Chicago, M. & St. P. R. Co.* (1893) 4 S. D. 433, 57 N. W. 200 (derrick allowed to be in a situation where it was dangerous to men on passing trains).

[6] *Ocean S. S. Co.* v. *Matthews* (1890) 86 Ga. 418, 12 S. E. 632. The court said: "It being shown that the defendant, whose duty it was to provide safe and suitable implements, on the contrary provided and employed implements which at and before the time of the injury were obviously unsafe and unfit, and on their face showed that they had been so long enough for their unsafe condition to have been discovered by the master in the exercise of ordinary diligence, it is not too much to assume that the defendant ought to have known of this condition; and it is asking little enough to require it to show that it did not know, or offer some excuse for not knowing. This defense, if it existed, could easily have been made; the proof must have lain within the defendant's reach; the books were in its possession, presumably so, at least; and if the plaintiff's evidence as to the condition of the hooks was untrue, the defendant could easily have disproved it."

[7] *Nelson* v. *St. Paul Flour Works* (1894) 57 Minn. 43, 58 N. W. 868.

that car by the invitation of an employee who had authority to the company by such invitation; and in the absence of evidence ing to rebut this presumption the jury is warranted in finding tha servant was not a trespasser.[8]

833. Negligence not inferable from the mere occurrence of an dent.—A doctrine which has very frequently been affirmed in ployers' liability cases is that the mere fact of the servant's ha been injured, owing to the existence of abnormally unsafe condit is not of itself sufficient to overcome the presumption entertaine the law, that the master has exercised proper care.[1] This doc

[8] *Bryant* v. *Chicago, St. P. M. & O. R. Co.* (1893) 4 C. C. A. 146, 12 U. S. App. 115, 53 Fed. 997. As to this case, see § 626, notes 2, 6, *ante*.

[1] "While in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier,—a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, . . . a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish, that the employer has been guilty of negligence." *Patton* v. *Texas & P. R. Co.* (1901) 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275.

"Excepting where contractual relations exist between the parties, as in the case of carriers of passengers and some others, negligence will not be presumed from the mere happening of the accident and a consequent injury; but the plaintiff must show either actual negligence or conditions which are so obviously dangerous as to admit of no inference other than that of negligence." *Stearns* v. *Ontario Spinning Co.* (1898) 184 Pa. 523, 39 L. R. A. 842, 63 Am. St. Rep. 807, 39 Atl. 292.

"The mere fact that the servant received injury does not establish, even prima facie, the negligence or breach of duty of the master." *Essex County Electric Co.* v. *Kelly* (1894) 57 N. J. L. 100, 29 Atl. 427.

Other cases in which the doctrine in the text is recognized are the following: *Moffatt* v. *Bateman* (1869) L. R. 3 P. C. 115, 22 L. T. N. S. 140, 6 Moore, P. C. C. N. S. 369, Reversing 5 W. W. & A. B. (Viet. Law) 125; *Kay* v. *Briggs* (1889; Q. B. D.) 5 Times L. R. 233 (upper compressing plate of a brick-making machine falls unexpectedly on the of a workman who has just arrest movement with a scraper); *Texas R. Co.* v. *Barrett* (1897) 166 U. S. 41 L. ed. 1136, 17 Sup. Ct. Rep (boiler exploded); *Jones* v. (1872) 2 Dill. 68, Fed. Cas. No (boiler exploded); *Re California Impror. Co.* (1901) 110 Fed. 670 drum exploded); *The Ida B. C* (1894) 10 C. C. A. 631, 23 U. S. 395, 62 Fed. 765 (fireman's leg caught in line thrown to steam *Jones* v. *Alabama Mineral R. Co.* 107 Ala. 400, 18 So. 30 (employee from hand car); *Birius* v. *Georg R. Co.* (1892) 96 Ala. 325, 11 S (switch caught in brakeman's cloth *Brymer* v. *Southern P. Co.* (1891 Cal. 496, 27 Pac. 371; *Sappenfi Main Street & Agri. Park R.* (1891) 91 Cal. 48, 27 Pac. 590; *G R. & Bkg. Co.* v. *Nelms* (1889) 8 70, 20 Am. St. Rep. 308, 9 S. E. (hammer burst in pieces while used); *Gassaway* v. *Georgia Sou R. Co.* (1882) 69 Ga. 317; *East Te see, V. & G. R. Co.* v. *Suddeth* (1 86 Ga. 388, 12 S. E. 682 (lamp went while brakeman was making sig with it); *Joliet Steel Co.* v. *Sh* (1893) 146 Ill. 603, 34 N. E. (proof that servant was injured by of molds, held not sufficient; but covery allowed on another ground); *ledo, W. & W. R. Co.* v. *Moore* (18 77 Ill. 217 (bursting of boiler); *Pe D. & E. R. Co.* v. *Hardwick* (1892) Ill. App. 562 (footboard of engine way); *Chicago & A. R. Co.* v. *D* (1886) 23 Ill. App. 148 (flange of broke); *Garden City Wire Spring* v. *Boecher* (1899) 94 Ill. App. 96; *Lo ville & N. R. Co.* v. *Conliff* (1890 Ky. 560, 14 S. W. 513 (rails of sw spread as train was moving slowly, caused the switch lever to strike a y

hand); *Henry* v. *Brackenridge Lumber Co.* (1896) 48 La. Ann. 950, 20 So. 221; *Hanrathy* v. *Northern C. R. Co.* (1876) 46 Md. 280 (defective steam hammer); *Hale* v. *New York & N. E. R. Co.* (1899) 174 Mass. 317, 54 N. E. 844 (arch pipe of locomotive blew out); *Duffy* v. *Upton* (1873) 113 Mass. 544 (derrick broke); *Toomey* v. *Eureka Iron & Steel Works* (1891) 89 Mich. 249, 50 N. W. 850 (boiler end fell upon workman); *Redmond* v. *Delta Lumber Co.* (1893) 96 Mich. 545, 55 N. W. 1004 (no proof offered that machine was out of repair when it caused an accident); *Quincy Min. Co.* v. *Kitts* (1879) 42 Mich. 34, 3 N. W. 240, per Cooley, J.; *Perry* v. *Michigan C. R. Co.* (1895) 108 Mich. 130, 65 N. W. 608; *Toomey* v. *Eureka Iron & Steel Works* (1891) 89 Mich. 249, 50 N. W. 850; *Davidson* v. *Davidson* (1891) 46 Minn. 117, 48 N. W. 560 (iron weights by which elevator was operated fell through top of car); *Nolan* v. *Shickle* (1877) 3 Mo. App. 300 (scaffold fell); *Lincoln Street R. Co.* v. *Cox* (1896) 48 Neb. 807, 67 N. W. 740; *Chicago, B. & Q. R. Co.* v. *Kellogg* (1898) 55 Neb. 748, 76 N. W. 462, Modifying on Rehearing 54 Neb. 127, 74 N. W. 454; *Baldwin* v. *Atlantic City R. Co.* (1900) 64 N. J. L. 232, 45 Atl. 810; *De Graff* v. *New York C. & H. R. R. Co.* (1879) 76 N. Y. 125; *Terry* v. *New York C. R. Co.* (1855) 22 Barb. 574; *Curran* v. *Warren Chemical & Mfg. Co.* (1867) 36 N. Y. 153; *Baulec* v. *New York & H. R. Co.* (1874) 59 N. Y. 356, 17 Am. Rep. 325; *Lancson* v. *Merrall* (1893) 69 Hun, 278, 23 N. Y. Supp. 560 (clamp holding hoisting cable of elevator broke and allowed cage to fall); *Mulligan* v. *Crimmins* (1894) 75 Hun, 578, 27 N. Y. Supp. 819 (court declined to say that a sliver would not be dislodged from a chisel by the blow of a heavy sledge hammer when the chisel was in good order); *Martin* v. *Cook* (1891) 37 N. Y. S. R. 733, 14 N. Y. Supp. 329 (hand of ladle from which molten lead was being poured into another suddenly gave way); *Mahoney* v. *New York C. & H. R. R. Co.* (1892) 46 N. Y. S. R. 738, 19 N. Y. Supp. 511 (drawhead found after an accident to be out of order); *Huff* v. *Austin* (1889) 46 Ohio St. 386, 15 Am. St. Rep. 613, 21 N. E. 861 (boiler exploded); *Kincaid* v. *Oregon Short Line & U. N. R. Co.* (1892) 22 Or. 35, 29 Pac. 3 (railroad brakeman cannot recover for personal injuries resulting from the parting of the train, due to the absence of a key holding the drawbar in place, where the key may have fallen out in the ordinary operation of the train, and there is nothing aside from the accident, to show that the key was not in place and properly fastened at the time the train started on its trip); *Mader* v. *Imperial Coal Co.* (1893) 152 Pa. 395, 25 Atl. 587; *Higgins* v. *Fanning* (1900) 195 Pa. 599, 46 Atl. 102; *Wojciechowski* v. *Spreckels Sugar Ref. Co.* (1896) 177 Pa. 57, 35 Atl. 596; *Spees* v. *Boggs* (1901) 198 Pa. 112, 52 L. R. A. 933, 82 Am. St. Rep. 792, 47 Atl. 875; *Dallus* v. *Gulf, C. & S. F. R. Co.* (1883) 61 Tex. 196 (derailment of train); *Houston & T. C. R. Co.* v. *Barrager* (1890; Tex.) 14 S. W. 242 (drawhead had become detached in the operation of moving the train); *Broadway* v. *San Antonio Gas Co.* (1900) 24 Tex. Civ. App. 603, 60 S. W. 270; *Missouri, K. & T. R. Co.* v. *Crowder* (1899; Tex. Civ. App.) 55 S. W. 380; *Hard* v. *Vermont & C. R. Co.* (1860) 32 Vt. 478; *Hughes* v. *Oregon Improv. Co.* (1898) 20 Wash. 294, 55 Pac. 119; *Ketterman* v. *Dry Fork R. Co.* (1900) 48 W. Va. 606, 37 S. E. 683; *Musbach* v. *Wisconsin Chair Co.* (1900) 108 Wis. 57, 84 N. W. 36; *Spille* v. *Wisconsin Bridge & Iron Co.* (1900) 105 Wis. 340, 81 N. W. 397; *Wyman* v. *The Duart Castle* (1899) 6 Can. Exch. 387.

See also cases cited in § 834, note 9, *infra*.

In one case it was laid down that, while a railroad company is not an insurer of the safety of its employees, a collision or derailment of a train, causing injury to an employee, raises a presumption of negligence on the part of the railroad company, and casts on it the burden of proving that it was not negligent. *Wright* v. *Southern R. Co.* (1900) 127 N. C. 225, 37 S. E. 221. The court relied on the cases cited in Shearm. & Redf. Neg. § 516, regarding the presumption of negligence that is entertained where a passenger is injured by some instrumentality for the condition of which the carrier is responsible. The position is expressly taken that "this presumption extends to the occurrence, regardless of the person injured."

In another case we find the similar ruling that, where it appears that a servant was injured in a train collision a prima facie case is made against the master. *Shuler* v. *Omaha, K. C. & E. R. Co.* (1901) 87 Mo. App. 618. The court proceeds upon the assumption that the rule which provides that where an accident results from "an act of such a

is controlling, even in cases where the nature of the accid strongly suggestive of the conclusion that the master had fallen of the obligatory standard of care.[2]

character that when due care is taken in its performance no injury ordinarily ensues from it in similar cases, it will be presumed to be negligent," applies to a collision between trains, even when the injured person is a servant. The authorities cited are cases where carriers were sued by third persons.

Both of these decisions are evidently contrary to the great mass of the authorities which make a distinction between the class of cases relied upon by the courts and those in which the injury was received by a servant or person to whom the defendant owes only the duty of exercising ordinary care. See last section, note 1.

It is error to give any instruction which is inconsistent with the doctrine stated in the text. *Baltimore Elevator Co.* v. *Neal* (1886) 65 Md. 438, 5 Atl. 338; *Wabash R. Co.* v. *Farrell* (1898) 79 Ill. App. 508; *Kuhns* v. *Wisconsin, I. & V. R. Co.* (1887) 70 Iowa, 561, 31 N. W. 868 (instruction disapproved which allowed jury to infer negligence from the fact that the accident was "unusual and extraordinary"); *Kansas P. R. Co.* v. *Salmon* (1873) 11 Kan. 83 (held to be error in an action for injuries received by a trainman in the operation of a railroad, to charge that such an accident raises a presumption of negligence on the part of the master); *Mobile & O. R. Co.* v. *Thomas* (1868) 42 Ala. 672 (engine derailed owing to defects of truck; charge erroneous which stated that the onus of proof that care and diligence was used was cast upon the defendant by a failure to have a suitable engine); *Hudson* v. *Charleston, C. & C. R. Co.* (1889) 104 N. C. 491, 10 S. E. 669 (erroneous to charge the jury that, if they found the appliance which caused the injury to be defective, it devolved on the defendant corporation to show that its condition was not, and could not by the exercise of reasonable care have been, known to its officers); *Louisville & N. R. Co.* v. *Filbern* (1869) 6 Bush, 574, 99 Am. Dec. 690 (instruction held improper by which the jury were in effect told that ordinarily the defendant was not only liable for negligence, either proximate or remote, but that they must regard all accidents or misfortunes occurring in consequence of the falling or displacement of natural objects along the line of the road results of such negligence).

An instruction to the effe where, in the due exercise of his the employee is injured through pliances or surroundings of the b and it does not appear that he fault, the burden is on the empl show that he himself was fre fault, is erroneous, as it take from the jury the consideration question as to whether or not jury was caused by unavoidabl dent. *Lindall* v. *Bode* (1887) 245, 13 Pac. 660.

It is also error to refuse instr embodying this doctrine. *Wan nois C. R. Co.* (1875) 40 Iow But a defendant cannot complain refusal of a trial judge to charg defendant was not bound to expl cause of the accident, where th are instructed that under the c stances of the case the breaking machinery was no evidence of on the part of the defendant. *C* v. *Overman Wheel Co.* (1894) 16 305, 38 N. E. 511.

A special verdict finding t death of a servant of a quarry c was caused by the sudden re loaded cars secured on a gr brake and a chock under the w not warrant the court in enter ment for the plaintiff, unless also a finding that, in the exe ordinary care, this method of them was insufficient. *Hoo Co.* v. *McCain* (1892) 133 Ind N. E. 956.

[2] "It is not enough for the p to show that he has sustained in under circumstances which may a suspicion, or even a fair i that there may have been negli the part of the defendant; but go on and give evidence of some act of negligence on the part of t son against whom he seeks co tion." *Gallagher* v. *Piper* C. B. N. S. 669, 33 L. J. C. P. N 10 Jur. N. S. 879, 10 L. T. N 12 Week. Rep. 988, per Willes J v. *New Gas Co.* (1876) L. R. 1 Div. 251, 45 L. J. Exch. N. S. L. T. N. S. 541 (referring proval to the above remark).

Many of the cases cited in th

It has even been held that negligence cannot be inferred where the instrumentality in question failed to work properly on a few other occasions besides that on which the injury was received.[3] But such a doctrine is scarcely consistent with that which declares that evidence of the prior unsatisfactory operation of an instrumentality is competent for the purpose of proving negligence on the master's part. See §§ 137, 820, *ante*. The onus cannot be said to rest on the plaintiff after he has produced evidence which, if not rebutted, will justify a verdict in his favor.

The limits of the rule are indicated by some exceptive forms of statement. Thus it is laid down that no presumption of negligence on the part of the master arises, where it does not appear that an appliance was originally defective, or that it had been so long in use as to render the duty of inspection necessary, or that the master had due notice of the defect.[4] So, also, it is said that the failure of an appliance to perform its functions properly is not sufficient to show negligence on the master's part, "unless the exercise of proper care would have shown the defective nature of the appliance;"[5] and that there is no presumption that the accident happened in consequence of a failure of duty on the master's part, where the conditions creating the abnormal danger had existed for so short a time that he was not chargeable with notice of its existence.[6]

The doctrine discussed in this section is applicable only in cases where the servant produces no other evidence of negligence than the mere fact of the accident. If any specific testimony bearing on that question is submitted, he is entitled to go to the jury.[7]

ceding note involve facts which render them apt illustrations of this statement.

[3] In *Dooley* v. *Star Knitting Co.* (1892) 134 N. Y. 552, 32 N. E. 35, a machine had been started three times previously by the shifting of a belt in the same manner as at the time of the accident. Recovery was denied; but Bradley, J., dissented on the ground that if, as the evidence tended to prove, the defendant, through his superintendent, had notice that the machine was liable to be set in motion by the casual shifting of the belt, it was the duty of the defendant to use due care to see that the machine retained its place, and that the proper adjustment of the belt in its line with and relation to the pulleys was maintained, or at least to advise the boy of the danger, that he might take the precautionary means requisite to his protection.

In *Sargee* v. *Clark Can Co.* (1901) 126 Mich. 508, 85 N. W. 1105, where a stamp press had fallen on one or two occasions before the accident, McLennan, J., dissented from the opinion of the majority on the ground that the evidence brought the case within the principle suggested in *Redroad* v. *Detroit Lumber Co.* (1893) 96 Mich. 545, 55 N. W. 1001, that "if there were anything to show that the machine had been out of order and that its worksince was spasmodic and uncertain, there might be room for the contention that defendant was negligent in not keeping it in repair."

[4] *Kinney* v. *Corbin* (1830) 132 Pa. 341, 19 Atl. 141.

[5] *Stourbridge* v. *Brooklyn City R. Co.* 1896) 9 App. Div. 129, 41 N. Y. Supp. 128.

[6] *Murphy* v. *Great Northern R. Co.* (1897) 68 Minn. 526, 71 N. W. 662.

[7] Where all the details of the construc-

834. Res ipsa loquitur.—The principal qualification to whic doctrine discussed in the preceding section is subject is that v arises from the operation of what is succinctly termed the doctri *res ipsa loquitur*.[1] The rationale of this doctrine is that, in " cases, the very nature of the action may, of itself, and through the sumption it carries, supply the requisite proof."[2] It is appli "where, under the circumstances shown, the accident presu would not have happened if due care had been exercised."[3] Its

tion of a bridge and its inspection are before the jury, the case of a servant who is injured by the fall of the bridge does not stand merely on the fact that the structure gave way, and it is not error to leave the jury to say whether the defendant's want of reasonable care in the erection and inspection of the bridge occasioned the injury complained of. *Bowen* v. *Chicago, B. & K. C. R. Co.* (1888) 95 Mo. 268, 8 S. W. 230.

A sufficient offer of proof of the cause of the injury to entitle plaintiff to go to the jury is made by his opening to the effect that he will prove the derailment of a car on which he was riding in the performance of his duty while running on a switch; due care by him and his fellow servants; the want of smoothness in the running of the cars; the inferior ity of the track to the main track in respect to ballasting and grading, and the derailment of other cars at the same point; and it is not necessary for him to specify the extent of the defects so indicated. *Lemery* v. *Boston & M. R. Co.* (1867) 167 Mass. 254, 45 N. E. 688.

[1] In some cases language is used which, if taken literally, would seem to commit the courts to the theory that the rule which throws upon carriers the burden of exculpating themselves when it is shown that a passenger has been injured by defective appliances has no analogue in cases where servants are the complainants. See, for example, *Mensch* v. *Pennsylvania R. Co.* (1892) 150 Pa. 598, 17 L. R. A. 450, 25 Atl. 31; *St. Louis, I. M. & S. R. Co.* v. *Harper* (1884) 44 Ark. 524. But such statements are clearly made with reference merely to the particular facts under review.

In *Houston* v. *Brush* (1894) 66 Vt 331, 29 Atl. 380, it was pointed out that, although the doctrine had been most frequently applied in actions against passengers, the presumption which it raises is really based upon the act or occurrence, and not alone upon the contract and relation between the parties

[2] *Winkelmann & B. Drug Co.* v. *Laday* (1898) 88 Md. 78, 40 Atl. 1

"In proving the injury the pl . . . may, and often does, prove circumstances, under which the was received, as raise a presumpt carelessness or negligence; and in a case the burden of disproving the sumption, by explaining the cir stances, so as to render their exi consistent with the absence of gence, would devolve upon the de ant." *Columbus & X. R. Co.* v. (1861) 12 Ohio St. 475.

"Without attempting to formula rule embracing every case to which maxim is to be applied, we think clear . . . that when the defen owes a duty to the plaintiff to u certain degree of care in respect to thing causing the accident, to pr the occurrence of such accident, and thing is shown to be under the man ment of the defendant or his serv and the accident is such as in the nary course of things does not occ those who have the management proper care, it affords evidence, in absence of evidence showing that it pened without the fault of the def ant, that the accident arose from lack of the requisite care. In such the occurrence itself, unexplained, sh prima facie a shortage of legal duty the part of the defendant." *Hou* v. *Brush* (1894) 66 Vt. 331, 29 Atl.

[3] *Stearns* v. *Ontario Spinning* (1898) 184 Pa. 519, 39 L. R. A. 63 Am. St. Rep. 807, 39 Atl. 292.

An instruction is correct which l it down that proof by an injured ployee that "his injury was occasio by an act which, with proper care, by machinery which, by proper use care, would not ordinarily produce d age," casts the burden on the emplo to prove that he was not charge with negligence. *Grant* v. *C* *R. Co.* (1891) 108 N. C. 40 13 S. 209.

tial import is that, on the facts proved, the plaintiff has made out a prima facie case, without direct proof of negligence.[4]

Through the operation of the presumption thus entertained the burden of proof is shifted to the defendant and remains upon him until he has produced some evidence which tends to establish his freedom from fault.[5] The burden which is thrown upon him, however, is not that of satisfactorily accounting for the accident, but merely that of showing that he used due care.[6]

The doctrine does not dispense with the rule that the party who alleges negligence must prove it. It merely determines the mode of proving it, or what shall be prima facie evidence of negligence.[7]

The cases cited below indicate the circumstances under which the doctrine has been applied in employers' liability cases.[8] But a com-

[4] *Bien* v. *Unger* (1900) 64 N. J. L. 598, 46 Atl. 593.

[5] See, generally, 1 Beven, Neg. pp. 129, *et seq.*; Shearm. & Redf. Neg. § 59.

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." *Scott* v. *London & St. K. Docks Co.* (1865) 3 Hurlst. & C. 596, 34 L. J. Exch. N. S. 220, 11 Jur. N. S. 204, 13 L. T. N. S. 148, 13 Week. Rep. 410.

In *Louisville, N. A. & C. R. Co.* v. *Berkey* (1893) 136 Ind. 181, 35 N. E. 3, the rule formulated was that, when it is shown that the master or his agent has placed in the hands of his servant defective appliances, and that these occasioned his injury, while he was in the exercise of due care, the burden of proof shifts to the master, and he is then required to show that he exercised due care in the selection or manufacture of such appliances.

[6] *Stearns* v. *Ontario Spinning Co.* (1898) 184 Pa. 523, 39 L. R. A. 842, 63 Am. St. Rep. 807, 39 Atl. 292; *Speer* v. *Boggs* (1901) 198 Pa. 112, 52 L. R. A. 933, 82 Am. St. Rep. 792, 47 Atl. 875.

[7] *Houston* v. *Brush* (1894) 66 Vt. 331, 29 Atl. 380.

"The presumption of negligence is often raised by the circumstances of an accident, and it may be a legitimate presumption that an appliance which gives out while it is being used for its proper purpose in a careful manner is defective or unfit. How far that presumption may go, in an action by an employee against an employer, to shift the burden of proof from the former to the latter, must depend upon the circumstances of the particular case." *The France* (1894) 8 C. C. A. 185, 20 U. S. App. 242, 59 Fed. 479, Reversing (1893) 53 Fed. 843.

On the ground that the presumption resulting from the application of the doctrine does not relieve the plaintiff of the burden of establishing affirmatively the negligence of the defendant, although it has the effect of casting on the latter the necessity of offering an explanation, it has been held to be error for a court, after laying down the rule of *res ipsa loquitur*, to conclude thus: "When the plaintiff rested, the burden was upon the defendant of showing such facts as warrant the conclusion that the accident was due to circumstances which the exercise of ordinary care could not foresee and guard against. Has the defendant met this obligation? If it has, your verdict must be for the defendant." *Jones* v. *Union R. Co.* (1897) 18 App. Div. 267, 46 N. Y. Supp. 321.

[8] It has been held that, in the absence of rebutting testimony, a jury would be justified in finding for the plaintiff under the following circumstances:

Where a girder falls from the beams of a building in course of construction. *Wight Fire Proofing Co.* v. *Poczekai* (1889) 130 Ill. 139, 22 N. E. 543.

Where a brakeman is knocked off a moving car by the fall of a rail from another car in front of him, on account of defects in the car, or the improper loading of rails. *McCoy* v. *Galveston, H. & S. A. R. Co.* (1896) 89 Tex. 168,

parison of the cases here collected with those in which the general discussed in the last section has been treated as controlling will that the courts have not been by any means consistent in their d

34 S. W. 95, Reversing (1895; Tex. Civ. App.) 32 S. W. 548.

Where a piece of coal flies from the tender of a passing train, and injures a section hand who is standing at a reasonable distance from the track. *Gulf, C. & S. F. R. Co.* v. *Wood* (1901; Tex. Civ. App.) 63 S. W. 164.

Where a large piece of coal falls from a tub, while it is being hoisted from the hold of a steamer. *Joint* v. *Webster* (1898) Rap. Jud. Quebec, 15 C. S. 220.

Where a keg placed upon a pile of hatchway covers, in close proximity to the hatchway, falls on a stevedore working below. *The Joseph B. Thomas* (1897) 81 Fed. 578.

Where a brick falls from a portion of the building where only bricklayers employed by defendant are at work, and injures a workman employed by an independent contractor. *Guldseth* v. *Carlin* (1897) 19 App. Div. 588, 46 N. Y. Supp. 357.

Where a stone is being lifted over a workman, and it falls upon him. *Smith* v. *Peter* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660, per Lord Halsbury.

Where heckling falls on a servant. *Walker* v. *Olsen* (1887) 9 Sc. Sess. Cas. 4th series, 946.

Where an employee in a packing house, while at work at a table trimming meat, is injured by the fall of an empty barrel from a platform above her. *Armour* v. *Golkowska* (1901) 95 Ill. App. 192.

Where a dumb-waiter, while unloaded, falls from the fifth floor of a warehouse and injures an employee who has inclined his head within the shaft to hear orders given from another floor, as was customary. *Winkelmann & B. Drug Co.* v. *Colladay* (1898) 88 Md. 78, 40 Atl. 1078.

Where an open window in the office of a railroad company falls on one who was presenting an order for payment, in accordance with a custom of the company to pay its employees through such window. *Carroll* v. *Chicago, B. & N. R. Co.* (1898) 99 Wis. 399, 67 Am. St. Rep. 872, 75 N. W. 176.

Where a piece of timber, which has been left leaning against a post, falls. *Sackewitz* v. *American Biscuit Mf* (1899) 78 Mo. App. 144.

Where a car having no brake i forced to escape and run wild. *T see Coal, Iron & R. Co.* v. *Hayes* 97 Ala. 201, 12 So. 98.

Where a wire carrying an el current breaks. *Jones* v. *Union* (1897) 18 App. Div. 267, 46 N. Y 321 (motion for nonsuit rightl nied).

Where machinery automatically *Blanton* v. *Dold* (1891) 109 Mo. S. W. 1149.

Where a punch or press for sta and beating tin, ordinarily caus fall by placing the foot of the op upon the treadle, falls when the tor's foot is not upon the treadle. *Sickel* v. *Hsley* (1894) 75 Hun, 5. N. Y. Supp. 1113.

Where the wall of a cistern *Mulcairns* v. *Jonesville* (1886) 67 24, 29 N. W. 565.

Where a scaffold collapses. *Co Bonta* (1882) 16 Jones & S. 15 firmed in (1884) 97 N. Y. 627; v. *Manhattan R. Co.* (1894) 8 Mi 29 N. Y. Supp. 1123 (1895) 11 715, 32 N. Y. Supp. 1149 (18 N. Y. 615; *Cunningham* v. *Asphalt Paving Co.* (1900) 49 App 380, 63 N. Y. Supp. 357. Esp where the collapse takes place at a when there is no weight on it b what it is intended to bear. *Co Duncan* (1857) 20 Sc. Sess. Cas. series, 180; *Stewart* v. *Ferguson* (164 N. Y. 553, 58 N. E. 662, Affi 52 App. Div. 317, 65 N. Y. Supp. *Westland* v. *Gold Coin Mines Co.* (41 C. C. A. 193, 101 Fed. 59.

Where a ladder breaks under ordi use. *Goodman* v. *Richmond & D. R* (1886) 81 Va. 576.

Where hoisting tackle gives way out being exposed to any unusual o normal strain. *Walker* v. *Olsen* (9 Sc. Sess. Cas. 4th series, 946; *Ba Lacalois* (1885; Quebec) Montre Rep. 1 Q. B. 280.

Where a chain breaks. *Whitel Moffat* (1849) 12 Sc. Sess. Cas. series, 434.

Where a shank by which a ladle taining melted iron is carried br *Coleman* v. *Mechanics' Iron Fou*

Co. (1897) 168 Mass. 254, 46 N. E. 1065.

Where a knot which united two pieces of rope intended to sustain a piece of timber slips. *Volk* v. *Schaeffer* (1898) 186 Pa. 253, 40 Atl. 404.

Where a railway switch is left open. *International & G. N. R. Co.* v. *Johnson* (1900) 23 Tex. Civ. App. 160, 55 S. W. 772.

In one case it seems to have been conceded that, where a ship breaks in a "vital" part, negligence is a warrantable inference. *The Lizzie Frank* (1887) 31 Fed. 477. But the case was decided against the plaintiff on the ground that the specific evidence showed that there was no negligence.

See also *Thomas* v. *Great Western Colliery Co.* (1894; C. A.) 10 Times L. R. 214, cited in § 687, note 1, subd. (e), *ante*.

A verdict for the plaintiff will not be disturbed where the evidence is that the unsafe adjustment of a plank in a temporary staging across which he and his fellow workmen were carrying materials was the cause of the injury. The mere fact that such evidence is quite consistent with the hypothesis that some person for whose acts the master was not responsible might have moved the plank does not throw on the plaintiff the onus of proving that the defect had existed so long that it ought to have been discovered by an agent of the defendants. *Giles* v. *Thomas Co.* (1885; Q. B. D.) 1 Times L. R. 169.

A fall through an open trap door would prima facie be regarded as an accident, the result of the dangerous character of the business, where the servant was engaged in lowering some article through the opening in the regular performance of his duties. A similar fall, where the servant was merely walking across the floor in going to some place to which his duties called him, would raise a more or less conclusive presumption that the employer was guilty of a breach of his obligation to provide a safe place of work, and, in the absence of some satisfactory explanation, or circumstances going to show that the servant had assumed this special risk, or was negligent at the time he received the injury, the employer would be held responsible for the consequences of the fall. See *Johnson* v. *Bruner* (1869) 61 Pa. 58, 100 Am. Dec. 613, where the above distinction is drawn by the court, in deciding that a nonsuit was erroneous in a case where a servant fell through a trap door which was not one of the appliances used by him in the course of performing the work for which he was hired.

In *Griffin* v. *Boston & A. R. Co.* (1889) 148 Mass. 143, 1 L. R. A. 693, 12 Am. St. Rep. 526, 19 N. E. 166, the court reasoned as follows: "The separation of a train in consequence of the spreading of a link, where nothing further appears, is more naturally to be attributed to an imperfection or defect in the link than to any other cause. Ordinarily, such separation would not happen if the link was sound and suitable for use. If the link was not sound and suitable for use, the fact of its being used in that condition properly calls for explanation from the defendant; and if, under such circumstances, the defendant fails to put in any evidence, some inference against it may be drawn therefrom. The fact may be susceptible of an explanation sufficient to exonerate the defendant. But in the absence of such explanation, we think the jury might properly infer negligence on the part of the defendant. Primarily, in such case, one may properly look to the railroad company itself, whose duty it is to use reasonable care to provide safe instruments and means for operating the railroad. In the absence of any explanation by the company, it is more probable that the separation of the train was from a cause for which it would be responsible than that it was from a cause for which it would not be responsible."

In *Houston* v. *Brush* (1891) 16 Vt. 331, 29 Atl. 380, it appeared that, although a derrick which gave way owing to the working out of a pin was almost daily subjected to the strain of lifting heavy stones, it had not been inspected to see if it was safe in this respect for about thirty days prior to the accident. The court said: "The working out of the pin was an accident which, in the ordinary course of things, does not occur if those who have the care and management of a derrick use proper care. The case standing thus, we think the jury had a right to consider the fact that the pin came out as it did, and from it to draw the inference that the defendants had failed to exercise ordinary care."

In a Massachusetts case the court considered it to be very questionable whether the mere fact that the planks of a bracket of a staging gave way and caused injury to employees was sufficient to show that the employer was in fault. *Brady* v. *Norcross* (1899) 172 Mass. 331, 52 N. E. 528. But it was re-

entiation of the circumstances under which this doctrine is and is applicable.[9]

The doctrine is not applicable where the defect which caused accident was latent, in such a sense that it could not have been covered by any examination which it was possible to make while

marked that such an accident was assumed to be evidence of negligence in *Ackerson* v. *Dennison* (1875) 117 Mass. 407, and *Prendible* v. *Connecticut River Mfg. Co.* (1903) 180 Mass. 131, 35 N. E. 575.

In another case, also decided in 1898, it was held by this court that the mere fact that a shaft supported by brackets falls is sufficient evidence to warrant a jury in finding that its fall was due to a defect in the supports. *Copithorne* v. *Hardy* (1899) 173 Mass. 400, 53 N. E. 915.

A finding that the defendant was not in fault as regards the adjustment of a scaffold used by workmen engaged in painting a ship is not warranted where the plaintiff's witnesses declare that the chains which supported the poles on which the scaffold rested were slung at such a distance from the ship's side that there was a likelihood of the poles tipping under the weight of the workmen, while the defendant produces evidence that the chains were slung at such a distance that no tipping was possible, but does not explain how the accident occurred. The fact that the catastrophe happened throws the weight of probability on the side of the witnesses who account for the accident, and furnishes a strong reason for accepting their testimony as correct. *Davison* v. *Henderson* (1895) 22 Sc. Sess. Cas. 4th series, 448.

In *Potts* v. *Port Carlisle Dock Co.* (1860) 8 Week. Rep. 524, 2 L. T. N. S. 283, Cockburn, Ch. J., was willing to concede that if the appliance was grossly defective, and the defect so clear and apparent as unmistakably to lead to the inference that an incompetent person had been employed in the construction, the plaintiff would have been entitled to maintain the action.

An instruction to the effect that, if the car platform which gave way under the plaintiff was defective, and plaintiff was injured by reason of such defects, they should find for him, is not error where it is qualified by an instruction that he could not recover if his own negligence contributed to the injury, or it was caused by a fellow servant's negligence. *Bonner* v. *Glenn* (1891) 79 [illegible] 531, 15 S. W. 572.

To the cases collected in § 841 *supra*, may be added those cited below which it was expressly denied that the doctrine of *res ipsa loquitur* was applicable. There was held to be no presumption of negligence under the following circumstances:

Where a trip hammer that should remain suspended above a die, until released by pressure upon a treadle, descends without apparent cause. *Bonner* v. *Logue* (1900) 84 N. J. L. 596, 46 [illegible] 593.

Where a seaman on board a tow is injured by the giving way of the chock through which the towline was passed to the tug. *Pederson* v. *John D. Spreckels & Bros. Co.* (1897) 81 Fed. 205.

Where a hook used to stay a boom in use as a derrick for unloading cargo breaks. *The Baron Innerdale* (1893) 93 Fed. 492.

Where a broken axle derails a train. *Brownfield* v. *Chicago, R. I. & P. R. Co.* (1899) 107 Iowa, 254, 77 N. W. 1049.

Where a servant has his leg caught under a hand elevator. *Likes* v. *Stolesky* (1898) 83 Ill. App. 398.

Where the injury is caused by an obstruction on the track of a railway. *Denver & R. G. R. Co.* v. *McCormick* (1895) 7 Colo. App. 121, 42 Pac. 676.

According to the Missouri court of appeals "the rule of *res ipsa loquitur* cannot be applied with any show of reason to a case of complicated machinery (here the breaking of a shaft in a planing mill). *Breen* v. *St. Louis Cooperage Co.* (1892) 50 Mo. App. 202, where it was remarked that even if a defect in one part of complicated machinery exists, the master cannot be charged with the obligation of anticipating its probable effect upon another part, when the plaintiff is incapable of showing that it had any such effect, or that such effect could be guarded against by the exercise of reasonable care. No authority justifying such a distinction is produced by the court, and the reason suggested seems to be quite beside the mark.

appliance remained in use;[10] nor where the circumstances are more consistent with the inference that the accident was due to the manner in which the appliance was being used by the plaintiff's coservants than with the inference that the accident was traceable to the inherent quality or condition of that appliance.[11]

835. Action not maintainable where no specific evidence of fault is offered.— The effect of the doctrines reviewed in the foregoing sections is that, except in that class of cases in which the doctrine of *res ipsa loquitur* is applicable, a servant is not entitled to have his case submitted to the jury, unless he introduces, in addition to the fact of the occurrence of the accident, some specific testimony which fairly tends to show that the employer was guilty of negligence.[1] In the ab-

[10] *Essex County Electric Co.* v. *Kelly* (1891) 57 N. J. L. 109, 29 Atl. 427.

[11] "Where a hoisting appliance, in the handling of which the injury was received, was a comparatively new one, of the kind customarily used, and neither the servant who had the custody of it, nor any of the persons whose duty it was to supply, repair, or use appliances of a similar sort had observed any defect in it, and the evidence shows that, at the time the accident occurred, it was being used in such a manner as to bring an unusual strain upon the part which gave way, and that it gave way precisely at a moment when it was subjected to a sudden jerk by the slipping of another portion of the apparatus, the inference is rather that the accident should be attributed to the unnecessary strain than to any defect in its condition. *The Prance* (1894) 8 C. C. A. 185, 20 U. S. App. 212, 59 Fed. 479, Reversing (1892) 53 Fed. 843, in which the doctrine of *res ipsa loquitur* had been applied.

In an action for injuries received by a trainman in the operation of a railroad, it is erroneous to charge that the accident raises a presumption of negligence on the part of the master. It tends rather to prove negligence on the part of subordinate employees for whose acts the master is not responsible. *Kansas P. R. Co.* v. *Salmon* (1873) 11 Kan. 83.

Where the master has shown that he adopted proper rules, which, if they had been observed, would have prevented an accident which occurred through the act of a fellow servant of the plaintiff, the presumption is that the act of the offending servant was in violation of the rules, and the master is not liable unless such servant was incompetent and his incompetency was, or ought to have been known to the master. *Pittsburg, Ft. W. & C. R. Co.* v. *Powers* (1871) 71 Ill. 341.

No presumption of defective quality and consequent negligence on the master's part can arise, where an appliance designed to support a weight gives way, not in the ordinary conduct of the work, but under an extraordinary strain. *Olson* v. *Starin* (1899) 43 App. Div. 422, 60 N. Y. Supp. 134.

[1] *Gallagher* v. *Piper* (1864) 16 C. B. N. S. 669, 33 L. J. C. P. N. S. 329, 10 Jur. N. S. 879, 10 L. T. N. S. 718, 12 Week. Rep. 988, per Willes, J. (See § 833, note 2, *supra*); *Purdy* v. *Westinghouse Electric & Mfg. Co.* (1900) 197 Pa. 257, 51 L. R. A. 881, 47 Atl. 237 (no evidence that the appliance in question was not suitable for the purpose for which it was used); *Wixler* v. *Imperial Coal Co.* (1893) 152 Pa. 395, 25 Atl. 587; *Simmons* v. *Chicago & T. R. Co.* (1881) 110 Ill. 340; *O'Boyle* v. *Lehigh Valley Coal Co.* (1891) 161 Pa. 275, 28 Atl. 1088; *M'Cluckie* v. *Hara Silver Min. & Smelting Co.* (1891) 10 Utah, 179, 37 Pac. 733.

"It is not enough that the servant shows an injury sustained, but he must go further and show some specific act of negligence." *Soderman* v. *Kemp* (1895) 145 N. Y. 427, 40 N. E. 212.

Where there is no evidence tending to show that any employee of the master, unless it be the plaintiff himself, was negligent, a demurrer to the evidence is properly sustained. *Williams* v. *Atchison, T. & S. F. R. Co.* (1879) 22 Kan. 117.

In *Shadford* v. *Ann Arbor Street R. Co.* (1897) 111 Mich. 390, 69 N. W. 661,

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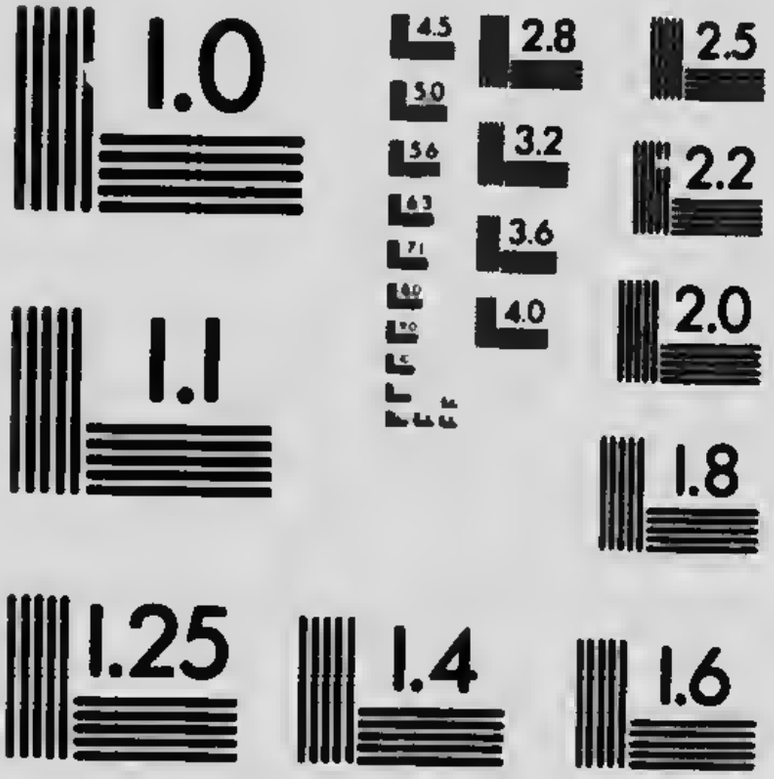

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sence of such testimony the case must obviously fall within the o
tion of the principle that an action is not maintainable where
plaintiff's evidence is equally consistent with the absence, or wit

it was held that, as there was no evidence whatever that the appliance was not in general use, it was error to submit to the jury the question whether other employers used such an appliance as that which caused the injury, and to give a charge to the effect that the defendant could not be found guilty of negligence if the appliance was in general use.

The owner of a packing-house cannot be held liable for an injury received by an employee, through striking his hand against a hook which had been turned out of the perpendicular so as to be brought slightly nearer than usual to one upon which he was hanging a hot tongue, where there is no evidence when the hook was so turned, or of any fault in regard to it, or of any unsuitable or insecure condition of the hooks, as a whole. *Ryan* v. *Armour* (1897) 166 Ill. 568, 47 N. E. 60.

Where a railroad company has established proper rules for the inspection of cars by its employees, it cannot be assumed, in the absence of proof, that such rules were not observed. *Hodges* v. *Kimball* (1900) 44 C. C. A. 193, 104 Fed. 745.

In an action for injuries alleged to have been caused by the looseness of a step on a locomotive, the bare suspicion arising from the contradictory statements of the employee responsible for the condition of the step,—one to the effect that he did not touch the step at a terminal point on the road, and the other to the effect that he removed the step, but had it replaced in a safe condition,—will not warrant a finding that the step was removed and left in an unsafe condition, so as to support a recovery in favor of the plaintiff. *Patton* v. *Texas & P. R. Co.* (1899) 37 C. C. A. 56, 95 Fed. 244. Affirmed in (1901) 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275.

Evidence that, with the articles actually used, a hoisting apparatus put together in the course of the work could not be made secure for the work to be done, does not imply that the means of making it more secure had not been furnished by the master, and, in the absence of further testimony, will not sustain a verdict for the plaintiff. *Robinson* v. *George F. Blake Mfg. Co.* (
143 Mass. 528, 10 N. E. 314.

Evidence that the light in the h
of an employee went out while h
coupling cars, supported by his
mony that the oil was bad, is insu
to support a finding that the oil w
terior, where other witnesses testif
the oil was good and of a kind a
used in lamps. *Gulf, W. T. & P.*
v. *Abbott* (1893; Tex. Civ. App.)
W. 299.

Evidence that an appliance of
tern different from that used was
ten years previously by others, o
it was in use by some persons
time of the accident, and would,
opinion of the witness, have pre
the accident, is not of itself sufficie
prove a want of reasonable care.
v. *Ontario Wheel Co.* (1899) 1
Rep. 578. In the same case it wa
that, where there is no evidence t
that an appliance had been appro
disapproved by the inspector whos
it was under the factory act to ex
it, the question upon which the
tiff's right of recovery turns is w
the appliance used was of such a
acter and pattern as to make the
it unreasonable; and that the on
upon the person alleging that th
tory was an unlawful one to prov
the appliance had not been inspe

A servant injured in jumping f
window to escape from a fire is n
titled to recover, in the absence
dence showing that the fire was
by the defendant's negligence, or t
could have been extinguished. *
chel* v. *Texas Drug Co.* (1901) 2
Civ. App. 1, 61 S. W. 419.

In a case where a brakeman
train, which was backing at a
miles an hour, fell while attempt
descend from the end car, an
dragged about 180 feet, when h
instantly killed, the testimony
was that the other brakeman, wh
on the car next the engine, sa
watchman rapidly signaling to st
perceived the signal, sprung for the
the train stopped about half
utes afterwards, and that the trac
almost straight. Held, that the
no evidence that decedent was in
exercise of care, or that defendan

existence, of negligence.[2] This rule, however, does not imply that it is only from direct evidence that the master's culpability can be in-

negligent. *Martin* v. *Boston & M. R. Co.* (1900) 175 Mass. 502, 56 N. E. 749.

A master cannot be held liable on the ground that he failed to provide a particular contrivance, where there is no evidence that such a contrivance was a safeguard against injuries of the kind complained of, or that it was a general custom among other persons engaged in the same business to employ it. *Central R. Co.* v. *Edwards* (1900) 111 Ga. 528, 36 S. E. 810.

The owner of a stone quarry cannot be held liable on a special verdict which merely recites that an employee engaged in loading cars with stone was killed by the sudden moving and collision, with that on which he was engaged, of two loaded cars secured on a grade by one brake and a chock under the wheels, without a finding to the effect that this method of securing the cars was insufficient and improper. A court can only infer that an injury received in the manner stated, by an adult employee, acquainted with the place of work, was attributable to perils incident to the service. *Hoosier Stone Co.* v. *McCain* (1892) 133 Ind. 231, 31 N. E. 956.

The fact that five out of six of the ties at the place where an engine left the track were rotten is sufficient evidence of negligence. *Walker* v. *McNeill* (1897) 17 Wash. 582, 50 Pac. 518.

In an action by an employee to recover for personal injuries caused by the slipping of a belt on a pulley, the case is properly submitted to the jury, where, in addition to testimony by the employee slightly tending to establish that the employer neglected to keep the machinery in safe condition, there is testimony showing that the employer admitted his liability. *Ellis* v. *Pierce* (1898) 172 Mass. 220, 51 N. E. 974.

Where the injury was caused by an unblocked frog, and there is no testimony as to its condition prior to an accident, the jury are at liberty to infer that it had never been blocked. *Union P. R. Co.* v. *James* (1896) 163 U. S. 485, 41 L. ed. 236, 16 Sup. Ct. Rep. 1109.

In the absence of specific evidence a court will not assume that a gas company has not in its service an employee whose duty it is to see that there is a proper supply of iron to construct a bar to keep a gate in position. *Allen* v. *New Gas Co.* (1876) L. R. 1 Exch. Div. 251, 34 L. T. N. S. 541, 45 L. J. Exch. N. S. 668.

That the submission of what is termed a "scintilla of evidence" is not sufficient to justify giving the case to the jury is a principle now established by the weight of authority. See Shearm. & Redf. Neg. § 56; Wharton, Ev. § 421. This principle was applied to an action by a servant in *Powers* v. *New York C. & H. R. R. Co.* (1891) 60 Hun, 19, 14 N. Y. Supp. 408; *Beaulieu* v. *Portland Co.* (1860) 48 Me. 291.

In an action for injuries due to the fact that a hook, fastened to a wharf and used to hold a rope and pulley for unloading a vessel, gave way under an extraordinary strain, the only evidence of a defect was the testimony of a fellow workman, who had looked at the hook after the accident, as it lay on the wharf. He said there was an old spot on it which resembled an old crack across the grain, but that he could not say for sure. He did not measure it, but judged it to be about half an inch deep. On cross-examination he reduced the depth of the crack to a quarter of an inch, and said that he did not handle it, and that he did not look at it closer than 5 feet. This evidence was held insufficient to satisfy the burden of proving the defect. *Olson* v. *Starin* (1899) 43 App. Div. 422, 60 N. Y. Supp. 134.

The mere fact that a little dust and grease appeared on the top of the steam chest of an engine after a run of 30 miles, causing a brakeman's foot to slip, is not sufficient evidence of negligence to warrant the submission to a jury of defendant's liability for injuries sustained by the brakeman. *Hall* v. *Iowa C. R. Co.* (1900) 111 Iowa, 523, 82 N. W. 999.

But the introduction of a scintilla of evidence is still deemed in some jurisdictions to require the submission of the case to the jury. *Muldowney* v. *Illinois C. R. Co.* (1871) 32 Iowa, 176; *Dick* v. *Indianapolis, C. & L. R. Co.* (1882) 38 Ohio St. 389; *Smith* v. *Sioux City & P. R. Co.* (1884) 15 Neb. 583, 19 N. W. 638; *Johnson* v. *Missouri P. R. Co.* (1886) 18 Neb. 650, 26 N. W. 347.

[2] *Baulec* v. *New York & H. R. Co.* (1874) 59 N. Y. 356, 17 Am. Rep. 325; *Essex County Electric Co.* v. *Kelly* (1891) 57 N. J. L. 100, 29 Atl. 427.

ferred. The burden of proof is satisfied by the production of ci
stantial evidence.[3]

**836. Burden of proving that the injury was caused by the m
negligence rests on the servant.**— The establishment of a ju
connection between the master's negligence and the injury bei
of the essential prerequisites to the maintenance of the actio
chapter XLII., *ante*), the burden of proving that there was such
nection rests on the servant.[1] The plaintiff must introduce test

See also, for the general rule. Shearm. & Redf. Neg. § 56.

Where the sole evidence produced by the plaintiff is that the appliance (here a turntable) broke after it had been operated without accident for 4½ years, he cannot recover on the theory that it was constructed by an incompetent person, as the facts thus submitted are quite consistent with the inference that the servants who constructed it were carefully selected. *Potts* v. *Fort Carlisle Dock Co.* (1860) 2 L. T. N. S. 283, 8 Week. Rep. 524.

A railroad company cannot be held liable as for a negligent inspection of a foreign car, where the evidence is equally consistent with the theory that the failure to discover the defect was due to the delinquencies of the car inspectors at the regular inspecting stations, and with the theory that such defect was not brought to its notice owing to the omission of the trainmen to perform their duty to report the existence of any defects which they might discover in the cars under their charge while upon the road. *Chicago & A. R. Co.* v. *Bragonier* (1882) 11 Ill. App. 516. It was said to be "probable from the evidence that the defect in this car [which was in the ratchet] could be discovered only when it was in motion; that when stationary the ratchet would hold, but when the car was in motion, the action of the wheels upon the brakes would shake it loose." Therefore, a presumption of the negligence of car inspectors "involves a presumption, equally strong, that the conductors and brakemen along the line of the road were likewise negligent in not discovering and reporting the alleged defects to their superiors. Their opportunities for discovering the defect in question were fully equal to those of the car inspectors. For their negligence in this particular, appellant would not be responsible to appellee, as they were his fellow servants."

[3] In an action for injuries to a brakeman caused by the breaking in two of a freight train, due to the pulli of a drawhead stem, there was n evidence that the key holding t was defective, but there was te that if it had not been defective i not have been pulled out. A mo er the accident a worn key was near where the break occurred, fastening which should have h tached to it was not found. A that defendant was negligent in to provide a safe key was held warranted by this evidence. *M K. & T. R. Co.* v. *Cox* (1900; Te App.) 55 S. W. 354, Rehearing in 56 S. W. 97.

Findings by the jury that a company was negligent, and that ployee alleged to have been ki such negligence was not guilty tributory negligence, are sufficien tained, although there is no direc imony as [illegible] the accident c where the evidence tends to sh the roadbed was out of repair a deceased shortly before the accid seen looking the train over, in t of his duty, and was not again s til he was found dead under circ es indicating that he had falle a car after a sudden jolt suffi have thrown him from the car. *Stock Yards Co.* v. *Conoyer* (1 Neb. 617, 59 N. W. 950, Affirm Rehearing (1893) 38 Neb. 488, St. Rep. 738, 56 N. W. 1081.

[1] *Texas & P. R. Co.* v. *Barrett* 166 U. S. 617, 41 L. ed. 1136, Ct. Rep. 707, Affirming (1895) A. 373, 30 U. S. App. 196, 67 F *O'Boyle* v. *Lehigh Valley C* (1894) 161 Pa. 275, 28 Atl. 10 *vidson* v. *Davidson* (18 ; Mi 18 N. W. 560; *Norfol* W. R *Jackson* (1888) 85 Va. 489, 370; *Murphy* v. *Greeley* (18 Mass. 196, 15 N. E. 654; *Smith* *York C. & H. R. R. Co.* (1890) Y. 645, 23 N. E. 990; *Buckley* *Percha & Rubber Mfg. Co.* (18 N. Y. 540, 21 N. E. 717, R

to show that the injury is more naturally to be attributed to the negligence of the defendant than to any other cause.[2] There is no case for

(1886) 41 Hun, 450; *Lockwood* v. *Chicago & N. W. R. Co.* (1882) 55 Wis. 50, 12 N. W. 401; *Carr* v. *North River Constr. Co.* (1888) 48 Hun 266; *Davis* v. *Columbia & G. R. Co.* (1883) 21 S. C. 93; *Donovan* v. *Harlan & H. Co.* (1899) 2 Penn. (Del.) 190, 44 Atl. 619; *The Lydia M. Deering* (1899) 97 Fed. 971.

In cases where the employee whose negligence caused the injury was a mere coservant, and therefore recovery can be had only on the ground of his incompetence and the master's knowledge thereof, the plaintiff has the burden of proving that the injury was traceable to that incompetence. *Ohio & M. R. Co.* v. *Dunn* (1894) 138 Ind. 18, 36 N. E. 702, 37 N. E. 516; *Baltimore Elevator Co.* v. *Neal* (1886) 65 Md. 438, 5 Atl. 338; *Summerhays* v. *Kansas P. R. Co.* (1875) 2 Colo. 484; *Paris* v. *Detroit & M. R. Co.* (1870) 20 Mich. 105, 4 Am. Rep. 364.

On the other hand, where the negligent employee was one of those for whose acts the master was responsible the plaintiff merely has the burden of proving that the negligence in question was the proximate cause of the injury. *Union P. R. Co.* v. *Callaghan* (1893) 6 C. C. A. 205, 12 U. S. App. 541, 56 Fed. 988.

An instruction is erroneous which is to the effect that, whatever may have been the cause of the accident, whether as alleged in the complaint, or from any other cause, however remote, if the defendant was "probably" negligent in it, then the jury, without any further proof, may find against the defendant. *Minty* v. *Union P. R. Co.* (1889) 2 Idaho, 437, 4 L. R. A. 409, 21 Pac. 660.

It has also been held erroneous to charge the jury to find for the plaintiff, if they believed that he was injured by the defects in a sawdust pipe which he was ordered to clean out, as such an instruction would permit them to render a verdict in his favor, even if the defects were not in any way the cause of his injury. *Washington Mfg. & Min. Co.* v. *Barnett* (1897) 19 Ky. L. Rep. 958, 42 S. W. 1120. But this objection to the instruction seems to be hypercritical.

[2] *Griffin* v. *Boston & A. R. Co.* (1889) 148 Mass. 143, 1 L. R. A. 698, 12 Am. St. Rep. 526, 19 N. E. 166.

(a) *Evidence insufficient to warrant verdict in plaintiff's favor.*—In an action where plaintiff's contention was that the fire was caused by the negligent maintenance by the master of a vat containing inflammable material in proximity to a trip hammer, and that the material was ignited by sparks from the hammer, it was held that a verdict in plaintiff's favor could not be supported by evidence that the sparks from the trip-hammer did not contain sufficient heat to cause any substance to ignite at a distance greater than 20 feet, while the hammer was situated 30 feet from the vat; that the fire was first discovered on a rack beside the vat, the rack being used to drain articles that had been dipped in the vat; and that the vat was covered at that time, but that in endeavoring to put out the fire the cover was knocked off, and fire thereupon appeared in the vat. *Dunlavey* v. *Racine Malleable & Wrought Iron Co.* (1901) 110 Wis. 391, 85 N. W. 1025.

In an action against an elevated railroad company by a conductor of a work train for injuries sustained by falling from a narrow, unguarded platform along the tracks into the street, plaintiff's evidence that "he walked along the platform, and stepped on something and slipped," is insufficient to show that defendant was negligent in permitting the platform to become slippery, where there is no evidence indicating what the "something" was, nor who placed it there, nor any suggestion that it had been there so long that the defendant had constructive notice of its presence, while on the other hand there is other evidence in the case showing that the platform was free from ice and snow. *Nugent* v. *Brooklyn Union Elev. R. Co.* (1901) 64 App. Div. 351, 72 N. Y. Supp. 67.

(b) *Evidence sufficient to warrant verdict in plaintiff's favor.*—Where the operator of a malt grinder in a mill where a fire broke out testified that the bearings on the machine were worn out, so that there was too much play; that the grooves in the cylinders were dull; and that the fire started from the mill, followed a few moments later by the explosion, causing the injury,—it is not error to refuse to charge that there was no evidence that the accident was caused from the position of the rollers, or bearings in which they were set, since the

submission to a jury, if there is an entire absence of evidence
would explain the manner in which the accident occurred,[3] or
evidence is as consistent with the absence of negligence for whi

jury were entitled to consider all the evidence bearing on the condition of the machine. *Wiedeman* v. *Everard* (1900) 50 App. Div. 358, 67 N. Y. Supp. 738.

Where a tiler at work on a build..g was struck by a hot rivet which fell from one of the upper stories by reason of failure of one of the riveters to catch the same as it was thrown to him, and such riveter testified that he watched the rivet as it fell, and saw it hit plaintiff, the jury is justified in finding that defendant was negligent in not providing a proper place for plaintiff to work, since, if there had been any obstruction to protect plaintiff from falling objects, the riveter would not have been able to follow the course of the falling rivet from the time he lost it until it struck plaintiff. *Pioneer Fireproof Constr. Co.* v. *Howell* (1900) 90 Ill. App. 122, Affirmed in (1901) 189 Ill. 123, 59 N. E. 535.

The testimony of two witnesses that a pin which held the boom of a derrick in position was much worn, and had been defective for some time, and that the vibration from the machinery would cause it to drop from its place, and that, after plaintiff's fall, it was found out of its position,—is sufficient to sustain a verdict in favor of a servant injured by the fall of the boom. *Union Bridge Co.* v. *Techan* (1901) 190 Ill. 374, 60 N. E. 533, Affirming (1900) 92 Ill. App. 259.

The case is for the jury where some of the evidence would warrant the conclusion that defects in a track were the cause of a derailment, although there is other evidence inconsistent with such a conclusion. *International & G. N. R. Co.* v. *Johnson* (1900) 23 Tex. Civ. App. 160, 55 S. W. 772.

Where a hammer furnished plaintiff to bend wire had chipped before, and the wire and utensil on which plaintiff was working were soft and not liable to chip, the fact that the chip which flew into the plaintiff's eye was so infinitesimal that the nature of the metal could not be recognized does not involve the consequence that the plaintiff should be nonsuited on the ground that there was no evidence that it was a chip from the hammer that injured him. *Duerst* v. *St. Louis Stamping Co.* (1901) 163 Mo. 607, 63 S. W. 827. In the same case it was held that, where plaintiff and a fellow employee testified that a h
chipped again and injured plainti
it struck a wire on a steel man
which plaintiff was working,
perts testified that a hammer wh
once begun to chip would conti
do so unless beveled, the fact t
experts also said that the hamme
not chip if it struck the wire, a
chipped it probably missed the w
struck the mandrel, did not pre
recovery, but presented a quest
the jury.

Where a brakeman, killed whil
ling cars, was found lying dead
frog, and there were indications
foot was struck by the wheel, a
over lengthwise, while eyelets of
were found within 3 or 4 inches
frog, and eyelets were missing f
cedent's shoe, the evidence was
be sufficient to raise the question
jury whether decedent's foot was
in the frog. *Jones* v. *Flint & P*
Co. (1901) 127 Mich. 198, 86 N.

A finding that defendant is an
for personal injuries to an emplo
guilty of negligence causing the
is sustained by evidence that p
was directed to remove some lim
under a mill, and that while mak
removal the engine and machine
started, and that a shaft const
a part of the machinery was in
of repair; and that plaintiff was
and rendered unconscious, an
found, the shaft and pulleys were
so near him as to show tha
probably had fallen upon him
folk Beet-Sugar Co. v. *Burnett*
55 Neb. 360, 75 N. W. 839.

[3] *Philadelphia & R. R. Co.* v. *S*
(1881) 97 Pa. 450; *White* v.
(1899) 38 App. Div. 149, 56 N. Y
629; *Texas & N. O. R. Co.* v. *C*
(1885) 63 Tex. 502.

In *Philadelphia & R. R. Co.* v.
(1888) 119 Pa. 301, 13 Atl. 2
court held that the servant could
cover for injury from the break
falling out of a brake pin. It w
ceded that the brake was in prop
dition a few miles above the p
accident, while the next place of
tion was a short distance below
proof did not show whether t
broke, fell out, or was remove
court said: "It devolved upo

defendant is responsible as with the existence of such negligence.[4] Still less can the action be maintained, where the only reasonable conclusion is that the injury was due to one of two causes, for neither of which the master was responsible.[5]

But while the plaintiff is bound to introduce evidence from which the jury may properly infer that the accident was caused by the defendant's negligence, he is not required to point out the particular act or omission which caused the accident.[6]

plaintiff to show negligence of the company, and that that negligence was the proximate cause of the injury. In this he has failed, and in the absence of proof on that point we cannot ascribe the accident to that cause."

An employer is not liable to an employee for injuries sustained by the latter in encountering an obstruction while necessarily passing through an unlighted passageway on leaving his work, where the employer supplied a sufficient number of electric lamps for lighting the passageway, some of which were not to be extinguished until after the employees had left the building, and one to be kept burning day and night, in the absence of any showing as to the cause of the extinguishment of the lights at the time of the accident. *Dorney* v. *O'Neill* (1898) 34 App. Div. 497, 54 N. Y. Supp. 235.

A laborer on a working train of a railroad company cannot recover for an injury caused by the derailment of one of its cars by a small stick of wood lying on the track, without showing that it was there through the direct and immediate fault of the company's employees. *Smith* v. *Louisiana & N. W. R. Co.* (1897) 49 La. Ann. 1325, 22 So. 359.

No recovery can be had for the death of an employee by an explosion in a cartridge factory, where the evidence of the only surviving workman warrants a fair presumption that the explosion was caused by the negligence of the deceased, and fails to show what caused the explosion if it was not such negligence. *Dominion Cartridge Co.* v. *Cairns* (1898) 28 Can. S. C. 361.

[4] *Griffin* v. *Boston & A. R. Co.* (1889) 148 Mass. 143, 1 L. R. A. 698, 12 Am. St. Rep. 526, 19 N. E. 166.

A servant cannot recover on evidence which may justify the inference of fault on the master's part, but which would also warrant the conclusion that the injury was caused by the negligence of a coservant. *Essex County Electric Co.* v. *Kelly* (1894) 57 N. J. L. 100, 29 Atl. 428; *Duffy* v. *Upton* (1873) 113 Mass. 544; *Blanchette* v. *Border City Mfg. Co.* (1886) 143 Mass. 21, 8 N. E. 430; *Musbach* v. *Wisconsin Chair Co.* (1900) 108 Wis. 57, 84 N. W. 36.

Nor can there be a recovery on evidence equally as consistent with the theory that the injury was caused by the unskilfulness of the plaintiff, as by the incompetency of the fellow servant which occasioned it. *Core* v. *Ohio River R. Co.* (1893) 38 W. Va. 456, 18 S. E. 596.

Negligence in respect to the employment of a sufficient number of men to operate a locomotive properly on its way to the roundhouse cannot be inferred from the mere fact that only one man, the hostler, was on it at the time when it ran over the plaintiff. So far as it goes, such evidence is equally consistent with the theory that the absence of the hostler's helper was due to the negligence of the hostler himself or the helper. *Reichel* v. *New York C. & H. R. R. Co.* (1892) 130 N. Y. 682, 29 N. E. 763.

[5] A railroad company is not liable to a section hand injured while engaged in ballasting the track, by a stone, presumably thrown up by himself, flying out at right angles with the track upon the passage of a train, since the injury is due either to his own negligence in not removing the stone, or to an unaccountable accident or occult risk, not due to the fault of the master, but incident to the service, which he assumed in entering upon such employment. *Steffen* v. *Chicago & N. W. R. Co.* (1879) 46 Wis. 259, 50 N. W. 348.

[6] *Mooney* v. *Connecticut River Lumber Co.* (1891) 154 Mass. 407, 28 N. E. 352, holding, in a case where a machine "ran away," that the trial court had rightly refused instructions to the effect that plaintiff could not recover (1) if the evidence failed to furnish satisfactory grounds for an inference, or for

A verdict for the plaintiff will be set aside, if, in view of established by the evidence, it was a physical impossibility tha cident should have happened in the manner alleged.[7]

The necessary proximity of cause may, like the fact of the of the negligence alleged, be established by evidence of a ma cumstantial nature.[8]

837. No action maintainable where cause of accident is me

anything better than a mere conjecture, as to the cause of the starting of the car, or (2) if it did not appear from the evidence what was the real cause of the starting of the machine.

Plaintiff in an action for personal injuries caused by the falling of a large piece of coal from the tub in which it was being hoisted from the hold of a steamer where plaintiff was employ need not prove to what special act of negligence, error, or inattention on the part of defendant the accident was due, if the latter has failed to show that the injury was due to inevitable accident. *Joint* v. *Webster* (1898) Rap. Jud. Quebec, 15 C. S. 220, where the court relied upon the testimony of witnesses that the fall of such fragments, though a common incident, was the result of some defect in the hoisting apparatus, or some neglect or momentary inattention on the part of the workmen, for whose negligence the master was, under the law of Quebec, responsible. See § 890, subd. *c*, *post*.

[7] Rule applied in an action for injuries caused by a slat saw at which defendant worked, where the theory was that plaintiff's hand passed beneath the overhanging steel guard, and came in contact with the saw, and it was apparent that the space was not sufficiently large to allow plaintiff's hand to pass in that manner. *Beyersdorf* v. *Cream City Sash & Door Co.* (1901) 109 Wis. 456, 84 N. W. 860.

[8] *Hughes* v. *Louisville & N. R. Co.* (1898) 104 Ky. 774, 48 S. W. 671 (brakeman, alleged to have come into contact with a bridge girder, had been seen descending the steps just before the accident); *Ft. Worth & R. G. R. Co.* v. *Kime* (1899; — Tex —) 54 S. W. 240 (low overhead bridge).

The case is properly submitted to the jury where, although no one saw the accident, it was apparent that deceased met his death by being in some manner caught by the coupler which he was oiling, or by the shaft, and there was evidence that the coupler was re safe by pins and bolts which from the coupling ½ to 1 in *& Co.* v. *Zerwick* (1899) 88 558.

In an action for damages, u & C. Anno. Stat. 2d ed. chap providing for a recovery for t a person killed in a mine, by the failure to inspect the n beginning work in the morn tiff's intestate was a driver, w contended, had been killed by between his ears, which he w in on the main line from a s loaded cars standing on the No one saw the accident. T seat was on the front end of car, and was uninjured. W his body was lying between t a rib of coal four feet dista front of his trip. Witness that after the accident the space enough between the c man to get through. Inte have been killed while on th the seat left uninjured, or he been between his cars and t the main track, and been cru count of the latter being t the switch. A verdict was held to have been on this evidence. *Jun* v. *Mercer* (1899) 84

Where the evidence used on a train at the sion of powder in the c wood burner, and emitted ume of sparks whenever o much so that on former oc sons riding several car len it had holes burned in th thereby; that on the day of sparks were flying past t which had its side doors ope there was no other source the fire could have originat ing that the explosion was spark from the engine is wa *lend* v. *Spokane Falls &* (1899) 21 Wash. 324, 58 P

jectural.— The doctrine stated in the last section involves the corollary that a servant cannot recover where it is merely a matter of conjecture, surmise, speculation, or supposition, whether the injury was or was not due to the negligence of the master or of an employee for whose acts and omissi . he is responsible.[1]

[1] *Reilly* v. *Campbell* (1894) 8 C. C. A. 438, 20 U. S. App. 334, 59 Fed. 990; *The Columbia* (1901) 106 Fed. 745 (ash bucket on steamer fell); *Newell* v. *Rahn* (1896) 64 Ill. App. 249; *Donald* v. *Chicago, B. & Q. R. Co.* (1895) 93 Iowa, 281, 33 L. R. A. 492, 61 N. W. 971; *O'Connor* v. *Illinois C. R. Co.* (1891) 83 Iowa, 105, 48 N. W. 1002 (derailment); *Henry* v. *Brackenridge Lumber Co.* (1896) 48 La. Ann. 950, 20 So. 221 (no explanation how plaintiff's decedent became entangled in a belt—verdict for defendant sustained); *Corcoran* v. *Boston & A. R. Co.* (1882) 133 Mass. 507 (brakeman killed by falling from a train); *Felt* v. *Boston & M. R. Co.* (1894) 161 Mass. 311, 37 N. E. 375 (plaintiff's decedent stated before his death that he did not know how the accident happened); *Hewitt* v. *Flint & P. M. R. Co.* (1887) 67 Mich. 61, 34 N. W. 659 (*arguendo*, in discussing instructions); *Quincy Min. Co.* v. *Kitts* (1879) 42 Mich. 34, 3 N. W. 240 (rough plank bridge gave way for some reason not apparent); *Redmond* v. *Delta Lumber Co.* (1893) 96 Mich. 545, 55 N. W. 1004; *Manning* v. *Chicago & W. M. R. Co.* (1895) 105 Mich. 260, 63 N. W. 312 (brakeman alleged to have been killed by collision with a tree projecting over the track, but no one saw him struck or fall from the car); *Peppett* v. *Michigan C. R. Co.* (1899) 119 Mich. 640, 78 N. W. 909 (mere possibility that derailment might have been due to defect in engine or rails, not enough to justify submission of case to jury); *Whitcomb* v. *Detroit Electric R. Co.* (1901) 125 Mich. 572, 84 N. W. 1072 (trolley pole found to be bent after car had run a mile from the barn); *Dobbins* v. *Brown* (1890) 119 N. Y. 188, 23 N. E. 537 (plaintiff's decedent thrown from bucket in which he was descending a shaft—cable found broken after accident, but no explanation given of the manner in which it was broken); *Niles* v. *New York C. & H. R. R. Co.* (1897) 14 App. Div. 58, 43 N. Y. Supp. 751; *McConnell* v. *New York C. & H. R. R. Co.* (1901) 63 App. Div. 515, 71 N. Y. Supp. 616 (lump of coal fell on brakeman from a passing locomotive tender); *Kelly* v. *Erie R. Co.* (1900) 53 App. Div. 465, 65 N. Y. Supp. 1046; *Melchert* v. *Smith Brewing Co.* (1891) 140 Pa. 448, 21 Atl. 755; *Fritz* v. *Salt Lake & O. Gas & E. L. Co.* (1899) 18 Utah, 493, 56 Pac. 90; *Sorenson* v. *Menasha Paper & Pulp Co.* (1882) 56 Wis. 338, 14 N. W. 446 (plaintiff's decedent found dead in a hole under an aperture in floor of defendant's mill—no evidence to show how he fell in); *Macfarlane* v. *Thompson* (1884) 12 Sc. Sess. Cas. 4th series, 232 (iron casing which was resting on the top of a boiler slipped along it, and struck a servant who was standing on a scaffold beside it); *Jarvis* v. *May* (1876) 26 U. C. C. P. 523 (cleats of ladder came loose); *Stainer* v. *Hall* (1899) 6 B. C. 579; *Montreal Rolling Mills Co.* v. *Corcoran* (1896) 26 Can. S. C. 595; *Canada Paint Co.* v. *Trainor* (1898) 28 Can. S. C. 352; *St. Lawrence S. B. Co.* v. *Campbell* (1885) Montreal L. Rep. 1 Q. B. 290.

"It is not sufficient for the employee to show that the employer may have been guilty of negligence, but the evidence must point to the fact that he was; and where the testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion." *Patton* v. *Texas & P. R. Co.* (1901) 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275.

In *Breen* v. *St. Louis Cooperage Co.* (1892) 59 Mo. App. 202, the court, after laying it down that the jury cannot, from the mere fact that some defect exists in some part of complicated machinery, conjecture not only that such defect was the direct and immediate cause of the accident, but also that it was the duty of the defendant to foresee such conjectural result and guard against it, went on to remark that the employer fulfils his duty by guarding against the probable result of defects, even if such

From this rule it follows that the action cannot be maintained after all the testimony has been put in, it remains doubtful wh the injury resulted from the cause suggested by the master, or

are shown, and that holding him responsible for conjectural results shifts his liability from the ground of negligen to that of insurance.

Liability has been denied under the following circumstances:

Where two explosions in a powder factory, one of which did, while the other did not, import negligence on the defendant's part, occurred at the time the servant was killed, and there is nothing to show to which of the explosions the death was due. *Craig* v. *Laflin & R. Powder Co.* (1900) 55 App. Div. 49, 67 N. Y. Supp. 74.

Where a pot containing acids was overturned, owing to the slipping of one of the hooks by which it was supported, and the only evidence as to what caused the accident was the testimony of an expert, who had never seen the machinery, and had no knowledge of its condition in answer to a hypothetical question, that the accident might have happened from the hook slipping back towards the point after being properly placed in the lug, by reason of its faulty construction. *Welle* v. *C. Zuloid Co.* (1899) 52 App. Div. 522, 65 N. Y. Supp. 370.

Where an employee opened the door of an elevator shaft and fell down the shaft while the elevator was elsewhere. *Nelson* v. *Swift & Co.* (1898) 55 Neb. 528, 75 N. W. 1107.

Where it was not proved whether the premature dumping of a dirt car, which was the immediate cause of the injury, was due to the unevenness of the track on which it ran, or to the looseness of the hook, which was loosened when it was to be dumped. *Mattson* v. *Qualey Constr. Co.* (1900) 90 Ill. App. 260.

Where a railroad engineer was killed by falling from the running board, while the engine was in motion, and the only evidence bearing upon the cause of his death was that the movements of the engine were attended by some jarring or lost motion, but it was not shown that this made him lose his hold. *Southern P. Co.* v. *Johnson* (1895) 16 C. C. A. 317, 44 U. S. App. 1, 69 Fed. 559.

Where the negligence charged was the want of a fence or guard around the machinery which caused the employee's death, contrary to the provisions of a statute, but there is no evidence that such negligence was the cause of t cident. *Canadian Coloured C Mills Co.* v. *K[illam]* (1899) 29 C C. 478. Reversing (1898) 25 Ont. Rep. 36, Which Affirms (1896) 28 Rep. 73.

The mere facts that decedent wa standing upon a car which woul admit of the passage under na hanging bridge of a man of av height, shortly before the train p nader the bridge, and that immed thereafter he was found lying o top of the car insensible, and in a time died, do not warrant the su sion to the jury of the question wh or not he was killed by coming in tact with the bridge, when, even a ing that the jury would be ju in finding that he was of the av height, there is no evidence that was any wound or bruise on his p or that he died from violence in-t disease. *Fitzgerald* v. *New York H. R. R. Co.* (1897) 154 N. Y. 2 N. E. 514, Reversing (1895) 88 359, 34 N. Y. Supp. 824.

Where a brakeman was found on top of the train, with a wound one eye, where he was struck bridge, and it is proved that the of the bridge guard were 3 inches than the bridge, and that they were posed to be, and where not bent 8 inches apart, testimony which n shows that some of the wires slightly bent, and that his hat (o . . . es wide) might possibly have p bet[ween] wires further apart tha width of the hat, without his n ing any warning, does not justif inference that the accident was c by the negligence of the compa maintaining a defective "telltale." aught that appeared, the accident have happened after the "telltale" given its warning. *Deschenes* v. *cord & M. R. Co.* (1897) 69 N. H 46 Atl. 467.

Where a brakeman, who had be gaged on a car signaling his train side track, was found dead on ground opposite the depot adjoinin track, the theory that he was kn off the car by contact with the roof, which was negligently constr too near the track, is not sustain evidence to the effect that deceased

after the accident, exclaimed that he had been knocked off the car; that a perpendicular line drawn from the edge of the depot roof was 16½ inches from the car; that there were no ladders on that side of the car; that the depot roof, or the gutter attached thereto, gave no evidence of having been struck; that the wounds of the deceased were not such as to indicate that he had been struck by the roof; that he fell from the end of the car; that he was found at the depot's west end; and that, in view of the direction in which the train was moving, he would necessarily have been struck by the east end, while it was not apparent that he had been dragged by the train. *Houston & T. C. R. Co.* v. *Loeffler* (1900; Tex. Civ. App.) 59 S. W. 558.

A verdict is properly directed for the defendant in an action for an injury alleged to have been caused by a defective switch, allowing the engine to be deflected to a siding, where there is merely testimony that two weeks or more before the accident the rails were not close together when the switch was closed, witness stating, as to the extent of the separation, "You could see in there; it didn't lay tight." If the case were submitted on such testimony the jury would be left to find that there was a defect sufficient to cause the accident; that it continued to the time of the accident, though it was not disclosed in the constant use of the road; and that the defect caused the accident, which with equal probability could be attributed to any of several causes for which defendant was not liable. *Saritz* v. *Lehigh & N. E. R. Co.* (1901) 199 Pa. 218, 48 Atl. 987.

A trainman injured by contact with the drawhead while he was coupling is properly nonsuited, where the only evidence to sustain his allegation that the coupling appliances were defective is his own testimony that the spring was out of the drawhead, and it is not shown that his injury resulted in any way from that cause. *Hannigan* v. *Lehigh & H. River R. Co.* (1898) 157 N. Y. 244, 51 N. E. 992, Reversing (1895) 91 Hun, 300, 36 N. Y. Supp. 293.

A nonsuit will be granted in an action by an employee against a railroad company for injuries received at a certain station by reason of a broken brake chain, where the only evidence as to when it broke is merely a suggestion that it was broken before the train reached the station at which it was inspected. *Dickerson* v. *Central R. Co.* (1899) 189 Pa. 567, 42 Atl. 299.

Where a trainman can only show that, while he was in the exercise of due care, an accident happened to a car, which caused him the injury complained of, the court will not infer that the car was in an unfit condition to be placed upon the road, and that the defect was of such a nature that it ought to have been discovered by appellant's servants. *Chicago, R. & Q. R. Co.* v. *Montgomery* (1884) 15 Ill. App. 295.

A judgment for damages against a railway company is erroneous, although plaintiff testifies that he was injured by a fall occasioned by a defective ladder on the side of a car, and one passing near the train testifies that he saw him fall from the car, when the car inspector testifies that the ladder was not defective when the train started, the conductor and other employees testify that it was examined by them after the accident and found intact, and also that plaintiff told them immediately after the injury that he was hurt by jumping from the car. *Jones* v. *Texas & P. R. Co.* (1899) 51 La. Ann. 1247, 26 So. 86.

A nonsuit should be granted where the plaintiff relies on the theory that the injury was caused by deceased trying to mount an engine which had a defective step, and the only fact proved is that he fell under the wheels of cars which he was coupling. *Philadelphia & R. R. Co.* v. *Schertle* (1881) 97 Pa. 450.

The mere fact that one out of fourteen cars in a train is unprovided with a footboard is not sufficient to warrant submitting to the jury the question whether the death of a brakeman by falling off the train was caused by that deficiency. *Rogers* v. *Louisville & N. R. Co.* (1898) 88 Fed. 462.

Where nothing more is shown than that a brakeman who had gone between two cars to couple them was afterwards found lying crushed and dead on the track, a verdict against the railway company is not warranted. *Atchison, T. & S. F. R. Co.* v. *Alsdorf* (1896) 68 Ill. App. 149. Affirming Opinion in Former Appeal (1894) 56 Ill. App. 578.

Evidence that plaintiff was riding on the forward end of a hand car with his feet hanging down 4 inches from the ties; and that his attention was attracted, and as he was turning his head his foot was caught, throwing him on the track,—is insufficient to support a

finding that he was injured because of the defective condition of the track. *St. Louis, A. & T. R. Co.* v. *Denny* (1893) 5 Tex. Civ. App. 359, 24 S. W. 317.

Liability for injuries to a servant cannot be based upon the mere fact that a car used for carrying refuse had "dumped" in operation, and that there was a slight straightening of the hook used in fastening the side of the car, where there is no evidence that such straightening had anything to do with the overturning of the car, or that it was of such a nature as to require any attention or repair, or such as to prevent the continued and safe service of the car. *Soderman* v. *Kemp* (1895) 145 N. Y. 427, 40 N. E. 212.

An employee engaged in making an excavation cannot recover for injuries from the improper laying or insufficient support of a track upon which dump cars were run, where such track was laid by himself in connection with fellow servants. *Cordelia* v. *Dwyer* (1894) 9 Misc. 399, 29 N. Y. Supp. 1073, Affirmed in (1897) 153 N. Y. 689, 48 N. E. 1105.

The mere fact that the trousers of an employee, who fell on the clay floor of the basement of his employer's store, were wet and muddy when he arrived at the hospital, will not, as against the testimony of many witnesses, authorize a finding that the employer had negligently allowed the clay to become damp and slippery. *McCarthy* v. *Shoneman Bros.* (1901) 198 Pa. 568, 48 Atl. 493.

In an action for injuries caused by a slat saw, at which plaintiff worked, where the theory was that plaintiff's hand passed beneath the overhanging steel guard and came in contact with the saw, there being evidence that considerable blood was found on parts of the machine below the table, and only scattering spots above, and hence that the injury might have come from the lower parts of the saw, and possibly without defendant's negligence, the rule that the mere happening of the accident established defendant's negligence is inapplicable. *Beyersdorf* v. *Cream City Sash & Door Co.* (1901) 109 Wis. 456, 81 N. W. 860.

An employer is not liable to an employee for injuries caused by a flying stick from some unexplained source getting between a pulley and a belt which another employee was adjusting thereon, and causing the belt to fly off, catch a plowshare lying upon the floor, and then in its movements catch such employee and draw him around the shaft. *Freebery* v. *St. Paul Plow Works* (18 Minn. 99, 50 N. W. 1026.

An employer is not liable for i to a boy who, while engaged in a machine not in motion, as to of which he had been fully ins was injured by the machine s starting from an unexplained ca catching his hand in the steel te jecting from iron rollers, where t chine was a safe and proper one construction, and such as was other factories of a like nature, not out of repair. *Ash* v. *Bros.* (1893) 154 Pa. 240, 26 Atl

The existence in an expansi of a steam pipe of a crack whi not be discovered by inspection, leaking of water and steam joint, are not such evidence of ne in failing to discover the defect render the employer liable for an to an employee caused by an ex of the joint, where such leakin Indiction that the joint is *Voigt* v. *Michigan Peninsular* (1897) 112 Mich. 504, 70 N. W.

Where the handle of a ladle carriage of molten metal break it is being used in the same wa has been for fifteen years pre the presumption is that it wa nally of sufficient strength; and the source of the weakness which it to give way is, upon the evide a mere matter of conjecture, a should be directed for defendant. v. *Campbell* (1894) 8 C. C. A. U. S. App. 334, 59 Fed. 990.

The unskilfulness and incom of brakemen will not make a company liable for injuries ca the derailment and overturning engine which struck calves u track, where it is only conjectu the greatest diligence and skill part might have prevented the n of the engine. *Central Trust Co.* *Tennessee, V. & G. R. Co.* (1895) 635.

The theory that an injury female servant received while a machine was caused by the wa sufficient number of male empl ner department cannot be based mere fact that, if there had be present, one of them might ha set at the task. *De Young* v (1896) 5 App. Div. 499, 38 N. 1089.

From the fact that a couplin cars which a switchman is att to couple was fastened in the dr

the cause suggested by the servant.[2] As long as there is nothing more tangible to proceed upon than two or more conjectural theories, it is immaterial that the theory which is suggested in the interest of

a jury may possibly draw the inference that the coupling pin, link, drawhead, and other coupling apparatus were defective, but they cannot, upon that inference, base the further one that the officers of the company knew, or by the use of ordinary care might have known, of such defective condition. *Missouri, K. & T. R. Co.* v. *Thompson* (1895) 11 Tex. Civ. App. 658, 33 S. W. 718.

It is not justifiable to infer that the pin which holds a brake rod in its place had dropped out before the car left a station 30 or 40 miles distant, and upon that inference to base the further inference that the car had not been properly inspected at that station. *Bailey* v. *Rome, W. & O. R. Co.* (1888) 46 Hun, 377, 3 N. Y. Supp. 585.

Where plaintiff's negligence may have caused the injury, an instruction requiring the defendant to show that his negligence did not contribute to the injury was erroneous. *Texas & P. R. Co.* v. *Maupin* (1900) 26 Tex. Civ. App. 385, 63 S. W. 346.

To submit to the jury the question whether defendant's negligence was the natural and probable cause of the accident, and whether the accident, in the light of the attending circumstances, ought reasonably to have been foreseen by a person of ordinary intelligence, care, and prudence, as likely to occur, is erroneous, where there is no evidence to support a finding that defendant's negligence was the proximate cause of the injury. *Musbach* v. *Wisconsin Chair Co.* (1900) 108 Wis. 57, 84 N. W. 36.

In *Rutledge* v. *Missouri P. R. Co.* (1892) 110 Mo. 312, 19 S. W. 58 it was held that the trial court should have sustained defendant's objection to the introduction of any evidence on the ground that the petition did not state facts sufficient to constitute a cause of action, where it first averred that plaintiff proceeded, in pursuance of orders given him by the yard master, to uncouple the car, and before he reached the proper place to perform that duty "someone unknown to him caused the cars to be moved without notice to him, whereby he was thrown from said car" and injured, and then also averred that the failure of defendant "to have such proper system and published rules regarding said matters was directly the cause of said train of cars being suddenly, without notice to plaintiff, moved," whereby he was thrown off and injured. The court said: "We do not see how these two allegations can stand together. He first alleged that he did not know who caused the train to move, and, of course, he did not know why and how it was moved, and not knowing this he could not affirm that the movement was the result of the failure to establish rules. It is evident this is a mere surmise, supposition, or guess of the plaintiff. The *probata* must correspond with the *allegata*. . . . At common law we think the plaintiff was bound to prove how and why this sudden movement occurred, and this he utterly failed to do. If the sudden movement was caused by the voluntary action of the engineer or in pursuance of a signal given by someone other than plaintiff, and this action of the engineer was caused, or the signal was given, by the wrong person, because defendant had failed to promulgate and enforce proper rules and regulations in regard to the movement of trains in its yards at Chamois, defendant is liable for the injury caused by such movement. We can appreciate how important it is in the management of trains to have a proper system of signals to protect the employees from danger; and the propriety of conferring on the switchman performing the duty of coupling or uncoupling cars the right to give signals to stop or start, as appeared whether on the cars or on the ground. On the other hand, if the sudden movement was the result alone of the ordinary operation of the train going onto the switch, plaintiff must be held to have assumed the risk of being thrown off the car by it, and therefore cannot recover. This is one of the risks of the employment which the law holds that he assumed when he engaged to perform the work assigned him. He mounted the car while in motion, and he knew it was going in on the switch, and hence he should have taken proper precaution against the ordinary movements of the train."

[2] As, where the evidence is equally consistent with the theory that the injury was caused by the negligence of a vice principal, and with the theory that it was caused by the negligence of a co-

the servant is more probable than that which is suggested in the terest of the master.[3]

838. Shifting of the burden of proof.—In the note below are lected several employers' liability cases in which specific referen made to the shifting of the burden of proof. For a more ge discussion of the subject, see Shearm. & Redf. Neg. § 58.[1]

servant. *Rose* v. *Boston & A. R. Co.* (1874) 58 N. Y. 217 (for facts see § 608, note 2, *ante*).

It is proper to charge that a servant injured by the sudden starting of a machine which he was oiling cannot recover if the jury are unable to decide whether the starting was due to a defect in the machine itself or to the act of a fellow servant or of a stranger. *Shaughnessey* v. *Sewall & D. Cordage Co.* (1894) 160 Mass. 331, 35 N. E. 861.

Nor can the action be maintained where it is left doubtful under the evidence whether the injury was caused by the servant's own negligence or by that of the master. *East Tennessee, V. & G. R.* v. *Stewart* (1884) 13 Lea, 432; *Consolidated Coal Co.* v. *Bonner* (1890) 43 Ill. App. 17; *Southern P. Co.* v. *Johnson* (1895) 16 C. C. A. 317, 44 U. S. App. 1, 69 Fed. 559 (see note 1, *supra*, for facts); *Farmer* v. *Grand Trunk R. Co.* (1891) 21 Ont. Rep. 299.

The presumption that a drawhead was defective at the time an inspection was made, and that the defect might have been discovered by a proper examination, cannot be raised upon the fact that it gave way and injured a brakeman, where it appears that its dangerous condition might have been occasioned by the violence of the impact of the cars at the time the injury was received. *Perry* v. *Michigan C. R. Co.* (1895) 108 Mich. 130, 65 N. W. 608.

[3] *Chandler* v. *New York, N. H. & H. R. Co.* (1893) 159 Mass. 589, 35 N. E. 89.

[1] Where it has been proved that some defect in the machinery or plant caused the accident, it is not necessary to show the precise nature of that defect, and the onus is thrown upon the master to show that the defect was one for which he was not to blame. *Macfarlane* v. *Thompson* (1884) 12 Sc. Sess. Cas. 4th series, 232, per Lord Monerieff, explaining the actual effect of *Fraser* v. *Fraser* (1882) 9 Sc. Sess. Cas. 4th series, 896, and *Walker* v. *Olsen* (1882) 9 Sc. Sess. Cas. 4th series, 946.

Whatever presumption of negligence may arise from the fact that a car off the track when a brakeman thrown from it is rebutted by proof the track and other agencies we good repair; and the plaintiff must fail in his action unless he pro fresh proof of negligence on the ma part. *Lockwood* v. *Chicago & N. Co.* (1882) 55 Wis. 50, 12 N. W. 4

Evidence that a servant was o temperate habits casts upon the de ant the burden of proving that he not intoxicated and was in the ex of proper care at the time of the dent. *Pennsylvania R. Co.* v. (1868) 57 Pa. 339, 98 Am. Dec. 22

If the unfitness of a servant is s to have existed at the time of em ment the burden is then on the m to disprove negligence in employing *Crandall* v. *McIlrath* (1877) 24 127.

In *Murphy* v. *Pollock* (1863) C. L. Rep. 224, it was held by Deas and Pigot, C. B., that, inasmuch a mode and circumstances of the em ment of a servant are matters peculi within the knowledge of the empl and not ordinarily within the know of a servant, the submission of evi from which a jury may reasonably the conclusion that the fellow se whose conduct was the proximate of the plaintiff's injury was incomp casts upon the employer the on showing that he exercised due and sonable care in the employment of servant.

It devolves on the master to that he has observed the duty of ing proper regulations. It is an affi tive fact that he can readily show, usually the plaintiff cannot prov negative. The servant must prove gence, and to exonerate himself master should show that proper ulations to prevent accidents been adopted, and these having shown to have been made, the pres tion is that the act was in violati the rule, and the company will a liable, unless the servant inflicting injury was incompetent, and the

839. Burden of proof, as affected by express statutory provisions.—*a. Statutes not exclusively applicable to employees.*—The provision in 5 Stat. at L. 306, chap. 191, § 13, that the fact of the bursting of the boiler of a steamboat shall be taken as "full prima facie evidence" of culpability, inures to the benefit of employees, although it is couched in general terms.[1]

Servants are also entitled to sue under § 3033 of the Georgia Code, which declares that "a railroad company shall be liable for any damage done to persons, stock, or other property, by the running of the locomotives or cars or other machinery of such company, . . . unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."[2]

In an action to recover damages under §§ 1166, 1167, of the Tennessee Code, which provides that when any person, animal, or other obstruction appears upon the roadway of a railroad company, "the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident," and that every railroad company that fails to observe these precautions

pany knew it, or had reasonable and proper means of knowing it. *Pittsburg, Ft. W. & C. R. Co.* v. *Powers* (1874) 74 Ill. 341.

After a defendant suffers judgment by default he has the burden of disproving negligence. *Ebert* v. *Hartley* (1899) 72 Conn. 453, 44 Atl. 723.

[1] *McMahon* v. *Davidson* (1867) 12 Minn. 357, Gil. 232, holding that the effect of this provision was that a verdict for the plaintiff was proper, as the defendant had produced no evidence to show that due care had been used in hiring the engineer who was in charge of a boiler which exploded.

[2] Hammers used by employees of a railroad company to drive spikes are not within the term "machinery." *Georgia R. & Bkg. Co.* v. *Nelms* (1889) 83 Ga. 70, 20 Am. St. Rep. 308, 9 S. E. 1049, adopting the following remarks of the supreme court of Alabama, in *Georgia P. R. Co.* v. *Brooks* (1887) 84 Ala. 138, 4 So. 289, in discussing a somewhat similar statute: "A hammer is a tool or instrument ordinarily used by one man in the performance of manual labor. It may be made an essential part of machinery when intended to be and is operated by means thereof; but when disconnected from any other mechanical appliances, and operated singly, by muscular strength directly applied, such tool or instrument is not machinery in its most comprehensive signification, or in the meaning of the statute."

It has been held that the presumption of negligence thus created is not confined to cases where the company is engaged in its ordinary business as a common carrier, and that it arises where a fireman of an engine furnished to a contractor employed to build an extension is injured. *Savannah & W. R. Co.* v. *Phillips* (1892) 90 Ga. 829, 17 S. E. 82.

In an action against a railroad company by an employee injured by the negligence of a coemployee, it is error to give in the charge the words of this provision, because in cases involving such injuries the burden of proof is upon the plaintiff. *Georgia R. & Bkg. Co.* v. *Hicks* (1894) 95 Ga. 301, 22 S. E. 613. See § 757, *ante*.

In a suit for the death of a railroad brakeman because of the failure of the company to provide warnings of the approach of the train to a low bridge, plaintiff need not show want of contributory negligence on the part of such brakeman, as he is required to do where the injury was due to the negligence of a coservant. *Savannah, F. & W. R. Co.* v. *Day* (1893) 91 Ga. 676, 17 S. E. 959. See § 843, subd. b, *infra*.

"shall be responsible for all damages to persons or property occasi
by, or resulting from, any accident or collision that may occur,"-
burden of proving compliance with the statute is upon the defend

b. Statutes enacted expressly for the benefit of employe

A statute which simply imposes a new obligation upon an empl
or renders him liable for the negligence of an employee who w
apart from its provisions, have been regarded as a mere coserva
the injured person, leaves upon the plaintiff the burden of provin
existence of such culpability as will entitle him to maintain
action.[4]

In Ohio a statute has been passed which provides that where
vant is injured "by reason of any defect on any car or locomotiv
the machinery or attachments thereto belonging, . . . the
of such defect . . . shall be prima facie evidence of negligc
on the part of the company.[5] (Ohio Laws 1890, p. 149, § 2.)

[3] *East Tennessee, V. & G. R. Co.* v. *Rush* (1885) 15 Lea, 145.

[4] In actions brought under any of the group of statutes reviewed in chapter XXXVII., *ante*, the burden of proof lies upon the plaintiff to prove each of the following propositions:

(a) That there was a breach of duty in the premises as regards the injured person. See *Southern R. Co.* v. *Guyton* (1898) 122 Ala. 231, 25 So. 34; *Louisville & N. R. Co.* v. *Binion* (1892) 98 Ala. 570, 14 So. 619; *Garland* v. *Toronto* (1896) 23 Ont. App. Rep. 238; *Mobile & B. R. Co.* v. *Holborn* (1887) 84 Ala. 138, 4 So. 146; *Louisville & N. R. Co.* v. *Davis* (1890) 91 Ala. 487, 8 So. 552.

(b) That this breach of duty was committed by some person for whose negligence the employer is made responsible by the statutes. *Gibbs* v. *Great Western R. Co.* (1884; C. A.) L. R. 12 Q. B. Div. 208, 48 J. P. 230, 53 L. J. Q. B. N. S. 543, 50 L. T. N. S. 7, 32 Week. Rep. 329; *Garland* v. *Toronto* (1896) 23 Ont. App. Rep. 238; *Mary Lee Coal & R. Co.* v. *Chambliss* (1892) 97 Ala. 171, 11 So. 897 (verdict set aside on the ground that there was no evidence that the failure to discover or remedy the defect was due to the negligence of the employer or his representative); *Louisville & N. R. Co.* v. *Davis* (1890) 91 Ala. 487, 8 So. 552.

(c) That such breach of duty was the efficient cause of the injury. *Southern R. Co.* v. *Guyton* (1898) 122 Ala. 231, 25 So. 34; *Louisville & N. R. Co.* v. *Binion* (1892) 98 Ala. 570, 14 So. *Farmer* v. *Grand Trunk R. Co.* 21 Ont. Rep. 299.

A statute requiring employe guard dangerous machinery does n pose upon a defendant the burd proving that the failure to comply the statute was not the efficient of the injury. *Montreal Rolling Co.* v. *Corcoran* (1896) 26 Can. 595, Reversing Rap. Jud. Quebec, R. 488.

[5] The effect of this provision has thus explained: "The presumpti knowledge of the defect, before a the time of the injury, is, by this ute, chargeable to the company; an statutory presumption cannot be come by proof of facts which only a presumption that the company d have such knowledge. Competen careful inspectors are presumed to erly inspect the cars and their a ments, but such presumption wou overcome the statutory presumpt knowledge of defects before and time of the injury. It would ta actual and proper inspection, equivalent, to overcome the stat presumption of knowledge of su fects." *Columbus, H. V. & T.* v. *Erick* (1894) 51 Ohio St. 146, E. 128.

Under this provision a railroad pany is liable for an injury to a ployee from the sudden starting locomotive by reason of leaky although it may not have had notice of the defect. *Lake Shore*

Wisconsin statute of a somewhat similar tenor has already been referred to in chapter XXIX., *ante*. See also § 873, note 3, *post*, for a case in which a court of a sister state refused to give effect to it on the ground that it pertained merely to the remedy. The essential effect of such enactments, it will be observed, is to extend the application of the doctrine of *res ipsa loquitur* to cases which, as it is ordinarily construed, would be beyond its scope.

C. Burden of proof with respect to defenses.

840. Generally.— When a breach of duty is proved or admitted to have been committed by the master, the burden of proving all such facts as he relies upon for the purpose of excusing his failure ordinarily rests upon him.[1] But from the ensuing sections it will be seen that this rule is not followed by all the courts in cases where the defense set up is one of those which is founded on the servant's alleged knowledge of the risk which caused his injury.

841. Burden of proof with respect to the assumption of the risk.— *a. Ordinary risks.*—As the doctrine which charges every adult servant with an acceptance of the ordinary risks of his employment rests, in part at least, upon the presumption which is entertained that he

S. R. Co. v. *Raitz* (1894) 10 Ohio C. C. 70.

Failure of a railroad company to furnish a customary appliance upon a locomotive, in consequence of which an employee is injured, places the company in the same position under this statute as though the appliance were furnished and the accident had resulted as a consequence of its defective condition, and the accident is made prima facie evidence of negligence. *Crumley* v. *Cincinnati, H. & D. R. Co.* (1896) 12 Ohio C. C. 164.

The presumption arising from the fact of the defect may be rebutted by showing that the company had no knowledge and was not guilty of negligence, and by evidence of careful and vigilant inspection by competent inspectors. *Pennsylvania R. Co.* v. *Meyers* (1893) 12 Ohio C. C. 263. But that presumption is not rebutted by the mere fact that the corporation employed a competent and sufficient inspector. *Felton* v. *Bullard* (1899) 37 C. C. A. 1, 94 Fed. 781, Citing the *Erick Case* (1894) 51 Ohio St. 146, 37 N. E. 128.

[1] An employer who alleges that the movement of a machine to which the plaintiff attributes his injury was impossible has the burden of proving that impossibility. *Wooster* v. *Bliss* (1895) 90 Hun. 79, 35 N. Y. Supp. 514; *Fox* v. *Le Comte* (1896) 2 App. Div. 61, 37 N. Y. Supp. 458.

The admission of a railway company in its answer, that the death of a fireman was caused by the unsafe condition of its track, shifts to it the burden of proving that the accident was caused by the malicious act of a trespasser, and that the consequences of such act could not have been prevented by the exercise of reasonable care. *Marcom* v. *Raleigh & A. Air-Line R. Co.* (1900) 126 N. C. 200, 35 S. E. 423.

Where a railroad company admits that he knew its track was not in safe condition at the point where an employee was injured by the derailment of a hand car, it will be presumed that the company's negligence in failing to maintain a safe track was the cause of the injury, and the burden is cast on the company to show that the accident was not caused by its negligence. *Wilkie* v. *Raleigh & C. F. R. Co.* (1900) 127 N. C. 203, 37 S. E. 204.

comprehends all those risks (see § 260, subd. *a, ante*), it is clear wherever such a servant has been injured owing to the existence risk of this character, and seeks to recover on the ground that h not appreciate it, he has the burden of showing that such appreci was not predicable under the given circumstances.[1] In the case minor the evidential situation is different, inasmuch as there presumption that he understands even the ordinary risks of his ployment. See § 291, note 7, *ante*.

b. Extraordinary risks.—The conception that the servant's n sumption of extraordinary risks is based upon the hypothesis th does not know of them, or take them into his calculations as o the elements of his contract (see § 273, *ante*), is deemed, in mo the American states, to require the conclusion that the burden of ing that he had knowledge of, and assumed, any particular risk w falls within this category rests upon the master.[2] The burden i course, shifted to the servant in those cases where the facts establi

[1] This doctrine has never, so far as the writer knows, been questioned, and is explicitly laid down in *Johnson* v. *Chesapeake & O. R. Co.* (1892) 36 W. Va. 73, 14 S. E. 432; *Whalen* v. *Illinois & St. L. R. & Coal Co.* (1885) 16 Ill. App. 320.

[2] "The employee is only presumed to assume the dangers usually attendant upon his employment; and when he shows that he has been injured by a cause or danger not usually or reasonably attendant upon his employment, he is then entitled to recover, unless it be shown that he knew of such unusual and unreasonable danger and fully comprehended its nature at the time of his employment or before the accident happened. The evidence in this case having established the fact that the injury to the plaintiff was caused by a danger which ought not to have attended his employment, and would not have attended it if the defendant had performed its whole duty towards him, there is no presumption that the plaintiff assumed the unusual risk, and the burden of proof is on the defendant to show affirmatively that he did." *Nadau* v. *White River Lumber Co.* (1890) 76 Wis. 120, 131, 20 Am. St. Rep. 29, 43 N. W. 1135.

"There can be no presumption of knowledge of special dangers arising from a peculiar and exceptional state of affairs." *Whalen* v. *Illinois & St. L. R. & Coal Co.* (1885) 16 Ill. App. 320.

To the same effect, see *Texas & P. R. Co.* v. *Archibold* (1896) 21 C. C. A 41 U. S. App. 567, 75 Fed. 802; *ander* v. *Central Lumber & Mill* (1894) 104 Cal. 532, 38 Pac. *Bjorman* v. *Ft. Bragg Redwoo* (1894) 104 Cal. 626, 38 Pac. 451; *cago* v. *Edson* (1891) 43 Ill. App Citing *Chicago & E. I. R. Co.* v. (1890) 132 Ill. 161, 22 Am. St. 515, 23 N. E. 1021; *Wells* v. *Burl C. R. & N. R. Co.* (1881) 56 Iowa 9 N. W. 364; *Greenleaf* v. *Illinois Co.* (1870) 29 Iowa, 14, 4 Am. 181; *Coates* v. *Burlington, C. R. R. Co.* (1883) 62 Iowa, 486, 17 760; *Moyes* v. *Chicago, R. I. & Co.* (1884) 63 Iowa, 562, 14 N. W 19 N. W. 680; *Chesapeake & N.* v. *Venable* (1901) 23 Ky. L. Rep. 63 S. W. 35; *Myhan* v. *Louisiana tric Light & P. Co.* (1889) 41 La. 964, 7 L. R. A. 172, 17 Am. St. Rep 6 So. 799; *Swoboda* v. *Ward* (187 Mich. 420; *Thorpe* v. *Missouri P.* (1886) 89 Mo. 650, 58 Am. Rep. S. W. 3; *Young* v. *Shickle, H. & B. Co.* (1890) 103 Mo. 324, 15 S. W. *Johnston* v. *Oregon Short Line R* (1892) 23 Or. 94, 31 Pac. 283; v. *Oliver Oil Co.* (1890) 34 S. C. 27 Am. St. Rep. 815, 13 S. E. 419; *hue* v. *Enterprise R. Co.* (1889) 32 299, 17 Am. St. Rep. 854, 11 S. E *Texas & St. L. R. Co.* v. *Vallie* (1 60 Tex. 481; *Texas & P. R. Co.* v. *son* (1896) 89 Tex. 519, 35 S. W. *Galveston Rope & Twine Co.* v. *Bu* (1893) 2 Tex. Civ. App. 308, 21 S

by the testimony produced in his behalf indicate that he was aware of the existence of the risk.[3]

In some states it has been explicitly decided that the burden of disproving his knowledge and assumption of an extraordinary risk lies on the servant.[4] The rationale of this doctrine would seem to be that it is a necessary corollary of the rule of pleading, that a servant must, in his complaint, expressly allege his ignorance of the danger to which his injury was due. See § 857, subd. *b, post*. It is submitted, however, that this point of view is a mistaken one, and that the incidence of the burden of proof is logically determinable with reference to any presumptions which may be entertained in the premises, and not with reference to the allegations which may be deemed necessary to show a good cause of action.

As soon as it is shown that the servant appreciated, or ought to have appreciated, the extraordinary risk in question, the presumption that every risk known by him to be involved in his employment was accepted becomes operative, and he has the burden of proving any facts upon which he may rely for the purpose of bringing the case within one of the recognized exceptions to the rule which charges him with that acceptance.[5]

958; *Gulf, C. & S. F. R. Co.* v. *Royall* (1898) 18 Tex. Civ. App. 86, 43 S. W. 815; *Norfolk & W. R. Co.* v. *Ward* (1894) 90 Va. 687, 24 L. R. A. 717, 44 Am. St. Rep. 945, 19 S. E. 849; *Hulehan* v. *Green Bay, W. & St. P. R. Co.* (1887) 68 Wis. 520, 32 N. W. 529; *Cole* v. *Chicago & N. W. R. Co.* (1886) 67 Wis. 272, 30 N. W. 600.

[3] *Galveston Rope & Twine Co.* v. *Burkett* (1893) 2 Tex. Civ. App. 308, 21 S. W. 958.

[4] This rule has been explicitly asserted in several Indiana cases. *Louisville, N. A. & C. R. Co.* v. *Sandford* (1888) 117 Ind. 265, 19 N. E. 770; *Clark County Cement Co.* v. *Wright* (1897) 16 Ind. App. 630, 45 N. E. 817; *Pennsylvania Co.* v. *Witte* (1896) 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377; *Chicago & E. R. Co.* v. *Wagner* (1896) 17 Ind. App. 22, 45 N. E. 76, 1121; *Toledo, St. L. & K. C. R. Co.* v. *Trimble* (1893) 8 Ind. App. 333, 35 N. E. 716.

In New Hampshire it has been laid down in general terms, with reference to an injury caused by an abnormal risk, that the plaintiff has the burden of proving that the accident was not caused by a risk which he assumed when he entered the defendant's employment. *Leazotte* v. *Boston & M. R. Co.* (1899) 70 N. H. 5, 45 Atl. 1084.

In Ohio it was laid down in an early case that a servant must aver and prove that he did not know of the defects in question. *Mad River & L. E. R. Co.* v. *Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312.

In Idaho the servant must show that his injury did not arise from a defect which he knew or ought to have known, and that it was not from a hazard incident to the business. *Minty* v. *Union P. R. Co.* (1889) 2 Idaho, 437, 21 Pac. 660.

In Virginia it is laid down that the servant must prove that the injury complained of did not result from the ordinary hazards of the business. *Norfolk & W. R. Co.* v. *Jackson* (1888) 85 Va. 489, 8 S. E. 370. But this statement seems to be, in its essence, nothing more than an affirmation of the doctrine that the burden of proving actionable negligence lies on the servant (see § 832, *supra*). This being one of the cases in which the servant is not required to allege his ignorance of the danger (see § 857, subd. e, *post*), it can scarcely be supposed that the court intended to enunciate the Indiana doctrine.

[5] *Malm* v. *Thelin* (1896) 47 Neb. 686, 66 N. W. 650, where the promise of the master to remedy the dangerous conditions was relied upon by the servant.

842. Burden of proof as to servant's contributory negligen

collection of the authorities which bear upon the subject of the b
of proof in its relation to the defense of contributory negligen
be found in Shearm. & Redf. Neg. §§ 107, 108. For the purp
the present treatise it will be sufficient to refer to the employe
bility cases in which the antagonistic doctrines on that subjec
been applied.[1]

If the defect and the risk created by it were obvious, it is proper for the trial judge to refuse a request for an instruction that the defendant has the burden of proving the plaintiff's knowledge of the existence of the defect. *Ferguson* v. *Phœnix Cotton Mills* (1901) 106 Tenn. 236, 61 S. W. 53.

In *Coates* v. *Burlington, C. R. & N. R. Co.* (1883) 62 Iowa, 492, 17 N. W. 760, the jury were instructed to the effect that, if deceased had knowledge of the condition of the frog, and continued in the employment of the defendant, and made no complaint thereof, and was not promised a change, there could be no recovery, and that the burden of proving the same was on the defendant. Discussing the contention that this instruction was erroneous, because it not only required the defendant to prove that the deceased had knowledge of the defect, but also to prove that he did not make complaint thereof and was not promised a change therein, the court said: "In *Wells* v. *Burlington, C. R. & N. R. Co.* (1881) 56 Iowa, 520, 9 N. W. 364, it is held that the burden rested upon the defendant to prove the affirmative allegation of the defense, and the fact that the plaintiff had knowledge of the alleged danger to which he was exposed. We think that when the defendant has shown that fact, it may well rest upon it as a defense, and that, in the absence of some excuse from the plaintiff for exposing himself to dangers known to him, there can be no recovery. It is a general rule (subject, of course, to some exceptions) that a party to an action is not required to establish the negative of a proposition. When the defendant shows that the plaintiff knew of the dangerous condition of the road or machinery which he aided to operate, it is then incumbent on the plaintiff to show that he was in some manner justifiable in exposing himself to the danger. The fact that such proof cannot be made in some cases where the injury results in death is no reason why the rule that the party who holds the affirmative of an issue is required to assume the
of proof should not be enforced.
burden had been held to rest on
fendant to prove the negative,
have been required to introduce
nesses, all of its officers and e
to whom such notice might pro
given, and prove by them that
plaint was made."

[1](a) *Burden on plaintiff to contributory negligence.*— The
that the burden of disproving
tory negligence rests on the se
been recognized in several cases

Illinois.—Illinois C. R. Co.
(1898) 174 Ill. 109, 50 N. E.
firming (1896) 69 Ill. App. 2
cago & A. R. Co. v. *Myers* (190
App. 578; *Chicago, B. & Q.*
Montgomery (1884) 15 Ill. Ap

Although an instruction fail
ify the plaintiff's right of reco
statement that he must not ha
of the danger and unnecessa
into it, the defect is cured by
quent instruction that he mus
tively show by a preponderan
evidence that he was in the e
due care. *American Exp. Co.*
(1898) 77 Ill. App. 476, Af
(1899) 179 Ill. 295, 53 N. E.

A finding that an employee
the time he was killed, using
for his safety, is justified by
that he was an intelligent, s
careful youth of nineteen yea
there was no eye witness to the
and no countervailing evidence
mand v. *Saalfeldt* (1898) 175
48 L. R. A. 753, 67 Am. St. Re
N. E. 645, Affirming (1897) 73
151. To the same effect, see
Laufman (1900) 89 Ill. App.
the plaintiff was an adult.

Indiana.— Pennsylvania Co
ney (1896) 145 Ind. 551, 42
This decision seems to be in
with an earlier one in which
down that an employee who is
injuries received through the
of an incompetent fellow ser
is met by the defense of co

843. Same subject continued; actions under statutes.— For the pose of discussing the incidence of the burden of proof in actions

negligence, is not required to show that he had no knowledge of that incompetency *Pennsylvania Co.* v. *Roney* (1883) 89 Ind. 453, 46 Am. Rep. 173. The position of the court is indicated by the following remark: "It may be true that, where a negative fact is essential to a recovery, it must be proved; but such a fact as the want of capacity of fellow servants constitutes no essential ingredient of the cause of action in such a case as this." Viewed with reference to the particular element of contributory negligence, which it was said the servant was not required to establish, this decision is also essentially repugnant to those of the same court which are cited in § 841, note 4, *supra*.

The effect of the Indiana statute cited in § 858, note 2, *post*, is that the onus of proving contributory negligence now lies on the defendant.

Iowa.—Error in charging in an action against a master to recover for the death of a servant, that the burden was upon defendant to establish the allegations of contributory negligence made against the plaintiff's intestate, as well as to establish its claim of waiver of defects in the appliance which caused the injury, is not cured by an instruction that the plaintiff conceded that the deceased knew of the defects in the appliance when he entered the master's service, where it is probable that the jury understood that "waiver" consisted not only of a knowledge of the danger and continuance in the employment, but of absence of protest and of promise to repair. *Ford* v. *Chicago, R. I. & P. R. Co.* (1898) 106 Iowa, 85, 75 N. W. 650, Reversing on Rehearing (1897; Iowa) 71 N. W. 332.

The absence of contributory negligence need not necessarily be established by direct proofs, but in the very nature of things must often be found, if at all, from the facts and circumstances of the case. *Gorman* v. *Minneapolis & St. L. R. Co.* (1889) 78 Iowa, 509, 43 N. W. 303.

An instruction is erroneous by which the jury are told that they have the right to infer that the plaintiff, when he received the injury, was in the line of his duty, and in the exercise of proper care and diligence, if such inference is in perfect harmony with all the facts established by the evidence. *Perigo* v. *Chicago, R. I. & P. R. Co.* (1880) 55 Iowa, 326, 7 N. W. 627.

Where an employee of a railroad company, who was inexperienced brakeman, when last seen alive was performing his duty in setting the brakes, and a minute later, the train having separated, he was thrown to the ground and killed, it was held that, although there was no other evidence bearing on the question of negligence on his part, the court was justified in submitting it to the jury in an action against the company. *Barns* v. *Chicago, M. & St. P. R. Co.* (1886) 69 Iowa, 450, 58 Am. Rep. 227, 30 N. W. 25.

Louisiana.—In support of the inclusion of this state among those in which the servant has the burden of disproving contributory negligence, Messrs. Shearman & Redfield cited *Moore* v. *Shreveport* (1848) 3 La. Ann. 615; *Ryan* v. *Louisville, N. O. & T. R. Co.* (1892) 44 La. Ann. 896, 11 So. 30. The former of these cases cannot be regarded as an explicit affirmation of the doctrine, and in the latter the court expressly declined to express any decided opinion on the question. A more satisfactory authority is *Deikman* v. *Morgan's L. & T. R. & S. S. Co.* (1888) 40 La. Ann. 787, 5 So. 76, which certainly puts the burden of disproving contributory negligence on the plaintiff. Yet it was expressly laid down in *Myhan* v. *Louisiana Electric Light & P. Co.* (1889) 41 La. Ann. 964, 7 L. R. A. 172, 17 Am. St. Rep. 436, 6 So. 799, that the burden of proving the servant's knowledge of the risk lies on the master, and, as the defense set up was contributory negligence, it seems a warrantable inference that the court must have considered that the master has the burden of establishing that defense, as a whole.

Maine.—*Cunningham* v. *Bath Iron Works* (1899) 92 Me. 501, 43 Atl. 106; *McLane* v. *Perkins* (1898) 92 Me. 39, 43 L. R. A. 487, 4 Atl. 255 (entire absence of evidence to the manner in which employees were drowned).

Massachusetts.—*Blanchette* v. *Border City Mfg. Co.* (1886) 143 Mass. 21, 8 N. E. 430; *Riley* v. *Connecticut River R. Co.* (1883) 135 Mass. 292.

New York.—*Dobbins* v. *Brown* (1890) 119 N. Y. 188, 23 N. E. 537.

A railroad brakeman, in an action by him against the railroad company to re-

brought under statutes it will be convenient to consider them longing to one or other of the two classes indicated by the he of the following subsections.

cover damages for injuries sustained by being struck by a bridge while on top of a car, is charged with the burden of proving his freedom from contributory negligence, and that he did not know it was a low bridge, and could not have ascertained that fact in the exercise of ordinary care and caution. *Williams* v. *Delaware, L. & W. R. Co.* (1899) 39 App. Div. 647, 57 N. Y. Supp. 263.

In an action for the death of a brakeman, caused by his striking against a low overhead bridge, alleged not to be properly guarded by "telltales," freedom from contributory negligence is not established by evidence that two of the telltales near the center were entirely gone and one was tangled with another, thus leaving a space of about 18 inches, through which a brakeman's head might pass without being struck by them and thereby warned of the bridge; that deceased was walking leisurely forward on the train as it approached the bridge, with the telltales and bridge in plain sight; and that snow had fallen on the day of the accident, but was not falling, so as to blind him, when he struck the bridge. *Albring* v. *New York C. & H. R. R. Co.* (1900) 46 App. Div. 460, 61 N. Y. Supp. 763.

A servant may establish his freedom from negligence either by direct testimony of acts showing care, or by circumstantial evidence from which a lack of contributory negligence may be inferred. *Vincent* v. *Alden* (1899) 45 App. Div. 627, 61 N. Y. Supp. 62.

Ohio.—In this state it was laid down in an early case that the plaintiff must aver and prove that he used due care and diligence. *Mad River & L. E. R. Co.* v. *Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312. But this ruling is inconsistent with later cases in which the doctrine is adopted that the burden of proving contributory negligence lies on the master, unless the servant's own testimony tends to show the existence of such negligence. *Baltimore & O. R. Co.* v. *Whitacre* (1880) 35 Ohio St. 627; *Cleveland, C. & C. R. Co.* v. *Crawford* (1874) 24 Ohio St. 636, 15 Am. Rep. 633; *Robison* v. *Gary* (1876) 28 Ohio St. 241.

Rhode Island.—That this is one of the states in which the burden of disproving contributory negligence lies on the plaintiff was explicitly dec a recent case, in which it was h no presumption could be indulge of the theory that an experienc man was in the exercise of due the time he met his death, wh though there were no eye witn is apparent, from the characte injuries, that he received a sev tric shock which must have been either by his becoming ground in contact with a heavily charg or from his creating a short ci the current through his body. *Narragansett Electric Lighti* (1899) 21 R. I. 128, 42 Atl. 50 court referred to the earlier de *Cassidy* v *Angell* (1879) 12 R 34 Am. Rep. 690, which had b strued by other courts and writers as embodying the doctr the burden of proving contribut ligence lies on the defendant i Island. The actual effect of t sion was explained to be thi where the facts established sh there was nothing to put a dec his guard against the dange caused his death, his represent entitled to the benefit of a pre that he was in the exercise of care, if nothing to the contr pears; but that, nevertheless, dence is adduced by the defenda tends to rebut this presumpt burden still rests upon the pla satisfy the jury by a preponde the evidence that he was in the of due care. It is obvious, that the logical result of ent the presumption thus supposed dulged is that the existence of utory negligence is negatived at set, unless the defendant offers in rebuttal, and that this necessarily implies that the b proving such negligence rests u Rogers, J., in a concurring dwelt upon this objection to t nation whic' had been given o tionale of the earlier decision. mated that, unless it could be s upon some other ground, it w authority.

West Virginia.—In three e court explicitly took the posit the burden of proving contribu ligence lies on the defendant.

a. Statutes which simply extend the common-law liability of the master.—In a portion of the group of statutes reviewed in chapter XXXVII., *ante*, the legislatures have abstained from declaring the serv-

v. *Pittsburgh, C. & St. L. R. Co.* (1877) 11 W. Va. 14; *Skeff* v. *Huntington* (1889) 16 W. Va. 317; *Fowler* v. *Baltimore & O. R. Co.* (1881) 18 W. Va. 579. These were all actions by strangers. But in *Johnson* v. *Chesapeake & O. R. Co.* (1892) 36 W. Va. 73, 14 S. E. 432, a passage from Wood's treatise on Master and Servant, § 382, to the effect that the servant must ever and prove that he exercised due care, was quoted with approval.

(b) *Burden on defendant to prove contributory negligence.*— In the great majority of American states the burden of proving the existence of contributory negligence rests on the defendant. This rule has been explicitly affirmed in the following employers' liability cases: *Montgomery & E. R. Co.* v. *Chambers* (1885) 79 Ala. 338; *Little Rock, M. R. & T. R. Co.* v. *Leverett* (1886) 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50; *Little Rock & Ft. S. R. Co.* v. *Eubanks* (1886) 48 Ark. 460, 3 Am. St. Rep. 245, 3 S. W. 808; *Chesapeake & N. R. Co.* v. *Venable* (1901) 23 Ky. L. Rep. 427, 63 S. W. 35; *Thorpe* v. *Missouri P. R. Co.* (1886) 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3; *Haltom* v. *Southern R. Co.* (1900) 127 N. C. 255, 37 S. E. 262; *Houston & T. C. R. Co.* v. *White* (1900) 23 Tex. Civ. App. 280, 56 S. W. 204; *Galveston, H. & S. A. R. Co.* v. *Collins* (1900) 24 Tex. Civ. App. 143, 57 S. W. 884.

Where the testimony of plaintiff, standing alone, does not justify a peremptory charge for defendant on the ground of contributory negligence, a charge that the burden on this issue is on defendant is correct. *Galveston, H. & S. A. R. Co.* v. *Gordon* (1899; Tex. Civ. App.) 54 S. W. 635.

An instruction as to contributory negligence, to the effect that, before the jury could find for the defendant, they must be sure that such negligence had been proved, is not erroneous as calling for a higher degree of proof than the law requires. *Bodie* v. *Charleston & W. C. R. Co.* (1901) 61 S. C. 468, 39 S. E. 715.

The doctrine now established in England is the same as that which prevails in the majority of the United States. See *Dublin, W. & W. R. Co.* v. *Slattery* (1878) L. R. 3 App. Cas. 1155, 39 L. T. N. S. 365, 27 Week. Rep. 191, per Lord Hatherley and Lord Penzance; *Wakelin* v. *London & S. W. R. Co.* (1886) L. R. 12 App. Cas. 41, 56 L. J. Q. B. N. S. 229, 55 L. T. N. S. 709, 35 Week. Rep. 141, 51 J. P. 404, per Lord Watson.

In *Holland* v. *North Metropolitan T. Co.* (1886) 3 Times L. R. 245, it was stated that the case of *Davey* v. *London & S. W. R. Co* (1883) L. R. 11 Q. B. Div. 213, 52 L. J. Q. B. N. S. 665, Affirmed in (1883) L. R. 12 Q. B. Div. 70, 53 L. J. Q. B. N. S. 58, was no longer authoritative, in so far as it embodied the contrary rule.

The doctrine adopted in the cases just cited is subject to a well-recognized qualification which has been thus stated: If, by the uncontradicted facts, on the truth of which the plaintiff must rest his own case, it is shown that the damage to the plaintiff was caused by himself, the trial judge is justified in nonsuiting the plaintiff. *Davey* v. *London & S. W. R. Co.* (1883) L. R. 11 Q. B. Div. 213, 52 L. J. Q. B. N. S. 665, per Lord Coleridge, summarizing the effect of earlier decisions.

In other words the burden of proving contributory negligence lies on the defendant, unless the testimony submitted on behalf of the plaintiff shows the existence of such negligence. *Montgomery & E. R. Co.* v. *Chambers* (1885) 79 Ala. 338; *New Omaha Thomson-Houston Electric Light Co.* v. *Baldwin* (1901) 62 Neb. 180, 87 N. W. 27. In the latter case it was held that an instruction that the burden of proof of contributory negligence is on defendant, unless it appears from "plaintiff's own testimony," refers to all testimony produced on plaintiff's behalf.

The burden of proving contributory negligence is held to rest upon the defendant, although there may be an affirmative allegation in the complaint that the plaintiff was free from fault. *Montgomery & E. R. Co.* v. *Chambers* (1885) 79 Ala. 338.

The essential conception to which the doctrine applied in all these cases is referable is that the injured person will be presumed to have used proper care, unless there is some specific testimony which points directly to the opposite conclusion. See *Texas & P. R. Co.* v. *Gentry* (1896) 163 U. S. 353, 41 L. ed.

ant's right to be conditional upon his being free from contr negligence. Under such circumstances the incidence of the of proof, as regards contributory negligence, is doubtless dete by the doctrine which the court of the particular state in w happens to have adopted in common-law actions.[1]

186, 16 Sup. Ct. Rep. 1104, holding that the presumption is that a railway employee who was killed at night by a flat car in front of an engine, when he was crossing a track, did not expose himself recklessly, but did look and listen for coming trains.

In jurisdictions where the defendant has the burden of proving contributory negligence, such negligence will not be inferred, as a matter of law, where the facts are equally as consistent with the hypothesis of its absence as with the hypothesis of its existence.

In the absence of any direct evidence as to what one killed while attempting to couple cars did or omitted immediately before the accident, the inference of his negligence from the position in which he was found after the collision, crushed between the sill of the car and the engine, is not alone sufficient to justify the withdrawal of the case from the consideration of the jury. *Creswell v. Wilmington & N. R. Co.* (1899) 2 Penn. (Del.) 219, 43 Atl. 629.

The question of contributory negligence on the part of the deceased is for the determination of the jury, where he started down a ladder, with his back to it, in a mine on a decline of 30 to 40 degrees, and was last seen alive descending near a roller below which the incline became nearly perpendicular, and the ladder was found rotten and unsafe after the accident, with two rungs broken out. *Reese v. Morgan Silver Min. Co.* (1898) 17 Utah, 489, 54 Pac. 759.

In a case where a servant was injured by an explosion of inflammable gas, which issued from the manhole of an oil tank, the court declined to hold th there was an irresistible inference that, after he had removed the manhead, he unnecessarily and negligently passed in front of the open manhole with the lantern in his hands, and that both he and the lantern were thrown by the explosion to the place where they were afterwards found, the evidence being merely that, after the accident, the manhead was found leaning against the still at one side of the manhole, and that there was a lantern with the glass globe slightly cracked, and a light still burning in it, about 25 feet beyond where the deceased was found in flames. *Bannon v. Lutz* (1 Pa. 166, 2[illegible] Atl. 890.

A finding that the death of man was caused by a defecti ance, while he himself was in else of due care is justified by that the wound on the body c in shape and size to the end constituting part of the braki ance; that the place of the w responded to the height of the the wound was sufficient to ca that deceased was seen near dge of the cars he was atte couple, and seemed to be th as the cars came together, and seen dragging an one of the c receded in consequence of th sion; and that a witness w quently made the coupling w to jump in case he observed a the apparatus. *Missouri P. Fox* (1900) 60 Neb. 531, 83 N

A merely conjectural theory plausible, will not prevail agai itive statement made by th with regard to the circumstan ed to the accident. Hence cannot say, as matter of law employee who was steadying of a mold when it fell, cru hand between it and the low the mold, had his hand under when the supporting chain bro the only testimony on the that of the employee, who sai had his hands on its side, and falling of the cover threw hi *Honifius v. Chambersburg I. Co.* (1900) 196 Pa. 47, 46 At

If the plaintiff's want of sk on for the purpose of showi injuries did not proceed fr carelessness, it must be sho work required skill. This w inferred from averments that t ants knew they had not emplo ful person to do the work, that the plaintiff was unskill unfit and improper person. *Glasgow & L. Steam Packet C* 16 Week. Rep. 483.

[1] If the statutes of Engla Canadian and Australian col

Under the Iowa statute, abrogating the doctrine of common employment in the case of railway servants, the burden of disproving contributory negligence lies on the plaintiff, as it does in common-law actions.[2]

b. Statutes in which the right of action is made conditional upon the servant's freedom from negligence.—Under the Massachusetts statute, act of 1887 (see chapter XXXVII., *ante*), the burden of disproving contributory negligence rests on the plaintiff.[3] As the same rule prevailed at common law (see preceding section), it is evident that the provision in the statute, which shows it to be for the benefit of a "servant who is in the exercise of due care and diligence" at the time of the accident, has left the plaintiff in precisely the same position.

In the Colorado act of 1893 the same words were inserted; but the courts do not seem to have considered whether the effect of the clause is to change the rule which prevails in this state under the common law, *viz.*, that the burden of proving contributory negligence lies on the defendant.

The Wisconsin statute of 1889 (see chapter XXXIX., *ante*), which provides that railroad companies shall be liable for damages sustained by any employee, "without contributing negligence on his part," when such damages were caused by the negligence of certain other specified employees, has been held to leave upon the defendant the burden of proving contributory negligence.[4]

Under S. C. Rev. Stat. § 1582, which gives an action to a person injured by reason of a city's mismanagement of anything under its control, providing such person has not in any way brought about such injury by his own negligent act, or negligently contributed thereto, it has been held necessary for the plaintiff to show, as part of his case, that he has not been guilty of contributory negligence.[5] The position taken was that the onus of disproving contributory negligence lies on the plaintiff, whenever the statute under which he sues creates a new right of action for a specified kind of negligence, and expressly excepts cases of such negligence from its purview. The doctrines adopted in Wisconsin and South Carolina are, therefore, antagonistic.

The somewhat peculiar rule which prevails under the statutes of

of Alabama, are construct on this footing, the burden of proving contributory negligence will rest upon the defendant.

[3] *Gorman* v. *Minneapolis & St. L. R. Co.* (1889) 78 Iowa, 509, 43 N. W. 303; *Perigo* v. *Chicago, R. I. & P. R. Co.* (1880) 55 Iowa, 326, 7 N. W. 627

[4] *Shea* v. *Boston & M. R. Co.* (1891) 154 Mass. 31, 27 N. E. 672.

[4] *Dugan* v. *Chicago, St. P. M. & O. R. Co.* (1893) 85 Wis. 610, 55 N. W. 891. Approving *Lorimer* v. *St. Paul City R. Co.* (1892) 48 Minn. 391, 51 N. W. 125.

[5] *Barksdale* v. *Laurens* (1900) 58 S. C. 413, 36 S. E. 661.

Georgia and Florida, which are identical in terms (see c
XXXIX., *ante*), and which give railway servants the right to
injuries caused by a coservant's negligence, provided they the
were free from fault, has been thus formulated by the supre
"An employee suing the company for injuries sustained by hi
the negligent performance of any act in which he particip
not made a prima facie case for recovery, without proving,
that he was wholly free from fault himself, or that there wa
gence on the part of his fellow servants. If he rests on the pr
tion of negligence, without actual proof thereof, that presu
applies to him with the same force as to others who particip
the same act of common duty; and to get the benefit of t
sumption as applied to the others, he must rebut it so far as it
to himself."[6] The effect of this rule is that it is only in case
the servant participated in the act which caused his injury th
subject to the burden of disproving contributory negligen
there was no such participation the burden of proving suc
gence rests on the master.[7] The burden of proof thus thrown

[6] *Gassaway* v. *Georgia Southern R. Co.* (1882) 69 Ga. 350. The last sentence in the above statement is taken verbatim from the syllabus written by the court for the case of *Atlanta & R. Air Line R. Co.* v. *Campbell* (1876) 56 Ga. 586.

"Before a recovery can be had by an employee of a railroad company, who sues for a personal injury sustained by the negligent performance of an act in which he participated, he must either show that he was wholly free from fault himself, or that there was negligence on the part of his fellow servant; and until this is done, he has not made a prima facie case against the company." *Jones* v. *Georgia Southern R. Co.* (1881) 66 Ga. 558; *Augusta Southern R. Co.* v. *McDade* (1898) 105 Ga. 134, 31 S. E. 420.

In an action for an injury resulting from an act in which plaintiff participated, the burden of showing that the agents of the company exercised all ordinary and reasonable care and diligence is not imposed on the company until the plaintiff has prima facie established either that he was not to blame or the company was. *Western & A. R. Co.* v. *Jackson* (1901) 113 Ga. 355, 38 S. E. 990.

[7] "The idea of this court is that where an employee has nothing at all to do with the act which resulted in his injury, he would stand upon the footing of a passenger in regard to ... times of negligence; but if he ... erred therein, then the pre... would be that he had as muc... with the accident as another, ... earned; and that it would be ... lent presumption to take it for ... without proof, that everybody ... to blame except him, when he ... much to do with the cause of t... ter as anyone else." *Central ...* *Co.* v. *Sears* (1877) 59 Ga. 43... *& R. Air Line ... Co.* v. ... (1876) 56 Ga. 58... *Central ...* *Co.* v. *Kelly* (1877) 58 Ga. ... *tral R. & Bkg. Co.* v. *Kenney* ... Ga. 485; *Jones* v. *Georgia So...* *Co.* (1881) 66 Ga. 559; *Baker* ... *ern & A. R. Co.* (1882) 68 ... *Cook* v. *Western & A. R. Co.* ... Ga. 619; *Central R. Co.* v. *Roo...* 70 Ga. 434; *East Tennessee, ...* *Co.* v. *Maloy* (1886) 77 Ga. 23... 941; *Central R. & Bkg. Co.* ... (1889) 83 Ga. 587, 10 S. E. 279... *R. & Bkg. Co.* v. *Miller* (1892 ... 571, 16 S. E. 939.

The injury in all the above c... was received by a servant do... in connection with railway roll... and the burden was, in each ... held to be on the plaintiff to ... contributory negligence. An... of the other class of cases is ... v. *Central R. & Bkg. Co.* (187...

injured servant may be satisfied by evidence which indicates prima facie that the injury was caused by the negligence of a coemployee.[8] He need not show affirmatively both negligence on the company's part and absence of negligence on his own part.[9]

No presumption arises in the employer's favor until he has offered evidence which tends to show either that he himself was faultless or that others were to blame for the accident.[10] As soon as he has introduced evidence which would warrant either of these inferences, the

509, Second Appeal (1878) 60 Ga. 120, where a switchman was injured by the negligence of laborers engaged in carrying iron from one point to another of a railway yard. But in view of the later decisions, it would seem that some of the language used in that case is too broad.

A servant who is shown to have been acting, at the time the injury was received, in violation of a rule, has the burden of proving that his breach of duty was not an efficient cause of the injury. *Prather* v. *Richmond & D. R. Co.* (1888) 80 Ga. 427, 12 Am. St. Rep. 263, 9 S. E. 530; *Western & A. R. Co.* v. *Bussey* (1894) 95 Ga. 584, 23 S. E. 207.

[8] *Campbell* v. *Atlanta & R. Air Line R. Co.* (1876) 50 Ga. 586; *Central R. & Bkg. Co.* v. *Kenney* (1877) 58 Ga. 489.

In an action by a father for loss of service of his minor son seventeen years old, who was killed while running a train as locomotive engineer, a judgment for plaintiff is sustained by evidence that if the accident occurred from fast running by deceased, his immediate superior, who was on the train at the time, ought to have controlled and restrained him so as to confine him to a safe speed, where such superior's failure to testify as to the real cause of the accident is not accounted for. *East Tennessee, V. & G. R. Co.* v. *Douglas* (1894) 94 Ga. 517, 19 S. E. 885.

[9] *Johnston* v. *Richmond & D. R. Co.* (1895) 95 Ga. 685, 22 S. E. 694, disapproving charge to opposite effect; *Central R. & Bkg. Co.* v. *Kenney* (1877) 58 Ga. 485; *Georgia R. Co.* v. *Bryans* (1886) 77 Ga. 429; *Florida, C. & P. R. Co.* v. *Mooney* (1898) 40 Fla. 17, 24 So. 148.

A court errs "in charging to the effect that the burden is on the plaintiff, not only to show himself blameless about the catastrophe, but the defendant negligent. It is true both must appear to the jury; but the moment the plaintiff proves to the jury either, the legal presumption proves the other, until rebutted, and the defendant must rebut that presumption." *Savannah, F. & W. R. Co.* v. *Barber* (1883) 71 Ga. 614.

"The presumption of law that the plaintiff, being an employee, is without fault, arises only when he is wholly disconnected with duties about the particular business in which he was hurt; when he is a party engaged in the duty in discharging which he is hurt, the onus is upon him to show himself without fault; so soon as he does that, the presumption arises that the other employees engaged with him in the duty were at fault or negligent, and the onus is shifted upon the company to show them without negligence; and this principle reconciles the cases decided by this court, when applied to the facts of each." *Central R. & Bkg. Co.* v. *Kelly* (1877) 58 Ga. 107, 108.

"After proving the fact and degree of the injury, if the plaintiff will show himself not to blame the law then presumes, until the contrary appears, that the company was to blame; or if he will show, on the other hand, that the company was to blame, the law then presumes until the contrary appears, that he was not to blame." *Central R. & Bkg. Co.* v. *Kenney* (1877) 58 Ga. 485.

[10] *Central R. & Bkg. Co.* v. *Sears* (1877) 59 Ga. 436; *Savannah, F. & W. R. Co.* v. *Barber* (1883) 71 Ga. 614; *Florida C. & P. R. Co.* v. *Burney* (1895) 98 Ga. 1, 26 S. E. 730.

In an action under the Florida act it was held error to charge the jury, without qualification or explanation, in the words of the 1st section, inasmuch as such an instruction was calculated to impress the jury with the idea that all presumptions were against the company, and that it devolved upon the company to make it appear that its agents had exercised all ordinary and reasonable care. *Florida C. & P. R. Co.* v. *Mooney* (1898) 40 Fla. 17, 24 So. 148.

burden is shifted to the defendant company to show that its emp
were free from negligence." The company can reply by proo
evidence to show either that it was not negligent or that the s
in fault.[12] When evidence supporting either of these inferenc
been given, the presumption against the company is rebutted, a
onus is shifted to plaintiff.[13]

The Alabama statute (Acts 1886-87, 146), which provide
engineers shall give warning signals at certain places, and stop
trains under the circumstances specified, and which also puts
the railway company, when any person is killed or injured, th
den of proving that its obligations had been duly performed
time and place of the accident, has no application to a case in
a servant is the injured person.[14]

[12] *Central R. & Bkg. Co.* v. *Kelly* (1877) 58 Ga. 107; *East Tennessee, V. & G. R. Co.* v. *Maloy* (1886) 77 Ga. 238, 2 S. E. 941; *Augusta Southern R. Co.* v. *McDade* (1898) 105 Ga. 134, 31 S. E. 420.

[13] *Central R. & Bkg. Co.* v. *Small* (1888) 80 Ga. 519, 5 S. E. 794.

[13] *Savannah, F. & W. R. Co.* v. *Barber* (1883) 71 Ga. 644; *Central R. Co.* v. *Moore* (1878) 61 Ga. 151.

The burden cast upon the c
by proof that an injury was
upon a servant through the ne
of a fellow servant is that of
that its servants exercised ordin
reasonable care, and does not
the duty of showing how the
occurred. *Georgia R. & Bkg.*
Hicks (1894) 95 Ga. 301, 22 S.

[14] *Mobile & B. R. Co.* v. *Holbor*
84 Ala. 138, 4 So. 146.

CHAPTER XLIV.

PARTIES IN ACTIONS FOR INJURIES RECEIVED BY SERVANTS.

844. Plaintiffs.
845. Defendants; generally.
846. Liability of the state to its employees.
847. Municipal corporations.
848. Receivers; common-law actions.
848a. Receivers; actions under statutes for the benefit of railway employees.
849. Fellow servants.
849a. Joinder of negligent coemployees and master as parties defendant.

844. Plaintiffs.— In the great majority of instances, of course, the plaintiff in the action is the injured servant himself, or, if death has ensued, one or other of those personal representatives who are enabled to sue under the various damage acts.[1] For the effect of those acts the practitioner is referred to general treatises on the law of negligence.[2]

Where the injured servant is a minor, and death does not result from the injury, his parent may maintain an action for loss of services. Several decisions dealing with the master's liability in this point of view have been cited in § 21, *ante*.

The fact that a servant of a corporation is a small stockholder of that corporation will not prevent him from recovering damages for an injury caused by its negligence.[3]

[1] It is only where an employee of a railroad company is killed through the negligence of a fellow servant that the action therefor must be brought by the personal representative, under Miss. Const. 1890, § 193. Where the negligence is that of the company itself.—as by failure to furnish safe appliances,—the action for the death of a child is to be brought by the parent, under Miss. Code 1892, § 663. *White* v. *Louisville, N. O. & T. R. Co.* (1894) 72 Miss. 12, 16 So. 248, Distinguishing *Illinois C. R. Co.* v. *Hunter* (1892) 70 Miss. 471, 12 So. 482.

In a case before the House of Lords it was laid down by the Lord Chancellor that, even if the Scotch law did not impose any obligation on a child to support his parent, there was, at all events, a moral obligation to do so, and that the existence of this obligation would enable a mother whose son's wages were her only means of support to maintain an action against an employer whose negligence caused the death of the son. *Wrems* v. *Mathieson* (1861) 4 Macq. H. L. Cas. 215. It was proved, however, that a child was legally obliged to support his parent.

[2] The English decisions are reviewed in 1 Beven, Neg. pp. 208, *et seq.* The American authorities are collected in Shearm. & Redf. Neg. §§ 196 *et seq.*

[3] *Morback* v. *Home Min. Co.* (1894) 53 Kan. 731, 37 Pac. 122. The court relied upon the consideration that the injured party had no personal control

845. Defendants; generally.— All the cases cited in these vo
take it for granted that any individual who is competent to ent
a valid contract for services is liable for a breach of any of
duties which the law imposes upon employers for the protect
their employees. On general principles it may be presumed th
infant is subject to this liability as long as he continues to acce
benefits of the contract. But the writer has not found any c
which this point has been explicitly determined. If the emplo
an insane person, the servant's rights in the present connection
may be supposed, governed by the general rule that a lunatic em
is liable, unless he can prove not only his incapacity to make th
tract out of which the claim against him arises, but, in additio
plaintiff's knowledge of his incapacity.[1]

A person who hires the services and labor of convicts in a c
penitentiary sustains essentially the relation of master to suc
victs, in spite of the fact that the wages of the latter go to the c
and although the usual relation of master and servant does no
because the labor is compulsory, yet such person owes the duty
convicts to furnish proper appliances.[2] U er such circums
the mere presence of the government employ who has charge
convicts does not relieve the hirer of the convicts from his li
for the tortious conduct of his own agents.[3]

An employee does not, by voluntarily engaging in labor wit
victs hired by his master, release the latter from liability for in
sustained by him in consequence of the master's failure to use
able caution in respect to employing and retaining the convicts.

846. Liability of the state to its employees.— It is now so w
tled as to be beyond discussion, that the doctrine of *respond*
perior cannot be applied so as to make the state liable for the
gence of its agents, unless the state has, through its legislatu

of the corporate property or its affairs, and distinguished the case from that of a partner, who cannot sue the firm in an action at law for any claim arising out of a matter within the scope of the partnership.

[1] *Imperial Loan Co.* v. *Stone* [1892] 1 Q. B. 599, 61 L. J. Q. B. N. S. 449, 66 L. T. N. S. 449, 66 L. T. N. S. 556, 56 J. P. 436.

[2] *Hartwig* v. *Bay State Shoe & Leather Co.* (1887) 43 Hun. 425.

[3] *Chattahoochee Brick Co.* v. *Braswell* (1893) 92 Ga. 651, 18 S. E. 1015. The court said: "It is entirely immaterial whether it was or was not lawful for these convicts to be thus placed under the control and management brick company and its bosses, company surely will not be hear that, although it injured the through the grossly improper co its own employee, it is not liable it was unlawful to put the pla der this employee's control. To would be to allow the company itself of its own misconduct i one wrong, in order to shield its the consequences of another wro more grievous and unlawful."

[4] *Porter* v. *Waters-Allen Fou Mach. Co.* (1895) 94 Tenn. 37 W. 22.

pressly assumed the responsibility for such negligence.[1] This immunity extends to all the separate governmental departments by means of which the state discharges its functions.[2] Nor is a servant of the Crown liable as an employer, the doctrine being that no action lies against a public servant upon any contract which he makes in that capacity.[3]

The common-law rule has by express enactments been modified to a greater or less extent in almost all, if not all, the jurisdictions with which we are concerned in this volume. But a full discussion of the authorities would carry us outside the scope of the present treatise.[4]

[1] *Lewis* v. *State* (1884) 96 N. Y. 74, 48 Am. Rep. 607 (injury caused by the defects of a ladle in which a convict was carrying molten metal).

"That the doctrine of *respondeat superior*, applicable to the relations of principal and agent created between other persons, does not prevail against the sovereign in the necessary employment of public agents, is too well settled upon authority and practice to admit of controversy." *Clodfelter* v. *State* (1882) 86 N. C. 51, 41 Am. Rep. 440 (convict lost his eyes by an explosion due to carelessness of superintendent).

See, for the general rule, Story, Agency, 7th ed. § 319; Shearm. & Redf. Neg. § 249; and *Oklahoma Agri. & Mechanical College* v. *Willis* (1898) 6 Okla. 593, 40 L. R. A. 677, 52 Pac. 921; *McIlhenny* v. *Wilmington* (1900) 127 N. C. 149, 50 L. R. A. 470, 37 S. E. 187.

[2] Where a prison guard is injured by falling from a defective ladder, he cannot maintain an action for damages against the state's prison, since such action would be, in effect, an action against the state to recover for a tort of its agents, and on grounds of public policy such an action cannot be permitted. *Moody* v. *State Prison* (1901) 128 N. C. 12, 53 L. R. A. 855, 38 S. E. 131.

The right of recovery has also been denied in a case where a prison guard lost his arm through the negligence of his superior. *Bourn* v. *Hart* (1892) 93 Cal. 321, 15 L. R. A. 431, 27 Am. St. Rep. 203, 28 Pac. 951.

See also *Alamango* v. *Albany County* (1881) 25 Hun, 551 (convict injured by the negligent operation of a sawmill, held not to be entitled to maintain an action).

A county is not liable for injuries received by an employee from a defective machine in an asylum which is maintained by the county in discharge of its duty, as a political division of the state, to care for its inmates. The maintenance of such an asylum does not become a private business such that the county is liable for injuries received by employees, by reason of the fact that some revenue is incidentally derived by the county from the sale of surplus farm products and from payments made by those liable for the support of insane persons kept in the asylum. *Hughes* v. *Monroe County* (1895) 147 N. Y. 49, 39 L. R. A. 33, 41 N. E. 407.

[3] *Dunn* v. *Macdonald* [1897] 1 Q. B. 555, 66 L. J. Q. B. N. S. 420, 76 L. T. N. S. 444, 45 Week. Rep. 355.

[4] By the English superannuation acts (that now in force was passed in 1887) compensation is provided for injured employees in certain specified cases. See Beven, Employers' Liability, p. 112.

In Canada the Dominion act (50 & 51 Vict. chap. 16, § 16, par. c) provides that the exchequer court shall have jurisdiction of any claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. It has been laid down that the effect of this statute is to place the Crown upon the same footing as private employers in respect to its liability for personal injuries received by its servants when engaged on public works. *Reg.* v. *Filion* (1895) 24 Can. S. C. 482, holding that, as the defense of common employment was not available in Quebec (see chapter XLVII., *post*), the province in which the accident occurred, an action was maintainable for injuries caused by the negligence of a fellow servant. This case follows *Quebec* v. *Queen* (1894) 24 Can. S. C. 420, in which, however, recovery

An intention to change the rule will not be imputed to the legisla unless that intention has been explicitly declared.[5]

847. Municipal corporations.—A servant's right of action fo injuries resulting from any negligence which may be committed b agents of a municipal corporation while engaged in the perform of one of its public functions is subject to the same limitation those which circumscribe that right in the case of the state it On the other hand such a corporation is liable as an employer, u the same circumstances as a private individual or corpora wherever the injury complained of was received by the servant participating in work which was being done in connection with exercise of a power conferred upon the corporation for the purpo enabling it to carry out one or other of its merely ministerial tions.[2]

was denied on the ground that the injury was not received on any public work.

As to the right of employees working on a certain state-owned railway in Georgia to sue under the statute as to railway servants which has been enacted in that state, see § 755a, note 1, *ante*.

[5] It has been held that the rule is not altered by a constitutional provision which confers jurisdiction upon the courts "to hear claims against the state" (*Coodfelter* v. *State* [1882] 86 N. C. 51, 41 Am. Rep. 440); nor by a provision which renders an agency of the state suable for "debts and other liabilities for which it is now liable" (*Moody* v. *State Prison* [1901] 128 N. C. 12, 53 L. R. A. 855, 38 S. E. 131); nor by a statute giving the superior court "jurisdiction of all claims against the commonwealth, whether in law or equity" (*Murdock Parlor Grate Co.* v. *Com.* [1890] 152 Mass. 28, 8 L. R. A. 599, 24 N. E. 854).

[1] See Shearm. & Redf. Neg. §§ 253, 255; Dill. Mun. Corp. §§ 963, 965.

The operation of a stone-crushing machine to prepare material for constructing and repairing its highways is held to be a governmental act of a municipality in such a sense that it will be exempt from liability for injury to an employee through a defect in a machine, although the machine is located several miles from the place where the material is to be used. *Colwell* v. *Waterbury* (1902) 74 Conn. 568, 57 L. R. A. 218, 51 Atl. 530.

The West Chicago park commissioners are a quasi-municipal corporatio liable for injury to an employee f vicious horse furnished him fo work, as it is the state which is the work of creating and maint the parks within their jurisdi *Backer* v. *West Chicago Park* 66 Ill. App. 507.

An intention to change the co law rule as to the nonliability of ipal corporations will not be in from the enactment of a statutor vision declaring cities and towns "to be sued." *Mellhenney* v. Wi *ton* (1900) 127 N. C. 146, 50 L. 470, 37 S. E. 187.

[2] In the earlier chapters of this tise, numerous cases have been ci which servants were injured whi gaged in public works undertak municipal corporations, and in whi doctrine stated in the text was for granted.

A city is liable for injuries cau the driver of a fire engine or hos by obstructions in the streets whi negligently allowed to remain *Farley* v. *New York* (1897) 152 222, 57 Am. St. Rep. 511, 46 N. Reversing (1896) 9 App. Div. 5 N. Y. Supp. 622; *Coots* v. *Detroit* 75 Mich. 628, 5 L. R. A. 315, 43 17. The court said in the latter "It would be not only absurd, manifest failure of justice, to hol the city of Detroit must be excuse liability because the plaintiff mu a matter of law, presume and ta tice that the city will violate thi ute, and disregard the duty laid by the legislature."

848. Receivers; common-law actions.— It is well settled that, during the continuance of a receivership, the proprietor or lessee of a railway cannot be held liable for injuries caused by the negligent

The rule which defines the liability of New England towns is not quite the same as that adopted in most of the American states. See Shearm. & Redf. Neg. § 258. In the case of a municipal corporation, it is not always enough to prove facts which would render a private corporation or an individual responsible for the injury complained of. The servant must also show that his right of recovery is not barred by the principle that "no private action, unless authorized by express statute, can be maintained against a city for neglect of a public duty imposed upon it by law for the benefit of the public, and for the performance of which the corporation receives no profit or advantage." *Pettingell* v. *Chelsea* (1894) 161 Mass. 368, 24 L. R. A. 426, 37 N. E. 380, where the court, relying on *Hill* v. *Boston* (1877) 122 Mass. 344, 23 Am. Rep. 332, held that, neither at common law nor under the employers' liability act of 1887, is a city liable to a lineman on its fire-signal system for negligence in respect to the condition of a pole which breaks and injures him.

"The general rule is that cities and towns are not liable to private action for omissions or neglect in the performance of corporate duties imposed upon them by law, unless such action is given by statute." *Taggart* v. *Fall River* (1898) 170 Mass. 325, 49 N. E. 622. There it was held that the mere fact that a city will derive an incidental advantage or profit to land owned by it from the opening of a street in compliance with a duty imposed on it by statute does not render it liable for a personal injury to a laborer while working under the direction of the superintendent of streets and surveyor of highways, in cutting through a bank of earth in opening such street. Under such circumstances the city is not liable for the death of a laborer by the falling of a bank of earth while grading a street, although the city has passed an order directing the superintendent of streets to grade such street.

On the other hand, a town is liable for the death of an employee killed by the fall of a large overhanging rock beneath which he was stationed by the superintendent of streets, of the dangerous condition of which the latter knew, but the deceased did not, where the work being done was undertaken voluntarily by the town as a private enterprise, and not under the compulsion of statute. *Collins* v. *Greenfield* (1898) 172 Mass. 78, 51 N. E. 454.

A city is liable for injuries resulting from the negligence of the superintendent appointed by its board of water commissioners, under Mass. Stat. 1884, chap. 309, § 24, in ordering work to be commenced and continued when the city has not properly provided for the safety of the workmen, although he is under the direction of the water commissioners, and has no power to furnish the necessary materials to avoid injury. *Connolly* v. *Waltham* (1892) 156 Mass. 368, 31 N. E. 302. There the defendant argued that the trial judge should have complied with its request for a ruling that the city was not responsible for a negligent act of its superintendent, the contention being based, not upon the ground that he was a public officer and acting in that capacity, and not as the defendant's agent or servant, but on the following grounds: that the superintendent was under the direction of the commissioners, and could not purchase or furnish anything except by their direction; that, as neither the city nor the commissioners furnished him with materials for bracing the trench, or gave him authority to procure them, he had no right or power so to do, and was under no duty to do that which was beyond his legal right and power, the consequence being that he could not personally be charged with negligence; and that, as the superintendent's negligence alone was charged, the question whether the city was liable for not furnishing materials for bracing was not in issue. But the court said: "This view of the case is too narrow. A superintendent may be negligent in ordering work to be commenced or continued when the proper materials or appliances for insuring the safety of the workmen engaged are not at hand, as well as in failing to use materials or appliances which are at hand. If he knew, or had reason to know, that there was danger of the caving of the trench, and had no materials for bracing it and no power to procure them, due care required of him to stop the work until suitable materials were

manner in which the road is operated by the receiver's emplo
But the receiver owes, in his official capacity, the same obligati
any other employer to the servants whom he hires to operate the
and those obligations may be enforced in an action at law b
mission of the equity court which appointed him.[2] The da
recovered by an employee are chargeable upon and payable
the fund in court, in the same manner as the other expenses
ministration.[3]

Where a railway extending through Louisiana and Texas ha
returned to the company, after having been in the hands of
ceiver appointed by a Federal court sitting in Louisiana, a
evidence showed that the earnings of the road had been used
receiver for the purpose of making permanent improvements,
held that a servant who had been injured by the negligence
receiver's agents in respect to the operation of the road might

furnished; and it was personal negligence in his work of superintendence to allow the digging to go on before the necessary materials were procured. For such negligence of a superintendent the principal is answerable, and cannot escape liability by showing that it was by his own act, and not by the fault of the superintendent, that suitable materials were wanting."

A city is not excused for negligent failure to give a workman a reasonably safe place in which to work in constructing a sewer, by the fact that the sewer may not have been legally established because of irregularities or omissions in the proceedings. *Norton* v. *New Bedford* (1896) 166 Mass. 48, 43 N. E. 1034. There the court remarked that, "while the irregularities and omissions in the laying out or establishment of the sewer might be taken advantage of on a petition for certiorari, they cannot be taken advantage of by the city in this collateral proceeding brought against the city by a workman who has been employed by its board of public works upon the footing that the city had the right to build the sewer."

This case was followed in Missouri, where it was held that a city cannot escape liability for injuries to one of its employees engaged in such work, on the ground that the city itself constructed the sewer, instead of letting out the contract to the lowest bidder, as required by its charter. *Donahoe* v. *Kansas City* (1896) 136 Mo. 657, 38 S. W. 571. The court said: "The corporation, having as a natural person undertaken t
struction of the sewer, should,
same extent and under the sa
cumstances, be held to respond
ages for the wrongful acts of its
and servants, and should not be
ted to escape responsibility u
ground that such wrongful acts
from the exercise of powers not
by its charter or ordinances."

[1] See High, Receivers, 3d ed. §

[2] *Graham* v. *Chapman* (1850)
Y. S. R. 349, 11 N. Y. Supp. 31
v. *Ohio & M. R. Co.* (1882) 11 F
14 Fed. 277. Examples of such
are the following cases: *Peirce*
(1897) 26 C. C. A. 201, 53 U.
291, 80 Fed. 865; *George* v
(1898) 29 C. C. A. 374, 56 U.
505, 85 Fed. 608; *Clune* v.
(1899) 36 C. C. A. 450, 94 F
Hunt v. *Kane* (1900) 40 C. C.
100 Fed. 256; *Gowen* v. *Bush* (
C. C. A. 196, 40 U. S. App. 349,
349.

Although no negligence in t
agement of the property may h
established, a court will somet
view of the special circumst
volved, order a receiver to pay
ant's wages while he is recover
the effects of his injury. *Mis*
R. Co. v. *Texas & P. R. Co.* (1
Fed. 700; *Missouri P. R. Co.* v.
P. R. Co. (1890) 41 Fed. 319.

[3] *Kain* v. *Smith* (1880) 80 N.
Ex parte Brown (1880) 15 S.
(defective boiler burst).

cute an action in a state court in Texas, and enforce a judgment recovered in that action against the property of the railway company.[1] It is, of course, a condition precedent to recovery in such an action, that a primary liability on the receiver's part should be established.[2]

848a. Receivers; actions under statutes for the benefit of railway employees.—The question whether the statutes which as regards railway companies, abrogate or modify the common-law doctrine as to coservants, should be construed as defining the rules of law to be applied in actions against receivers, is one which has been determined differently by different courts. But the weight both of reason and authority seems to be decidedly in favor of the conclusion that this question should be answered in the affirmative.

Georgia.—The provisions of the acts in force before 1895 (see chapter XXXIX., *ante*) were held not to inure to the benefit of employees on railways in the hands of receivers.[1] This doctrine was

[1] *Texas P. R. Co.* v. *Johnson* (1890) 76 Tex. 421, 18 Am. St. Rep. 60, 13 S. W. 463; *Texas P. R. Co.* v. *Overheiser* (1890) 76 Tex. 437, 13 S. W. 468; *Texas P. R. Co.* v. *Griffin* (1890) 76 Tex. 441, 13 S. W. 471; *Texas & P. R. Co.* v. *Geiger* (1890) 79 Tex. 13, 15 S. W. 214.

[2] *Texas & P. R. Co.* v. *Collins* (1892) 84 Tex. 121, 19 S. W. 365.

[1] In *Henderson* v. *Walker* (1875) 55 Ga. 481, the court argued thus: "He (the plaintiff) shows by his declaration that he is not such an employee. He rests his case on a statutory right, and yet does not put himself into the only class to which the right belongs. The company owning the road was not in possession. It had no employees. There was no privity between it and the plaintiff. He was not its servant; it was not his master. It had nothing to do with selecting his coemployees whose negligence caused the injury. A court of equity, by its officers, the receivers, had possession of the road; and the plaintiff, instead of hiring himself elsewhere to a railroad company or corporation, voluntarily hired himself to these ministers of the law. We think the letter of his situation is the law of it, and that as he was not in fact in the employment of a railroad company, he is not to be considered in such employment by construction. Unless the contrary appeared, the receivership is to be deemed a compulsory one; there is no presumption that the receivers went in on the application of the company or by its consent. They represent, not the company, but the court. The property and franchise of the company have been seized, and the court, subordinate to the laws of the land, is for the time being the lord paramount. Doubtless the receivers, as common carriers, bear a relation to the public very similar to that of other common carriers; but the difference between the public and this plaintiff is that the public can appeal to a general law applicable as against all common carriers, whereas the plaintiff must invoke a special statutory provision which will not reach all employers alike, but only railroad companies. Other classes of employers have not been made subject for injuries sustained by one servant through the fault of another. . . . Employees of receivers are not within the words of the Code, and to extend the words by construction, so as to subject the company's assets to pay damages for the carelessness or misconduct of men whom neither the officers nor agents of the company had any part in selecting, would be attended with difficulties, both technical and practical. Injuries to freight and passengers may come under the head of expenses of administration; but to include under that head the damages caused by one necessary agent of administration to his fellow would be like punishing the body because one hand or foot had wounded the other."

This case was followed in *Thurman* v. *Cherokee R. Co.* (1876) 56 Ga. 376; *Brown* v. *Comer* (1895) 97 Ga. 801, 25 S. E. 176; *Youngblood* v. *Comer* (1895) 97 Ga. 152, 23 S. E. 509, 25 S. E. 838. But in the last-cited case a strong dis-

held to be applicable although the receiver had been appointe
petition of the company itself.[2] The consequence of adop
narrow construction of the statutes was that neither a recei
ating a railway nor a railway company was subject to an a
an employee for injuries caused by the negligence of a cocn
In two of the Federal cases cited [illegible] *supra*, it was u
the statute (Georgia Acts 18[illegible] 22), by which it was
that "damages payable for injuries to persons and propert
by the running of the cars on said road, and for which the
is now liable, as common carrier, by the laws of this state,
be a lien on the income of the road, had so far changed the l

senting opinion was delivered by Atkinson, J. The following extract is worth inserting: "When the expression . . . [i. e., railroad companies] was used, it was the purpose of the legislature to apply it to the business, and not to persons or corporations which were railroad companies *eo nomine* only. If its significance were so confined, there would be no authority for applying the rule of liability above indicated to railroad and banking companies, or to canal and railroad companies, or to individuals who, having under the present law purchased the properties and franchises of a railroad company, chose to take out a certificate of incorporation under some name other than that of a railroad company; because, while in fact operating railroads, such are not railroad companies only; and yet the courts of this state have constantly applied the rule in question to all such corporations and persons engaged in the business of operating railroads under charter authority, and without reference to whether it was or was not by name a railroad company. The statute in question having been enacted for the protection of employees of such companies operating railroads, the business conducted under their charters would seem upon reason to be impressed with the liabilities imposed by law, without reference to the person or agency which might lawfully thereafter be employed in the conduct of the business for which it was chartered; and this being true, there is no reason apparent to my comprehension why a receiver, like any other person who may attempt to exercise the charter power, should be exempt from the liability thus imposed. The statute in question is one highly remedial, and, being of that nature, should be liberally construed in advancement of its obviously beneficial purposes. In its construction tenaciously to its letter ignore and purpose, and defeats the legislative intent. It is true receiver represents the court as the mere custody of the concerned; but when the co takes to exercise the charter operate the property in its receiver likewise represents rate franchise, and necessaril in his official character, the ities, duties, and obligation upon the franchise which he exercise."

The construction thus put statute by the state court w by the Federal courts in the Georgia. *Clyde* v. *Richmon Co.* (1894) 59 Fed. 394; *Co. v. East Tennessee, V. &* (1895) 69 Fed. 353, 357; *Trust & Guaranty Co.* v. *At tion Co.* (1895) 69 Fed. 358.

The Code provisions whi presumption of negligence on railroad companies when the sults from the running of etc., were held not to be a actions against receivers. *Huidekoper* (1896) 98 Ga. E. 440.

It was also laid down tha by which a servant of a ra pany agrees to be bound by a necessarily binding between receivers of the company's r binding, there must have be tion of it as between them, ei ly or by implication. *Spenc* (1895) 97 Ga. 681, 25 S. E.

[2] *Brown* v. *Comer* (1895) 25 S. E. 176.

[3] *Youngblood* v. *Comer* (18 152, 23 S. E. 509, 25 S. E. 8

nounced in the earlier decisions that damages might be recovered from a receiver by an employee knocked from a moving train by striking a structure near the track. But this contention did not prevail.[4]

The act of December 16, 1895 (p. 103), provided that an employee of a receiver might maintain an action against him for injuries caused by the negligence of a coemployee. But this statute is applicable only to cases where the injury was received after its passage.[5]

Indiana.—It is held that, as a suit against a receiver is in effect against the corporate property in his possession, a receiver of a rail-

[4] *Central Trust Co. v. East Tennessee, V. & G. R. Co.* (1895) 69 Fed. 353; *Baltimore Trust & Guaranty Co. v. Atlanta Traction Co.* (1895) 69 Fed. 358. In the former case the court said: "It will be seen that the 'injuries to persons' for the payment of which the receiver shall apply the income of the road, and for which a lien is given, are such injuries as are inflicted on persons to whom it would owe a duty as a common carrier. Now, it is contended, as I understand the argument, that under the statutes of Georgia (Code, § 2083) the liability of the company in a case such as we are now considering is in its capacity as a common carrier. An examination of that section will show that this position cannot be sustained. The language of the section is as follows: 'Railroad companies are common carriers, and liable as such. As such companies necessarily have many employees who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employees as to passengers for injuries arising from the want of such care and diligence.' It will be seen from its language that this section is applicable to injuries to the employee arising from the want of care and diligence on the part of another employee in the running of trains; and if it should be held that in a proper case coming withia this statute (Code, § 2083),—as, for instance, a brakeman injured by the negligence of an engineer in running a train so as to cause a collision,—the receiver under the act of 1876 would be required to make payment out of the income of the road, it is obvious that it does not include the case now before the court. This injury is said to have been caused by a dangerous structure on the side of the track, and no complaint is made whatever as to the manner in which the train was run. So the discussion of this section of the Code of Georgia (§ 2083) is almost unnecessary, because by its language the act of 1870 itself only provides for the payment out of the income in the receiver's hands, as a first liability, for injuries to persons 'caused by the running of the cars on said road;' and the injury received by this complainant cannot, as I have stated, be said in any fair sense to have been caused by the running of the cars upon the road. It is true that the train was in motion when the intervener was knocked from its side, but the complaint is of the structure by the side of the track, with which he came in contact and which caused his injury. It is unnecessary, therefore, to decide the question as to whether the liability of the railroad company to an employee injured by want of care and diligence of another employee in the running of the trains is a liability 'as a common carrier' under the act of 1870, or whether it is only the same degree of liability it would owe to a passenger, and not within the terms of the act. This reasoning applies only to § 2083, which is invoked here, as stated, in connection with the act of 1876. Section 3036 of the Code, which makes the employer liable for an injury to an employee caused by the negligence of a coemployee generally, and without reference to running of trains, is not involved. The last-named section creates a liability for the lack of ordinary and reasonable care, and the former for a liability 'as to passengers,' namely, for slight neglect, or the absence of extraordinary care."

[5] *Barry v. McGhee* (1897) 100 Ga. 759, 28 S. E. 455.

way company may be sued under the employers' liabilit
1893.[6]

Iowa.—The act abolishing the doctrine of common emplo
regards the servants of "persons owning or operating railwa
chapter XXXIX., *ante*) has been held applicable to servan
ceivers.[7]

Kansas.—The provisions of 1 Kan. Gen. Stat. 1889, ¶ 1
ing railroad companies liable for all damages to any employ
negligence or mismanagement of its other employees (se
XXXIX., *ante*), have been held by a Federal court of appeals
to railroad companies in the hands of receivers, and to
employee injured by the carelessness of a fellow servant
work in the line of his duty to an allowance against the pr
the company in the hands of the receiver for the injuries s

[6] *Hunt* v. *Conner* (1901) 26 Ind. App. 41, 59 N. E. 50.

[7] *Sloan* v. *Central Iowa R. Co.* (1883) 62 Iowa, 728, 10 N. W. 331.

[8] *Hornsby* v. *Eddy* (1893) 5 C. C. A. 560, 12 U. S. App. 404, 56 Fed. 461. Thayer, D. J., said: "It is clear that, with respect to persons employed by a railway company as railway operatives, the statute last above quoted changes the rule of the common law, that the master is not liable to a servant for an injury sustained in consequence of the negligence of a fellow servant. Does the fact that a receiver is appointed to temporarily operate a railroad forthwith alter the status of all its employees, and re-establish as to them the old rule of the common law, so long as the receiver remains in charge? Viewing the question in the light of those considerations of public policy which probably gave birth to the statute, we cannot conceive of any reason why the appointment of a receiver should have such effect. It is a fact of which we may well take judicial notice, that great railway systems which employ thousands of men are frequently operated for a term of years through the agency of a receiver. Such receivers do not, as a general rule, change the working force of the road, or the rules and regulations by which trains are run, or by which the other business of the road is transacted. The men whom they employ are engaged in the same quasi-public service as other railway employees, and daily encounter the same risks and hazards. Furthermore, the receiver of a railroad operates it for the immediate benefit of the company by which it is owned, discharges all of the public d corporation, and appropriat come of its road to the pres its property and franchises, payment of its debts." T judge then referred to the U act of March 3, 1887 (24 552, 554, chap. 373, §§ 2, 3, Stat. 1901, p. 582), allo against receivers appointed courts, and proceeded tha general considerations warra clusion that, if the rules of t law are modified for the be employees of railway compa because of the extraordinary which they are exposed, or public nature of the servi they are engaged, or for any son, then for like reasons t of the common law should applicable to the employees er who is engaged in opera road; and we can scarcely c any legislative body would i make any distinction betwe classes of employees last ref is said, however, that the s ute above cited is in derog common law, and for that be strictly construed. But is also a remedial statute, a that nature, the plaintiff in titled to invoke an interpr will give effect to the inte lawmaker. At all events, tion ought not to be ad merely clings to the letter the obvious spirit and pur enactment." The case of

Massachusetts.—The employers' liability act of this state is one of general application (see chapter XXXVII., *ante*). But it has been held that a receiver may be sued under a statute by which "railroad corporations" are made liable for injuries caused by fire communicated by their locomotives.[9]

Minnesota.—A receiver is liable to an employee injured by the negligence of a coemployee, under Gen. Stat. 1894, § 2701, making "every railroad corporation owning or operating a railroad" liable for such negligence (see chapter XXXIX., *ante*).[10]

Missouri.—The statute defining the liabilities of railroad corporations in relation to damages sustained by their employees, and stating who are fellow servants (see chapter XXXVII., *ante*), applies to re-

Co. v. *Thomason* (1881) 25 Kan. 1, where a track repairer was allowed to recover against a trustee in possession, was adduced to show that the statute had previously been construed in the sense which was deemed by the court to be the proper one.

A later case applying the same rule is *Rouse* v. *Hornsby* (1895) 14 C. C. A. 377, 32 U. S. App. 111, 67 Fed. 219. Compare also *Rouse* v. *Harry* (1895) 55 Kan. 589, 40 Pac. 1007; *Rouse* v. *Redinger* (1895) 1 Kan. App. 355, 41 Pac. 433.

[9] *Wall* v. *Platt* (1897) 169 Mass. 398, 18 N. E. 270, construing Pub. Stat. chap. 112, § 214.

[10] *Wikkelson* v. *Truesdale* (1895) 63 Minn. 137, 65 N. W. 260. The court said: "It is true that the word 'receiver' is not used in this statute, and that its language is 'every railroad corporation owning or operating a railroad;' but the statute is a police regulation intended to protect life, person, and property, by securing a more careful selection of servants and a more rigid enforcement of their duties by railroad companies, by making them pecuniarily responsible to those of their servants who are injured by the negligence of incompetent or careless fellow servants. It is remedial in its nature, and must be construed, if not liberally, certainly in accordance with its obvious purpose and spirit. It would be a most unreasonable construction of the statute, if we were to adopt the one claimed for it by the defendant. We are aware that able courts have adopted such a construction of similar statutes, but we are of the opinion that they have taken a narrow view of the statute, and we must decline to follow their conclusions. If this police regulation does not apply to receivers of railroad corporations, it is difficult to see why such receivers are not absolved from a compliance with each and all of the police regulations made applicable by statute to railroad corporations. Can it be true that a railroad corporation whose road is operated for it by a general manager is, and one whose road is managed for it by a receiver is not, subject to the police regulations of the state? Or that the employees of the one have, and those of the other have not, a remedy when injured by the negligence of a fellow servant? Or that the employees of a corporation whose road is operated by a general manager today have such remedy, but if injured to-morrow they will have it not, because a receiver has taken the place of the manager? It would seem that an affirmative answer must be given to these questions, if we held that this statute has no application to receivers of railway corporations. Manifestly, such is not the fair and reasonable construction to be given to the statute. It is only in a technical sense that a receiver manages a railroad for the court appointing him. He operates it subject to the direction of the court, not for its benefit, but for the owners of the road,—the corporation and its creditors. In doing so he necessarily exercises the franchises, rights, and powers of the corporation, and discharges its functions as a common carrier, and appropriates the income received from the operation of the road for the benefit of the corporation; and it logically follows that in so operating the road the receiver stands, in respect to duty and liability, just where the corporation would if it was operating the road. A distinction in

ceivers of railroad corporations, as well as to the corporations selves.[11]

Ohio.—The statute set out in chapter XXXVIII., *ante*, has be by a Federal court of appeals to be broad enough to cover a which the defendant is the receiver of a railway company' erty.[12]

this respect has been made between the common-law duties and liabilities of the corporation and those imposed on it by statute, but there can be no distinction in principle; for wherein is the duty and liability more imperative or sacred in the one case than in the other? A receiver cannot, while exercising the franchises and powers of a corporation, claim immunity from the police regulations and liabilities which have been imposed upon the corporation by the state."

[11] *Powell* v. *Sherwood* (1901) 162 Mo. 605, 63 S. W. 485.

In a case where it was held that a trustee in possession might be sued under a statute declaring "railroad corporations" to be liable for animals killed by trains, the court remarked, *arguendo*, that a receiver might also have been sued. *Farrell* v. *Union Trust Co.* (1883) 77 Mo. 475.

[12] *Peirce* v. *Van Dusen* (1897) 24 C. C. A. 280, 47 U. S. App. 330, 78 Fed. 693. The court said: "If the reasoning of the Georgia and Texas courts be applied to the Ohio statute, it cannot be held to embrace employees acting under the receiver of a railroad corporation. But in our judgment the statute is applicable to actions against receivers of railroad corporations. To hold otherwise would be to subordinate the reason of the law altogether to its letter. While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words. If the Ohio statute is construed as applicable only to actions for personal injuries brought directly against railroad corporations, the result would be that in an action brought in one of the courts of Ohio the employees of a railroad corporation would be accorded rights that would be denied in another action of like kind, perhaps in the same court, to employees of the receiver of a railroad corporation under exactly similar circumstances. Could such a result have been contemplated by the legislature of Oh think not. The avowed object statute was the protection and railroad employees. To that e clared that in the actions mea it every person employed by road company and invested wi or authority to direct or cont employees should be deemed t rior, not the fellow servant, of der his direction and control. gal effect as well as the objec declaration was, in the cases s make the negligence of the sup negligence of the company. N is done to the ordinary meanin words of the statute if it be held legislature had in mind actions receivers of railroad corpora well as actions directly against porations. The appointment of of a railroad does not change to the property nor work a di of the corporation. Although ture of the court and acting orders, the receiver, for most stands in the place of the co exercising its general powers, its rights, controlling its prop rying out the objects for whi erected, discharging the pub resting upon it, and representi terests as well of those who railroad as of those who ha against the corporation or its The corporation remains in notwithstanding a provisional ship established by an order and for the purpose of effectu will of the state, as manifest act of 1890, an action again ceiver, arising out of his mana the property, may be regard against the corporation 'in the or 'in the possession of' the *McNulta* v. *Lochridge*, 141 U 331, 35 L. ed. 790, 799, 12 Sup 11. . . . So much as to and true meaning of the Ohi without reference to the courts it may be enforced. If th means what we hold it to m not full effect be given to it

Texas.—In two actions brought under the act of 1891 (see chapter XXXVIII., *ante*) the right of an employee to recover from a receiver was denied on the ground that a receiver, being merely a court officer, and not "a proprietor, owner, charterer, or hirer" of the railroad he has in charge, is not within the terms of a statute.[13] In a subsequent decision the broader position was taken that the statute, as it merely defines who are, and who are not, fellow servants, and prescribes that certain persons vested by railway companies with authority and control or command over other employees are vice principals, and not fellow servants, but does not mention receivers of railway companies either in the title or the body of the act, cannot be extended by construction so as to embrace such receivers and thus con-

for personal injuries brought against a receiver in a court of the United States? This question must be answered in the affirmative. Such legislation is not liable to the objection that it encroaches upon Federal authority or upon the jurisdiction or power of the United States court. The statute does nothing more than to prescribe a rule of action to be observed by all within the state. The authority to enact it is derived from the general power of the state to regulate the exercise of the relative rights and duties, and to provide for the safety, of all persons within its territorial jurisdiction. It is the duty of the Federal court sitting in this state to enforce all enactments having such objects in view, unless they encroach upon the powers and authority of the United States. That duty arises out of the statute declaring that 'the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States.' . . . Undoubtedly, the whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the states. But as Congress has not dealt with that subject it was competent for Ohio to declare that an employee of any railroad corporation doing business here, including those engaged in commerce among the states, shall be deemed, in respect to his acts within this state, the superior, not the fellow servant, of other employees placed under his control. If the effect of the Ohio statute be, as undoubtedly it is, to impose upon such corporations, in particular circumstances, a liability for injuries received by some of its employees which would not otherwise rest upon them according to the principles of general law, that fact does not release the Federal court from its obligation to enforce the enactments of the state. Of the validity of such state legislation we entertain no doubt."

The court then pointed out that there was another view of this matter equally conclusive. If under the act of Congress of March 3, 1887 (24 Stat. at L. 552, chap. 373), as amended by the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 582), a railroad in the possession of a Federal receiver was to be managed and operated according to the requirements of the laws of the state in which the property is situated, "in the same manner that the owner or possessor thereof would be bound to do if in possession thereof," it was clear that such management and operation must be subject to any rule prescribed by the state imposing upon railroad corporations liability for the negligence of employees having superior authority over other employees.

[13] *Turner* v. *Cross* (1892) 83 Tex. 218, 15 L. R. A. 262, 18 S. W. 578; *Texas & P. R. Co.* v. *Collins* (1892) 81 Tex. 121, 19 S. W. 365.

In *Yoakum* v. *Selph* (1892) 83 Tex. 607, 19 S. W. 145, the court, relying on these cases, held that a third person could not recover from a receiver under the damage act. But it is clear that a conclusion based upon the construction of a statute which is applicable only to the employees of railway companies is not an authority for the ruling thus made.

vert into vice principals certain employees who would, apart fro
provisions, be fellow servants.[14]

A Federal court sitting in Texas is not prevented by this s
and the construction thus placed upon it from allowing a clai
damages for an injury caused by a coservant, if the cause of
arose in another state in which no statute open to such a constr
has been enacted.[15] By the act of June 18, 1897, the wording
fellow servant act was changed so as to be applicable to "every
son, receiver, or corporation operating railroads or street railw
See chapter XXXVIII., *ante*.

849. Fellow servants.— The extent of the personal respon-sibil
a servant or agent for acts of negligence committed by him i
course of his employment will be discussed at length in the
volume of this treatise. Here it will be sufficient to say that th
trine is now firmly established that a servant may be sued by a
servant who has been injured through his fault, whether the ci
stances attending the accident were such that the master would
self be liable, or were such that an action against him would be
by the defense of common employment.[1] But a superior servant

[14] *Campbell* v. *Cook* (1894) 86 Tex. 630, 40 Am. St. Rep. 878, 26 S. W. 486. Reversing (1894; Tex. Civ. App.) 24 S. W. 977. "The language," said the court, "cannot be so changed as to embrace an officer of the court, who is in no sense a corporation, because the reasons of the law apply to both." This decision was followed in *San Antonio & A. P. R. Co.* v. *Reynolds* (1895; Tex. Civ. App.) 30 S. W. 816.

[15] *Texas & P. R. Co.* v. *Cox* (1891) 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905, where the court declined to follow the two decisions cited in note 13, *supra*.

[1] *Brown* v. *Butterley Coal Co.* (1885; Q. B. D.) 53 L. T. N. S. 964, 53 J. P. 230 (assumed, *arguendo*, in suit brought under the employers' liability act of 1880); *Stephen* v. *Thurso Police Comrs.* (1876) 3 Sc. Sess. Cas. 4th series, 542; *Adams* v. *Glasgow & S. W. R. Co.* (1875) 3 Sc. Sess. Cas. 4th series, 215; *Wright* v. *Roxburgh* (1861) 2 Sc. Sess. Cas. 3d series, 748; *Matthews* v. *M'Donald* (1865) 3 Sc. Sess. Cas. 3d series, 506; *Stewart* v. *Coltness Iron Co.* (1877) 4 Sc. Sess. Cas. 4th series, 952; *Warax* v. *Cincinnati, N. O. & T. P. R. Co.* (1896) 72 Fed. 637; *Cheatham* v. *Red River Line* (1893) 56 Fed. 248; *Hukill* v. *Maysville & B. S. R. Co.* (1896) 72 Fed. 745; *Hinds* v. *Harbou* (1877) 58 In *Hinds* v. *Overacker* (1879) 6 517, 32 Am. Rep. 114; *Rogers* v. (1882) 87 Ind. 410; *Martin* v. *ville & N. R. Co.* (1891) 95 Ky. S. W. 801; *Hare* v. *McIntire* (1 Me. 240, 8 L. R. A. 450, 17 Am. S 476, 19 Atl. 453; *Farwell* v. *B W. R. Corp.* (1842) 4 Met. 49, Dec. 339 (assumed by Shaw, that an action would lie against t ligent servant); *Osborne* v. (1881) 130 Mass. 102, 39 Am. R 137 Mass. 1 (overruling *Jaquith* (1855) 4 Gray, 99, 61 A 56); *Kalleck* v. *Deering* (18 Mass. 200, 47 N. E. 698; *Gi Wolfrom* (1875) 22 Minn. 185 *man* v. *Barnett* (1876) 62 Me *Steinhauser* v. *Spraul* (1893) 1 551, 558, 21 S. W. 515, 859; *O Young & Sons' Seed & Plant Co.* 58 Mo. App. 628; *Burns* v. (1894) 75 Hun, 437, 27 N. Y. 499; *Fert* v. *Whipple* (1877) 586; *Lawlor* v. *French* (1895) 497, 35 N. Y. Supp. 1077; *Walker* (1890) 139 Pa. 42, 23 Rep. 160, 21 Atl. 157 (conceded *cudo*); *Durkin* v. *Kingston C* (1895) 171 Pa. 193, 29 L. R. A Am. St. Rep. 801, 33 Atl. 237; v. *Granger* (1894) 18 R. I. 507,

liable to one of his subordinates for the negligence of another of those subordinates.[2]

849a. Joinder of negligent coemployees and master as parties defendant.—By the Federal circuit court of the Kentucky district it has been laid down that there is no such joint liability to an injured servant on the part of the employing company and the employees whose negligence caused the injury as will permit their joinder in one action for such injury,[1] and that a servant cannot be joined as defendant with the receiver of a company and the company itself, in an action in which it is sought to hold them liable for his negligence, where the only ground on which liability is imputed to the receiver and the company is the negligence of that servant.[2] But in the Indiana district the doctrine has been adopted that an act of negligence committed by a coservant, if it is of such a nature that he represents the master with respect to its commission, constitutes a breach both of the master's duty and of the coservant's own duty as regards the injured servant, and that for this reason the latter may maintain a joint action against the master and the negligent coservant.[3]

639 (assumed *arguendo*); *Fox* v. *Sandford* (1856) 4 Sneed. 36, 67 Am. Dec. 587; *Thompson* v. *Hermann* (1879) 47 Wis. 602, 32 Am. Rep. 784, 3 N. W. 579.

In most of the above cases the distinction between acts of misfeasance and nonfeasance is not emphasized. In some of them the act of the servant is described as being one of misfeasance, and the liability put upon that ground. *Lottman* v. *Barnett* (1876) 62 Mo. 159; *Hukill* v. *Maysville & B. S. R. Co.* (1896) 72 Fed. 745; *Warax* v. *Cincinnati, N. O. & T. P. R. Co.* (1896) 72 Fed. 637; *Burns* v. *Pethcal* (1891) 75 Hun. 437, 27 N. Y. Supp. 499; *Osborne* v. *Morgan* (1881) 130 Mass. 102, 39 Am. Rep. 437. The distinction, however, is immaterial so far as regards the negligent acts committed by servants in the course of their employment, since, according to the Massachusetts case last cited, all such acts fall under the category of misfeasance, as being committed after the performance of the contract has been entered upon. Town selectmen who, in constructing a public sewer themselves, employ a person to work in a particular place, are, although acting as public officers, personally liable for an injury occurring to him through their negligence in respect to providing a reasonably safe place to work and suitable materials. *Breen* v. *Field* (1892) 157 Mass. 277, 31 N. E. 1075.

[2] *Clancy* v. *Harrison* (1878) 4 Vict. L. Rep. (L.) 437.

[1] *Hukill* v. *Maysville & B. S. R. Co.* (1896) 72 Fed. 745. In a removal case it has been held that an employer held liable for injuries to an employee because of the negligence of a coemployee in his absence and without his direction cannot be said to have acted in concert with such coemployee to produce the injury, so as to render him liable with the latter in a joint action. *Warax* v. *Cincinnati, N. O. & T. P. R. Co.* (1896) 72 Fed. 637.

[2] *Landers* v. *Felton* (1896) 73 Fed. 311.

[3] *Charman* v. *Lake Erie & W. R. Co.* (1900) 105 Fed. 449, citing many cases.

CHAPTER XLV.

PLEADING AND PRACTICE.

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A. Generally.

850. Jurisdiction.— An action by a servant against his ma

personal injuries received in the course of his employment is transitory in its nature, and may be instituted wherever the wrongdoer may be found, and jurisdiction of his person can be obtained.[1] This rule is applied irrespective of whether the right of action is one which exists under the common law or is one which is created by a statute.[2]

On the ground that a servant who has been injured owing to the breach of a duty which is imposed by law upon the master by reason of the relation of the parties, as well as by the contract of employment, may treat the wrong suffered as a tort, and bring an action *ex delicto*, it has been held that a servant of a railway company operating a line in two states can maintain an action against it under a statute abrogating the common-law doctrine as to coservants, although that doctrine is still applied in the other state, and it was there that he entered into the contract of service.[3] A similar conclusion as to the right of a servant to sue under such a statute has also been arrived at by starting from the assumption that an action against a railway company for an injury received in another state is one sounding in contract, not in tort.[4]

850a. Nonsuit taken after reversal—law of the case.—Where a

[1] This elementary rule has been taken for granted in numerous cases already cited in the earlier chapters of this treatise. For others, see the chapter dealing with the Conflict of Laws (XLVI.).

[2] In *Herrick* v. *Minneapolis & St. L. R. Co.* (1883) 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413, the court observed that "in actions *ex contractu* there is no distinction made between statutory and common law actions in this regard, and there is no good reason why any different rule should be applied in actions *ex delicto*.

The general rule on the subject has been thus formulated by the Supreme Court of the United States:

"Whenever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." *Dennick* v. *Central R. Co.*, (1880) 103 U. S. 11, 26 L. ed. 439.

In *St. Louis, I. M. & S. R. Co.* v. *Brown* (1899) 67 Ark. 295, 54 S. W. 865, it was held that, under the statute authorizing the bringing of an action against a railroad company for an injury to person or property in any county through which the road passes, a resident of Arkansas may sue in any county in Arkansas through which the road passes for personal injuries received thereon in another state.

Under Kentucky Civ. Code Prac. § 73, authorizing an action against a common carrier for an injury to a passenger, or to other person or his property, to be brought in the county in which "plaintiff" resides, if he reside in a county into which the carrier passes, an action against a railroad company to recover damages for the death of an employee may be brought by the administrator in the county in which he resides, if he reside in a county into which the railroad passes. *Turner* v. *Louisville & N. R. Co.* (1901) 23 Ky. L. Rep. 340, 62 S. W. 1025.

[3] *Kansas City, Ft. S. & M. R. Co.* v. *Becker* (1899) 67 Ark. 1, 46 L. R. A. 814, 77 Am. St. Rep. 78, 53 S. W. 406.

[4] In the case referred to it was held that, where a servant of a railroad company operating lines in North Carolina was injured in Tennessee by the negligence of a fellow servant, the courts of the former state had jurisdiction of the action, and that the fellow servant act of 1897 of that state applied to it, making the railroad company liable. *Williams* v. *Southern R. Co.* (1901) 128 N. C. 286, 38 S. E. 893.

judgment for plaintiff in an action for personal injuries, w
was removed from a state to a Federal court, was reversed, an
cause remanded for new trial on the ground that the injury
caused by the act of a fellow servant, but before the second tria
plaintiff took a nonsuit and then instituted an action in an
county of the same state as that in which the original one was bro
the judgment rendered on the appeal was held not to be the la
the case in the second action.[1]

851. Matters not open for argument by counsel.—In an action
injuries alleged to have been caused by the negligent method of
adopted by defendant's foreman, where the plaintiff's counsel
stated in his opening that he made no question of the foreman's
petency, and no evidence has been put in tending to show tha
foreman was incompetent, except such inferences as might be d
from the manner in which the work was done, and there was no
dence of any want of care on the part of the defendant in empl
the foreman, plaintiff's counsel is properly prevented from arg
at the trial that the foreman wa incompetent, and that the defe
knew his incompetency, or with due care might have known it
that the injury in suit resulted from that incompetency.[1]

852. Questions not open for consideration on appeal.— In the
joined note are cited a few decisions in which courts of review
refused to consider the point raised, for the reason that it was
presented on the appeal.[1]

[1] *Illinois C. R. Co.* v. *Bentz* (1902) 108 Tenn. 670, 58 L. R. A. 690, 69 S. W. 317.

[1] *Summersell* v. *Fish* (1875) 117 Mass. 312.

[1] Where both parties in an action for indemnity for an injury caused by an unblocked frog go to trial on the single question whether it was or was not blocked at the time of the accident, the defendant cannot take for the first time on appeal the point that the case should have been tried upon the theory that the defendant, if it had once blocked the frog, incurred no liability by reason of its subsequent displacement, unless it had actual or constructive notice of such displacement. *Union P. R. Co.* v. *James* (1896) 163 U. S. 485, 41 L. ed. 236, 16 Sup. Ct. Rep. 1109.

Questions of fact which have been settled at a trial term to furnish a basis for the determination of the legal questions involved in the case are not open for consideration by the appellate court. *Edwards* v. *Tilton Mills* (1901) 70 N. H. 574, 50 Atl. 102.

Where plaintiff was injured by ing and overexerting himself in at ing to lift a truck wheel out drainage hole in the floor of defen cotton mill, and there was no ment that the evidence did not s the verdict, a contention that pl in his stooping posture, while p the truck, because of pulleys ov and because of the poor light place, could not protect himself pr against the hole, will not be cons *Ferguson* v. *Phœnix Cotton* (1901) 106 Tenn. 236, 61 S. W.

After a trial on the merits, it late for the defendant to objec the question whether it had pl competent man in charge of the was not raised by the pleadings. a case comes under the rule that pleadings would have been amend course in the court below, the ment will be considered as havin made. *Trainor* v. *Philadelphia* Co. (1890) 127 Pa. 149, 20 Atl. 6

The point at a worktrain wh jured a trackman owing to its be

B. Pleading.

As to the pleadings in suits brought under the English employers' liability act of 1880, and the statutes modeled thereon, see §§ 737, 738, *ante*.

853. Scope of subtitle.—In the earlier sections of this treatise the sufficiency of the pleadings with reference to various specific groups of facts has been discussed in connection with the doctrines within the purview of which those facts were deemed to fall. (See especially §§ 562, 592, *ante*.) In the present subtitle it is proposed to collect the cases which illustrate those general rules of pleading which are independent of the particular circumstances involved.

The judicial conflict with respect to some important points is no doubt due in a great measure to the fact that the rules of pleading applied by the different courts vary considerably in regard to strictness. Under these circumstances the propriety of following any given decision will depend primarily upon whether the system of pleading adopted in the state in which the court sits which is invited to defer to the authority of that decision is substantially similar to the system with reference to which it was rendered. But the cases even in the same jurisdiction are often strangely inconsistent.

854. Complaint; sufficiency, generally.— In order to withstand a demurrer a complaint must allege facts which, if true, show that the master was guilty of a breach of duty as regards the injured servant, and that the injury resulted from that breach of duty.[1] If such facts

without lights was run in accordance with the regulations of the company, and that the injury was therefore the act of the company, cannot be taken on appeal, unless it was suggested to the trial court. *Coon* v. *Syracuse & U. R. Co.* (1851) 5 N. Y. 492.

See also § 855, note 4, and § 856, note 8, *infra*.

[1] A declaration is sufficient which alleges a contract creating a duty, facts showing prima facie a breach of contract, injury therefrom, and damage by reason of the injury. *Eagle & P. Mfg. Co.* v. *Welch* (1878) 61 Ga. 411.

A complaint which charges that the injury resulted from the failure of the employer to discharge its duty to its employees by neglecting to provide rules for signals to engineers of switch engines in a yard where there are many tracks, and where two or more engines are employed near each other at night, and also avers that the signals used were the same for all engines, and that plaintiff's intestate was killed in consequence of the engineer of the engine with which he was working misteking a signal intended for another engineer, states a good cause of action. *Louisville & N. R. Co.* v. *York* (1900) 128 Ala. 305, 30 So. 676.

An allegation that a railroad company negligently permitted an iron pin to be and to remain on a tender in such a manner that the movement of the train threw it off and injured the plaintiff is not insufficient for failure to allege that it was dangerous to carry the pin on the tender, or that it was left in an unsafe position, or where one might reasonably expect it would be thrown off. *Cleveland, C. C. & St. L. R. Co.* v. [illegible] (1899) 152 Ind. 607, 46 L. R. A. 33, 53 N. E. 415.

Where the gist of the action is a breach of the duty to give warning, the absence of an allegation that the plain-

tiff was inexperienced is not fatal to the sufficiency of the complaint, where it is alleged that the plaintiff was not acquainted with the danger of doing the work in the manner in which he was doing it at the time of the accident; that defendant's foreman was present and knew of the danger, but ordered him to do the work without warning him thereof; and that he was not furnished with proper tools to do the work. *Hillsboro Oil Co.* v. *White* (1899; Tex. Civ. App.) 54 S. W. 432.

Where the injury is alleged to have resulted from the negligence of the defendant's general superintendent, it is not necessary to allege that the defendant was responsible for his negligence. *Woodson* v. *Wm. Johnston & Co.* (1899) 109 Ga. 454, 34 S. E. 587.

A complaint alleging facts from which a breach of the non-delegable duty to provide a reasonably safe place of work may be inferred is good. *Ft. Wayne* v. *Patterson* (1900) 25 Ind. App. 547, 58 N. E. 747 (neglect to shore up a trench); *Laporte* v. *Cook* (1897) 20 R. I. 261, 38 Atl. 700 (similar facts).

Such a complaint cannot be objected to on the ground that it does not specify the status of the employee who ordered the servant into the place where he was injured. *Foster* v. *Greeley* (1900) 15 Colo. App. 176, 61 Pac. 482.

The word "negligently" need not be used in the complaint, for the purpose of describing the quality of the act or omission charged, provided the facts alleged are such as import negligence. *Silveria* v. *Iverson* (1899) 125 Cal. 266, 57 Pac. 996.

An allegation that the injury was the direct result of the negligence of the defendants, and their carelessness and negligence in appointing an unsuitable employee by whom an engine was negligently managed, is a sufficient averment that the negligence of the defendants in not selecting a competent servant was the cause of all the grievances for which remuneration is sought in this suit. *Blake* v. *Maine C. R. Co.* (1879) 70 Me. 60, 35 Am. Rep. 297.

Where a declaration sufficiently states the duty of the defendant to warn plaintiff, its employee, of the danger of an explosion of "cinder taps" near which plaintiff was working, a further allegation that the defendant, by the exercise of due care, ought to have known that the cinder taps were liable to explode, is a charge of "knowledge" on defendant's part, and is not objectionable, as being merely a charge of "duty," and not a presentation of issuabl The purpose of such an alleg merely to charge the defendant knowledge out of which the duty arose. *Western Tube Co.* v. *P* (1901) 192 Ill. 113, 61 N. E. lirming (1900) 94 Ill. App. 640.

Indirect allegations that the of a defendant corporation whom suit has been brought "h in their duty in certain respe "had not taken the precautions tain the fitness of an employe placing him in charge of danger chinery," are insufficient to cha officers with liability, when it alleged what part, if any, said were called on to take in the within the scope of the duty upon them by virtue of their o wherein they had failed in the ance of such duty. *Henry* v. *ridge Lumber Co.* (1896) 48 950, 20 So. 221.

Allegations that a master to keep the rim of a machine in that the sections were l joints separated, and splints an projected above its surface, and juries resulted to a servant i quence of such rim being out o have been held insufficient to cause of action for negligen there is no allegation that the repair causing the injury was to which negligence was charg any act or omission of the mas ing the injury. *Lafayette Co* v. *Stafford* (1900) 25 Ind. App N. E. 944.

In *Riley* v. *Baxendale* (Hurl. & N. 445, 30 L. J. Ex 87, 9 Week. Rep. 347, a case under the older system of pl attempt was made to prevent th ant from demurring, and to pu a traverse of the fact, by allegi tract that "the defendants sh due and ordinary care not t the said J. R. to extraordinar and risk in the course of his ployment." A nonsuit on the of the case was held to be pr reasons thus explained by Po B.: "Generally speaking, a n cannot be turned into a cont great inconvenience would res were to permit it to be decla such. If the obligation had bee as a duty, the defendant mi demurred. But when it is all contract the defendant cannot because it is possible that there such a contract in point of fac

are set forth, it is not necessary to aver expressly that the defendant owed the servant a duty in the premises.[2] Nor is the plaintiff required to plead any other legal conclusion upon which his right of action is predicated.[3]

855. Sufficiency considered with relation to the doctrine of assumption of risks.— Where the risk from which the injury is alleged to have resulted was, so far as appears, an ordinary or an obvious one, the complaint is demurrable, unless it states some facts which, if proved, will remove the case from the operation of the rule which charges a servant with the assumption of such risks.[1]

855a. — with relation to the doctrine of coservice.— (See also § 854, note 3, *supra.*) A complaint which charges negligence directly upon the employer himself, and not upon the employees, is good on demurrer, although the defendant is a corporation, and this circumstance necessarily implies that the default alleged must have been that of an employee.[1] But a demurrer to the complaint should be sustained where the facts alleged show that the injury was caused by the negligence of a coemployee while acting in his capacity as a mere servant,[2] unless there is an averment that the master did not exercise

[1] *Sackewitz* v. *American Biscuit Mfg. Co.* (1899) 78 Mo. App. 144; *Ft. Wayne* v. *Christie* (1901) 156 Ind. 172, 59 N. E. 385 (complaint held good which alleged an injury caused by failure to shore a trench properly).

[2] Thus a declaration in an action for injuries alleged to have been caused by the negligence of a coemployee need not deny that they were not fellow servants, where the facts showing their relation are set out therein. *Chicago & A. R. Co.* v. *Swan* (1898) 176 Ill. 424, 52 N. E. 916. Affirming (1897) 70 Ill. App. 331; *Chicago City R. Co.* v. *Leach* (1898) 80 Ill. App. 354.

A declaration in an action against a railroad company for an injury to the plaintiff's eyes by a fragment of steel struck off by him in working on an engine with a cold chisel is fatally defective if it fails to aver any fact tending to show that he was not rightfully put at the particular work, or that the cutting of steel with a cold chisel was not such work as an employee of the plaintiff's age and experience might be employed at. *Whitelaw* v. *Memphis & C. R. Co.* (1886) 16 Lea, 391, 1 S. W. 37.

A complaint averring an injury caused by the servant's catching his foot in an unblocked guard rail is demurrable, where it does not allege that the servant was inexperienced when he entered the employment; nor that he was ignorant of the conditions at that time and afterwards; nor that he remained in the defendant's service relying upon a promise made by it to block its guard rails. *Missouri P. R. Co.* v. *Baxter* (1894) 42 Neb. 723, 60 N. W. 1044.

[1] *Turner* v. *Indianapolis* (1884) 96 Ind. 51, following *Ohio & M. R. Co.* v. *Collarn* (1881) 73 Ind. 261, 38 Am. Rep. 134.

[2] *Indiana, B. & W. R. Co.* v. *Bailey* (1886) 110 Ind. 75, 10 N. E. 631; *Madison & I. R. Co.* v. *Baron* (1855) 6 Ind. 205; *Laporte* v. *Cook* (1897) 20 R. I. 261, 28 Atl. 700.

In *Indianapolis & St. L. R. Co.* v. *Johnson* (1885) 102 Ind. 352, 26 N. E. 200, it was contended that from specific allegations showing that the injury was due to negligence in loading cars, no inference arose that they were loaded by his fellow servants, the argument being that, because it was averred in the complaint "that said defendant suffered, permitted, and directed said bent and crooked iron rails to be placed on and projecting over the end of said car last named," etc., it might as well be inferred that this was done by the chief agents and officers of the railroad company as by a fellow servant. The court said:

ordinary care and prudence in the employment of such fell vant, or had retained him in his service after receiving notice was negligent in the discharge of his duties.[3]

It has been held, however, that, if a defendant makes no ob to the sufficiency of the complaint on the ground of its averring injury inflicted by the negligence of a coservant, and simply den knowledge of defects in the appliance which was the immediate of the injury, and permits the introduction of evidence that chargeable with such knowledge, the complaint will, after a for the plaintiff, be considered as having been amended so as form to this proof.[4]

"The infirmity of counsel's position is that they would determine whether the persons who loaded the cars were fellow servants or not by the office they held, and not by the work in which they were at the time engaged. One who loads the cars of a railroad company is, while so engaged, a fellow servant with the brakeman who goes upon the train in which such loaded cars are afterwards placed; and it makes no difference what official designation of agency may be applied to him. There are certain duties which pertain to the position of master, and whoever performs them is, for the time being, in the master's place. There is also certain work which pertains to the duty of employee or servant, and whoever else beside the master does this is, while so engaged, a fellow servant with any other employee who is in the same general employment. Courts know judicially that loading railroad iron on flat cars pertains to the service of an employee; and when it is averred that one servant was injured in consequence of the negligent manner in which such loading was performed by the defendant, the presumption arises that such injury was the result of the negligence of a fellow servant. This is so because a railroad corporation must of necessity employ servants to load its cars. To say that the servant who loaded the cars was also the chief agent and officer of the railroad company, without more, would in no manner change the situation. Regardless of his agency or office in other respects, if he was also properly engaged in loading cars, he was at that time a fellow servant with all others in like service."

A complaint is demurrable which alleges in substance that the plaintiff, a brakeman, was injured by a derailment due to the defendant's having allowed a train to attain a dangerous rate of speed. The intendment is that injury must have been caused negligence of the employees o the train. *Sherman* v. *Roche R. Co.* (1853) 15 Barb. 574.

An allegation that the d "threw or caused to be thrown whereby the plaintiff was inj equivalent to an allegati was thrown by a fellow plaintiff. *Di Marcho* v. *Eudd Foundry* (1893) 18 R. I. 514, 328, 28 Atl. 661.

Where the plaintiff seeks reco der a declaration setting forth injury was caused by an emp the defendant, who is directly not to have been in the same li ployment as the plaintiff, an shown that the plaintiff was em a certain kind of work, and wa by an accident of the kind tha ordinarily occur through the n of one in the same line of emp it is necessary for him to sh another servant in another lin ployment had caused the injury a way as to make the maste *Helfrich* v. *Williams* (1882) 553.

In West Virginia, if the ascribed in the complaint di the defendant, it is not nece allege negligence of the maste ploying proper servants, to servant to recover for injur sioned by a coservant. *Un more & O. R. Co.* (1890) 34 W. 12 S. E. 512.

[3] *Lake Shore & M. S. R. Co.* v (1886) 108 Ind. 1, 8 N. E. 639 v. *Androscoggin R. Co.* (1873 465, 16 Am. Rep. 492; *Standar Co.* v. *Minor* (1901) 27 Ind. 61 N. E. 684.

[4] *St. Louis, I. M. & S. R. Co.* v (1884) 44 Ark. 524.

A complaint alleging the discharge of such functions by the negligent servant as show him to be a vice principal is not demurrable.[5]

In an action against an employer for injuries resulting from a defect in the plant it is not necessary to allege that the injuries were not caused by the negligence of a fellow servant.[6]

856. Averment of the master's knowledge of the dangerous conditions.— *a. Generally.*—It is not open to question that a complaint, the essential effect of which is that the servant was exposed to an undue risk by the existence of certain abnormally unsafe conditions, and that those conditions were known, either actually or constructively to the master, is good against a demurrer,[1] unless the absence of such knowledge is a necessary inference from the facts specifically alleged.[2] But the courts are far from being unanimous as to the necessity of introducing an express averment, charging the master with knowledge.

[1] *Hathaway* v. *Des Moines* (1896) 97 Iowa, 333, 66 N. W. 188.

[2] *Louisville, E. & St. L. Consol. R. Co.* v. *Miller* (1895) 140 Ind. 685, 40 N. E. 116.

[3] This doctrine is taken for granted in all the cases cited under this section, and has been explicitly enunciated in the following cases: *McMullen* v. *Newhouse Coal Co.* (1896) 23 Sc. Sess. Cas. 4th series, 759; *Conrad* v. *Gray* (1895) 109 Ala. 130, 19 So. 398; *Ohio & M. R. Co.* v. *Heaton* (1891) 137 Ind. 1, 35 N. E. 687; *Baltimore & O. & C. R. Co.* v. *Rowan* (1885) 104 Ind. 88, 3 N. E. 627; *Miller* v. *Itasca Cotton Seed Oil Co.* (1897; Tex. Civ. App.) 41 S. W. 366.

An allegation that the defective condition of the instrumentalities was known to the master includes constructive knowledge. Hence a complaint containing such an allegation cannot be excepted to on the ground that it does not aver that the defendant's knowledge was acquired in time to enable him to make repairs. *Louisville, E. & St. L. Consol. R. Co.* v. *Miller* (1895) 140 Ind. 685, 40 N. E. 116; or on the ground that it does not sufficiently present the issue whether there had been a negligent failure to inspect the machinery. *Lake Erie & W. R. Co.* v. *McHenry* (1894) 10 Ind. App. 525, 37 N. E. 186.

[4] A complaint which shows on its face that the defect which caused the injury was latent is demurrable, although it also contains an allegation that the defendant had made a careful examination of the appliance in question. Such an allegation is not equivalent to one which expressly charges knowledge. *Hencke* v. *Ellis* (1901) 110 Wis. 532, 86 N. W. 171.

[5] *United Kingdom.*— The necessity for such an averment was explicitly affirmed in *Griffiths* v. *London & St. K's Docks Co.* (1884) L. R. 13 Q. B. Div. 259, 53 L. J. Q. B. N. S. 501, 51 L. T. N. S. 533, 33 Week. Rep. 35, 49 J. P. 100 (see § 857, note 2, *infra*); *Potts* v. *Plunkett* (1859) 9 Ir. C. L. Rep. 290; *Davies* v. *England* (1861) 10 Jur. N. S. 1235, 33 L. J. Q. B. N. S. 321. In the last cited case one of the counts alleged that the defendants, by representing slaughtered carcasses of cattle to be sound, caused and procured the plaintiff to cut up the same; that the beasts were unsound and diseased, whereby he contracted the disease, and was permanently injured. Held, that the count was bad. "It is consistent with the declaration," said Blackburn, J., "that the defendants may themselves have been cheated by the grazier from whom they purchased the beasts."

As there is no implied warranty that a vessel is seaworthy, a complaint is demurrable which alleges merely that a seaman was made sick through its leaky condition, and contains no averment that the owner knew in what state the vessel was. *Couch* v. *Steel* (1854) 3 El. & Bl. 402, 2 C. L. Rep. 940, 23 L. J. Q. B. N. S. 121, 18 Jur. 515.

A declaration in an action for injuries received by a servant in executing certain work outside of the scope of his employment is insufficient where it

b. Doctrine that knowledge must be expressly charged.—T
trine embodied in a considerable number of decisions is that
plaint is bad unless it contains an averment of knowledge on t
ter's part,[3] or (according to some authorities), unless it alleg
which are of such a nature as to raise the presumption that
such knowledge.[4]

merely alleges that the defendants required the plaintiff to do that work, well knowing at the time that the plaintiff was unfit for such duty, and contains no averment that the defendants knew there was danger in the work, or even that the work was dangerous. *Smyly* v. *Glasgow & L. Steam Packet Co.* (1868) 16 Week. Rep. 483.

An averment of knowledge was contained in the declarations in the following cases: *Tarrant* v. *Webb* (1856) 18 C. B. 797, 25 L. J. C. P. N. S. 261; *Roberts* v. *Smith* (1857) 2 Hurlst. & N. 213, 26 L. J. Exch. N. S. 319, 3 Jur. N. S. 469; *Williams* v. *Clough* (1858) 3 Hurlst. & N. 258, 27 L. J. Exch. N. S. 325; *Brown* v. *Accrington Cotton Spinning & Mfg. Co.* (1865) 3 Hurlst. & C. 511, 34 L. J. Exch. N. S. 208, 13 L. T. N. S. 94; *Mellors* v. *Shaw* (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, 9 Week. Rep. 748; *Hall* v. *Johnson* (1865) 3 Hurlst. & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 13 Week. Rep. 411; *Griffiths* v. *Gidlow* (1858) 3 Hurlst. & N. 648, 27 L. J. Exch. N. S. 404; *Senior* v. *Ward* (1859) 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261; *Ashworth* v. *Stanwix* (1861) 30 L. J. Q. B. N. S. 183, 3 El. & El. 701, 7 Jur. N. S. 467, 4 L. T. N. S. 85.

Federal Courts.—*Jordan* v. *Wells* (1878) 3 Woods, 527, Fed. Cas. No. 7,525.

Colorado.—*Summerhays* v. *Kansas P. R. Co.* (1875) 2 Colo. 484.

Illinois.—*Illinois C. R. Co.* v. *Jewell* (1867) 46 Ill. 99, 92 Am. Dec. 240. See however notes 9, 10, *infra*.

Indiana.—*Pennsylvania Co.* v. *Congdon* (1893) 134 Ind. 226, 39 Am. St. Rep. 251, 33 N. E. 795; *Chicago, St. L. & P. R. Co.* v. *Fry* (1892) 131 Ind. 319, 28 N. E. 989; *Arcade File Works* v. *Jutcau* (1896) 15 Ind. App. 460, 40 N. E. 818, 44 N. E. 326; *Evansville & T. H. R. Co.* v. *Duel* (1893) 134 Ind. 156, 33 N. E. 355; relying on the following cases: *Indianapolis & C. R. Co.* v. *Love* (1858) 10 Ind. 554; *Columbus & I. C. R. Co.* v. *Arnold* (1869) 31 I 99 Am. Dec. 615; *Pittsburgh, C. R. Co.* v. *Ruby* (1871) 38 I 10 Am. Rep. 111; *Brazil & C.* v. *Cain* (1884) 98 Ind. 282; *Sh Toledo & W. R. Co.* (1864) 23 *Sullivan* v. *Toledo, W. & W.* (1877) 58 Ind. 26; *Bogard* v. *L E. & St. L. R. Co.* (1885) 100 I *Pittsburgh, C. & St. L. R. Co.* v (1886) 105 Ind. 151, 5 N. E. 18 *Shore & M. S. R. Co.* v. *Stupak* 108 Ind. 1, 8 N. E. 630; *India* W. *R. Co.* v. *Dailey* (1887) 110 10 N. E. 631; *Lake Shore &* Co. v. *Stupak* (1890) 123 Ind. N. E. 216.

A complaint which charges n in general terms and does notice of the defect, or allege fa which notice may be inferred, i cient. *Turner* v. *Indianapolis* 96 Ind. 51. See, however, cases trary effect which are cited in *infra*.

Kansas.—*Carruthers* v. *Chica & P. R. Co.* (1895) 55 Kan. 600 915.

Maine.—*Buzzell* v. *Laconia* (1861) 48 Me. 113, 77 Am. Dec

Missouri.—*Thompson* v. *Ch I. & P. R. Co.* (1899) 2 Mo. A 633. See, however, the Misso cited in note 9, *infra*.

Tennessee.—*Morriss Bros.* v. (1900) 105 Tenn. 59, 58 S. W. note 4, *infra*.

Virginia.—A count averring eral terms that the defendant provide a suitable appliance, "b of which careless act of the de the plaintiff was injured, is de as alleging neither that the d failed to exercise ordinary car viding a suitable appliance, nor alleged defects were known or have been known to him. *Norf R. Co.* v. *Jackson* (1888) 85 8 S. E. 370.

Wisconsin.—*Heneke* v. *Ellis* 110 Wis. 532, 86 N. W. 171. ever, note 7, *infra*.

[4] *Pennsylvania Co.* v. *Sear*

A necessary result of the doctrine is that a general allegation of negligence is not enough to render a complaint proof against a demurrer.[5] The omission of an express averment of knowledge, however, is not fatal, where it is charged by one of the allegations that the defect in question would have been known to the defendant if he had exercised proper care,[6] or where there is an explicit averment that he failed to perform his duty with respect to the examination of the defective appliance.[7] Nor is the absence of such an averment a sufficient ground for arresting the judgment after a trial on the merits, in which evidence showing that the defendant had notice of the defect in question was admitted without any objection on his part.[8]

c. Doctrine that an express allegation of knowledge is not necessary.—In other decisions the doctrine is adopted that the want of a specific averment that the master had notice of the defect in question does not

136 Ind. 460, 34 N. E. 15, 36 N. E. 353 (where the complaint was of the negligent maintenance of a low overhead bridge without any "telltales" to warn the trainmen).

In another Indiana case it was held that as the place at which the servant was directed to deposit hot slag was covered with water, it will be presumed, as against a demurrer, that this fact was known to the defendant. *New Albany Forge & Rolling Mill* v. *Cooper* (1892) 131 Ind. 363, 30 N. E. 294.

In Tennessee the doctrine has been propounded that the rule requiring knowledge to be averred is applicable only where the defect is latent and not discernible by ordinary observation, or by the application of the usual and approved tests, and that the complaint is good against a demurrer if the defects alleged were of such a character that the defendant was bound to take notice of them. *Morriss Bros.* v. *Bowers* (1900) 105 Tenn. 59, 58 S. W. 328.

[5] *Creamery Package Mfg. Co.* v. *Hotzepiller* (1900) 24 Ind. App. 122, 56 N. E. 250.

[6] A declaration is not demurrable which avers that such defects "would have been known to the defendants but for the want of all proper care and diligence on their part." *Noyes* v. *Smith* (1856) 28 Vt. 59, 65 Am. Dec. 222.

A general allegation of the master's knowledge of the defect is sufficient to include constructive as well as actual knowledge. *Louisville, E. & St. L. Consol. R. Co.* v. *Miller* (1895) 140 Ind. 685, 40 N. E. 116; *Lake Erie & W. R. Co.* v. *Mellenry* (1894) 10 Ind. App. 525, 37 N. E. 186.

[7] In *Wedgwood* v. *Chicago & N. W. R. Co.* (1877) 41 Wis. 478, the complaint was demurred to on the ground that it did not contain any allegation that the master had notice of the defect which caused the injury. But the court held the complaint sufficient, saying: "It is charged that the company carelessly and negligently omitted the usual and proper inspection of the car, or improperly inspected it, and also allowed the projecting bolt at the end of the car to remain without being cut off. The plaintiff was wholly unaware of the dangerous position of this bolt, and, while performing his duty, was thrown down by it and injured. These facts would seem to bring the case within the rule which imposes liability on the master for an injury to the servant occasioned by a defect in machinery furnished the servant to operate, where the master has been guilty of negligence in furnishing such machinery, or, knowing of a defect therein, fails to notify the servant of its existence. It is true, the defendant in the present case is a railroad corporation, and can only act through officers or agents. But this does not relieve it from responsibility for the negligence of its officers and agents whose duty it is to provide safe and suitable machinery for its road which its employees are to operate." See, however, note 2, *supra*.

[8] *Davis* v. *Central Vermont R. Co.* (1882) 55 Vt. 84, 45 Am. Rep. 590, approving the admission of such evidence.

render the complaint demurrable, if there is a general alleg
negligence, or of facts which show prima facie that he was
negligence.[9] The theory that a specific allegation that the d
knew of the defect which caused the servant's injury is not

[9] *Federal Courts.*—An allegation of the master's knowledge of the incompetence of a seaman placed in charge of a winch, upon sending the experienced winchman to attend to other duties, is unnecessary in a libel for injuries caused to a stevedore by such incompetence, where the facts showing the neglect of duty on the part of officers of the vessel to provide a competent winchman are clearly stated. *The Annies* (1899) 34 C. C. A. 558, 93 Fed. 240, Reversing (1898) 87 Fed. 565.

In *Halverson* v. *Nixen* (1876) 3 Sawy. 562, Fed. Cas. No. 5,970, the court referred to the ruling in the English case of *Couch* v. *Steel* (1854) 3 El. & Bl. 402, 2 C. L. Rep. 940, 23 L. J. Q. B. N. S. 121, 18 Jur. 515, note 3, *supra*, and expressed a doubt whether the allegation there held bad, viz., that "the owner so negligently, improperly, and insufficiently equipped and fitted said ship, that she was unseaworthy and unfit for the voyage," was not a sufficient averment of actual negligence or want of due care on his part.

Illinois.—*Chicago & E. I. R. Co.* v. *Hines* (1890) 132 Ill. 161, 23 N. E. 1021. See, however, note 3, *supra*.

Indiana.—A complaint which charges generally, that the defendant carelessly permitted its elevator to become dangerous, and to be and remain unfit for use, was held good, on the express ground that "a general allegation of negligence in the performance of, or in failing to perform, a duty which the law casts upon a defendant, resulting in injury to a plaintiff who is without fault, is sufficient to withstand a demurrer." *George H. Hammond & Co.* v. *Schweitzer* (1887) 112 Ind. 216, 13 N. E. 869.

In another case the court refused to sustain a demurrer to a complaint which, without alleging knowledge, averred that the defendant company had "negligently" allowed its road to get out of repair. *Pittsburgh, C. & St. L. R. Co.* v. *Adams* (1886) 105 Ind. 151, 5 N. E. 187.

In another case a complaint was upheld which simply averred that the defendant company "negligently used" in its business a defective brake, and did not specifically allege knowled
defect. *Ohio & M. R. Co.*
(1891) 128 Ind. 197, 27 N. E.

In other cases complaints
sufficient which merely cha
fendant with a "negligent"
furnish safe instrumentaliti
ville, P. & St. L. Consol. R.
(1892) 133 Ind. 265, 32 N.
Cleveland, C. C. & L. R. Co.
(1885) 100 Ind. 160.

In a still more recent
been declared by the court
be well settled in this clas
that the averment of negli
part of the defendant, and th
of the want of contributory
or knowledge of dangerous
the plaintiff, is to be deemed
against a demurrer, unless
specifically stated in the comp
the contrary. *Clark County*
v. *Wright* (1897) 16 Ind. A
N. E. 817 (citing *Chicago &*
Co. v. *Wagner* [1896] 17 Ind
45 N. E. 76; *Evansville & E.*
Mallott (1895) 13 Ind. App.
E. 549; *Eureka Block Co.*
Brewster (1895) 13 Ind.
46 N. E. 1101).

The doctrine applied in t
however, has been explicitly
in *Evansville & T. H. R. C*
(1893) 134 Ind. 156, 33 N.
that expression of opinion
date than any of the cases
except the one decided by t
appeals, it may be inferred
cases are no longer good law
so far as regards the partic
now under discussion.

Iowa.—A general allegatio
gence is good against a d
though it can be proved only
that the employer had actu
structive knowledge of t
O'Connor v. *Illinois C. R.*
83 Iowa 105, 48 N. W. 1002.
ing, it should be remarked,
on a motion to arrest the ju
made on the ground that th
to the complaint was one wh
form rather than to substan

Missouri.—An allegation t
fendant negligently furnish
ance which was defective an

where the duty to keep the instrumentality free from defects, and the breach of that duty, are averred, has been declared by one court from the general principle that the law charges every accountable person with a knowledge of his duty, and of what he has or has not done. The position taken is that a complaint which sets out the master's duty and its nonfulfilment must, in this point of view, be regarded as embracing, by implication, an allegation that he knew

equivalent to an averment that the defendant had notice of the defect in question. *Crane* v. *Missouri P. R. Co.* (1885) 87 Mo. 588. The court said: "To sustain the allegation in the petition that defendant negligently furnished a car that was defective and unsafe, the plaintiff would be required to prove the fact that the car was unsafe; and, also, the fact that defendant either knew, or by ordinary care might have known, of the defect, because without such proof the charge of negligence would be unsustained. The charge that defendant negligently furnished a defective and unsafe car, stating wherein it was defective, is as broad as if the charge had been that the defendant furnished such car, which it either knew, or might have known by due care, was defective and unsafe. In either case he would have to make the same proof." This case was followed in *Johnson* v. *Missouri P. R. Co.* (1888) 96 Mo. 340, 9 Am. St. Rep. 351, 9 S. W. 790.

In another case this court, commenting on the fact that the charge in the complaint was not that a certain handhold on a car was out of repair, but that it was "defectively constructed in this: that it was not fastened to the brakestaff securely," said that the plain meaning of this allegation was that the defect was one of design, and that, as this was the cause of action alleged, it was not necessary to state that the company negligently or carelessly adopted the brake, or continued to use it after ascertaining its unfitness. *Current* v. *Missouri P. R. Co.* (1885) 86 Mo. 62.

A petition which alleges that defendant, a railroad company, negligently and carelessly permitted a loose iron rail to remain upon the path alongside the track used by switchmen in the necessary discharge of their duties, is not defective by reason of the omission to allege that defendant had knowledge, or by ordinary attention to its duties would have known, that the rail lay upon the path. The omitted statement is substantially contained in the allegation made. *Hall* v. *Missouri P. R. Co.* (1881) 74 Mo. 298.

Those cases are in conflict with the decision of the court of appeals cited in note 3, *supra*.

Nebraska.—*Chicago, B. & Q. R. Co.* v. *Kellogg* (1898) 55 Neb. 748, 76 N. W. 462. Modifying on Rehearing (1898) 54 Neb. 127, 74 N. W. 451.

South Carolina.—It has been held that in an action to recover damages for an injury done by a master to his servant, an allegation that the injury was sustained by reason of neglect of duty on the master's part in furnishing proper machinery for the work required of the servant is not insufficient in failing to allege further that the master knew of the defect in the machinery; as want of knowledge, through no absence of due diligence in acquiring it, is a matter of defense, and therefore need not be set forth as a part of plaintiff's cause of action. *Branch* v. *Port Royal & W. C. R. Co.* (1892) 35 S. C. 195, 14 S. E. 808. The court said: "We think, therefore, that knowledge on the part of the defendant company in this case of the defect in the machinery, by reason of which the injury complained of was sustained, constitutes no part of the plaintiff's cause of action, but is a matter of defense. Indeed, to hold otherwise would, as it seems to us, in violation of the well settled rule as to the degree of negligence which would make the master liable to his servant, require a much higher degree of negligence; for where a master knowingly furnishes his servant with machinery so defective as to be unsafe, he displays such a reckless disregard of human life, that his conduct could not properly be characterized as exhibiting anything less than the grossest negligence. If, therefore, knowledge on the part of the master of the defect in the machinery constitutes an essential element in the cause of action, then it follows that the only degree of negligence for which a master could be held liable for an in-

what his obligation was in the premises, and his own failure
what was incumbent upon him by reason of that obligation.[10]

857. Averment of the servant's ignorance of the dangerous cond

—*a. Generally.*—That a complaint is good which, in addition
averments discussed in the beginning of the preceding section
tains an express allegation that the servant had no notice
danger in question, is not disputed.[1] But the question whethe
necessary to introduce such an allegation in order to render th
plaint proof against a demurrer has received different answ
different courts.

b. Doctrine that a complaint not containing an averment of
ance is bad.—One view is that the statement of claim is not
against a demurrer unless it contains an averment that the
which caused the accident was not known to the injured ser

jury sustained by his servant by reason of a defect in the machinery with which he is furnished to do the work for which he is employed, would be the grossest negligence; but if it is held, as we do hold, that want of knowledge on the part of the master is a matter of defense, which, if shown, may excuse the failure to perform an acknowledged duty, then no such consequence follows, and the well settled rule of ordinary negligence may be applied."

West Virginia.—*Hoffman* v. *Dickinson* (1888) 31 W. Va. 142, 6 S. E. 53.

[10] *Chicago & E. I. R. Co.* v. *Hines* (1890) 132 Ill. 161, 22 Am. St. Rep. 515, 23 N. E. 1021.

[1] Specific authority as to the elementary proposition is scarcely needed. But see *Conrad* v. *Gray* (1895) 109 Ala. 130, 19 So. 398; *Cummings* v. *Collins* (1876) 61 Mo. 520; *Miller* v. *Itasca Cotton Seed Oil Co.* (1897; Tex. Civ. App.) 41 S. W. 366.

[2] *England.*—In *Griffiths* v. *London & St. K. Docks Co.* (1884) L. R. 13 Q. B. Div. 259, 53 L. J. Q. B. N. S. 504, 51 L. T. N. S. 533, 33 Week. Rep. 35, 49 J. P. 100. Affirming L. R. 12 Q. B. Div. 493, and Approving *Williams* v. *Clough* (1858) 3 Hurlst. & N. 258, 27 L. J. Exch. N. S. 325, as a whole, but not expressing any opinion as to the suggestion of Bramwell, B., that the declaration ought to have gone further and shown that the servant had not the means of knowing the danger, it was said by Bowen, L. J.: "The old form of declaration used to show that the danger which caused the accident was known to the master and unknown to the servant. Both these allegati
material, because without them t
no cause of action, and unless
proved at the trial directly,
there were facts from which it
inferred, that the servant was
of the danger, he would be non

In the same case also it was re
by Brett, M. R.: "The ques
whether a prima facie cause of
is shown in the statement of
this action. Now where it is a
by a servant against his master
wrongful condition of machinery
premises on which the servant is
or of the condition of the
which the services of the servant
be fulfilled, if the servant confi
allegations in his statement of
alleging the existence of danger
of these things owing to the n
of the master, he shows no caus
tion. That was decided many y
by *Priestley* v. *Fowler* (1837) 3
W. I. Murph. & H. 305, 1 Jur
L. J. Exch. N. S. 42. If the d
one which was known to the m
not to the servant, the knowled
master and the want of knowled
servant make together a cause o
and as it is necessary that th
things should exist in order to
prima facie cause of action, it i
sary that they should be shown
in the statement of claim."

The same doctrine is tak
granted in *Williams* v. *Clough*
Hurlst. & N. 258, 27 L. J. Ex
325, the special point there de
ing stated in note 3, *infra*.

Federal Courts.—*Dunmead* v

or (according to some authorities), states facts which raise a prima facie presumption of ignorance on his part.[3]

The better opinion seems to be that under this doctrine a com-

can Min. & Smelting Co. (1882) 4 McCrary 244, 12 Fed. 847.

Illinois.—A plaintiff must aver his want of knowledge if he intends to rely upon it. *Kinnare* v. *Chicago* (1897) 70 Ill. App. 106. *Contra*, see cases cited in note 7, *infra*.

Indiana.—*Indiana, B. & W. R. Co.* v. *Dailey* (188[illegible] 110 Ind. 75, 10 N. E. 631; *Louisville, N. A. & C. R. Co.* v. *Sandford* (1888) 117 Ind. 265, 19 N. E. 770; *Louisville, N. A. & C. R. Co.* v. *Corps* (1890) 124 Ind. 427, 8 L. R. A. 636, 24 N. E. 1046; *Big Creek Stone Co.* v. *Wolf* (1894) 138 Ind. 496, 38 N. E. 52; *Lake Shore & M. S. R. Co.* v. *Stupak* (1886) 108 Ind. 1, 8 N. E. 630; *Spencer* v. *Ohio & M. R. Co.* (1892) 130 Ind. 181, 29 N. E. 915; *Cleveland, C. C. & St. L. R. Co.* v. *Parker* (1900) 154 Ind. 153, 56 N. E. 86; *Lafayette Carpet Co.* v. *Stafford* (1900) 25 Ind. App. 187, 57 N. E. 944; *Chicago & A. E. R. Co.* v. *Wogner* (1896) 17 Ind. App. 22, 45 N. E. 76, 1121; *Pennsylvania Co.* v. *Witte* (1896) 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377; *Standard Cement Co.* v. *Minor* (1901) 27 Ind. App. 479, 61 N. E. 684.

In view of the above decisions it is clear that the ruling to the opposite effect in *Indianapolis & C. R. Co.* v. *Klein* (1858) 11 Ind. 38, is no longer good law in this state.

Kentucky.—*Bogenschutz* v. *Smith* (1886) 84 Ky. 330, 1 S. W. 578 (citing *Griffiths* v. *London & St. K. Docks Co.* [1884] L. R. 13 Q. B. Div. 259, 53 L. J. Q. B. N. S. 504, 51 L. T. N. S. 533, 33 Week. Rep. 35, 49 J. P. 100). Later decisions to a contrary effect are cited in note 7, *infra*.

Maine.—*Buzzell* v. *Laconia Mfg. Co.* (1861) 48 Me. 113, 77 Am. Dec. 212.

Nebraska.—A petition which does not aver that the servant was excusably ignorant of the danger which resulted in the injury does not state a cause of action. *Missouri P. R. Co.* v. *Baxter* (1891) 42 Neb. 793, 60 N. W. 1044.

Ohio.—*Mad River & L. E. R. Co.* v. *Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312.

The servant must either aver his want of knowledge of the defect which caused the injury, or that, having such knowledge, he informed the master, and continued in the employment upon a promise, express or implied, to remedy the defect. *Chicago & O. Coal & Car Co.* v. *Norman* (1892) 49 Ohio St. 598, 32 N. E. 857.

Tennessee.—In *Morriss Bros.* v. *Bowers* (1900) 105 Tenn. 59, 58 S. W. 328, the trial court sustained a demurrer based on the ground that the servant's ignorance was not averred. This ruling was not referred to by the supreme court.

Vermont.—In *Brainard* v. *Van Dyke* (1899) 71 Vt. 359, 45 Atl. 758, a complaint was held bad on the ground that the servant's knowledge was not expressly negatived, although there is an express averment that he was not "notified of" the danger. But the reasonable inference surely is that the pleader here used the words "notified of" in their colloquial, though incorrect sense, as being equivalent to "know." The case scarcely seems to be one for a formal demurrer, though it may be that a motion to make the complaint more definite would have been properly granted.

Virginia.—In one case this court sustained a demurrer to a complaint based on the ground that the knowledge of the servant was not negatived therein. *Norfolk & W. R. Co.* v. *Jackson* (1888) 85 Va. 489, 8 S. E. 370. But there is a later ruling to a contrary effect. See note 7, *infra*.

[3] An allegation to the effect that the injury was received while the servant was in the performance of new work is sufficient, as being an implied averment of want of knowledge. *Clark County Cement Co.* v. *Wright* (1897) 16 Ind. App. 630, 45 N. E. 817.

The want of an averment by the plaintiff, that at the time he entered the service he had no knowledge of the negligent habits of the fellow servant through whose negligence he was injured, is not cured by an allegation that the plaintiff was "wholly unacquainted" with the fellow servant when he took the employment. *Lake Shore & M. S. R. Co.* v. *Stupak* (1886) 108 Ind. 1, 8 N. E. 630.

An averment that the master failed to inform the servant of the condition of an appliance is not a sufficient allegation of the servant's want of knowledge. Such an averment is quite consistent with his having been apprised of it by

plaint which alleges that the injured servant did not know tha appliance which caused his injury was unsafe is sufficient, wit an additional averment to the effect that he had no notice of tha safety,[4] and that it is not necessary to aver specifically that he no means or opportunity to know the condition of the defectiv strumentality, or that he could not have known of it by the u ordinary care.[5] But there is some authority for a stricter theor

c. Doctrine that a complaint not containing an averment of i ance is good.—Another view is that the servant's knowledge an

some other person, or his having learned it by observation and experience. *Becker* v. *Baumgartner* (1892) 5 Ind. App. 576, 32 N. E. 786.

[4] *Williams* v. *Clough* (1858) 3 Hurlst. & N. 258, 27 L. J. Exch. N. S. 325.

[5] See cases cited in § 410, *ante*, and also *Ohio & M. R. Co.* v. *Pearey* (1891) 128 Ind. 197, 27 N. E. 479; *Evansville & T. H. R. Co.* v. *Ibel* (1893) 134 Ind. 156, 33 N. E. 356; *Heltonville Mfg. Co.* v. *Fields* (1894) 138 Ind. 58, 36 N. E. 529; *Louisville, N. A. & C. R. Co.* v. *Breedlove* (1894) 10 Ind. App. 6[illegible]38 N. E. 357; *Consolidated Stone C[illegible]v. Williams* (1900) 26 Ind. App. [illegible]4 Am. St. Rep. 278, 57 N. E. 558; *[illegible] & E. I. R. Co.* v. *Richards* ([illegible]) .8 Ind. App. 46, 61 N. E. 18; *Pe[illegible]a Co.* v. *Witte* (1896) 15 Ind. A[illegible]), 43 N. E. 319, 44 N. E. 377. The above cited decisions of the Indiana supreme court do not refer to the ruling to the contrary effect which is mentioned in the next note, but they must be regarded as having impliedly overruled it.

A declaration of a baggage master, alleging substantially that it was his duty to preserve the safety of the passengers; that, after being notified that new wheels had been put under a car, and to look out for them, he heard a noise indicating they were hot, and, while looking out of a side door of the baggage car to see to their condition, he, without fault or negligence on his part, was struck by the spout of a tank, resulting from defendant's negligence in locating the spout; and that he did not know it was so near the track,—was held good on general demurrer, the court being of opinion that a special demurrer was necessary to bring up an objection to the complaint based on the fact that it did not allege that it was no part of the servant's duty to have known where the spout was located. *Atlanta & C. Air-Line R. Co.* v. *Woodruff* (1881) 66 Ga. 707.

A complaint is not demurrable ground that because it alleges a in a coupling apparatus to have "patent and open to the inspec the railway company if an exami of the same had been made," it the defect to have been one whic obvious to ordinary careful obser and consequently one which the tiff might have avoided by the e of due care. The words will b strued as meaning that the defe one which could have been easi covered in a careful examination company's inspectors. *Louisville & C. R. Co.* v. *Howell* (1896) 1 266, 45 N. E. 584.

[6] In *Williams* v. *Clough* (18 Hurlst. & N. 258, 27 L. J. Exch. 325, Bramwell, B., considered th declaration ought also to show t plaintiff had not the means of k of the unsafety. But, as already the other members of the court agree with him on this point.

In an Indiana case it was lai that, where the injury results f negligence of a fellow servant, th plaint should allege that the p did not know, or have the same of knowing, of the negligence skillfulness of such servant. *B. & W. R. Co.* v. *Dailey* (18 Ind. 75, 10 N. E. 631. One of thorities cited is *Lake Shore & Co.* v. *Stupak* (1886) 108 Ind. 1. 630. But that case only goes extent of requiring the servant tive actual knowledge. Another lied on is *Atlas Engine Works dall* (1884) 100 Ind. 293, 50 A 798. But this contains no r any point of pleading. On th hand, the later cases cited in t note show that, whatever may on been the doctrine in this state, of the servant's means of knowl now unnecessary.

deductions based thereon constitute matters of defense, and that it is for this reason unnecessary to negative such knowledge in the complaint.[7] Under this doctrine also it has been held that, if the existence of the defect was actually unknown, but should have been known, the fact that the servant had equal means of knowledge need not be negatived in the complaint.[8]

d. Effect of an averment that the servant was not negligent.—If the hypothesis could be entertained, for the purposes of any particular case, that the defense upon which the master had definitively elected to rely was contributory negligence, or if the theory were adopted

[7] *United Kingdom.*— In *Watling* v. *Oastler* (1871) L. R. 6 Exch. 73, 40 L. J. Exch. N. S. 43, 23 L. T. N. S. 815, 19 Week. Rep. 388, it was held, on grounds explained in the following subsection, that an averment of the plaintiff's ignorance was not necessary. A few years earlier the Irish court of exchequer had also expressed the opinion that there is no universal rule to the effect that the declaration in an action for injuries to a servant caused by the appliances with which the work is carried on must contain an averment that the plaintiff was ignorant of the danger. *Smyly* v. *Glasgow & L. Steam Packet Co.* (1868) Ir. Rep. 2 C. L. 24, 16 Week. Rep. 483. But in view of the English decisions cited in note 2, *supra*, these rulings cannot be regarded as embodying the authoritative doctrine.

California.— *Magee* v. *North Pacific Coast R. Co.* (1889) 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114; *Robinson* v. *Western P. R. Co.* (1874) 48 Cal. 409; *McQuilken* v. *Central P. R. Co.* (1875) 50 Cal. 7.

Illinois.— The fact that the servant did not know the dangerous conditions which caused his injury is evidentiary in its nature, and therefore it need not be averred. *Consolidated Coal Co.* v. *Scheiber* (1896) 65 Ill. App. 304. *Contra*, see case cited in note 2, *supra*.

Kentucky.— *Southern R. Co.* v. *Durall* (1899) 21 Ky. L. Rep. 1153, 54 S. W. 741; *Chesapeake & N. R. Co.* v. *Venable* (1901) 23 Ky. L. Rep. 427, 63 S. W. 35. These decisions indicate an abandonment of the doctrine adopted in the earlier case cited in note 2, *supra*. But, as will be shown in the following subsection, they rest, in common with other decisions to the same effect, upon a theory as to the defenses open to the master which is not accepted by the majority of the courts.

Missouri.—*Ducrst* v. *St. Louis Stamping Co.* (1901) 163 Mo. 607, 63 S. W. 827; *Crane* v. *Missouri P. R. Co.* (1885) 87 Mo. 588; *Cummings* v. *Collins* (1876) 61 Mo. 520; *Fisher* v. *Central Lead Co.* (1900) 156 Mo. 479, 56 S. W. 1107, disapproving *dictum* to contrary effect in *Epperson* v. *Postal Teleg. Cable Co.* (1899) 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050, and overruling *Thompson* v. *Chicago, R. I. & P. R. Co.* (1899) 2 Mo. App. Rep. 653.

The same rule of pleading is applicable in actions brought under Mo. Rev. Stat. 1889, § 7074, for injuries caused by the failure to furnish props in a mine. *Adams* v. *Kansas & T. Coal Co.* (1900) 85 Mo. App. 486.

Rhode Island.— The declaration in an action to recover for injuries sustained by plaintiff's intestate in the course of his employment need not allege that he was not fully informed as to his surroundings and the condition of the belting where he was required to work, and that he did not continue to work there without objection, and that he did not assume the risk of injury. *Lee* v. *Reliance Mills Co.* (1899) 21 R. I. 322, 43 Atl. 536.

South Carolina.—*Carter* v. *Oliver Oil Co.* (1890) 34 S. C. 211, 27 Am. St. Rep. 815, 13 S. E. 419; *Donahue* v. *Enterprise R. Co.* (1889) 32 S. C. 299, 17 Am. St. Rep. 854, 11 S. E. 95.

Virginia.— *Richmond Granite Co.* v. *Bailey* (1896) 92 Va. 554, 24 S. E. 232. The earlier ruling, cited in note 2, *supra*, is not referred to by the court, but is presumably superseded by this decision.

West Virginia.— *Hoffman* v. *Dickinson* (1888) 31 W. Va. 142, 6 S. E. 53.

Wisconsin.— *Hulchan* v. *Green Bay, W. & St. P. R. Co.* (1887) 68 Wis. 520, 32 S. W. 529; *Behm* v. *Armour* (1883) 58 Wis. 1, 15 N. W. 806.

[8] *Cummings* v. *Collins* (1876) 61 Mo. 520.

that this is the only defense which can be founded on the fact servant's knowledge of the risk, an averment that the injury v ceived without fault on his part might, it is evident, be pr taken as including by implication the allegation that he was ig of that risk. See, generally, §§ 119–121, 295, 319, 320, *ante*, hypothesis here suggested apparently underlies decisions by th lish Court of Exchequer,[9] and by the Kentucky court of app The theory thus indicated may perhaps be also regarded as th rationale of three decisions rendered in states where, althou defense of assumption of risks is recognized, the courts consider form of contributory negligence.[11] But neither the hypothe-

[9] In the case referred to the ruling was that a declaration stating that the defendant was owner of a factory and machine; that W. was employed by him to work therein, and in the course of his employment it was necessary for him to enter the machine to clean it; that by the negligence of the defendant it was unsafely constructed and in a defective condition, and was, by reason of not being sufficiently guarded, unfit to be used and entered, as the defendant well knew; and by reason of the premises, and also by reason, as he well knew, of no sufficient apparatus having been provided by him to protect W., it was suddenly put in motion while he was at work in the machine, and he thereby sustained injuries from which he afterwards died,—sufficiently shows that the machine was set in motion by the defendant's negligence, and therefore discloses a cause of action, although there is no allegation that W. was ignorant of the dangerous and defective character of the machine. *Watling* v. *Oastler* (1871) L. R. 6 Exch. 73, 23 L. T. N. S. 815, 19 Week. Rep. 388, 40 L. J. Exch. N. S. 43. The position taken was that the averment that the injury was caused "by reason of the negligence of the defendant" was equivalent to an averment under the older forms of pleading, that the injury was caused by the defendant's "mere" negligence. Virtually, therefore, the plaintiff was alleging himself to be free from contributory negligence, and such an allegation necessarily implied an assertion on his part that he was ignorant of the defect in question. The decision, therefore, is essentially one to the effect that the complaint was sufficiently definite with respect to the allegation that due care had been exercised by the servant, and that, as it virtually included such an allegation, the further conclusion followed that it virtually included also an allegatio norance on the servant's part. this is the rationale of the case i by the passage quoted in § 863, *infra*. See also the comment upon the ruling by Bowen, L. J. *Griffiths Case* (1884) L. R. 13 Q. 259, 53 L. J. Q. B. N. S. 504, 5 N. S. 533, 33 Week. Rep. 35, 4 100, referred to in note 2, *ante*.

[10] In one case it was laid do the plaintiff's ignorance of the need not be specifically alleged. dence tending to show such igno competent under the plea of c tory negligence. *Southern R. Durall* (1899) 21 Ky. L. Rep. S. W. 535.

In another it was held tha brakeman, who is suing for caused by a defective roadbed, der no duty, and had no oppo to examine it, it was not neces him to aver or prove that he know of the existence of the *Chesapeake & N. R. Co.* v. (1901) 23 Ky. L. Rep. 427, 63 S

[11] In *La Salle* v. Kostka (19 Ill. 130, 60 N. E. alleg the exercise of c he was treated as an imp. a al that he was ignorant of the d question. (For the Illinois d see § 298a, *ante*, and sections to.)

In an earlier case this court h that, as the jury must have fo finding the defendant guilty, t deceased was not guilty of cont negligence, such an allegation v tainly sufficient on error, but frained from expressing an opi to whether it would have be against a demurrer. *Chicago Co.* v. *Hines* (1890) 132 Ill. 168, St. Rep. 515, 23 N. E. 1021.

In *Behm* v. Armour (1883) 5

the theory referred to at the beginning of this subsection is applicable or available under the doctrine which prevails in most jurisdictions, *viz.*, that evidence of a servant's having begun or continued work with a knowledge of a given risk will warrant, according to the point of view, either the inference that he assumed that risk, or that he was negligent. See § 306, *ante*. In Indiana and Ohio it has been held that a necessary corollary of this doctrine is that an allegation of freedom from contributory negligence does not adequately supply the place of an allegation of ignorance of the risk.[12] In Georgia a similar position has been taken, but the conclusion of the court was based upon a wholly different ground, *viz.*, that a complaint in which there is no specific averment of ignorance is not sufficiently definite.[13]

15 N. W. 806, the court considered itself bound, under the liberal rule which was followed in Wisconsin with regard to the construction of pleadings, to effectuate the pleader's intention by holding that a complaint averring freedom from contributory negligence sufficiently negatived any knowledge on the part of the plaintiff, or reasonable means of knowledge, that the appliance in question was an unsafe one. The reason thus assigned evidently does not go to the root of the matter. (For the Wisconsin doctrine as to the nature of the defense of assumption of risks, see § 310, note 7, *ante*.)

[11] *Louisville, N. A. & C. R. Co.* v. *Corps* (1890) 124 Ind. 429, 8 L. R. A. 636, 24 N. E. 1016, where the court pointed out that "it may be true that an employee exercises the utmost care, and yet be true that the risk assumed was an incident of the service in which he was engaged." This case was followed in *Kentucky & I. Bridge Co.* v. *Eastman* (1893) 7 Ind. App. 514, 34 N. E. 835; *Chicago & E. R. Co.* v. *Lee* (1897) 17 Ind. App. 215, 46 N. E. 513. In view of these rulings a recent decision of the Indiana court of appeals, to the effect that the plaintiff's knowledge need not be specifically alleged, where it is averred that he was free from fault, must be pronounced erroneous. *Summit Coal Co.* v. *Shaw* (1896) 16 Ind. App. 9, 44 N. E. 676.

In *Chicago & O. Coal & Car Co.* v. *Norman* (1892) 49 Ohio St. 598, 32 N. E. 857, the court thus stated its conclusion with regard to the contention that an averment that the roof of the mine in question fell and caused the death of plaintiff's decedent, "without fault on his part," included by implication an averment that the character of the roof of a mine and the insufficiency of its supports were unknown to the deceased: "After a careful consideration of the question, we are of the opinion that, both upon principle and authority, the demurrer should have been sustained. The deceased may at the time have been without any fault contributing to his injury,—may have been extremely careful,—and yet fully aware of the danger to which he was exposed from the insecurity of the roof of the mine; and a failure to communicate such fact to the employer is not a mere matter of defense that should be pleaded, but a defect in the ground on which his liability is asserted; that is to say, actionable negligence."

[12] "The allegation that the deceased was without fault is too general and too much in the nature of a legal conclusion to serve as a substitute for the proper allegation of his want of knowledge. If he was ignorant, that was a specific fact upon which issue could be taken; and if it was true, there could be no good reason why it was not alleged. The omission to allege it is better accounted for on the theory that it did not exist than on any other. Our law requires that the cause of action shall be 'plainly, fully, and distinctly' set forth; and the rule is that pleadings shall be taken most strongly against the pleader." *Allen* v. *Augusta Factory* (1888) 82 Ga. 76, 8 S. E. 63. As regards the special consideration upon which this ruling is based, it is noteworthy that the theory entertained by the court as to the necessary particularity of the allegations of a complaint is in direct antagonism to that of the

858. Averment of the servant's freedom from contributory n gence.—(See also § 857, subd. *d, supra.*) A complaint which, in tion to the averments discussed in the two preceding section cludes an allegation that the injured servant was free from gence, is unquestionably good against a demurrer.[1] But the au ties are conflicting as to the sufficiency of a complaint in which is no allegation to this effect.

One doctrine is that the complaint is demurrable unless it contains an express allegation that the servant did not contribu his injury by his own fault or negligence, or states facts from the absence of such fault or negligence is clearly apparent.[2]

On the other hand, several courts have adopted the rule that tributory negligence, being matter of defense, need not be nega in the complaint.[3]

English judges who decided the case cited in note 9, *supra*, and in § 863, note 1, *infra*.

[1] *Ohio & M. R. Co.* v. *Heaton* (1894) 137 Ind. 1, 35 N. E. 687; *George H. Hammond & Co.* v. *Schreiter* (1887) 112 Ind. 246, 13 N. E. 869; *Clark County Cement Co.* v. *Wright* (1897) 16 Ind. App. 630, 45 N. E. 817.

[2] *England.*—In *Watling* v. *Oastler* (1871) L. R. 6 Exch. 73, 40 L. J. Exch. N. S. 43, 23 L. T. N. S. 815, 19 Week. Rep. 388 (for actual point decided, see § 857, note 9, *supra*), the court seems to have proceeded on the theory that it was necessary to read into the complaint an implied allegation of freedom from contributory negligence. But the doctrine now prevailing in England that the onus of proving contributory negligence rests on the defendant (see § 842, *ante*), seems to involve, as a necessary corollary, the conclusion that the plaintiff is not bound to negative such negligence by an express averment.

Federal Courts.—*Dunmead* v. *American Min. & Smelting Co.* (1882) 4 McCrary, 244, 12 Fed. 847.

Indiana.—*Evansville & C. R. Co.* v. *Dexter* (1865) 24 Ind. 411.

An averment that the plaintiff was "without fault" is good as an averment negativing contributory negligence on his part. *Rogers* v. *Overton* (1882) 87 Ind. 410.

A complaint which shows that the accident happened without the fault of plaintiff is not demurrable for the reason that "it nowhere directly alleges that he did not himself contribute to the sickness, loss of time and labor, and paralysis for which he also claims ages." *Ohio & M. R. Co.* v. *N* (1880) 71 Ind. 271.

A complaint containing alleg which merely show freedom from gence up to a time which is sep by an appreciable interval fro actual moment of the accident is rable. *LaFayette Carpet Co.* v. *ford* (1900) 25 Ind. App. 187, 57 944.

The rule in this state is now c by Burns's Rev. Stat. (Ind.) 190 359a, by which it is provided t shall not be necessary for the p to allege or prove the want of co tory negligence, that such neg shall be a matter of defense, and may be proved under the answer eral denial. This act has been d to be constitutional. *Indi Street R. Co.* v. *Robinson* (190 Ind. 232, 61 N. E. 197.

Ohio.—*Mad River & L. E. R. Barber* (1856) 5 Ohio St. 541, Dec. 312.

[3] *Alabama.*—*Columbus & W. R. Bradford* (1888) 86 Ala. 574, 6 (action was under the employe bility act; see chapter XXXVII., *a*

California.—*Magee* v. *North Coast R. Co.* (1889) 78 Cal. 430, St. Rep. 69, 21 Pac. 114; *Robi Western P. R. Co.* (1874) 48 Ca *McQuilken* v. *Central P. R. Co.* 50 Cal. 7.

Georgia.—A petition in an act personal injuries to an employ though it contains allegations izing the inference that it was pl duty to have known and to h

859. Necessary correspondence between the allegata and probata — The conclusions which have been arrived at in dealing with the question whether there was or was not a variance under the given circumstances are indicated by the decisions of which the effect is stated below.[1]

moved the cause from which his injuries resulted, is good as against a general demurrer, where it affirmatively alleges that plaintiff was "wholly without fault," and that at the time of the injury he was attending to his duties, and was not aware of the danger to which he was exposed. *Blackstone* v. *Central R. Co.* (1898) 105 Ga. 380, 31 S. E. 90.

Illinois.—*Wabash, St. L. & P. R. Co.* v. *Shacklet* (1883) 105 Ill. 364, 44 Am. Rep. 791; *Chicago & N. W. R. Co.* v. *Coss* (1874) 73 Ill. 394; *Chicago & E. I. R. Co.* v. *Hines* (1889) 33 Ill. App. 271.

Mississippi.—*Buckner* v. *Richmond & D. R. Co.* (1895) 72 Miss. 873, 18 So. 449.

Missouri.— The doctrine applied by this court, and the reasons for adopting it, are shown by the following passage: "If the onus of proving contributory negligence or of knowledge on the part of plaintiff of defective machinery rests on the defendant, it would be a singular rule of pleading to require a plaintiff to aver negatively that he was not guilty of contributory negligence, or did not have knowledge of defective machinery, neither one of which he would be required to prove to make out his case, but which the defendant would be required to prove to make out his defense. The denial of a negative proposition is the affirmation of its opposite, and the general rule is that he who bases a right on an affirmative proposition must establish it." *Crane* v. *Missouri P. R. Co.* (1885) 87 Mo. 588.

This rule of pleading is also applicable to actions brought under Mo. Rev. Stat. 1889, § 7074, for injuries caused by the failure to furnish props in a mine. *Adams* v. *Kansas & T. Coal Co.* (1900) 85 Mo. App. 486.

Virginia.—*Norfolk & W. R. Co.* v. *Jackson* (1888) 85 Va. 489, 8 S. E. 370; *Richmond Granite Co.* v. *Bailey* (1896) 92 Va. 554, 24 S. E. 232.

Texas.—An allegation that the plaintiff did not know of the existence of the hole in the track which caused his injury, not having been informed of it, and his duties not having previously required him to perform any work at that particular place, is good on general demurrer. *San Antonio & A. P. R. Co.* v. *Parr* (1894: Tex. Civ. App.) 26 S. W. 861.

Wisconsin.—In an action under the act of 1893 (see chapter XXXIX., *ante*), it has been held that the insertion of the words "without contributory negligence on his part" do not change the common-law rule so as to make it necessary to plead the contributory negligence as a defense. *Andrews* v. *Chicago, M. & St. P. R. Co.* (1897) 96 Wis. 348, 71 N. W. 372.

[1](a) *Cases in which there was held to be a variance.*—An employee cannot recover for an injury on the ground that the machine was defective, in the absence of any allegation in his declaration that the injury resulted from such defects. *Eckles* v. *Norfolk & W. R. Co.* (1896) 96 Va. 69, 25 S. E. 545.

Recovery cannot be had on proof of any defects in a machine other than those which he has specifically alleged. *Arcade File Works* v. *Juteau* (1895) 15 Ind. App. 460, 40 N. E. 818, 44 N. E. 326; *Conrad* v. *Gray* (1896) 109 Ala. 130, 19 So. 398.

Where the negligence alleged is that boards were "uneven, unsound, rotten, unsafe, and defective," he cannot recover upon the theory that sound boards were not sufficiently strong, or that the ground where they were used was soft, so that a loaded truck, when being wheeled over the boards, depressed the ends, causing the load to fall on him. *Shanke* v. *United States Heater Co.* (1900) 125 Mich. 346, 84 N. W. 283.

Where the complaint contains an allegation that defendant negligently constructed a scaffold of insufficient strength to support the weight placed on it, this allegation being followed by a recital of the circumstances of the accident, in which it is alleged a board of insufficient strength, placed across an area, broke, and there is also another allegation that the scaffold was overloaded, and in consequence thereof it broke, and an averment, not specifying any defect in construction, but merely stating that there was negligence in the use of the scaffold, there can be recovery without proof that the board over the area broke.

860. Redundancy.—In a suit for injury from the master's
gence, only the negligence causing the mischief should be decla

Coates v. *Chapman* (1900) 195 Pa. 109, 45 Atl. 676.

Where the complaint specifies an injury caused by the defective construction of an appliance, the jury is properly informed that the plaintiff cannot recover upon evidence which tends to show that the injury was caused by the carelessness of a superior employee in preparing the appliance for use. *Drinkout* v. *Eagle Mach. Works* (1883) 90 Ind. 423.

Recovery cannot be had on the ground that incompetent servants were employed, if the declaration charges only the improper construction of the elevator which caused the injury, and its careless use and management. *Sell* v. *Charles Rietz & Bros. Lumber Co.* (1888) 70 Mich. 479, 38 N. W. 451.

Proof of failure of a railroad company to furnish an engineer with the necessary assistants to maintain a lookout to avoid accidents is a fatal variance from a petition which bases the charge of negligence on the employment of an incompetent engineer; and a general charge of negligence in the petition does not obviate the variance, where the petition after such general charge returns to the specific charge of incompetency and keys its general charge of negligence to the specific charge first made. *Missouri, K. & T. R. Co.* v. *Shockman* (1898) 59 Kan. 774, 52 Pac. 446.

Where a complaint specifies certain acts of negligence on the part of a designated employee, recovery cannot be had upon proof of the commission of other acts of negligence by another employee. *Thomas* v. *Louisville & N. R. Co.* (1896) 18 Ky. L. Rep. 164, 35 S. W. 910.

Under a declaration alleging an injury caused by certain negligent acts of a designated vice principal, a servant cannot recover either upon evidence which shows the breach of a general duty owed to him by the defendant, or upon evidence which indicates culpability on the part of some other employee whose negligence is not specifically alleged. *Chicago & E. I. R. Co.* v. *Driscoll* (1898) 176 Ill. 330, 52 N. E. 921, Reversing (1897) 70 Ill. App. 91.

There is a fatal variance where the petition sets forth that the plaintiff was injured through the negligence of the company in "using defective machinery," and "in running its cars," etc., and the evidence shows that the injury was caused by a broken rail. *Wa*
Hannibal & St. J. R. Co. (1880)
514 (Norton and Napton, JJ., c
servant for personal injuries

Where a complaint in an act
negligence in failing to furnish
appliances, and the evidence sh
plaintiff was instructed to e
mouth of the cotton bin of an
and drag down cotton seed wh
become clogged therein, and t
seed slipped down and crushed
will not sustain a verdict for
on account of such alleged defe
pliances. *Brown* v. *Miller* (19
Civ. App.) 62 S. W. 547.

It has been held that, under a
allegation that the cars which
his injury were carelessly ha
switchman cannot recover for
which are shown to have result
"kicking" those cars. *Missou*
T. R. Co. v. *Baker* (1900; T
App.) 58 S. W. 964. But the
ness of this ruling may well be

The widow of a deceased serv
suit against a railroad company
homicide of her husband cannot
any acts of negligence which
charged in the declaration. *Ge*
& Blg. Co. v. *Oaks* (1874) 52

Where the specific breach of
lied upon in the servant's de
is the failure of the defendan
struct him as to the proper m
which ties should be loaded o
way car, he cannot, in an actio
cover for injuries due to the fal
of the ties, recover on the the
there was a defect in the car.
East & West R. Co. (1889) 84
20 Am. St. Rep. 352, 10 S. E. 5

(b) *Cases in which there was be no variance.*—An instructio
finding for defendant on the g
variance between the declarat
proof is properly refused, wh
plaintiff's testimony clearly t
support the declaration. *Gun*
Schott (1900) 95 Ill. App. 1
ment affirmed in (1901) 192
85 Am. St. Rep. 348, 61 N. E.

Under general allegations
gence of defendant, the plaint
show that the negligence con
the acts or omissions of defe
its superior or managing officer.
alone by the negligent act of
servant. *Olson* v. *St. Paul, M.*
Co. (1886) 34 Minn. 477, 26 N.

A declaration alleging that the defendant carelessly and negligently permitted a railroad track and a car to become and remain defective is sustained by evidence that they became and remained defective through his personal negligence in not discovering and remedying the defects, if he took upon himself that branch of the business. *Fifield v. Northern R. Co.* (1860) 42 N. H. 225.

Where a workman in the employ of a telegraph company is injured through a defective telegraph pole, the allegation of negligence is sustained by proving the danger from the defect in the pole, and that it was known to the defendants. *Byron v. New York State Printing Teleg. Co.* (1857) 26 Barb. 39.

There is no such variance as to work a surprise to the defendant, where the evidence in an action against a railway company showed that it was necessary for plaintiff, as brakeman, to climb up the ladder on the side of the cars, while in motion, and the petition alleged that it was necessary for him to ride back and forth on the ladder on the side of the cars. *Potter v. Detroit, G. H. & M. R. Co.* (1899) 122 Mich. 179, 81 N. W. 80, Reversed on rehearing in (1900) 122 Mich. 205, 82 N. W. 245, but not as regards this point.

In an action for injuries received by plaintiff while in defendant's employ in digging a shaft, where the complaint avers that, as a consequence of the careless manner in which the shaft was constructed, and the neglect of defendant in not planking or properly securing the sides thereof, without any fault on plaintiff's part, the sides of the shaft fell in upon him, and that defendant, "well knowing in the premises the danger of said shaft to those employed therein," negligently, etc., directed plaintiff to proceed to the bottom thereof and dig there, without advising him of the danger, etc., and the negligence shown by the proof (if any) is that defendant, being aware of the existence of a fissure in the side of the shaft (at a point where it caved in), neglected to inform plaintiff of it the cause of action proved is substantially alleged in the complaint, or, at the least, the variance is not such as to mislead the defendant, and may be disregarded. *Strahlendorf v. Rosenthal* (1872) 30 Wis. 674.

A complaint alleging that the derailment of an engine was occasioned by a spreading of the rails, and also that the derailment was caused by the company allowing the roadbed to become defective, in that the crown was not of sufficient width to support engines and trains, and that the ties were worn out and worthless, and that the rails were carelessly and only partially spiked, and that in consequence of said carelessness the wreck occurred,—does not restrict the plaintiff to proof of an injury caused by the spreading of the rails, *Texas & P. R. Co. v. McClane* (1900) 24 Tex. Civ. App. 321, 62 S. W. 565.

A declaration that the defendant knew of the unsafe conditions is supported sufficiently by evidence that he ought to have known of such conditions. *Mellors v. Shaw* (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, 9 Week. Rep. 748, per Blackburn, J.

There is no material variance where the complaint, in an action for personal injuries received on an elevator, alleged that the operator suddenly and violently started the elevator upward with great force and rapidity, by reason of which plaintiff was unable to enter the same, and then carelessly and negligently stopped and suddenly lowered it a short distance, while the proof was that, after being stopped, it was again moved upward, not lowered, with great rapidity. *Nutzmann v. Germania L. Ins. Co.* (1901) 82 Minn. 116, 84 N. W. 730.

Where the complaint in an action for injury from an explosion of powder on the caboose of a construction train alleges that the engine was so defective and so carelessly managed that it emitted a large volume of dangerous sparks, and that [if defendant had exercised ordinary care in and about the construction and use of said engine, said sparks would not have been emitted, and the explosion would not have occurred], and it is also alleged that there was negligence in placing the powder in the caboose, and failing to warn plaintiff thereof, and failing to take proper precaution to keep it without the reach of sparks from the engine, the bracketed words represent merely the pleader's conclusion from the facts previously stated, and do not limit the proofs to the allegation that the engine was defective or carelessly managed. *Allend v. Spokane Falls & N. R. Co.* (1899) 21 Wash. 324, 58 Pac. 244.

In *Rush v. Spokane Falls & N. R. Co.* (1900) 23 Wash. 501, 63 Pac. 500, a case arising out of the same accident, a substantially similar ruling was made.

as there is always danger that redundant charges, if allowe proved, will lead to findings not based on the real charge.[1]

861. Duplicity.— A count is bad for duplicity where it alle eral distinct and independent breaches of duty. These all should each be made the subject of a separate count, if the p desires to rely thereon.[1]

862. Repugnancy.— To render a pleading bad on the groun pugnancy, the repugnancy must be such that proof of one facts pleaded as a basis of recovery will necessarily disprove state of facts which is also pleaded as such basis.[1]

863. Definiteness.— The standard of certainty and definit which a servant is obliged to conform in stating the facts o he relies as constituting a cause of action has been thus sta recent decision by one of the Federal courts of appeal: "A de is entitled to be apprised with reasonable particularity of against which he is called on to make defense, not only to surprise at the trial, but to obviate the labor and expense of ing himself against claims on which the plaintiff may have no of relying. At the same time, the right of a defendant to be i of the issue he is called on to meet is not to be so extended quire from the plaintiff such particularity of averment as not necessary to enable the defendant properly to prepare fense, may unduly burden the plaintiff, and needlessly him to the peril of a fatal variance at the trial."[1] The ma

[1] *Thorsen* v. *Babcock* (1888) 68 Mich. 523, 36 N. W. 723.

[1] *Laporte* v. *Cook* (1897) 20 R. I. 261, 38 Atl. 700, where a demurrer was sustained to a count in a declaration which alleged a neglect to furnish proper safeguards for plaintiff's protection, and not to give him suitable instructions and neglect to provide proper persons to take charge of the work. The court referred to Gould, Pl. § 99.

[1] A court will not require the plaintiff to make an election between the counts of his declaration, where he is suing for injuries caused by the negligent operation of a train, and in the first count it is alleged that he was in the defendant's employ as assistant road master; in the second, that he was in the employ of a company which was reconstructing defendant's tracks; and in the third, that he was a passenger on one of the defendant's trains. *Rinard* v. *Omaha, K. C. & E. R. Co.* (1901) 164 Mo. 270, 64 S. W. 124.

[1] *Coughlin* v. *Blumenthal* (Fed. 920.

The rules of pleading requir able certainty in the statement tial facts, to the end that th party may be informed of w called upon to meet at the tri this end the allegations sh precise and definite as the natu case will reasonably permit. *liance Mills Co.* (1899) 21 R. Atl. 536; *Martello* v. *Fusco* R. I. 572, 45 Atl. 577.

"It is sufficient if a pleadi advises the opposite party of constituting the cause of actio v. *Chicago & N. W. R. Co.* Wis. 608, 31 N. W. 163.

"It is enough if there be co pleading to a common intent should presume all that we r can in order to sustain a d which substantially shows a duty in the defendant, alt terms may be somewhat an

which this general principle has been applied in relation to various showings of a fact is indicated by the cases cited below.[2]

Watling v. *Oastler* (1871) L. R. 6 Exch. 73, 40 L. J. Exch. N. S. 13, 23 L. T. N. S. 815, 19 Week. Rep. 388, per Kelly, C. B. (see further as to this case, § 857, note 9, *supra*).

[1](a) *Complaint held good.*—A complaint which alleges in substance that the accident was caused by the negligence of the master is sufficient on demurrer. If the master's case is that the act was not caused by his negligence, it will be for him to plead and prove the specific facts upon which he relies as evidence that he employed proper persons to keep the defective instrumentality in good repair. *M'Kinney* v. *Irish N. W. R. Co.* (1868; Exch. Ch.) Ir. Rep. 2 C. L. 600. There it was alleged that it was the duty of the defendant railway company to keep the railway and engines and carriages thereon in proper repair for the safe conveyance of the plaintiff's intestate, and that the defendant, not regarding its duty in that behalf, did not keep the railway, etc., in proper repair, whereby, and by reason of the negligence of the defendant, the injuries complained of occurred. The court (dissenting, Fitzgerald, B.) was of opinion that this declaration might fairly be construed to mean negligence in permitting the line and carriages to be out of repair; that it was open to the defendant to avail itself, by plea, of any proper defense in which proper issues should be settled; and that, if from the generality of the pleading the defendant was in any way embarrassed in this defense, the proper course was to apply to the court by motion.

Where the gravamen of the complaint is the failure to provide and enforce proper rules, it is not necessary to specify any particular rule which, in the plaintiff's view, should have been made. *Coughlin* v. *Blumenthal* (1899) 96 Fed. 920.

Where plaintiff in an action for injuries sustained while in defendant's employ by the slipping of a log from a dolly on which it was being carried alleges negligence of defendant in failing to furnish sufficient men to do the work with safety, it is not necessary to separately allege failure to block or fasten the log on the dolly, since that fact was only a circumstance rendering it necessary to furnish additional men. *Supple* v. *Agnew* (1901) 191 Ill. 439, 61 N. E. 392, Reversing (1898) 80 Ill. App. 437.

A declaration which alleged an undertaking on the part of the employer to furnish suitable powder for blasting purposes, and a breach of it by furnishing mixed powder, by which the risk was increased, unknown to the employee, whereby an explosion took place and said employee was injured, was held to be good on general demurrer. The court remarked that, if it was desired to rely on the failure to specify any particular elements in the mixture which rendered it unsafe, that was matter for special demurrer, if for demurrer of any kind. *Eagle & P. Mfg. Co.* v. *Welch* (1878) 61 Ga. 444.

An allegation in a declaration seeking to recover for causing the death of plaintiff's intestate while in the course of his employment, which alleges that the plaintiff's intestate was caught by the belt or shafting so that his left arm was drawn into said shafting or belt while the same were running, is sufficiently precise and definite as to the manner in which the plaintiff's intestate came in contact with the belt. *Lee* v. *Reliance Mills Co.* (1899) 21 R. I. 322, 43 Atl. 538.

Where the complaint in an action for injuries caused by the breaking of a defective rope which held back a saw alleges that the servant's duty required him to be "almost directly in front of the saw," a motion to require a more specific allegation as to where the servant was required to stand when operating the saw is properly denied. *Heltonville Mfg. Co.* v. *Fields* (1894) 138 Ind. 58, 36 N. E. 529.

Where injuries were alleged to have been received by a brakeman who, while climbing the side-ladder of a moving car, came into collision with a stationary car on the adjoining track, a demurrer based on the ground that it did not allege that he was at the top of the car when he was struck was overruled for the reason that the inclined position of the cars was sufficiently indicated by the words of the complaint. *Chicago & E. I. R. Co.* v. *Richards* (1901) 28 Ind. App. 46, 61 N. E. 18.

A declaration alleging that by reason of defendant's negligence in permitting the walls, roof, and supports of its mine to remain defective, and in knowingly

placing an incompetent and unskilful foreman in charge thereof, and in consequence of his lack of ordinary competency and skill in conducting the work after he knew, or should have known, that it had become dangerous, plaintiff's decedent, a laborer, known by defendants to be of insufficient mental capacity to appreciate obvious danger, was killed by a large quantity of water, mud, etc., being suddenly let into the portion of the mine in which he was at work, states the connection between the negligence alleged and the injury with sufficient clearness to enable the defendant to understand the case. *Dingee* v. *urue* (1900) 98 Va. 251, 35 S. E. 794.

Where the petition in an action for injuries resulting to an employee from the negligence of a general superintendent [illegible] employer alleges that they [illegible] while the plaintiff was [illegible] on the hold of a ship, and the place, and manner of the occurrence relied upon as the cause of action are [illegible] means of other allegations, sufficiently stated, it is not essential to specify the name of the ship nor the names of the plaintiff's colaborers. *Woodson* v. *Wm. Johnston & Co.* (1899) 109 Ga. 454, 34 S. E. 587.

A count charging the employer with liability by reason of the known incompetency of a servant is not demurrable on the ground that it does not set out the particulars of the incompetency. *Johnston* v. *Canadian P. R. Co.* (1892) 50 Fed. 886.

In an action for injuries caused by the defective condition of an engine, a complaint is sufficiently specific which alleges that the throttle leaked, and that there were other defects known to the defendant and unknown to the plaintiff. *Wabash & W. R. Co.* v. *Morgan* (1892) 132 Ind. 430, 31 N. E. 661.

A complaint in an action by a brakeman for injury sustained by reason of the breaking of a ladder on a freight car, alleging in substance that such ladder "was so negligently and improperly constructed, and had become so worn and loose and out of repair that when the plaintiff, in using the same, took hold of one of the steps, the same immediately gave way and was wholly detached from the car," shows with sufficient definiteness and certainty in what respect the ladder was negligently and improperly constructed. *Carey* v. *Chicago & N. W. R. Co.* (1887) 67 Wis. 698, 31 N. W. 163.

An averment of the master's knowledge of the defect is sufficient. The evidentiary facts showing how the [illegible] ant knew need not be alleged. [illegible] *dated Coal Co.* v. *Scheiber* (189[illegible] Ill. App. 304.

A plaintiff is not required to s[illegible] his complaint the names of the [illegible] of the defendant through whom [illegible] pects to bring notice to the de[illegible] of the negligent habits of the [illegible] in charge of a train upon whi[illegible] plaintiff was injured. *Lake Shor[illegible] S. R. Co.* v. *Stupak* (1890) [illegible] 210, 23 N. E. 246.

The exact time that a railway [illegible] pany has known of the defective [illegible] tion of an engine, and of the in[illegible] tency and carelessness of an engi[illegible] not so material that the court wil[illegible] a motion to make a complaint mo[illegible] cific, on the ground that it mer[illegible] leges that these facts have bee[illegible] known to the defendant. *Wab[illegible] R. Co.* v. *Morgan* (1892) 132 In[illegible] 31 N. E. 661.

Where the complaint in an acti[illegible] injuries received in the quarry [illegible] defendant city describes the quar[illegible] leges that it was owned by the [illegible] ant, and gives the name of defe[illegible] superintendent under whose di[illegible] plaintiff was working, it is not s[illegible] to a special demurrer on the [illegible] that it does not allege where the [illegible] was located. The situs of the qu[illegible] a matter as much in the knowle[illegible] defendant as of plaintiff. *Augu[illegible] Owens* (1900) 111 Ga. 464, 36 S. [illegible]

The defendant in an action fo[illegible] sonal injuries to an employee w[illegible] be required to make more defini[illegible] certain an allegation in the answ[illegible] the accident was caused by a dan[illegible] herent in the work, of which p[illegible] was aware, and against which [illegible] "frequently been warned." The [illegible] under such circumstances being [illegible] the personal knowledge of the [illegible] party, there is no danger of su[illegible] *Bigras* v. *Montreal Water & Pow[illegible]* (1898) Rap. Jud. Quebec, 15 C. [illegible]

In an action for the death of [illegible] ployee which was alleged to ha[illegible] sulted from negligence in furnishi[illegible] safe appliances to the employee, [illegible] held, on motion to make the p[illegible] more definite, that the plaintiff w[illegible] bound to state in his petition w[illegible] the employee was experienced or [illegible] perienced, or whether the mast[illegible] given him any assurance of the [illegible] ciency of the appliances, or what [illegible] danger to which he was subject[illegible] obvious or hidden. *Fugler* v. [illegible] (1890) 43 Mo. App. 44.

864. Plea; generally.—The defense of assumption of risks or waiver must be specially pleaded if the employer wishes to rely thereon.[1] Being affirmative in its character, it cannot be proved under the general denial.[2]

(b) *Complaint held bad.*—A count is bad which does not state in what particular the defendant was negligent,—that is to say, of what the negligence consisted. *Lapere* v. *Cook* (1897) 20 R. I. 261, 38 Atl. 790.

A general averment that the defendant violated his duty in being ignorant of the quality of a flagstone on which the plaintiff was required to stand in doing his work is not sufficient. The complaint must set forth the facts out of which the duty to furnish such an instrumentality arises. *Potts* v. *Plunkett* (1899) 3 Ir. C. L. Rep. 299.

A complaint is demurrable, which, although it states that the injury was caused by the negligence of certain fellow servants of whose incompetence the defendant was aware, fails to allege the acts which constituted the negligence complained of. *Martello* v. *Fusco* (1900) 21 R. I. 572, 45 Atl. 577.

An averment that the delinquent fellow servant was not properly qualified for his duties is not sufficiently specific. *Mackay* v. *Watson* (1857) 24 Sc. Sess. Cas. 4th series, 383.

A petition alleging that defendant negligently employed plaintiff's son to unload bricks from a wagon, which employment was dangerous for one of his age, and that he was injured while at the work, but not stating wherein the work was dangerous, or by what cause the boy was thrown down and run over by the wagon, is demurrable as not stating with sufficient certainty the negligence charged. *Martello* v. *Fusco* (1900) 21 R. I. 572, 45 Atl. 577.

Where a complaint states that the defendant failed to provide lawful safeguards, that one of such safeguards was lacking, and that the place provided for plaintiff to work was unsafe, the defendant was entitled to a bill of particulars stating the particular safeguard claimed to have been omitted, and in what respect the place provided to work in was unsafe. *O'Leary* v. *Condee* (1899) 60 N. Y. Supp. 1103.

In a case where the injury was alleged to be due to the fact that the servant's arm was caught in a belt, the defendant was held to be entitled to a more definite statement, showing the manner in which the servant was engaged, what was the usual and proper method of discharging his duty with respect to the running of the machine, and what machine it was. *Lee* v. *Reliance Mills Co.* (1897) 21 R. I. 322, 43 Atl. 536.

A petition alleging that the cause of the injury was a pole which was "too near the track" is subject to a special demurrer based on the ground that it does not allege how near the pole was to the track. *Rhodes* v. *Central R. Co.* (1899) 105 Ga. 384, 31 S. E. 94.

It is not sufficient to charge negligence in not putting a certain machine to be out of repair. The character of the defect should be stated,—not necessarily in minute detail, but in general terms. *Cochran* v. *Richmond &c.* (1896) 96 Fed. 620.

An averment in a declaration, in an action to recover damages for personal injuries resulting from negligence, that defendants negligently omitted to provide plaintiff employees with sound and suitable machinery and appliances for raising an anchor and chain of a certain dredge in the course of their business, whereby one of plaintiff's servants was struck by the anchor chain and killed, was held demurrable on the ground that there was no allegation that the injury resulted from the breaking of any chain or other appliance, and that there was no description of any machinery or appliances as unsafe or defective, or of the nature of any defect or error in judgment in the machinery and appliances used for raising the anchor, and getting in the anchor chain.

A declaration which alleges that defendant negligently omitted to provide for the repair of certain machinery supplied, on which plaintiff was employed, the result being that said machinery became dangerous, and was well known to said defendant to be so dangerous, but which fails to allege in what respect defendant omitted to provide for repairing it, is demurrable. *Cook* v. *Diamond State Steel Co.* (1900) 2 Penn. (Del.) 522, 47 Atl. 1111.

[1] *Oregon Short Line & U. N. R. Co.* v. *Tracy* (1895) 14 C. C. A. 199, 29 U. S. App. 529, 66 Fed. 931; *Mayes* v. *Chicago, R. I. & P. R. Co.* (1881) 63 Iowa,

Whether, under the modern system of pleading prescribed by t
English judicature act and the Colonial statutes modeled thereon,
is necessary that the defense embodied in the maxim *Volenti non
injuria* must be specially pleaded, does not seem to have been
pressly decided.[3]

As regards the defense of coservice, some courts take the posi
that it is available without being specially pleaded. The concept
relied upon is that proof of such negligence necessarily negatives
averment that the plaintiff was injured through the negligence
the master.[4] On the other hand, the doctrine has been enunci
that, unless it appears from the complaint itself that the injury
due to the negligence of a fellow servant, the defense that it was
caused cannot be raised unless the appropriate averments in this
gard are inserted in the answer.[5]

The plaintiff's ignorance of the defect which caused his inj
will be taken as admitted, unless it is specially traversed. It is
put in issue by a general traverse of the averment of negligence.[6]

As to the sufficiency of the plea in suits brought under the
ployers' liability acts, see § 738, *ante*.

C. Functions of court and jury.

865. Questions of law and fact.—In this section it is merely
posed to recapitulate under their more general aspects the main p
ciples which serve to define the boundary line between the respe
provinces of courts and juries in dealing with the issues which a
in employers' liability cases. The manner in which those princi
have been applied with relation to specific doctrines of substan
law, and to the provisions of statutes, has already been shown in
earlier parts of this treatise in which those doctrines and stat
have been discussed.

a. Sufficiency of evidence to establish a material issue.—In d
with the issues of the negligence of the master or the coservi

562, 14 N. W. 340, 19 N. W. 680; *Wells v. Burlington, C. R. & N. R. Co.* (1881) 56 Iowa, 520, 9 N. W. 361; *Nicolaus v. Chicago, K. I. & P. R. Co.* (1891) 90 Iowa, 85, 57 N. W. 694; *McMullen v. Missouri, K. & T. R. Co.* (1895) 60 Mo. App. 231.

[2] *Louisville & N. R. Co. v. Orr* (1882) 84 Ind. 50.

[3] In *Le May v. Canadian P. R. Co.* (1889) 18 Ont. Rep. 314, Ferguson, J., propounded, but did not determine, this question. In the court of appeal (17 Ont. App. Rep. 293) this point not touched upon.

[4] *Sheehey v. Prosser* (1893) 5 App. 569; *Wilson v. Charleston & Co.* (1897) 51 S. C. 79, 28 S. E. citing *Adams Exp. Co. v. Darby* 31 Ind. 20, 99 Am. Dec. 58.

[5] *Conlin v. San Francisco & S. Co.* (1864) 26 Cal. 404.

[6] *Skerritt v. Scullea* (1877) 1 11 C. L. 389.

negligence of the servant there is always a preliminary question to be determined by the trial judges, *viz.*, whether there is any evidence on which the jury can properly find in favor of the party on whom the onus of proof lies.[1]

b. Facts or conclusions therefrom disputable.—The culpability of either of the parties to the action is always a matter for the jury to determine, where there is a conflict of testimony as to the facts upon which the existence or non-existence of that culpability hinges;[2] and also where those facts, although they may be clearly established or undisputed, are of such a nature that reasonable men may fairly differ upon the question whether they do or do not import culpa-

[1] See the opinions of Willes, J., in *Ryder* v. *Wombwell* (1868) L. R. 4 Exch. 32, 38 L. J. Exch. N. S. 8, and of Lord Cairns in *Metropolitan R. Co.* v. *Jackson* (1877) L. R. 3 App. Cas. 193, 47 L. J. C. P. N. S. 303, 37 L. T. N. S. 679, 26 Week. Rep. 175.

In the absence of evidence that the danger was hidden, or that the servant was misled by the failure of the master to adopt such constructions, methods, or rules as were usual in the trade, and which the servant, therefore, had the right to take for granted until otherwise instructed, it is improper to submit to the jury the question whether, in their judgment, the place of work was reasonably safe or the rules reasonably proper, and thus make their judgment on these points the test of the master's liability. *Bethlehem Iron Co.* v. *Weiss* (1900) 40 C. C. A. 270, 100 Fed. 45.

A plaintiff may be nonsuited, where he has not produced sufficient evidence to support the material averments of his declaration. *Burrell* v. *Gowen* (1890) 134 Pa. 527, 19 Atl. 678; *Choctaw, O. & G. R. Co.* v. *Nicholas* (1899; Ind. Terr.) 53 S. W. 475.

[2] *Tennessee Coal, Iron & R. Co.* v. *Currier* (1901) 47 C. C. A. 161, 108 Fed. 19; *Van Steenburgh* v. *Thornton* (1895) 58 N. J. L. 160, 33 Atl. 380; *Belleville Stone Co.* v. *Mooney* (1897) 60 N. J. L. 323, 38 Atl. 835, Affirmed in (1897) 61 N. J. L. 253, 39 L. R. A. 834, 39 Atl. 764; *Smith* v. *Little Pittsburg Coal Co.* (1898) 75 Mo. App. 177; *Ford* v. *Knipe* (1897) 180 Pa. 210, 36 Atl. 729; *Hill* v. *Southern P. Co.* (1901) 23 Utah, 94, 63 Pac. 811; *Cosselmon* v. *Dunfee* (1901) 59 App. Div. 467, 69 N. Y. Supp. 271 (identity); *Grace & H. Co.* v. *Kennedy* (1900) 40 C. C. A. 69, 99 Fed. 679 (appointment of watchman to guard an obstruction in a street); *Hamman* v. *Central Coal & Coke Co.* (1900) 156 Mo. 232, 56 S. W. 1091 (supply of roof props in mine); *Nelson* v. *Lumberman's Min. Co.* (1887) 65 Mich. 288, 32 N. W. 438 (lagging in mine gave way); *Coontz* v. *Missouri P. R. Co.* (1894) 121 Mo. 652, 26 S. W. 661 (possibility of discovering the defect by an ordinarily careful inspection).

A witness in an action for injuries caused by a crane alleged to be defective stated that there was no other crane on the track on which it was worked at the time of the accident; that it was on the same track; that after he had complained to the foreman about it he kept watch of it, and knew where it was; that it was the same crane that he saw fall down several times within a day or so prior to the accident; that there was only one crane on the tracks; and that he saw the chain slip several times before the accident. His evidence was held to be sufficient to identify the crane in use at the time of the accident with that reported as defective, though there was also evidence that there were many cranes in the works, and that they were liable to be changed about. *Nicoud* v. *Wagner* (1900) 106 Wis. 67, 81 N. W. 999.

The question whether or not the duty of keeping the roof of its mine in repair devolved on defendant is properly submitted to the jury in an action for personal injuries to an employee by the fall of slate from the roof, where defendant had pleaded that under its contract with plaintiff such duty devolved on the latter. *Breckinridge & P. Syndicate* v. *Murphy* (1897) 18 Ky. L. Rep. 915, 38 S. W. 709.

See also cases cited in § 339, note 5, *ante*, as to the contributory negligence of the servant.

bility.[3] The logical effect of the latter branch of this statement also be expressed by various other forms of phraseology which vey a virtually similar meaning. Thus it is laid down that the should not be withdrawn from the jury, where it is manifest th covery can be had on any view which can be taken of the facts

[3] *Grand Trunk R. Co.* v. *Ives* (1892) 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679 (cited with approval in *Texas & P. R. Co.* v. *Gentry* (1896) 163 U. S. 368, 41 L. ed. 193, 16 Sup. Ct. Rep. 1104); *Tennessee Coal, Iron & R. Co.* v. *Currier* (1901) 47 C. C. A. 161, 108 Fed. 19; *Mason & O. R. Co.* v. *Yockey* (1900) 43 C. C. A. 228, 103 Fed. 265; *Mexican C. R. Co.* v. *Eckman* (1900) 42 C. C. A. 311, 102 Fed. 274 (railway tunnel not guarded by telltales, and not excavated to a uniform height throughout); *Kansas City, P. & G. R. Co.* v. *Spellman* (1900) 42 C. C. A. 321, 102 Fed. 251 (brakeman injured while attempting to couple a locomotive with a bent pilot bar); *Texas & P. R. Co.* v. *Wineland* (1900) 42 C. C. A. 588, 102 Fed. 673 (some evidence that the wheels of a locomotive truck were not made of reasonably safe material, and had not been properly inspected); *Bethlehem Iron Co.* v. *Weis* (1900) 40 C. C. A. 270, 100 Fed. 45 (servant's constructive knowledge of danger and master's liability for not instructing him as to that danger); *Southern P. Co.* v. *Burke* (1893) 9 C. C. A. 229, 23 U. S. App. 1, 13 U. S. App. 110, 60 Fed. 704 (master's knowledge of defect); *Green* v. *Sansom* (1899) 41 Fla. 94, 25 So. 332; *Lake Erie & W. R. Co.* v. *Wilson* (1900) 87 Ill. App. 360 (grass and weeds suffered to grow on side track); *Ross* v. *Shanley* (1899) 185 Ill. 390, 56 N. E. 1105. Affirming (1899) 86 Ill. App. 144; *Missouri, K. & T. R. Co.* v. *Young* (1896) 4 Kan. App. 219, 45 Pac. 963 (master's knowledge of defect); *Wilson* v. *Williams* (1900) 22 Ky. L. Rep. 567, 58 S. W. 444 (defective elevator); *Louisville & N. R. Co.* v. *Miller* (1900) 22 Ky. L. Rep. 327, 57 S. W. 230 (appliance repaired in an improper manner); *Hopkins* v. *O'Leary* (1900) 176 Mass. 258, 57 N. E. 342 (plaintiff put to work after a blast was set off, without any precautions being taken to see that all the charges had been exploded); *Jones* v. *Pacific Mills* (1900) 176 Mass. 354, 57 N. E. 663 (ladder spliced after having been broken, gave way; several witnesses had testified that a spliced ladder was only from one half to three fourths as strong as it would hav originally); *Day* v. *Donohue* (18 N. J. L. 380, 41 Atl. 934 (trial a nonsuit that a fellow servan caused the accident by his negli lection of the materials, although was evidence tending to show th materials were defective); *Swee New York, N. H. & H. R. Co.* 26 Jones & S. 223, 10 N. Y. Sup (injury from a defective coupli the use of which might have been the evidence, due either to the gence of the defendant or of a servant); *Gray* v. *Floersheim* 164 Pa. 508, 30 Atl. 397 (n knowledge of defect); *Houston & R. Co.* v. *Gaither* (1896; Tex. Civ. 35 S. W. 179 (rails not secure tened); *Mangum* v. *Bullion, B. Min. Co.* (1897) 15 Utah, 534, 5 834; *Walker* v. *McNeill* (189 Wash. 582, 50 Pac. 518.

See also cases cited in § 330, *ante*, as to the plaintiff's contr negligence.

The question whether the def was chargeable with knowledge dangerous condition of a steam cannot be taken from the jury there is evidence that it w years old, and that, at the point it gave way, the plates had bee down to one fourth of their o thickness. *Lehigh Valley R. Co.* (1897) 25 C. C. A. 566, 51 App. 265, 80 Fed. 470.

Whether the master ought to h certained the dangerous con which caused the injury is a q for the jury, where the facts a that persons of equally good ju might arrive at different conc *Crowell* v. *Thomas* (1897) 18 Ap 520, 46 N. Y. Supp. 137.

The owner of a mill is not as of law free from negligence caus explosion of the burrs, where the by which the mill is operated is an inexperienced engineer, a starting the engine, the gover fuses to move until he pushes it with his hands, and he subs goes into the mill and lets corn i hopper while the burrs are re

the evidence tends to establish;[4] nor where there is evidence tending to sustain each of two antagonistic theories as to the manner in which the accident occurred;[5] nor where it is possible to draw more than one

very rapidly, and immediately after the explosion he finds the engine running very rapidly and the governor standing still. *Ford* v. *Knipe* (1897) 180 Pa. 210, 36 Atl. 729.

Where several witnesses have testified that, in view of the method adopted for moving a heavy log, there should have been a greater number of men assigned to do the work than was actually assigned to perform it, the master's negligence is a question for the jury. *Supple* v. *Agnew* (1901) 191 Ill. 439, 61 N. E. 392, Reversing (1899) 80 Ill. App. 437.

Whether suitable materials have been provided for the preparation of those appliances the construction of which the master is justified in leaving to the servants (see §§ 612 *et seq.*, *ante*), is primarily a question for the jury. *Kalleck* v. *Deering* (1897) 169 Mass. 209, 47 N. E. 698.

A nonsuit at the close of plaintiff's case in an action by an employee against a street railway company for injuries received in a collision is properly denied where there is evidence tending to show that the signals misled the employee to his injury, and the possible existence of causes leading to the derangement of the signals, and also testimony upon the questions as to whether such conditions existed, or were sufficient to cause the accident, or were in any way chargeable to the negligence of the company. *Bergen County Traction Co.* v. *Bliss* (1898) 62 N. J. L. 410, 41 Atl. 837.

It is error to nonsuit a plaintiff where there is evidence which tends to show that the injury may have been caused by a defective system. *Fairweather* v. *Owen Sound Stone Quarry Co.* (1895) 26 Ont. Rep. 604.

Contributory negligence and assumption of risk, being in the nature of pleas of confession and avoidance, are affirmative defenses, and cannot be considered on a motion for nonsuit. *Cogdell* v. *Wilmington & W. R. Co.* (1899) 124 N. C. 302, 32 S. E. 706.

In *Woodruff* v. *Alabama Great Southern R. Co.* (1885) 75 Ga. 47, the court said with reference to the circumstances under review: "Without doubt, this record does not make a strong case for the recovery of damages in consequence of the negligence of the defendant; indeed, it is a very weak case; but, as there is possibly enough in the evidence to enable the jury to say, if it is uncontradicted, that the injury was occasioned by the defective machinery of the company, and as the law which is to determine the plaintiff's right is somewhat uncertain, the injury having been sustained in another state by the plaintiff, while acting as an employee of a railroad company chartered in that state, and as it is doubtful whether, under the common law, which obtained there at the time of the casualty, he sustained the relation of coemployee to the company's agent whose negligence caused the damage, we think it better that the case should have gone to the jury than to have been nonsuited."

In an action for injuries to an engine wiper, when moving a wheel by order of his foreman, a charge that, if plaintiff was experienced in such work, or knew or understood its dangers, if any, he assumed the risk, or if he failed to use ordinary care and caution, and such failure, if any, contributed to his injury, the finding should be for defendant, is proper, where the testimony did not clearly show the danger to be obvious. *Galveston, H. & S. A. R. Co.* v. *Renz* (1900) 24 Tex. Civ. App. 335, 59 S. W. 280.

According to the practice and forms of procedure in the Scotch court of session, the court directs the issue which is to be submitted to the jury. This implies the consideration of the prima facie sufficiency of the plaintiff's averments before the issue is approved. *Jamieson* v. *Russell* (1892) 19 Sc. Sess. Cas. 4th series, 638.

[4] *Tennessee Coal, Iron & R. Co.* v. *Currier* (1901) 47 C. C. A. 161, 108 Fed. 19.

[5] The theory of defendant sued by an employee for personal injuries, that the injury was due to the negligence of a coemployee in not seeing that the cable was attached to a car by which plaintiff was injured before shoving it down an incline, should be given to the jury,—especially where the claim of plaintiff is fully presented. *Hennig* v. *Globe Foundry Co.* (1897) 112 Mich. 616, 71 N. W. 156.

See also *Harney* v. *Missouri P. R. Co.*

inference from the evidence;[6] nor where the evidence leaves it d
ful or uncertain what inference should be drawn with regard t
of the points upon which the plaintiff's right of recovery depe
nor where the deductions of fact to be drawn from the evidenc
disputed;[8] nor where opposite conclusions can reasonably be d
from the evidence.[9]

A corollary of the rules enunciated above is, that a general af
tive charge by which the jury are told that, if they believe th
dence, they must render a verdict for the defendant, should nev
given, either in a case where there is any conflict in the evidence
any material point in issue on which a recovery may be had, o
case where the evidence fairly admits of a conclusion or infe
which may be drawn by the jury adverse to the right of the par
questing the charge.[10]

c. Facts and conclusions not disputable.—The question wh
there was culpability in the premises is one to be determined b
court when the facts are undisputed or clearly established, an
conclusion to be drawn from those facts is a matter which c
reasonably be the subject of any doubt or controversy;[11] and

(1899) 80 Mo. App. 667 (evidence tended to show both that defects existed and that they were obvious).

[6] The question of the master's liability for the death of his servant is for the jury upon evidence from which can be drawn either the inference that the death was the result of the failure of the master to exercise reasonable care to provide proper machinery and appliances and a safe place in which to work, or that it was the result of obvious danger or risk, or the want of ordinary care on the part of the servant. *Comben* v. *Belleville Stone Co.* (1896) 59 N. J. L. 226, 36 Atl. 473.

[7] *Nyback* v. *Champagne Lumber Co.* (1899) 33 C. C. A. 269, 63 U. S. App. 519, 90 Fed. 774; *Tribay* v. *Brooklyn Lead Min. Co.* (1886) 4 Utah. 468, 11 Pac. 612.

[8] *Lasky* v. *Canadian P. R. Co.* (1891) 83 Me. 461, 22 Atl. 367.

The court said: "In any case where intention is to be discovered, exigencies weighed, or matters of expediency considered, although the testimony may not be conflicting, still, unless the case is so palpably right or wrong that there can be but one opinion about the case, the question is for the jury, and not the court. Such interpretations arise more often in negligence cases than any other. The negligence of neither party can be conclusively establis
a state of undisputed facts from
different inferences may be fairly
or upon which fair-minded men
rive at different conclusions. *N*
Boston, C. & M. R. Co. (1888)
62, 6 Am. St. Rep. 151, 12 Atl. 7
cases cited.

[9] *Belleville Stone Co.* v. *Mooney*
60 N. J. L. 323, 38 Atl. 835, Affir
(1897) 61 N. J. L. 253, 39 L. R.
39 Atl. 764.

[10] *Louisville & N. R. Co.* v.
(1901) 129 Ala. 553, 30 So. 57
dence tended to support plaintiff
tention that he was injured by t
den checking of a car through th
gence of the foreman of the sw
crew to which he belonged).

A charge that, in the absence
evidence of defects in, or negligen
struction of, or negligent use by
ant of, the structure which fell, t
cannot infer negligence, is prope
fused, where the evidence is con
upon the question whether the st
had been built in a proper way.
a charge substantially reques
judge to direct a verdict for the
ant. *Alexander* v. *Maryland St*
(1899) 189 Pa. 582, 42 Atl. 286.

[11] "It is well settled that th
may withdraw a case from the
gether and direct a verdict for th

the weight of evidence is clearly against the contention of either party with respect to a material fact.[12]

That the power of the court to control the verdict in actions for negligence is usually exercised for the advantage of the defendant is a fact well known to everyone who has even the most superficial acquaintance with cases of this type. But the general rule stated above is also applied, under appropriate circumstances, for the benefit of the plaintiff. That is to say, where the facts are substantially undisputed, and the conclusion that there was a negligent omission of duty by defendant is one at which all reasonable men must have arrived from a consideration of those facts, the question of liability becomes one of law, and it is not error for the court to instruct the jury that the right to recover is established, and to submit to them only the question of damages.[13]

866. Instructions.— In various places in the earlier chapters of this treatise the propriety of instructions has been discussed with reference to the question whether they presented with completeness and precision one or other of the doctrines of substantive law upon which the servant's right of action depends. In the present section it is proposed to summarize the effect of the cases in which the correctness

tiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it." *Patton* v. *Texas & P. R. Co.* (1901) 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275.

"It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court." *Grand Trunk R. Co.* v. *Ives* (1892) 144 U. S. 408, 417, 36 L. ed. 485, 489, 12 Sup. Ct. Rep. 679 (quoted with approval in *Texas & P. R. Co.* v. *Gentry* (1896) 163 U. S. 368, 41 L. ed. 193, 16 Sup. Ct. Rep. 1104).

It is error to submit to the jury the question whether a breach of duty was committed, if it is apparent that, under the evidence introduced, there are two or more possible ways of accounting for the accident, and that negligence is not a permissible inference in any point of view. *Essex County Electric Co.* v. *Kelly* (1894) 57 N. J. L. 100, 29 Atl. 427 (alternatives were that the defect was latent and undiscoverable by reasonable inspection, or that servant's means of knowledge were better than those of master).

In an action to recover for the death of such servant, where it appeared that all the parts of the apparatus used except the rope safely performed their functions, their sufficiency or fitness is not a matter in issue, and it is error to submit such questions to the jury. *Hunt* v. *Kile* (1899) 38 C. C. A. 641, 98 Fed. 49.

Whether a person is a fellow servant or a superior is a question of law for the court, where the facts are not in dispute. *National Fertilizer Co.* v. *Travis* (1899) 102 Tenn. 16, 49 S. W. 852.

Numerous illustrations of the manner in which this rule has been applied will be found in the earlier chapters which deal with the circumstances under which negligence is imputable to a master or a servant.

[12] *Cummings* v. *Chicago & N. W. R. Co.* (1899) 89 Ill. App. 199, writ of error dismissed (1901) 189 Ill. 608, 60 N. E. 51; *Germaud* v. *Smith* (1901) 66 N. J. L. 390, 49 Atl. 427.

[13] *Toledo Brewing & Malting Co.* v. *Bosch* (1900) 41 C. C. A. 482, 101 Fed. 530; *Mexican C. R. Co.* v. *Glover* (1901) 46 C. C. A. 334, 107 Fed. 356.

of the instructions has been considered under its more general aspects.[1] The principles of trial practice illustrated by these decisions are, of course, applicable to all actions of which the gravamen is negligence, and in this point of view the conclusions arrived at cannot be said to possess any special or characteristic significance in relation to the subject of the liability of employers. It is not amiss, however, to remark that the rulings collected in the subjoined note, like those of those stated in other parts of this treatise, are inserted not for the purpose of furnishing the practitioner with a useful list of authorities in which the principles adverted to are exemplified in relation to various evidential situations which have arisen, and may well arise again, in actions for injuries received by servants. When, as happens not infrequently, a case may be classified under more than one heading, its position has been determined by what the author conceives to be the most important phase of the decision.[2]

[1] In view of the rigorous standards which have been applied in many of the cases cited *infra* and in the chapters referred to in the text, it is impossible not to regret that courts of review are not more thoroughly permeated with the liberal spirit which pervades the following passage in a recent judgment by one of the Federal courts of appeal: "If every slight defect or slip which a microscopic eye can detect in a question or answer or the charge of the court is to be counted prejudicial error, litigation will become interminable over subtle refinements and quibbles which were not seen or regarded by the judge or jury at the trial, and which had no bearing whatever on the decision of the case on its merits. Such an administration of the law would be intolerable. 'But there is nothing,' said Judge (now Mr. Justice) Brown, of the Supreme Court of the United States, 'which tends to belittle the authority of the courts, or to impair the confidence of the public in the certainty of justice as much as the habit of reversing cases for slight errors in admitting testimony, or trifling slips in the charge. . . . Better by far the practice of the English courts and the Federal Supreme Court, where every intendment is made in favor of the action of the lower court, and cases are rarely reversed except for errors going to the very merits.—errors which usually obviate the necessity of a second trial.' Report American Bar Association, 1889, p. —. Though these remarks of the learned justice were not uttered from the bench, they express the rule upon the subject by which appeal [illegible] should be guided, and they have [illegible] proval." *Western Coal & Min. Co. v. Berwick* (1899) 36 C. C. A. [illegible] Fed. 399.

[2] (a) *Instructions as to abstract principles.*—An instruction which proceeds upon the assumption that [illegible] pliance furnished by the master [illegible] gerous *per se*, and that in its [illegible] master is negligent, because the [illegible] other appliances not dangerous [illegible] he might use, is erroneous. [illegible] *E. I. R. Co. v. Finman* (1899) [illegible] App. 383. (See, generally, chapter [illegible] *ante*.)

An instruction of which the effect [illegible] that the plaintiff can recover [illegible] proves the existence of a single [illegible] two or more defects alleged in the [illegible] laration as the cause of his injury [illegible] open to exception. *St. Louis, I. M. & S. R. Co. v. Bond* (1901) 189 Ill. 2[illegible] N. E. 593, Affirming (1900) 89 Ill. [illegible] 555.

An instruction that, if plaintiff's injuries were caused by defects in the [illegible] ant's machinery on which he was work[illegible] ing, and plaintiff was not guilty of [illegible] tributory negligence, he was entitled [illegible] recover, unless he knew, or, by the [illegible] ercise of ordinary care, could have [illegible] known, of the defects, is erroneous [illegible] the reason that it omits the necessary [illegible] element of defendant's knowledge of [illegible] defects. *Virginian & N. C. Wheel Co. v. Chalkley* (1900) 98 Va. 62, 34 S. [illegible] (See, generally, chapter X., *ante*.)

An instruction that plaintiff is [illegible] titled to recover unless the condition

867. Verdicts.—A jury is properly permitted to base a verdict upon a general allegation of negligence in regard to the conditions stated,

an embankment by the fall of which he was injured was such as to threaten such "glaring, apparent, and immediate danger that a person of ordinary care and prudence would have refused to work around it under the circumstances," is erroneous, as it does not embody the rule which would govern a reasonably careful person. *Bradley* v. *Chicago, M. & St. P. R. Co.* (1897) 138 Mo. 293, 39 S. W. 763.

The fact that a jury is directed to find the defendant guilty if he furnished a defective appliance, and the plaintiff was injured by reason of that defect, while exercising ordinary care, does not constitute prejudicial error, where the instruction contains the additional words, "if the jury should also believe from the evidence that the plaintiff did not know of the defect." The impediment is that the jury would have inferred that their verdict was to be conditional upon their believing from the evidence the first, as well as the last, fact specified. *Toledo, W. & W. R. Co.* v. *Ingraham* (1875) 77 Ill. 309.

In an action for personal injuries caused by the fall of a derrick while being raised from one floor of a building to another, the jury were fully instructed upon the questions raised in the case. Upon their return into court with the inquiry as to precisely what matters they were to decide, the judge replied that the only substantial question was whether the derrick and its appliances were such that it could be safely hoisted from one floor to another; and repeated the instructions previously given upon that subject. The foreman then asked if "appliances" included "brains." The judge answered "No." Held, that the defendant had no ground of exception. *Summersell* v. *Fish* (1875) 117 Mass. 312. The point made by counsel was that the effect of the judge's answer was to exclude an element which bore upon the question whether the method of using the appliance was a proper one.

A charge is erroneous which gives the jury to understand that the mere fact of minority, of and in itself, imposes upon the master a greater degree of care in regard to the servant than that which rests upon him in respect to a servant of full age. It is the immaturity of mental and physical faculties and capacity which is incident to some, not all, minors, and not the mere fact of minority, which the master must have special regard for; and where, in a given instance of minority, this immaturity is wanting, the minor is put upon the same footing as an adult. *Alabama Mineral R. Co.* v. *Marcus* (1896) 115 Ala. 586, 22 So. 135. (See, generally, chapter II, B, *ante*.)

It is error to give an instruction which virtually directs the jury to find for the plaintiff if he has no personal knowledge of a defect, whether the accident has been caused by the negligence of his fellow servants or not. *Beattie* v. *Kneeland* (1892) 63 Hun, 283, 17 N. Y. Supp. 895.

An erroneous instruction as to the circumstances which will create the relation of master and servant is not cause for reversal of a judgment for plaintiff, where there is no question but that the negligence which caused plaintiff's injury was that of a vice principal, and not of a fellow servant. *Westside Coal Co.* v. *Schwartz* (1898) 177 Ill. 272, 52 N. E. 276, Affirming (1898) 75 Ill. App. 468.

In an action in which the defendant was charged with negligence in not furnishing proper pinch bars and a sufficient number of persons to move the tender, the court charged that it was the duty of plaintiff to exercise care to acquaint himself with the work, and with the appliances, grounds, and tracks whereon he was required to work, and that, in determining whether he had exercised care, it was proper to consider the length of time he had been in defendant's employ, and his intelligence and experience. The court rejected the contention that, although the charge was correct as applied to defects in the tools, appliances, grounds, and tracks, it was not applicable to machinery, appliances, grounds, rails, and tracks, which were properly constructed. *Cahow* v. *Chicago, R. I. & P. R. Co.* (1901) 113 Iowa, 221, 84 N. W. 1056.

An instruction as to the duties of a mine owner to his employees, substantially in the language of Hurd's Rev. Stat. 1899, p. 1169, § 18, imposing them, was held to be a sufficient statement of such duties. *Donk Bros. Coal & Coke Co.* v. *Peton* (1901) 95 Ill. App. 163, Affirmed in (1901) 192 Ill. 41, 61 N. E.

330, citing *Mt. Olive & S. Coal Co.* v. *Rademacher* (1901) 190 Ill. 538, 60 N. E. 888.

Where plaintiff, a brakeman, was injured while uncoupling a car from a tender, the drawhead of which was defective, an instruction that "employees . . . are not presumed to take risks arising from the negligence of the employer" is not erroneous if it is followed by a charge that if the employee knows, or by use of care can discover, that machinery is defective, and then undertakes to use it, and is injured, he is guilty of negligence. *International & G. N. R. Co.* v. *Gourley* (1899) 21 Tex. Civ. App. 579, 54 S. W. 397.

In *Litton* v. *Thornton* (1881) 7 Vict. L. Rep. (L.) 4, the jury found for the defendant upon a charge in which they were told that if the plaintiff had had an opportunity of seeing the defective nature of the machine (a pile driver) there was as great an obligation upon him as upon the employer to know it, and that if he chose to work the machine, knowing, or having the opportunity of knowing, its faulty construction, he took the risk upon himself. The verdict was sustained on the ground that, in order to justify setting it aside, it would be necessary to take the position that a servant, having contracted to work a machine, is not bound to observe its condition, or not at liberty to refuse to work it if he finds it defective. The court considered that the plaintiff ought to have noticed a defect of the kind alleged, and that, if he did not, he incurred the risk of a jury finding that he had contributed to the accident by his own negligence.

In *Galveston, H. & S. A. R. Co.* v. *Delahunty* (1880) 53 Tex. 206, it was urged that a new trial should be ordered, for the reason that the jury had been charged that it was the duty of the defendant to furnish "sound material with which to do the work." The court admitted that this instruction contravened the principle that a master is not an insurer, but refused to set aside the verdict as the evidence clearly showed that the defendant company had been negligent. The position was taken that, as no complaint had been made at the trial with regard to the correctness of the instruction, the defendant should be required to make a stronger showing as to its prejudicial quality than if it had been objected to at the right time. But this decision would, perhaps, not be approved by all courts.

As every material question in ers' liability cases is comprised issue of negligence, the defen such a case is not entitled to struction that the plaintiff ca cover if the injury was the resu "unavoidable accident," though plended in the answer that such cause of the injury. *San Anto Co.* v. *Robertson* (1899; Tex. Civ 55 S. W. 317. The judgment versed in (1900) 93 Tex. 503, 5 323, but not on this point.

Where a special verdict is ta jury should not be instructed gard to the legal effect of their ns the effect of such an instruct le to create an inclination t that theory of the evidence wh enable the servant to recover. where the question as to whether cident was occasioned by a pipe or the negligence of W., workman, is submitted to the instruction that, if the inju caused by the negligence of W., fendant would not be liable, is ous. *Musbach* v. *Wisconsin C* (1900) 108 Wis. 57, 84 N. W.

(b) *Appropriateness of inst with relation to the issues mad pleadings.*—On the ground that ration which alleges that the was using due care for his own impliedly negatives his knowledg defects (see § 857, note 11, s has been held that a charge in a for injury to a servant that, jury believe plaintiff has made cuse, as laid in the declaration, preponderance of the evidence must find for plaintiff," etc., faulty as ignoring the questions er plaintiff knew of the defect, have known by the exercise of c care, or had as good opportunity fendant of knowing it. *Las Kostka* (1901) 190 Ill. 130, 6 72. Affirming (1900) 92 Ill. App

The fact of defendant's failure nish lights being admissible on t tion of plaintiff's negligence i out in the dark to the place w was injured, a requested ins that there are no allegations in laration that defendant was g gence in failing to furnish that for this reason all te gard to lights should be di ed, properly modified so as to that the defendant should not b guilty of negligence in regard furnishing of light, and that t dict should not be based upon

leged want of light. *Iroquois Furnace Co.* v. *McCrea* (1901) 191 Ill. 340, 61 N. E. 79, Affirming (1900) 91 Ill. App. 337.

An instruction as to the right of railroad companies to erect cattle guards is properly refused in an action for personal injuries to a brakeman while making a coupling, caused by stepping through a cattle guard, where no question as to the right or duty of defendant to erect the cattle guards is involved. *Illinois C. R. Co.* v. *Sanders* (1897) 166 Ill. 270, 46 N. E. 799, Affirming (1896) 66 Ill. App. 439.

A charge to the jury that the single question is whether or not a frog was blocked at the time a railroad employee was injured by catching his foot in it is not improper, when the pleading and evidence have narrowed the inquiry to this single matter. *Union P. R. Co.* v. *James* (1896) 163 U. S. 485, 41 L. ed. 236, 16 Sup. Ct. Rep. 1109.

In an action for personal injuries in which the sole negligence alleged is the use of an unsafe rope, an instruction that it was defendant's duty to furnish plaintiff a reasonably safe place to work in is misleading. *Hughley* v. *Wabasha* (1897) 69 Minn. 245, 72 N. W. 78.

In an action for personal injuries occasioned to the plaintiff by the starting of a machine which he was engaged in oiling, while in the defendant's employ, if the declaration alleges that the machine was likely to start of itself, and did so start, an instruction as to the defendant's liability in the event of its being found that the machine was liable to start by the acts of some of his employees is properly refused for the reason that the question is not open under the declaration. *Shaughnessey* v. *Sewall & D. Cordage Co.* (1891) 160 Mass. 331, 35 N. E. 861.

Instructions based on the theory that plaintiff was injured because of certain defects in the machinery about which he worked are erroneous, where such defects are not alleged in the petition, and no amendment is made. *Vincent* v. *Kauffman Mill. Co.* (1895) 131 Mo. 211, 33 S. W. 428.

Where the only negligence charged is a failure to fasten a brakewheel upon the staff, whereby a brakeman was killed, an instruction that, if the brakeman received the injury because of the negligence of the company's inspectors in not noticing and reporting the defects, the company would be liable, etc., is not proper. *Chicago & E. I. R. Co.* v. *Knoerim* (1894) 152 Ill. 458, 43 Am. St. Rep. 259, 39 N. E. 32 t.

In an action by a brakeman who stepped into a ditch running across the track, an instruction that, if the tracks were not so ballasted as to be reasonably safe in coupling cars, and plaintiff was thereby injured, he should recover, is erroneous, where the issue made by him is that defendant was negligent in permitting the ditch to remain, and not that the ballasting generally was defective. *Chicago & I. R. Co.* v. *Myers* (1899) 86 Ill. App. 401.

Special instructions in an action by a yard master against a railroad company for injuries sustained by being thrown from a footboard of an engine on which he was riding, by a collision with a rock on the track, with reference to the footboard being out of repair, and charging him with knowledge of its condition,—are properly refused as introducing an issue not made by the pleadings, where the petition alleges that the injury was the result of the negligence of the company in the handling of cars improperly loaded, and in failing to discover and remove the rock. *Galveston, H. & H. R. Co.* v. *Bohan* (1898; Tex. Civ. App.) 47 S. W. 1040, Denying Rehearing (1898; Tex. Civ. App.) 47 S. W. 1052.

A charge which embodies general rules as to the duty of railroad companies to exercise proper care in operating their cars and trains, which are inapplicable to the case, should be refused in an action by a widow to recover damages for the death of her husband, killed while coupling cars in his employment as a brakeman. *Louisiana Extension R. Co.* v. *Carstens* (1898) 19 Tex. Civ. App. 190, 47 S. W. 36.

Where a declaration is framed upon the theory that the plaintiff is entitled to recover as for the negligence of a superior servant, it is error to allow the introduction of evidence going to show the incompetence of such servant, and to charge the jury as to the liability of a master who retains an incompetent employee, with knowledge of his incompetence. *East Tennessee & W. N. C. R. Co.* v. *Collins* (1886) 85 Tenn. 227, 1 S. W. 883.

Where the declaration alleged, and the evidence tended to prove, that defendant had failed to exercise ordinary care in selecting the foreman under whose direction decedent was working, it was not error for the court to modify a requested instruction purporting to define defendant's duties towards de-

ceased so as to include its duty with respect to the selection of a proper foreman. *Dingee* v. *Union* (1900) 98 Va. 217, 35 S. E. 794.

Where a declaration alleged that defendant company negligently and carelessly permitted and caused hot cinders to be deposited in the yard where plaintiff was working, an instruction submitting the question whether defendant was negligent in causing a hot cinder cap to be taken from its place on the plates, after it had been drawn from the furnace, and carried to the yard, submits an issue within the scope of the declaration. *Western Tube Co.* v. *Polchinski* (1901) 192 Ill. 113, 61 N. E. 451, Affirming (1901) 94 Ill. App. 610.

Where there are general allegations of negligence followed by averments specially setting out the acts which constitute the negligence, the latter will take the place of and control the former. Thus, where plaintiff, in an action for injuries occasioned by a Mexican colaborer dropping a heavy stone on his hand, alleged as negligence that defendant had put plaintiff to work with such laborer, who was a man of a low order of intellect, and could not understand the English language, the issue was confined to the incompetency of such colaborer, resulting from his low order of intellect and inability to read the English language; and an instruction permitting plaintiff to recover if the Mexican was not a competent person to do the work at which he was engaged goes beyond the pleadings, and is erroneous. *B. Luntry Sons* v. *Lourrie* (1900; Tex. Civ. App.) 58 S. W. 837.

In an action by a widow to recover damages for the death of her husband, alleged to have been caused by the negligence of a division superintendent and conductor of a railroad company while the deceased, under their directions, was making a coupling, it is improper to give a charge upon the law appertaining to cases where an employee seeks to recover because of defective machinery, and as to the effect of his knowledge or means of knowledge, or a charge on the assumption of ordinary risks, and as to the effect of knowledge on the part of an employee of danger. *Louisiana Extension R. Co.* v. *Carstens* (1898) 19 Tex. Civ. App. 190, 47 S. W. 36.

In an action by a servant against the master to recover for an injury alleged to have been caused by the breaking of an unsound piece of timber furnished by the master for the use of the servants in building a scaffolding, it is not error

refuse an instruction that ant would not be liable if he a sufficient quantity of sou and the unsound piece was to selected and used by plaintiff servants, where the defendant specially that the plaintiff was because of the manner in whi ducted himself at the time injured, and where it appear issue tendered by the inst not actually litigated at the contention at the trial he was hurt by his own fa *Murray Mfg. Co.* v. *Hess* (1 C. A. 647, 98 Fed 56.

In a suit against a railroa for injuring a section hand, tion that, if he was injured man's negligence in leaving control of the plaintiff and borers during his absence fro could recover, is not warra allegation that plaintiff's i occasioned by the negligence man in directing his gang t the track without making ar to notify them of the approa in time to clear the track. *& D. C. R. Co.* v. *Gilstrap* Tex. Civ. App. 304, 61 S. W

A charge upon gross negli leading and improper, in an widow to recover for the de husband, alleged to have be the negligence of a superior w deceased, under his direction, gaged in coupling cars, wher damages are not sought. *Lou tension R. Co.* v. *Carstens* Tex. Civ. App. 190, 47 S. W.

An instruction as to the rocks on defendant's track is an action for personal injur employee, where the presence rocks is the negligence on wh tiff relies. *Galveston, H. & S.* v. *Pitts* (1897; Tex. Civ. App. W. 255.

In an action by an employee fendant for injuries caused by t ing and slipping of a lever w jackscrew which plaintiff was to use in lifting a bridge strin work for defendant, the com leged that the jackscrew fur defendant was defective, in t lever was constructed of such s terial that it bent in use. An tion was given that, if the jury from the evidence that the lever jackscrew was or ought to h known by the defendant to be d and unfit for the purpose for w

was being used, and not sufficiently tough and hard for use in hoisting the stringer without bending, and that the injury was caused by this defect, the plaintiff could recover. A charge was also given which in express terms required a verdict against plaintiff, unless it was proved that the lever was made out of a material so soft that it bent on being used. Held, that the charge did not vary from the pleading, and that under it the jury could not have considered any defect other than the one alleged. *Galveston, H. & S. A. R. Co. v. Hopson* (1900) 21 Tex. Civ. App. 458, 50 S. W. 928.

In an action by a brakeman to recover for personal injuries, an instruction that if the plaintiff was injured by falling from a car because a hand hold insecurely fastened, and not in reasonably safe condition, gave way, he might recover, is justified by allegations and proof that the fastenings gave way because of the rottenness of the wood to which they were attached. *Missouri, K. & T. R. Co. v. Rose* (1898) 19 Tex. Civ. App. 479, 49 S. W. 133.

An instruction giving the law relating to fellow servants is proper where the declaration alleges that the deceased and those who caused his death were not fellow servants, and defendant pleads the general issue, even though the evidence may show that they were not such. *St. Louis & T. H. R. Co. v. Eggmann* (1895) 60 Ill. App. 291, Affirmed in (1896) 161 Ill. 155, 43 N. E. 620, but not on this point.

In an action against a railroad company for the death of an employee while riding upon a truck which was designed for use in laying rails, and which, because of its unusual weight, was being pushed in front of an engine, instead of being carried on a car in the usual manner, an instruction which makes the case depend upon the proper performance of the duty to provide safe appliances is erroneous, as the truck was not provided for such a purpose, and the case really turns upon the official character of the foreman. *Erdlbeck v. Philadelphia, H. & P. R. Co.* (1895) 169 Pa. 592, 32 Atl. 588.

Where, in an action for injuries to a railroad employee, the alleged negligence consisted in placing a box of dynamite in an open caboose which carried its employees, an instruction that it was the duty of the master to ascertain and make known to his servants the danger of this explosive, and the proper method of handling it with safety, and that the ignorance of the master thereof would furnish no excuse if he could, by reasonable diligence and ordinary care, have obtained such knowledge, is relevant to the issues. *Rush v. Spokane Falls & N. R. Co.* (1900) 23 Wash. 501, 63 Pac. 510. So also is an instruction that the master impliedly engages with the servant that the place in which he is to work or in which he is to be placed shall be reasonably safe. *Rush v. Spokane Falls & N. R. Co.* (1900) 23 Wash. 501, 63 Pac. 509.

An instruction making the liability of the defendant depend upon the foreman's negligently pulling a coupling pin, and letting the car loose, does not present a different ground of negligence from a petition which alleges negligence in sending a car down a grade at a great rate of speed. The extraction of the pin and the letting loose of the car are acts incidental to the main act of negligence alleged. *Texas & P. R. Co. v. Reed* (1895; Tex. Civ. App.) 32 S. W. 118.

Where the essence of the negligence complained of is that the car which a railway employee was clearing after a trip was struck by a switch engine, the engineer's knowledge or ignorance of his presence on the car is an immaterial element. Hence an instruction that, if the engineer knew, or by the exercise of ordinary care could have known, of plaintiff's presence in the car, the verdict should be for plaintiff, is erroneous, though the court did not charge the converse of the proposition. *Johnson v. International & G. N. R. Co.* (1899; Tex. Civ. App.) 54 S. W. 620.

Where the complaint avers that plaintiff's injury did not result from risks incident to the employment, and the answer puts the averment in issue, it is error to refuse to instruct on that theory of the case. *Holy Cross Gold M. & Mill. Co. v. O'Sullivan* (1900) 27 Colo. 251, 60 Pac. 540.

As an instruction on an abstract proposition of law need not be given, a refusal to submit to the jury the question whether plaintiff might have discovered a fellow servant's incompetence is not ground for reversal, where the defense was not on that ground. *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92.

Where plaintiff alleged that defendant's foreman negligently attempted to bolt certain timbers in a dangerous and extraordinary manner, and that plaintiff was injured while working thereon under the foreman's directions, it is error

to give an instruction as to the defendant's duty to furnish its employees with a safe place to work. *San Antonio & A. P. R. Co.* v. *Weapers* (1899) 22 Tex. Civ. App. 344, 51 S. W. 910.

In an action for injuries received by plaintiff by reason of the breaking of a steel loop used in raising the span of a bridge about which he was working, an instruction that unless plaintiff received his injuries from the natural and probable result of raising the end of the bridge, and by the means employed in raising same, he could not recover, is properly refused, since, although it is otherwise correct in point of law, it eliminates the issue as to whether the appliances furnished by the employer were suitable, proper, and reasonably safe, and is therefore calculated to mislead the jury. *Mexican C. R. Co.* v. *Murray* (1900) 42 C. C. A. 334, 102 Fed. 264.

An instruction that if the employees of the defendant railroad company left a switch open, so that the plaintiff, who was standing on the footboard of an engine which ran in upon a side track, was injured by the resulting collision, the fact that he was riding on the footboard would not prevent a recovery,—is material error, since it takes from the jury the question of the plaintiff's negligence. *Chicago & A. R. Co.* v. *Harrington* (1898) 77 Ill. App. 499.

In an action against a railroad for injuries to an employee, caused by defendant's foreman negligently throwing a tie from a caboose and striking plaintiff, an instruction to find for defendant if the throwing of the tie was the proximate cause of the injury, and plaintiff knew it was being thrown from the car, is properly refused, since it does not submit the issue of the foreman's negligence in so doing, and the jury might, under such an instruction, find for the defendant in spite of their being of opinion that the injury did not result from simply throwing the tie from a running train, but from the negligent manner of so doing. *Galveston, H. & S. A. R. Co.* v. *Dehnisch* (1900); Tex. Civ. App.) 57 S. W. 64.

(c) *Appropriateness with reference to the evidence introduced at the trial.*—An instruction is properly given when it tends to enlighten the jury with regard to a legal principle which is relevant to the case, and proper for the jury to consider with reference to the evidence respecting a fact on which the jury is required to furnish an answer. *Western Tube Co.* v. *Polobinski* (1901) 192 Ill. 113, 61 N. E. 451, Affirming (1 Ill. App. 640.

An employer sued for personal to an employee is entitled to an tion as to the extent and limi duty to plaintiff in respect to th of the place where his work w performed. *Guinard* v. *Kansas Co. Co.* (1897) 95 Wis. 482, 70 671.

An instruction to the effect brakeman injured through the of a defective ladder cannot c there was a visible defect in the and he failed to report it, is ref used, where there is no evi the defect was visible, or the tiff ever saw the car before the accident. *Toledo, W. & W.* v. *Ingraham* (1875) 77 Ill. 309.

An instruction in an action sonal injuries to a railroad that if the jury believe that d used ordinary care to have the inspected, and had no actual k of its defective condition, they for defendant, is properly refus there is no evidence that any was made, although there is that there were persons whose was to make inspection. *Chic R. Co.* v. *Binkopski* (1897) 72 22.

A requested instruction in for personal injuries from the of a boiler, that the defendants held liable for defects in the ture of the boiler or in its condition of which they knew to have known, is properly where there is no evidence of defects. *Gillespie* v. *Dry Dock B. R. Co.* (1896) 12 App. Div. N. Y. Supp. 245.

An instruction that the would not be liable if the ma ated by plaintiff was the one use for its purpose and in go though the jury should find t would admit plaintiff's fingers between it and the drum, is no ously refused, as the court called on to decide as to the p of such a machine's admitting hand. *Swift & Co.* v. *Holoubek* 62 Neb. 31, 86 N. W. 901, Rec Rehearing (1900) 60 Neb. 7 W. 249.

The court properly refuses requested instruction in an against a master for a person from the explosion of a boiler the master relies on an inspecti boiler made by public offici

chargeable with any negligence on their part in making the inspection, where there is no evidence that their inspection was in fact negligent, or that they were incompetent to make the inspection, and the charge correctly informs the jury that the master could not rely upon such inspection alone. *Gillespie v. Dry Dock, E. B. & B. R. Co.* (1898) 12 App. Div. 501, 42 N. Y. Supp. 215.

An instruction that the jury might consider the manner in which the trench which caved in upon the plaintiff was shored and supported is warranted where evidence as to what was customary in the way of bracing such a ditch is received, after having been excluded when first offered. *Schmit v. Gillen* (1899) 41 App. Div. 392, 58 N. Y. Supp. 45.

In an action for an injury caused by a piece of steel which flew off a rivet hammer, an instruction to the effect that, as the evidence showed that the hammer in question was made by a manufacturer whose tools were of high standing, and that such hammers must be highly tempered, and were therefore liable to chip and crack when in use, the plaintiff assumed the risk of being injured by such chipping or cracking, is properly refused, where the facts, as shown by the witnesses, were not applicable to hammers which had become cracked and chipped from use like the one which caused the accident. *De La Verne Refrigerating Mach. Co. v. Stahl* (1900) 24 Tex. Civ. App. 471, 60 S. W. 39.

An instruction, in an action for injuries, that, if the jury believed it was dangerous to ship and handle dynamite in the caboose car of a train with the doors open, and that such danger could have been avoided if a safer way, known or easily capable of being learned by the master, had been adopted, then it was the duty of the master to his servants to adopt such safer way, is not open to exception on the ground that no allegation or proof of a safer method was shown, since there was a patent danger in so shipping such an explosive. *Rush v. Spokane Falls & N. R. Co.* (1900) 23 Wash. 501, 63 Pac. 500.

Judgment for an employee will not be reversed, at suit of employer, for the giving of an instruction that the burden of proof is on employee to show both defect in machine, with negligence in providing it, and also negligence in permitting floor on which he stood to operate it to be wet and slippery, when accompanied, also, by instruction to find for employer if the machine was not defective, though there was no evidence that the admittedly wet and slippery condition of the floor was due to negligence. *Swift & Co. v. Holoubek* (1901) 62 Neb. 31, 86 N. W. 910, Reversing on Rehearing (1900) 60 Neb. 784, 84 N. W. 249.

The refusal of an instruction embodying the doctrine that an employer is not culpable if the environment of the servant was as safe as it usually is under similar circumstances in a business of the same character is prejudicial error in any case where the evidence is such that the defendant may possibly escape liability on this ground. *St. Louis, P. & N. R. Co. v. Cronin* (1900) 87 Ill. App. 521 (see, generally, chapter XL., *ante*).

Instructions in a case based on an injury caused by the emergence of a locomotive from a building without warning are inadequate if they do not notice facts proved by the testimony that the owner regarded the place as a dangerous one, that no warning had been given to the injured person, although he was inexperienced, nor the facts in regard to the track and the manner of its use and the place of the accident, which show the place to have been peculiar and dangerous. *Hess v. Bethlehem Iron Co.* (1898) 31 C. C. A. 363, 59 U. S. App. 627, 88 Fed. 23.

Where, in an action for injuries received by an engine wiper while moving a wheel by order of his foreman, there is proof that the mechanism and movement of the wheel were unusual and that he was unfamiliar with it, and was suddenly set to work to aid in moving it, it was held that a charge in favor of defendant, excluding the issues of plaintiff's inexperience and want of knowledge of the danger, was properly refused. *Galveston, H. & S. A. R. Co. v. Renz* (1900) 24 Tex. Civ. App. 57, 59 S. W. 280.

Where, in an action for injuries to an engine wiper while moving a wheel by order of his foreman, issues as to his experience in the particular work, and defendant's knowledge thereof, were presented by the evidence, a charge instructing the jury, without qualification, that he assumed the ordinary risks incident to the work, was misleading, and calculated to exclude such issues from the case. *Galveston, H. & S. A. R. Co. v. Renz* (1900) 24 Tex. Civ. App. 335, 59 S. W. 280.

An instruction embodying the rule as to continuance of work with knowledge

of a defect should not be refused when the evidence introduced at the trial makes such a charge pertinent, although the question is not directly raised by the plaintiff's pleadings. *Johnson* v. Ga. Pac. & A. R. Co. (1875) 55 Ga. 123.

A requested instruction, that the rule as to a master's duty to furnish a safe place for a servant to work does not apply where the place is made unsafe solely by reason of the hazardous character of the work which the servant has undertaken to do, and where the latter is aware of or by the exercise of his faculties could with ordinary care have become fully advised, of the character of the work and the surroundings,—even if good as an abstract proposition, is not applicable where the danger was due to a bank of clay overhanging an excavation in the shale beneath, which could have been removed as the excavation proceeded, and the servant injured was inexperienced in the work. *Alton Paving, Pkg. & Fire Brick Co.* v. *Hudson* (1898) 176 Ill. 270, 52 N. E. 256, Affirming 74 Ill. App. 612.

A charge upon the effect of the master's knowledge of a defect is erroneous, where there is no evidence that he had any knowledge of the unsafe character of the appliance. *H. S. Hopkins Bridge Co.* v. *Barnett* (1892) 85 Tex. 16, 19 S. W. 884.

An instruction that if the coupling pins were defective, and the fact was known to plaintiff, and he continued in the service of the company, he assumed the risk arising from defective pins, is erroneous where the evidence is uncontradicted that the plaintiff knew nothing about the pin, the defective condition of which contributed to his injury, and that it was customary to throw away all defective pins. *Missouri, K. & T. R. Co.* v. *Baker* (1900) Tex. Civ. App.) 58 S. W. 961.

An instruction to the effect that the giving of an express promise to repair will not enable the servant to recover if the danger of using the appliance is so great that no man of ordinary prudence would continue to use it, is rightly refused where the evidence is that the plaintiff went to work because he relied, not on a promise to repair, but because he was told that the appliance had been repaired since he last used it. *Atchison, T. & S. F. R. Co.* v. *McKee* (1887) 37 Kan. 592, 15 Pac. 484.

No express instruction is required in regard to an alleged but unproved inexperience of plaintiff, who sues for injuries received in defendant's employ, where such ground of recovery shown by the evidence or include charge. *Gulf, C. & S. F. R. Co.* (1896; Tex. Civ. App.) 34 S. W.

An instruction on the con negligence of plaintiff's inex his assumption of the risk, quired by evidence that such who was a railroad engineer, over the road a few times wit trains at the place of the acci was caused by defects in t *Walker* v. *McNeall* (1897) 17 59 Pac. 518.

In an action for injuries sus plaintiff by the breaking of a lever, an instruction that, if knew, or had the means of through the use of it, what pliance which he was constr was sufficient or not for the which it was being used, he risk of using it, is erroneous is nothing in the evidence to the use of the lever by p gested a defect therein, and faulty for the reason that might have been led to t plaintiff, in the absence of a fect, did not have the right that defendant had used due provide a suitable appliance. *Sherman, S. & S. R. Co.* (1 Civ. App.) 58 S. W. 964.

In an action for the death road engineer by derailment of by a misplaced switch, an that employees of railroads the risks usually incident to in which they engage, and the jury believe that the accident in the death of such engineer sult of hazards incident to ness of railroading, and was by want of ordinary care on of defendant, plaintiff can is properly refused where the clearly shows that the switch placed through the defendant of the switch, or through inter some unauthorized person. *T. C. R. Co.* v. *Gaither* (1897 App.) 43 S. W. 266.

A charge as to the doctrine tion of risks cannot be ob the ground that it submits t a theory not raised by the where the plaintiff himself h that he very much doubted defect in an apparatus requir a tensional strain could have covered on inspection, that i possible to know how great would actually be in any given

that the best of such machinery frequently gave way. *Throckmorton* v. *Missouri, K. & T. R. Co.* (1898) 14 Tex. Civ. App. 222, 39 S. W. 174.

An instruction on the question of the father's acquiescence in the employment of his son in a dangerous service, that one is deemed to have acquiesced when, with full knowledge of all the facts, he refrains from objecting or enforcing his objections to a proper extent for such time and under such circumstances that it may be reasonably inferred that he has waived or abandoned his right to object, is proper if an issue as to acquiescence is raised by the evidence. *Missouri, K. & T. R. Co.* v. *Evans* (1897) 16 Tex. Civ. App. 68, 41 S. W. 80.

An unqualified instruction which states that the plaintiff cannot recover if he knew of certain specified defects is properly refused where there is evidence going to show the existence of other defects as well. *Houston & T. C. R. Co.* v. *Kelley* (1896) 13 Tex. Civ. App. 1, 34 S. W. 809. Rehearing Denied in 13 Tex. Civ. App. 25, 46 S. W. 863.

A refusal to charge on the questions of assumed risk and contributory negligence in an action for injuries received by plaintiff while in defendant's service as a section hand was proper, where the evidence showed that his injuries resulted from defendant's negligence in running a train at a high rate of speed, without warning, so near to a hand car that one who assisted plaintiff in lifting it from the track became so frightened that he let go his hold, thereby injuring plaintiff. *International & G. N. R. Co.* v. *Newburn* (1900) Tex. Civ. App.) 58 S. W. 542. Affirmed in (1901) 94 Tex. 310, 60 S. W. 429 (this point not discussed).

In an action against a railroad company for negligently causing a brakeman's death, an instruction directing attention to decedent's conduct in relation to matters as to which there is no proof of contributory negligence, and so giving an excessively wide range to the jury to search for contributory negligence, is properly refused. *Missouri P. R. Co.* v. *Fox* (1900) 60 Neb. 531, 83 N. W. 744.

A request for an instruction in a suit by a brakeman to recover for injuries received while walking between cars to uncouple them, contrary to the rules of the road, that he cannot recover if he voluntarily violated the rule, cannot be refused, although the evidence tends to show that the rule had been waived. The instruction requested is applicable to one possible theory of the effect of the evidence. *Cleveland, C. C. & St. L. R. Co.* v. *Baker* (1899) 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224.

In the absence of evidence to show, in an action for injuries, that a servant selected the place to do his work, an instruction that, if the plaintiff did not select a safe place to work, he could not recover, is properly refused. *Silveira* v. *Iversen* (1900) 128 Cal. 187, 60 Pac. 687.

Where previous instructions had fully covered the law of the case, and no evidence of defendant's negligence is introduced, plaintiff is not entitled to the instruction, "Knowledge of the danger was not conclusive evidence of neglect in failing to avoid it." *Joyce* v. *Worcester* (1885) 140 Mass. 245, 4 N. E. 565.

Where a brakeman was thrown from a car by the giving way of a hand hold while he was placing himself in position to leave the car when the train arrived at a certain point, an instruction to find for the railroad if the brakeman was negligent in getting off the car while it was running at the rate of 10 miles an hour is properly refused. *International & G. N. R. Co.* v. *Howes* (1899; Tex. Civ. App.) 54 S. W. 325.

As the burden is on a railroad company, in an action for death of a fireman caused by excessive speed of the engine, to show that deceased had control over the speed, it cannot complain of submission of the issue as to whether he had such control, though there was no evidence as to it. *Galveston, H. & S. A. R. Co.* v. *Ford* (1899) 22 Tex. Civ. App. 131, 54 S. W. 37.

Where the evidence tends to show that the braces of a sewer which fell in upon the injured servant were put in place under the direct supervision of a vice principal, it is not error to refuse a charge explaining the doctrine as to co-servants. *La Salle* v. *Kostka* (1901) 199 Ill. 130, 60 N. E. 72, Affirming (1900) 92 Ill. App. 91.

Where the evidence shows that the negligence which caused the injury consisted in the breach of one of the master's non-assignable duties, it is not error to refuse to give an instruction as to the rule which prevents a recovery for injuries caused by the negligence of a fellow servant. *Terrell Compress Co.* v. *Arrington* (1898; Tex. Civ. App.) 48 S. W. 59.

Where the defendant contends that the plaintiff was a fellow servant with the employee whose act caused the injury, it is not error to give an instruc-

tion abstractly defining the relation of fellow servants. *Western Tube Co.* v. *Polobinski* (1901) 192 Ill. 113, 61 N. E. 451, Affirming 94 Ill. App. 640.

A requested charge in an action by a servant to recover for personal injuries, that the verdict should be in favor of the employer if the employee was injured by reason of the negligence of a fellow servant, is properly refused, when there is no evidence to support a finding that the accident was thus caused. *Schmit* v. *Gillen* (1899) 41 App. Div. 302, 58 N. Y. Supp. 158.

In a case where there are no facts calling for it, an instruction with regard to the limitations upon the fellow servant doctrine is deemed to be prejudicial error, where, upon the whole case, it appears that the jury were thereby misled and confused. *Coal Creek Min. Co.* v. *Davis* (1891) 90 Tenn. 712, 18 S. W. 387.

In an action by an employee against a master for injuries alleged to have been caused by the incompetency and negligence of a coemployee, it is not erroneous for the court to make a distinction between the incompetency and negligence, and to submit to the jury only the question of negligence, where the evidence was entirely directed to the manner in which such coemployee performed his work, and the knowledge of plaintiff and defendant in respect thereto. *Olsen* v. *North Pacific Lumber Co.* (1900) 40 C. C. A. 427, 100 Fed. 384.

In an action against a railroad for injuries resulting from the engineer's negligence, a charge submitting the case not only in respect to his want of knowledge of the road, but also his incompetency generally, is erroneous, where the evidence failed to show that the company knew of such incompetency, or failed in performing its duty in selecting him for the work. *Galveston, H. & S. A. R. Co.* v. *Gibson* (1899; Tex. Civ. App.) 54 S. W. 779.

Where there is no evidence to show that the accident was caused by the negligence of the fellow servant alleged to be incompetent, it is error to give a charge directing the jury to inquire whether that servant was negligent. *Galveston, H. & S. A. R. Co.* v. *Faber* (1885) 63 Tex. 344, on second appeal (1888) 77 Tex. 153, 8 S. W. 64.

Where there is no evidence that a certain employee was incompetent or guilty of negligence causing the accident, it is error to instruct the jury that, if they find the accident to have been due to his incompetence, the plaintiff should recover. *Galveston, H. & S. A.* v. *Arispe* (1891) 81 Tex. 517, 17 47.

An instruction that, if the jur that the plaintiff was injured negligence of the fellow servant act caused the injury, he cannot unless he shows that the fellow was also incompetent, is not open jection, where there is evidence was intemperate, to the knowle the master's representative. *C* & Z. Co. v. *Roediger* (1894) 78 M 28 Atl. 901.

In *Cooper* v. *Hamilton Mf* (1867) 14 Allen, 193, the cou ruled out the defense of common ment in a case where it appear the plaintiff's evidence that he gaged, with other workmen, in a heavy machine from one room other, by means of trucks, one wheels of which broke through th causing the injury in question. preme court said: "We feel cons to set aside this verdict, not bec case was one which ought not been submitted to the determina the jury, but because the d were precluded by the ruling court from submitting to their eration a ground of defense whic to have been left open to them. pears by the exceptions that, a evidence in support of the pl case was put in, the court m peremptory ruling that the pain law that an employee could no tain an action against his emp he was injured by the negli others in the service of the s ployer, when he was acting in charge of his duty, and all were in a common service, would not l cable to the case. The effect decision, at the stage of the which it was announced, was to the defendants from offering dence to sustain a defense based rule of law referred to. This was erroneous. No doubt the de were bound to provide suitable tures for carrying on all the op necessary to the transaction of ness or performing the work, the persons employed by them gaged. As applied to the case this principle of law would re them to use proper care in ord that the doors were of sufficient to support any machine which necessary to move over or up But the nature of this care wh were bound to use was such

defendants might have performed their full legal duty by employing suitable persons of competent skill and experience, whose business it was to keep the floors in such condition as to repairs that they were fit and safe for use for any of the purposes for which it might become necessary to appropriate them. If they were diligent and careful to this extent, and any want of repair had not existed for so long a time as to show absolute negligence on the part of the defendants, then the accident would have been attributable to the negligence of an agent or servant in the service of a common employer with the plaintiff, and the case would have come within the principle which the court, without hearing the evidence in behalf of the defendants, decided was inapplicable to the case."

Where a jury would be justified in finding from the facts in evidence that a fireman jumped from his engine after seeing a slow-up signal, and was thrown against the plaintiff, an instruction based on the theory that the failure of the engineer to obey the signal in time was the proximate cause of the injury is not erroneous. *Galveston, H. & S. A. R. Co.* v. *Jackson* (1899) Tex. Civ. App.) 53 S. W. 81, Judgment Affirmed in (1900) 93 Tex. 262, 54 S. W. 1023.

In an action by a switchman for damages for injuries sustained by being thrown from a car where his duties called him, by the sudden jerking or checking of the car, alleged to have been caused by the negligence of the foreman of the switching crew or the engineer of the switch engine, where the evidence shows that the control of the acts of the switchmen and of the movements of the train that was being switched was by means of signals given by the foreman to the engineer and switchman, and that it was the duty of the switchman to keep a lookout for all signals given by the foreman, an instruction that if the jury "believe from the evidence that there was no more shaking and jarring in said car at the time of the injury to the plaintiff than was usual or customary on defendant's railroad at and before that time, their verdict must be for the defendant,"—is erroneous, as failing to predicate like conditions or similar circumstances, such as existed at the time of the alleged injury. *Louisville & N. R. Co.* v. *Smith* (1901) 129 Ala. 553, 30 So. 571.

Where plaintiff's only right to be on the car where he was injured depended on the fact that he was an employee, though the car stood near a highway, it is not error to refuse to instruct on the duty of the engineer to blow the whistle and ring the bell at such point. *De Walt* v. *Houston, E. & W. T. R. Co.* (1900) 22 Tex. Civ. App. 403, 55 S. W. 534.

Where there was evidence to show that a servant had been injured by the starting of a train, whereby he was caught between a car and platform, and received additional injuries from a foreman's negligence in backing the train, and that the former injury might not have killed him, an instruction that, if the foreman was not negligent in starting the train, a verdict should be returned for the defendant, is properly refused, as the latter injury is also to be considered by the jury. *Houston & T. C. R. Co.* v. *White* (1900) 23 Tex. Civ. App. 280, 56 S. W. 204.

(d) *Appropriateness with reference to theories advanced by either party.*—Instructions should be given as to any theory which either the plaintiff or defendant may advance with respect to the significance of any part of the testimony which bears upon a material issue. *Cerrillos Coal R. Co.* v. *Deserant* (1897) 9 N. M. 49, 49 Pac. 897.

In a case where a servant's eye was destroyed by a piece which was chipped off of a sledge, wielded by a fellow servant, it was held to be error to refuse an instruction that, if the evidence showed the injury to plaintiff to have been the result of a mere accident, he could not recover. *Webster Mfg. Co.* v. *Nisbett* (1900) 87 Ill. App. 551.

Where the plaintiff's case is based partly on the theory that the defendant was negligent in retaining an engineer, and partly on the theory that a defective locomotive was used, an instruction to the effect that there was a failure of proof to show that the engineer was unskilful, incompetent, and negligent, and that the appellant had knowledge of his unfitness a sufficient length of time prior to the accident to have provided against it, and that therefore the jury should find for the appellant, is properly refused, for the plaintiff may still recover by reason of the defects in the engine. *Wabash & W. R. Co.* v. *Morgan* (1892) 132 Ind. 430, 31 N. E. 661, 32 N. E. 85.

Where one of several theories as to the cause of an injury is that it resulted from the negligent loading of cars, and the evidence tends to show that the loading was done by an independent contractor, it is error, in a case

where a special verdict is to be rendered as to each of these theories, to refuse to submit to the jury the question of negligence in regard to the loading. *Haley* v. *Jump River Lumber Co.* (1892) 81 Wis. 412, 51 N. W. 321, 950.

In an action against a railroad company for negligently causing the death of a brakeman, an instruction as to decedent's contributory negligence, which wholly omits reference to plaintiff's contention that decedent's death was occasioned by the negligent construction of a braking appliance, is properly refused. *Missouri P. R. Co.* v. *Fox* (1900) 60 Neb. 531, 83 N. W. 744.

In an action for injuries resulting from his falling from a derrick about which he was working, an instruction which was addressed to the issue of assumed risk, which ignores the question of a vice principal's negligence, is erroneous. *St. Louis S. W. R. Co.* v. *Smith* (1901; Tex. Civ. App.) 63 S. W. 1064.

(e) *Instructions objected to as invading the province of the jury.*—An instruction declaring it the duty of defendant to adopt reasonably safe methods, "and" to use well-known and practical appliances in thawing dynamite, is erroneous in an action for injuries to an employee from an explosion, where defendant used no appliances and the question at issue is whether its failure to do so was negligence. Such an instruction in effect takes from the jury the right to determine whether the defendant's method of thawing dynamite before an open fire, without such appliances, was reasonably safe. *Bertha Zinc Co.* v. *Martin* (1895) 93 Va. 791, 22 S. E. 869.

It was proper to refuse to charge that the mere fact of an accident raises no presumption of negligence; since such a charge is an invasion of the province of the jury. *Missouri, K. & T. R. Co.* v. *Baker* (1900; Tex. Civ. App.) 58 S. W. 964.

It is error to give an instruction which assumes that a material fact which is in dispute has been proved. *Neville* v. *Chicago & N. W. R. Co.* (1890) 79 Iowa, 232, 44 N. W. 367.

An instruction that the plaintiff, by entering into and remaining in defendant's service, assumed only the ordinary risks directly connected with his immediate employment as a brakeman, and did not assume any risk or dangers resulting from a defective and dangerous track or frog, unless prior to the time of his injury he actually knew, or by the use of reasonable and ordinary care under all the circumstances shou[ld] known, that the particular frog he was injured was in a defect[ive] dangerous condition, and thereaf[ter] mained in defendant's empl[oy] using such track and frog with[out] jection or promise of amendment defect, was held to be erroneous, reason that it assumed the fro[g] in a dangerous condition. *Co[x]* *Burlington, C. R. & N. R. Co.* 62 Iowa, 491, 17 N. W. 760. Th[e] said: "Appellee claims that the ant pleaded a confession and av[oid] by averring that the deceased k[new] by the exercise of ordinary care have known, of the condition of t[he] and that he made no objection and was promised no change whereby he assumed the risk. examination of the averments of swer, it will be seen that the d[e]fe does not admit that the frog w[as] dangerous condition. It is stated that the deceased 'could w[ith] known of its location and const[ruc] and the dangers thereto, if an dangers existed in fact.' We k[no] no rule of pleading which would quired the defendant to admit frog was in a dangerous condi[tion] order to avail itself of the defe[nse] deceased knew of its actual co[n]d and made no complaint."

In an action for injuries ca[used] the derailment of a locomotive, [al]l by the defendant to have been c[au]s the excessive speed at which the bimself was running the locom[oti]ve requested charge which assume when the accident occurred, ther[e] rule of the company in force w[hich] hibited the operation of an eng[ine] greater speed than 18 miles an h[our] a curve of over 6 degrees, is prop[er] fused; since, if the court had g[iven] charge, its effect would have bee[n] the jury that such a rule was [in] that plaintiff's intestate had n[o] it, and that the point of accident a curve of over 6 degrees—all were matters for the jury. *G[ulf]* *H. & S. A. R. Co.* v. *Smith* (1 Tex. Civ. App. 127, 57 S. W. 99

In an action for injury caus[ed] explosion, an instruction that should find defendant guilty gence if they believe that the which drew the caboose in wh[ich] plosion occurred was defective it emitted large quantities of which set fire to a box in the containing dynamite, does not on the province of the jury, w[hich]

evidence is that the engine emitted an unusual quantity of sparks, so that it was liable to set fire to any combustible with which the sparks came in contact, and that the company's workmen were conveyed in the caboose, with dynamite therein, the presence of which was unknown to them. *Allen* v. *Spokane Falls & N. R. Co.* (1899) 21 Wash. 324, 58 Pac. 244.

In an action by a brakeman for injuries received while coupling cars, a charge that, if plaintiff, when he went to make the coupling, placed himself in such a position as was customary, and gave a signal that the cars approaching him should move more slowly, and that this signal was disregarded, the result being that he was injured, he could recover, is erroneous, since the jury receive therefrom the impression that, if the plaintiff assumed the customary position, he was using ordinary care. *Missouri, K. & T. R. Co.* v. *Baker* (1900; Tex. Civ. App.) 58 S. W. 964.

In an action for the death of a brakeman who, while standing on the pilot of a switch engine, lost his footing, and was run over and killed, an instruction that if the engineer, by the exercise of ordinary care, could have seen that the brakeman had lost his footing, and he did in fact lose his footing, and the engineer, by the exercise of ordinary care, could have stopped the engine in time to have avoided inflicting fatal injuries on the brakeman, his failure to do so, if he did so fail, was negligence, is erroneous, in assuming, as a matter of law, that it was the duty of the engineer to exercise ordinary care to see that the brakeman had not lost his footing. *San Antonio & A. P. R. Co.* v. *Weller* (1900; Tex. Civ. App.) 62 S. W. 554.

In an action for injuries alleged to have been caused by the master's negligence in giving an order, an instruction which assumes such negligence to be the fact, and excludes from the jury all consideration of evidence which has been introduced and which tends to prove that the order had been given in different terms, is erroneous. *Linn* v. *Massillon Bridge Co.* (1899) 78 Mo. App. 111.

An instruction that if the jury believe that plaintiff's intestate and another person specified were fellow servants, and if the injury to the former was due to the tracks not being put and kept in good repair, plaintiff cannot recover, is properly refused where there is evidence that the bad condition of the track was not due to such person, and also that he was unreliable. *Rittenhouse* v. *Wilmington Street R. Co.* (1897) 120 N. C. 544, 26 S. E. 922.

In an action by an employee to recover for personal injuries alleged to have been caused by his employer's negligence in keeping and using a work bench and tools for the purpose of cutting wires, an instruction that the maintaining and using of such bench and tools was not in itself negligence, because they could have been used without injury to any one if proper precautions were taken, is reversible error, where there was evidence tending to prove that it was dangerous to cut wires on the bench with the means provided by the employer. *Ward* v. *Odell Mfg. Co.* (1898) 123 N. C. 248, 31 S. E. 495.

In *Elledge* v. *National City & O. R. Co.* (1893) 100 Cal. 282, 34 Am. St. Rep. 290, 34 Pac. 720, an instruction to the effect that the burden of proof as to the defendant's knowledge, or culpability in lacking knowledge, of any insecurity in the place of work is on the plaintiff, but that this burden is satisfied when it is shown that the place was insecure in such a respect that, if a proper inspection had been made by defendant, the insecurity would have been ascertained in time to have prevented the injury, was objected to on the ground that by using the word "when," instead of "whenever" or "if," the trial judge assumed that the necessary proof was made. The court said that such a construction of the language of the charge was opposed to the manifest intention of the judge, and that the last part of the charge simply specified the evidence which would be sufficient to satisfy the burden of proof.

An instruction that use or nonuse of bagging in hoisting iron pipe is not necessarily negligence is properly refused, where the omission to protect the pipe by canvas is the fact upon which the question of negligence substantially turns. *New York Electric Equipment Co.* v. *Blair* (1897) 25 C. C. A. 216, 51 U. S. App. 81, 79 Fed. 896.

An instruction is erroneous which, in doubtful cases, withdraws from the jury the question whether the negligent and injured servants were in branches of the business so distinct that the rule as to common employment is not applicable. *Ryan* v. *Chicago & N. W. R. Co.* (1871) 60 Ill. 171, 14 Am. Rep. 71 (error to charge that a laborer in a carpenter shop assumed the risk of an engineer's negligence in operating his engine). See § 504, *ante*.

A charge to find for defendant unless the jury believe the parties in charge of certain empty cars used more force than necessary in attaching them to the caboose, or were otherwise negligent in making the coupling, is a charge on the weight of evidence, since it makes the use of unnecessary force in attaching the cars negligence *per se*. To give such a charge, therefore, is error, though in other portions of the charge the failure of those engaged in annexing the empty cars "to exercise ordinary care to avoid injuring those in the caboose," if on account of such failure "the empty cars were run violently against the caboose," to plaintiff's injury, was made the test of liability. *Houston & T. C. R. Co.* v. *Burns* (1901; Tex. Civ. App.) 63 S. W. 1035.

An instruction that a servant has a right to presume that the master has performed his duty with ordinary care is not objectionable, as being upon the weight of evidence. *Missouri, K. & T. R. Co.* v. *Crowder* (1899; Tex. Civ. App.) 53 S. W. 380.

An instruction that if plaintiff, while in the performance of his duty and in the exercise of ordinary care, stepped upon a cross-tie and into a hole, and was thereby injured, he was entitled to recover, is not subject to the objection that it assumes that plaintiff was exercising due care, and that the injury was the proximate result of the condition of the premises where plaintiff was employed. *Sherman, S. & S. R. Co.* v. *Belf* (1900; Tex. Civ. App.) 58 S. W. 147.

Where plaintiff alleged, and it was not denied, that when he received his injuries he was working under the direction of defendant's bridge foreman, and the evidence shows that he received and obeyed orders from such foreman, an instruction treating the foreman as defendant's vice principal is not error. *San Antonio & A. P. R. Co.* v. *Weisers* (1899) 22 Tex. Civ. App. 344, 54 S. W. 910.

An instruction that if, after an independent contractor had quit a job and left the premises, the master adopted and used the structures he had erected, or acquiesced in their use by his servants, then such structures became those of the master and if, by reason of his failure to keep them in good repair, a servant was injured, he was responsible for the injury, is not objectionable, as charging the jury in respect to matters of fact, since the court does not undertake to say what facts amounted to an adoption of the structures. *Rinake* v. *Victor Mfg. Co.* (1900) 58 S. C. S. E. 700.

(f) *Instructions unduly emph particular portions of the evi* The case is properly submitted u whole evidence. A trial judge bound to single out one particul and give it a prominence whic have the effect of misleading t An instruction that the fact th fell out while a trench was be was some evidence of negli properly refused, in an action f sonal injuries by a subsequent earth in the trench, where, af first fall, uprights for the pur holding up the side walls were twice as thick as before. *O'* *O'Connell* (1897) 167 Mass. 38 E. 758.

(g) *Inconsistent instructions*— struction, in an action by an e for injury from the breaking plank in a scaffold on which working, that a servant is not b inspect the appliances furnish but may assume that they are bly safe, and that a servant is b take notice of such defects as w disclosed by ordinary care in o the appliances furnished him, th followed by an hypothesis of f which the jury are ordered against defendant, and embraci fact that plaintiff, in the exerci dinary care and diligence, wou discovered the defect, consti knot, is confusing, as a jury co ply both propositions. *Armour zeau* (1901) 191 Ill. 117, 60 N. Reversing 93 Ill. App. 235.

In *Schaub* v. *Hannibal & St. J* (1891) 106 Mo. 74, 16 S. W. court gave an instruction ask the defendant to the effect that ceased assumed the risk of i himself from the negligence of low servants in setting these fre too close to the point of the sw it also gave plaintiff's instruc which the jury were told that, i knocked from the car he was s standing on the ladder, and wholly by the negligence and ness of the defendant, its agents ants, in negligently leaving standing so close to the north s side track as to be in a dangero imity to the main track, then recover. The supreme court said the court here has not distinguis tween the duty of the defendant ter and the duty of the serv servants, to each other. It has

the jury that, if the master furnished a safe and properly constructed track, and employed competent servants, and furnished safe cars, that it had performed all the duty it owed deceased. The jury are told, on the contrary, that, if deceased lost his life by the negligence of the defendant or its servants, the defendant was liable. By its terms it includes all of defendant's servants, and, in so doing, authorizes the jury to attribute the negligence of trainmen engaged in the same common employment with deceased to defendant, and in so doing it most clearly contradicts the other instruction in which the jury were told deceased assumed the risk of the negligence of his fellow servants. The instructions under the evidence were misleading."

In a case where the evidence tends to show that the injury was due to the negligence of a fellow servant, it is error to give an instruction that the plaintiff had a right to assume that the defendant company had exercised reasonable care in the selection of its employees; that he was not bound to investigate whether it had done so or not; and that until such time as notice to the contrary was brought home to him, he had a right to act on such assumption. Even though such an instruction contains a correct proposition of law, it should not be given under such circumstances, as its practical effect is "to neutralize every other instruction given upon the subject of fellow servants, and absolutely cut out any defense based upon the theory that deceased came to his death through the negligence of a fellow servant." *Chicago, B. & Q. R. Co.* v. *Libey* (1896) 68 Ill. App. 144.

(h) *Instructions objected to as not being sufficiently specific.*— Where the jury have been instructed in general terms, on defendant's motion, as to contributory negligence, and no more specific instructions have been asked with respect to the consequences of plaintiff's violation of a rule, the defendant cannot complain that the jury were not told that such violation would preclude the plaintiff from recovery. *Louisville & N. R. Co.* v. *Hiltner* (1900) 22 Ky. L. Rep. 1141, 60 S. W. 2, Reversing 21 Ky. L. Rep. 1826, 56 S. W. 654.

A charge that, if the jury believe that the accident was caused by the careless and unskilled manner in which plaintiff handled or operated the tools used in his work, and that but for such carelessness the accident would not have happened, plaintiff could not recover, should be refused, as too general, where the allegation is that the injury was caused by a chip from a particular defective hammer. *Duerst* v. *St. Louis Stamping Co.* (1901) 163 Mo. 607, 63 S. W. 827.

Where the question whether a temporary foreman was competent to manage the appliances has been fairly raised by the evidence, and the trial judge has correctly stated who are fellow servants, error cannot be predicated of the omission of specific instructions as to the relation of the foreman to the plaintiff, where no request for them was made. *Trainor* v. *Philadelphia & R. R. Co.* (1890) 137 Pa. 349, 20 Atl. 632.

(i) *Unnecessary and superfluous instructions.*—It is not error to refuse to give an instruction which is virtually a repetition of one already given. *Frandsen* v. *Chicago, R. I. & P. R. Co.* (1873) 36 Iowa, 372.

An instruction that if a railroad employee, injured while coupling cars, was without fault, the law raises a presumption that the defendant company was negligent, is not erroneous for failure to charge in the same connection the defendant's theory that the injury was a mere accident, where such theory is sufficiently covered by other parts of the charge. *Raleigh & G. R. Co.* v. *Allen* (1898) 106 Ga. 572, 32 S. E. 622.

"If the principles of those doctrines [which preclude the servant from recovering if he has assumed the risk or has been negligent] were stated correctly [in the instructions], and in such a way as to enable the jury to apply them intelligently to what, from the conflicting evidence, they should find to be the facts, the defendant cannot complain that they were not applied in detail by the court to a particular state of facts which might or might not be found by the jury." *Martineau* v. *National Block Book Co.* (1896) 166 Mass. 4, 43 N. E. 513.

Where the charge contains instructions on the servant's assumption of risk, an instruction as to a master's duty to furnish and maintain safe appliances is not erroneous for failure to mention the question of the plaintiff's assumption of risk. *Hellar* v. *National & P. Worsted Mills* (1901) 22 R. I. 347, 47 Atl. 1092.

Where the charge of the court in an action to recover for injuries sustained by reason of the breaking of a handle on a hand car places upon the plaintiff the burden of showing what caused the handle to break, it is not error to refuse

an instruction to return a verdict for defendant if it cannot be determined from the evidence what caused the breaking. *Texas C. R. Co.* v. *Fox* (1900) 24 Tex. Civ. App. 295, 59 S. W. 49.

In an action by a brakeman for injuries caused by the insecurity of a handhold, it is not error to refuse to instruct that the mere fact that the handhold came off, and that the plaintiff was hurt, will not justify a recovery, where the jury are instructed to find for defendant if it had exercised care in inspecting the car. *International & G. N. R. Co.* v. *Hawes* (1899; Tex. Civ. App.) 54 S. W. 325.

Where, in an action to recover for injuries, the servant's instruction as to the negligence of the master is otherwise adequate, it is not necessary that it should embrace the master's theory of the results of his knowledge of the defect, since the master can submit such theory in an instruction of his own. *Hester* v. *Jacob Dold Packing Co.* (1900) 84 Mo. App. 451.

The inclusion of main rails and guard rails in an instruction defining the duty of a railroad company with reference to keeping its tracks, switches, main rails, and guard rails in proper repair, though there is no question as to their condition, is not reversible error, where it is improbable that the jury are misled thereby. *International & G. N. R. Co.* v. *Turner* (1897; Tex. Civ. App.) 43 S. W. 560.

Where the petition in an action for injuries to a servant alleged that it was caused by stepping on a projecting bolt of the footboard of defendant's engine, it is not error to refuse to instruct that there can be no recovery if the injury was caused by stepping on some other substance on such board, where the court has also charged that a verdict for the defendant should be given if there was no projecting bolt on the footboard, or if there was no negligence in reference to the bolt, or if the bolt was not the proximate cause of the accident. *Houston & T. C. R. Co.* v. *Milam* (1901; Tex. Civ. App.) 60 S. W. 591, Reversing (1900; Tex. Civ. App.) 58 S. W. 735.

(j) *Error in instructions, when cured by other parts of the charge.*—An instruction that defendant was required to furnish a reasonably safe place in which the plaintiff should work, though erroneous when taken alone, is harmless when other parts of the instruction and other instructions emphasize that defendant was bound only to use reasonable care to furnish a reasonably [illegible] place in which plaintiff should [illegible] *Taylor* v. *Star Coal Co.* (1899) Iowa, 40, 81 N. W. 249.

An instruction in an action [illegible] employee against a railway compan[illegible] injuries sustained by its negligence, [illegible] if at the time the employee was [illegible] ly an engine the persons in charge [illegible] of were in the exercise of ordinary [illegible] "you will find for the defendant, [illegible] you find for plaintiff under the fir[illegible] agraph of this charge."—is not e[illegible] ous, where such first paragraph exp[illegible] instructs the jury that the emp[illegible] right of recovery rests upon the [illegible] gence of the railway company [illegible] verdict in his favor cannot be pu[illegible] rendered under that paragraph, [illegible] such negligence is proved. *Texas* [illegible] *R. Co.* v. *Breadow* (1898) 19 Tex. [illegible] App. 483, 47 S. W. 816.

In one case an instruction to the [illegible] that the plaintiff must not only [illegible] lish, by a preponderance of evi[illegible] that his own negligence did not [illegible] tribute to the injury, but also th[illegible] was ignorant of the defects whi[illegible] sulted in the injury, was objected [illegible] the ground that it authorized the [illegible] to find for the plaintiff if thes[illegible] propositions were established, a[illegible] not direct their attention to the [illegible] which the fact of his knowl[illegible] proved, would have upon the q[illegible] whether he assumed the risk. [illegible] jection was overruled on the g[illegible] that the effect of the plaintiff's [illegible] edge was indicated in another p[illegible] the instruction. *Belair* v. *C[illegible] N. W. R. Co.* (1876) 43 Iowa, 66[illegible]

An instruction for plaintiff, in [illegible] tion for damages because of defec[illegible] negligence, which authorizes a re[illegible] on facts hypothesized therein, w[illegible] reference to plaintiff's assumption [illegible] risk, relied on as a defense, is not [illegible] neous where the assumption of [illegible] submitted to the jury in a separ[illegible] st uction. *Sackewitz* v. *American Mfg. Co.* (1899) 78 Mo. App[illegible]

The error of a court in assum[illegible] disputed fact as true is cured by [illegible] instructions which correctly sta[illegible] law upon the subject. *Kansas* [illegible] *Ft. S. & M. R. Co.* v. *Becker* (18[illegible] Ark. 1, 77 Am. St. Rep. 78, 40 L. [illegible] 814, 53 S. W. 406.

The failure of an instruction to [illegible] cate that the defendant mining [illegible] pany would be liable only for an [illegible] directly caused by its neglect to [illegible] the room in which the plaintiff w[illegible] in a reasonably safe condition is

although that allegation may be followed by another which specified one particular form which the negligence assumed.[1]

Special interrogatories which pertain to evidentiary facts only, and not to ultimate facts, are properly refused.[2]

It is proper to refuse to submit an interrogatory which assumes as true an evidentiary fact.[3]

A judgment based on a finding which is not supported by any evidence, or which is supported by insufficient evidence, will be reversed.[4]

A judgment for the plaintiff, entered upon a special verdict, will

by instructions that the defendant is not liable if the plaintiff loosened or pulled down the piece of slate that fell on him, or if he could have avoided the accident by ordinary care which must measure up to the dangers of the employment. *Russell Creek Coal Co.* v. *Wells* (1898) 96 Va. 416, 31 S. E. 611.

While it is the better practice to state the qualifications of a master's liability for injuries to an employee in connection with a statement of the liability, the failure to do so, where such qualifications are referred to in connection with a statement of the liability, will not render the charge misleading. *International & G. N. R. Co.* v. *Jackson* (1901) 25 Tex. Civ. App. 619, 62 S. W. 91.

Error of the court in giving Ga. Civ. Code, § 2321, in charge to the jury in a suit by an employee against a railroad company for an injury alleged to have resulted from the negligence of an employee, is not cured by the judge subsequently stating in his charge the correct rule on the subject, without calling the attention of the jury to his mistake in quoting the section as the law of the case. *Port Royal & W. C. R. Co.* v. *Davis* (1898) 103 Ga. 579, 30 S. E. 262.

An objection to a charge that it was abstract, in that the jury were told that it was the defendant's duty to warn an inexperienced servant of the hazards and risks of his employment, and did not limit the obligation to the risk which was the actual cause of the injury, will not be allowed to prevail where there is no pretense that warning was given to the deceased about any other danger, and other parts of the charge, given at the instance of the railway, pointedly limit the jury's consideration to the particular risk to which the injury was due. *St. Louis, I. M. & S. R. Co.* v. *Davis* (1892) 55 Ark. 462, 18 S. W. 628.

[1] Where a complaint for injuries received by the fall of a telegraph pole on which plaintiff was working alleges defendant's failure to furnish a safe place to work, in not setting the pole sufficiently in the earth, and allowing the dirt around its base to be washed away, the plaintiff's case does not depend solely upon his ability to establish negligence in respect to the washing away of the earth. It is not error, therefore, to permit the jury to find an inadequate setting of the pole from all the evidence, including its appearance, the way it fell, and the description of the ground. *Riker* v. *New York, O. & W. R. Co.* (1901) 64 App. Div. 357, 72 N. Y. Supp. 168.

[2] As where in an action for injuries alleged to be caused by an imperfect and dangerous appliance, defendant requests the submission of interrogatories as to whether plaintiff was instructed not to use the appliance, and as to whether he was injured because he undertook to use it in violation of his instructions. *Gundlach* v. *Schott* (1901) 192 Ill. 509, 85 Am. St. Rep. 348, 61 N. E. 332, Affirming 95 Ill. App. 110.

Or where, in an action for the death of a railroad employee struck by an engine, the submission of special interrogatories as to whether he knew the place where he was struck was a dangerous place to work, and was loading his revolver when he was struck, was requested. *St. Louis, I. M. & S. R. Co.* v. *Eaquann* (1896) 161 Ill. 155, 43 N. E. 820.

[3] *Gundlach* v. *Schott* (1901) 192 Ill. 509, 85 Am. St. Rep. 348, 61 N. E. 332, Affirming (1901) 95 Ill. App. 110.

[4] *Morris* v. *Rochester Repairing Trans. Co.* (1901) 73 Conn. 680, 49 Atl. 180. *Toledo, St. L. & K. C. R. Co.* v. *Trimble* (1893) 8 Ind. App. 333, 35 N. E. 716.

to set aside, unless every fact which is required to make out his appears in that verdict. Its silence as to any material point amo with respect to the matter involved, to a finding against him.[5] It has been held that, if the conditions disclosed by the answer portion of the interrogatories indicate culpability on the defen part, the jury's assertion of its inability to answer certain oth terrogatories will not warrant the entry of a judgment for th fendant, although it may be clear that there was no lack of per evidence upon which to base a conclusion as to the facts to those interrogatories relate.[6]

Where it is necessary to set aside a special finding, for the r that it was physically impossible that the accident could have pened in the manner stated, and the other findings in regard defendant's negligence and the plaintiff's contributory negli have reference to the finding thus discredited, the whole of the ings are rendered inconclusive and insufficient to support a judg for the plaintiff.[7]

A judgment for plaintiff, based upon inconsistent special fin some of which indicate negligence on the part of the master's while others point to contributory negligence on the plaintiff's will not be allowed to stand.[8]

A general verdict for a servant is conclusive in his favor, unle special findings are utterly irreconcilable with it.[9] But if the

[5] *Phillips* v. *Romona Oolitic Stone Co.* (1898) 19 Ind. App. 341, 49 N. E. 467.

[6] Where a snow plough ran off the track of a railway and went through a bridge, it is error, in an action for injuries received by the engineer of the train, to enter a judgment for the defendant, where the jury found, in answer to three of the questions submitted to them, that the snow plough was defective, that the bridge was defective, and that the train was short handed, although they also stated that they did not know whose negligence, if any there were, caused the accident, nor whether defendant knew or ought to have known of these several conditions, and returned the same answer to several other questions which bore upon the liability of the defendant, and in respect to which enough evidence was submitted at the trial to enable them to give a positive answer. *Padsey* v. *Dominion Atlantic R. Co.* (1895) 27 N. S. 498. (Two judges dissenting.)

[7] *Pewaukee* v. *Cream City Sash & Door Co.* (1901) 109 Wis. 456, 84 N. W. 860.

[8] In an action by an employe while working under a bridge, jured by a timber thrown fro bridge by other workmen, specia ings that the direct cause of the was the failure of the foreman timely warning to plaintiff, and form the men who were unload timbers that there was any one the bridge, that plaintiff knew t coemployees were above him, ab throw off timber, that he coul avoided the injury if he had re where he was, and watched whi the timber was to fall,—are so sistent as to necessitate the reve a judgment for plaintiff. *St. L S. F. R. Co.* v. *Bricker* (1899) 6 224, 59 Pac. 268.

[9] *Hatchett* v. *Cincinnati, W. & Co.* (1892) 132 Ind. 334, 31 N. There is no irreconcilable conf tween a general verdict based theory that the injury was cau defendant's negligence, and the interrogatories, where it is s found that the breaking of the fl a car wheel, which was "roadw

wers to interrogatories are themselves contradictory, they will not control the general verdict, although that verdict may be inconsistent with a portion of the answers.[10]

was the proximate cause of the derailment, and the proximate cause of the wreck was found to be the high rate of speed at the point of derailment, and that finding also states that the track where the flange broke was not defective, but that the wheel ran on the rail until it struck a curve before it was derailed, and that the flange broke because the track was rough and uneven,—the high rate of speed being the proximate cause of the breaking of the flange. *Chicago, I. & L. R. Co.* v. *Ferguson* (1901) 27 Ind. App. 114, 59 N. E. 1088. (This action was brought under the Indiana employers' liability act, by which railway companies are made liable for the negligence of engineers. See chapter XXXVII., *ante*.)

In an action for injuries to a brakeman, resulting from the unsafe condition of his place of work, a special finding that the general plan of the interlocking switch plant at which the brakeman was injured was like the general plan of similar plants on other railroads with which the brakeman was acquainted, was not necessarily inconsistent with the conclusions of the jury in the general verdict that there was a negligent failure on the part of the defendant railroad company to provide a reasonably safe place for the brakeman to work in switching cars at night; that the brakeman had not assumed the risk, and that he did not directly contribute to his injury by his own negligence. *Flutter* v. *New York, C. & St. L. R. Co.* (1901) 27 Ind. App. 511, 59 N. E. 337.

Special findings in an action for injury to a brakeman, to the effect that he was injured while running alongside of a moving engine by tripping over wires stretched across the path, that the wires from a semaphore ran across the track on which the engine was to a pulley box about four feet south of it, being strung about seven inches from the ground, between the track and the box, that from the box to the tower station the wires were strung higher, that the box, and the wires running each way from it, were in full view, that the brakeman was in full use of his sight, and had worked as a brakeman for many years, and in that capacity for the defendant company for several months, and that he did not know that the wires he tripped over were not boxed,—contain nothing which forbids the jury from concluding that the brakeman had a right to assume that his path was not rendered dangerous by his employer's stretching wires across it at such a height that a person intent on his duties was liable to be tripped by them, or which requires a judgment for defendant on the special findings notwithstanding a general verdict for plaintiff. *Flutter* v. *New York, C. & St. L. R. Co.* (1901) 27 Ind. App. 511, 59 N. E. 337.

Notwithstanding a general verdict for the plaintiff, judgment is properly entered for the defendant, where the jury find specially that the injury was caused by the negligence of a coemployee, and that he was competent for his work. *American Wire Nail Co.* v. *Connelly* (1893) 8 Ind. App. 398, 35 N. E. 721.

In an action for injuries alleged to have been caused by defendant's negligence in failing to provide a guard over revolving knives in a wood-cutting machine used by plaintiff, and in failing to warn plaintiff of the increased danger resulting from the small size of the stick he was planing when injured, a general verdict for the plaintiff is inconsistent with special findings that the machine was of a kind in general use, was in good repair, without defects; that plaintiff had used it three months, and knew that it was a dangerous machine, and that there was no guard on it, and had made no complaint; that he was of mature years, and had had five years' experience in wood-cutting. *Guedelhofer* v. *Ernsting* (1899) 23 Ind. App. 188, 55 N. E. 113.

Where, in an action for injuries received in a quarry, the complaint charged that the servant was employed to do special work as a wheeler, free from hazard, and that he was ordered to perform a different, perilous service, without being warned of the danger, a special finding that he was engaged to do "general work," and that the work required was a part of his duties is contradictory to a general verdict in plaintiff's favor. *Consolidated Stone Co.* v. *Redmon* (1899) 23 Ind. App. 319, 55 N. E. 454.

See also § 139, note 3, *ante, ad fin.*

[10] *Hatchett* v. *Cincinnati, W. & M. R. Co.* (1892) 132 Ind. 331, 31 N. E. 792.

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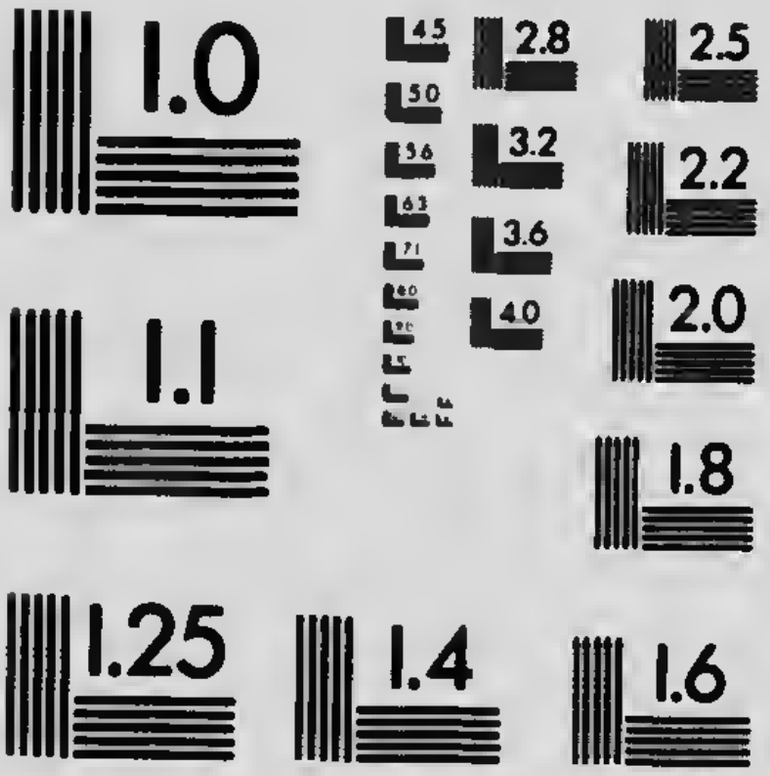

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Where two grounds of negligence have been alleged, either which, if made out, would be sufficient to sustain the verdict in re to the negligence of defendant, and evidence has been offered u each of the grounds, a court will not grant a new trial, if it can that one of the grounds is made out, although the other may not unless it appears from a special finding that the verdict is based u a ground which is not sustained by the evidence.[11]

[11] Where a servant has alleged both that the belt which broke and caused the injury was improperly laced, and that it had not been properly inspected, the jury's finding of negligence without any special finding on either of these grounds will not be set aside for fa to show want of proper inspection, the inspection was immaterial if n gence existed as to the lacing. *M* v. *National & P. Worsted Mills* (1 22 R. I. 347, 47 Atl. 1092.

CHAPTER XLVI.

CONFLICT OF LAWS.

A. WHERE THE EFFECT OF A STATUTE IS NOT INVOLVED.

868. Conflict of laws, as between the courts of two states.

869. — as between Federal and state courts.

B. WHERE THE EFFECT OF A STATUTE IS INVOLVED.

870. Conflict of laws as between the courts of two of the United States.

a. Injury received in another state.

b. Injury received in state where action is brought.

871. — as between Federal and state courts.

872. — as between Federal and foreign courts.

873. *Lex fori* controlling, where statute affects merely the remedial procedure.

874. Presumptions as to the law prevailing in other states.

A. WHERE THE EFFECT OF A STATUTE IS NOT INVOLVED.

868. Conflict of laws, as between the courts of two states.— In one case it has been laid down that, in determining the right of a servant to recover for an injury received in a sister state, a court is not bound to adopt the construction which has been placed upon the common law in that state. The position taken was that the common law was presumably the same in both jurisdictions, and that the court which tried the action was, for this reason, not only competent, but under an obligation, to decide the rights of the parties according to its own theory of the actual effect of that law, as applied to the facts in evidence. The conclusion deduced from the principle thus laid down was, that the rulings of the court of last resort in the state where the accident occurred were not controlling as regards the question whether the defense of coservice was available.[1]

According to several other cases, the right of recovery, under such circumstances, should be determined with reference to the decisions of the courts of the state or country within the limits of which the injury was received.[2]

[1] *Krogg* v. *Atlanta & W. P. R. Co.* (1886) 77 Ga. 202, 4 Am. St. Rep. 79.

[2] *Lazotte* v. *Boston & M. R. Co.* (1899) 70 N. H. 5, 45 Atl. 1084 (applying the Massachusetts doctrine that the duty of a railway company with respect to the inspection of its cars is adequately discharged when competent inspectors have been employed); *Nashville, C. & St. L. R. Co.* v. *Foster* (1882) 10 Lea, 351 (applying Alabama doctrine that the existence of coservice is not

The doctrine of the Federal courts, which is discussed in the following section, may, perhaps, be thought to lend some support to the former of these antagonistic doctrines. The elements to be considered, however, are not the same in each instance. The jurisdiction exercised by Federal and by state courts is concurrent and coequal, so far as regards actions of the type with which we are here concerned. There is accordingly no positive reason why the former courts should defer to the opinion of the latter with respect to the application in any given principle of the system of law which is administered by both courts. But it is difficult to perceive any satisfactory ground upon which it is possible to sustain a doctrine which amounts essentially to a declaration that the general principle by virtue of which the rights and liabilities of the parties to an action sounding in tort are governed by the law of the place where the tort was committed is subject to an exception in cases where the law to be considered is the common law. The true theory would rather seem to be that, for purposes of private interstate and international jurisprudence

negatived by the fact that the negligent and injured servants were in different departments of the master's business); *McMaster* v. *Illinois C. R. Co.* (1887) 65 Miss. 264, 7 Am. St. Rep. 653, 4 So. 59 (applying Louisiana rule that conductor is a vice principal as to a brakeman); *Illinois C. R. Co.* v. *Harris* (1901; Miss.) 29 So. 760 (same rule applied). See also cases cited in the next note.

In *Walsh* v. *New York & N. E. R. Co.* (1894) 160 Mass. 571, 39 Am. St. Rep. 514, 36 N. E. 584, the Connecticut doctrine, that the inspection of railway cars is a non-delegable duty, was applied in favor of a plaintiff who could not have recovered under the decisions in Massachusetts. The court said: "We are of opinion that, as between the states of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the form resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties. . . . The policy of the supposed Connecticut rule cannot be said to be opposed to that prevailing here, even apart from statute. See Stat. 1893, chap. 359." It was deemed to be unnecessary to consider whether the court was prepared to adopt the doctrine propounded by the editor Story's Conflict of Laws, 8th ed. note *a*, *viz.*, that "whether the domestic law provides for redress in such cases or not, should, on principle, be immaterial, so long as the right is a reasonable one and not opposed to the interests of the state." (See § 870, note 3, *infra*.)

The doctrine laid down in this case was followed in *Engquist* v. *Ludington Steel Co.* (1893) 94 Wis. 70, 34 L. R. A. 503, 59 Am. St. Rep. 859, 68 N. W. 873, where the court applied the doctrine of common employment in the form in which it has been adopted in Illinois, the state in which the cause of action arose, although that doctrine was somewhat more favorable to the servant than that which prevailed in Wisconsin.

Where a corporation was engaged in constructing a tunnel under the St. Clair River, which separates Michigan from Ontario, and employed an overseer on each side of the river, it was held that its liability for injuries to a servant, caused by the unsafety of the place of work on the Ontario side, was to be determined with reference to the laws of Ontario, although the servant had been sent to the Ontario side by a foreman on the American side. *Quinn* v. *St. Clair Tunnel Co.* (1899) 121 Mich. 616, 47 L. R. A. 112, 80 N. W. 1. On first appeal (1897) 111 Mich. 57, 47 L. R. A. 134, 66 Am. St. Rep. 38, 69 N. W. 116.

presumption may properly be entertained that such rights and liabilities, in so far as they are dependent upon the common law, have been exactly defined by the decisions of the courts in each state or country in which that system prevails. That theory may fairly be said to involve the corollary that such decisions, if any have been rendered which indicate with reasonable clearness what the position of the parties would be in the state or country in which the cause of action arose, are as binding upon a foreign court as the specific provisions of a statute are universally conceded to be under similar circumstances.

See §§ 870–872, *infra*.

869. — as between Federal and state courts.— "The courts of Great Britain and America have established the general doctrine of the non liability of the employer for an injury to one servant, caused by the negligence of another servant in the same common employment; and this doctrine of general jurisprudence, as it involves no Federal question, is no more open to judicial denial in the Federal courts than in the state courts or the ordinary common-law tribunals."[1] But a Federal court does not consider itself bound to administer the particular form of that doctrine which may happen to have been adopted by the courts of the state in which the accident occurred.[2]

[1] *Dillon* v. *Union P. R. Co.* (1874) 3 Dill. 319, Fed. Cas. No. 3,916, per Dillon, J.

[2] In *Hough* v. *Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612, Mr. Justice Harlan thus stated the views of the court: "Our attention has been called to two cases determined in the supreme court of Texas, and which, it is urged, sustained the principles announced in the court below. After a careful consideration of those cases, we are of opinion that they do not necessarily conflict with the conclusions we have reached. Be this as it may, the questions before us, in the absence of statutory regulations by the state in which the cause of action arose, depend upon principles of general law, and in their determination we are not required to follow the decisions of the state courts."

In *Baltimore & O. R. Co.* v. *Baugh* (1893) 149 U. S. 378, 37 L. ed. 778, 13 Sup. Ct. Rep. 914, the views of the majority were thus announced: "The question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.' There is no question as to the power of the states to legislate and change the rules of the common law in this respect as in others; but, in the absence of such legislation, the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the states is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution. To-day, the volume of interstate commerce far exceeds the anticipation of those who framed this Constitution, and the main channels through which this interstate commerce passes are the railroads of the country. Congress has legislated in respect to this commerce, not merely by the Interstate Commerce Act and its amendments, 24 Stat. at L. 379, chap. 104 (U. S. Comp. Stat. 1901, p. 3151), but also by an act passed at the last session, requiring the use of automatic couplers on freight cars. Public Acts, 52d Cong. 2d Sess. chap. 113. The lines of this very plaintiff in error extend into half a dozen or more states, and its trains are largely

B. Where the effect of a statute is involved.

870. Conflict of laws as between the courts of two of the States.— *a. Injury received in another state.*—(Compare cas in § 872, *infra.*) The broad principle has been laid down t *lex fori,* and not the *lex loci,* is controlling in cases where brought in one jurisdiction for an injury received in another in the common-law rights and liabilities of masters and servant been modified by statute.[1] But the weight of authority is in of the doctrine that, under such circumstances, the question w

employed in interstate commerce. As it passes from state to state, must the rights, obligations, and duties subsisting between it and its employees change at every state line? If, to a train running from Baltimore to Chicago, it should, within the limits of the state of Ohio, attach a car for a distance only within that state, ought the law controlling the relation of a brakeman on that car to the company to be different from that subsisting between the brakeman on the through cars and the company? Whatever may be accomplished by statute,—and of that we have now nothing to say,—it is obvious that the relations between the company and employee are not, in any sense of the term, local in character, but are of a general nature, and to be determined by the general rules of the common law."

In this case an elaborate and very able dissenting opinion was delivered by Field, J., in which he combated the doctrine that there was "an atmosphere of general law floating about all the states, not belonging to any of them, and of which the Federal judges are the especial possessors and guardians, to be applied by them to control judicial decisions of the state courts whenever they are in conflict with what those judges consider ought to be the law."

"In the absence of legislative enactments, the liability of a master to one of his employees for the negligence of another is determinable by the general law, and not by the local law, and the decisions of the courts of the state in which the injury is inflicted are not controlling in the national courts." *Northern P. R. Co.* v. *Muse* (1894) 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. 114; *Chicago, M. & St. P. R. Co.* v. *Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 185.

For other cases applying this rule stated in the text, see *Newport M. Valley Co.* v. *Howe* (1892) A. 121, 6 U. S. App. 172, 52 F *Northern P. R. Co.* v. *Peterson* 2 C. C. A. 157, 4 U. S. App. Fed. 182 (decision reversed, in 162 U. S. 346, 40 L. ed. 994, 16 Rep. 813, but merely on the gro the lower court had misapprehe effect of the earlier decisions of preme Court as to superior se *The Louisiana* (1896) 21 C. C 41 U. S. App. 324, 74 Fed. 748 *man* v. *Reynolds* (1896) 23 C. C 33 U. S. App. 686, 77 Fed. 271; v. *Central Vermont R. Co.* (1 C. C. A. 110, 50 U. S. App. 27, 590; *New York, N. H. & H. R O'Leary* (1899) 35 C. C. A. Fed. 737; *Briegal* v. *Southern* (1900) 39 C. C. A. 359, 98 F *Louisville & N. R. Co.* v. *Stubb* 54 L. R. A. 696, 48 C. C. A. Fed. 934.

In view of these decisions the *Kerlin* v. *Chicago, P. & St. L.* (1892) 50 Fed. 185, in which th court for the district of India the position that, as the contro relation of master and servan served to the states, a Federa should follow the ruling of t courts with regard to the de coservice, is of no authority. cision it will be observed anted *Baltimore & O. R. Co.* v. *Baugh* (1 U. S. 378, 37 L. ed. 778, 13 Rep. 914, and is therefore i overruled by that case and th already cited. The court seems overlooked *Hough* v. *Texas & P* (1879) 100 U. S. 213, 25 L. which had previously enunciat doctrine which is now always in the Federal courts.

[1] *Anderson* v. *Milwaukee & S Co.* (1875) 37 Wis. 321.

the injured employee can maintain an action should, as a general rule, be determined with reference to the provisions of the foreign statute.[2]

[2] Prior to the enactment of the Minnesota act reviewed in chapter XXXIX., *ante*, a railway servant, injured in Iowa by the negligence of a coservant, was allowed to recover in the former state. *Herrick* v. *Minneapolis & St. L. R. Co.* (1883) 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413. The court said: "The general rule is that actions for personal torts are transitory in their nature, and may be brought wherever the wrongdoer may be found, and jurisdiction of his person can be obtained. As to torts which give a right of action at common law, this rule has never been questioned, and we do not see why the transitory character of the action, or the jurisdiction of the courts of another state to entertain it, can in any manner be affected by the question whether the right of action is statutory or common law. In actions *ex contractu* there is no such distinction, and there is no good reason why any different rule should be applied in actions *ex delicto*. Whenever, by either common law or statute, a right of action has become fixed, and a legal liability incurred, that liability, if the action be transitory, may be enforced, and the right of action pursued, in the courts of any state which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the state where it is sought to be enforced. Of course, statutes that are criminal or penal in their nature will only be enforced in the state which enacted them; but the statute under which this action is brought is neither, being purely one for the reparation of a civil injury. . . . The only case which goes to the length of holding that this action cannot be maintained is that of *Anderson* v. *Milwaukee & St. P. R. Co.* (1875) 37 Wis. 321, which, on the facts, is on all fours with the present case, and in which the court holds that such an action will only lie in the state of Iowa, which enacted the statute. But with due deference to that court, and especially to the eminent jurist who delivered the opinion in that case, we think they entirely failed to distinguish between the right of action, which was created by the statute of Iowa and must be governed by it, and the forum of the remedy, which is always governed by the law of the forum, whether the action be *ex contractu* or *ex delicto*. It is elementary that the remedy is governed by the law of the forum, and this is all that is held by any case cited by the court in support of their opinion."

This Minnesota ruling has been followed quite recently in *Chicago & E. I. R. Co.* v. *Reese* (1899) 178 Ill. 132, 44 L. R. A. 410, 52 N. E. 951, affirming (1898) 78 Ill. App. 286 (accident occurred in Indiana). The court said: "Actions not penal, but for pecuniary damages for torts or civil injuries to the person, are transitory, and, if actionable where committed, in general may be maintained in any jurisdiction in which the defendant can be legally served with process. We think it well settled that, without regard to the rule which may obtain as to a cause of action which accrued under the laws of a separate and distinct nation, a right of action which has accrued under the statute of a sister state of the Union will be enforced by the courts of another state of the Union, unless against good morals, natural justice, or the general interest of the citizens of the state in which the action is brought."

In *Voshefskey* v. *Hillside Coal & I. Co.* (1897) 21 App. Div. 168, 47 N. Y. Supp. 286, the action was held to be barred because the plaintiff had violated a Pennsylvania statute prohibiting the riding upon loaded cars in mines.

In a case where a railway employee was suing in Kentucky, under the provisions of the employers' liability act of Alabama, for an injury received in the latter state through the negligence of an engineer, it was held that he could recover damages without showing that such engineer was guilty either of gross or of wilful negligence, although proof of such negligence would be a condition precedent to the maintenance of such an action under the law prevailing in Kentucky. *Louisville & N. R. Co.* v. *Graham* (1896) 98 Ky. 688, 34 S. W. 229.

See also the cases cited in the next subsection.

Only the parties specified as having the right to sue under the provisions of a damage act can maintain an action upon that act in another state. *Western & A. R. Co.* v. *Strong* (1874) 52 Ga. 461; *Hendricks* v. *Western & A. R. Co.* (1874) 52 Ga. 467 (wife held not enti-

This doctrine is, of course, subject to the qualification wh
sults from the well-recognized principle that a foreign statute
conflicts essentially with the statutes or public policy of the
which the suit is being prosecuted will not be enforced by the
of that state.[3] That this qualification does not affect the right
covery is a conclusive inference in those cases where a statute
coincides in its provisions with that of the state in which the a
occurred has been enacted in a state in which the suit is inst
But the mere fact that the common-law doctrine established
state where the action is brought differs from that which is en
in the statute of the other state does not necessarily show that
an antagonism between the policy of the two states.[5]

tled to sue alone, as the children are also made beneficiaries under the Tennessee act).

If contributory negligence, as that term is ordinarily understood, is a bar to a right of action created by the statute of the state where the injury was received, while the doctrine as to comparative negligence prevails in the state where the action is brought, the servant cannot recover if his negligence was a proximate cause of the accident, whether that negligence was greater or less than that of the employer. *East Tennessee, V. & G. R. Co.* v. *Lewis* (1890) 89 Tenn. 235, 14 S. W. 603 (injury was received in Georgia).

[3] *Texas & P. R. Co.* v. *Cox* (1892) 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905.

[4] In *Chicago, St. L. & N. O. R. Co.* v. *Doyle* (1883) 60 Miss. 977 (decision as to damage act) the court said: "The view that no recovery could be had here except for a result traceable to an omission of duty in Mississippi is unfounded. Physical force proceeding from this state and inflicting injury in another state might give rise to an action in either state, and *vice versa*; but the omission of some duty in Mississippi cannot transfer a consequence of it manifested physically in another state to Mississippi. The cases of injuries commenced in one jurisdiction and completed in another illustrate our view on this subject. The true view is that the legal entity called the corporation is omnipresent on its railroad, and the presence or absence of negligence with respect to an occurrence at any point of the line is not to be resolved by the place at which any officer or employee was stationed for duty. The question is as to duty operating effectuall
place where its alleged failur
h n to result. The locality o
lision was in Tennessee. It w
if anywhere, that the company
miss in duty, for there is where
er caution should have been us
The fact that he was in servi
that part of the road on which
stant service was rendered mak
ference. He was in the habit o
ing the service in which he wa
He was still an engineer of t
pany, in charge of one of the
tives, and engaged in a duty in
his employment, and the place
change in his position, duties,
and none as to the liability of
ployer to him."

Where two states, in which
ration has an existence, have
of similar import, giving an a
the death of an employee, caus
negligence, suit may be
either. *Louisville & N. R. C*
(1892) 13 Ky. L. Rep. 9
914.

[5] *Herrick* v. *Minneapolis*
Co. (1883) 31 Minn. 11, 1
771, 16 N. W. 413. There it
tended by counsel that the gen
which declares that the law of
in which the injury was receiv
mines the rights and liabilitie
parties in an action brought in
state is subject to the qualificat
to sustain the action, the la
forum and the law of the pla
the right of action accrued mu
in holding that the act done
right of action. The court sa
admit that some text-writers—
Rorer on Interstate Law—ass
down this rule, but the authorit

It is well settled that "a court of one state accepts the interpretation of a statute affixed to it by the court of last resort thereof."[6] But the decisions of the courts of sister states as to statutes of a similar tenor are, at most, of merely persuasive authority, and will be followed only when the reasoning on which they are based is deemed to be satisfactory.[7]

In an action against a railway company which operated a line extending through North Carolina and Tennessee, three out of five of the judges of the supreme court of the former state held that an action brought for injuries received in Tennessee through the negligence of a fellow servant was one sounding in contract, and not in tort;[8] that, in the absence of any evidence to show where the contract was made, or what state should take jurisdiction of its enforcement, the law applicable to the case was that which prevailed in North Carolina, where the plaintiff and the defendant company were domiciled; and that the action was therefore maintainable under the statute by

generally fail to sustain it. . . . A few cases appear to lay some stress upon the fact that the statutes of both states were similar, but rather as evidence of the fact that the statute of the state giving the right of action is not contrary to the policy of the laws of the state where the action is brought. Such is the case of *Chicago, St. L. & N. O. R. Co.* v. *Doyle* (1883) 60 Miss. 977. . . . But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the law of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this liability upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens."

The Indiana employers' liability act is not "so repugnant to good morals or natural justice, or so prejudicial to the best interests of our people," that the Illinois courts should refuse to enforce it. *Chicago & E. I. R. Co.* v. *Ross* (1899) 178 Ill. 132, 41 L. R. A. 110, 52 N. E. 951, Affirming (1898) 78 Ill. App. 286, where the court expressed its views on this point in the virtually equivalent form that the common-law rule is not such a part of the public policy of Illinois as will prevent its courts from enforcing a statute of another state, abolishing the rule, in an action for personal injuries received in the latter state.

[6] *Tullis* v. *Lake Erie & W. R. Co.* (1899) 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Krogg* v. *Atlanta & W. P. R. Co.* (1886) 77 Ga. 202, 1 Am. St. Rep. 79.

[7] This principle is illustrated by *Wilkelson* v. *Truesdale* (1895) 63 Minn. 137, 65 N. W. 260, and other cases in which the courts have declined to follow the Georgia and Ohio decisions denying the right to recover from railway receivers under statutes giving a right of action against railway companies in cases where the delinquent is a coemployee. See § 845a, *ante*.

[8] See, however, the Arkansas case cited in note 9, *infra*.

which the doctrine of co-service has been abrogated as to railw
panies operating in that state.[9] (See chapter XXXIX., *ante*.)

The converse of the situation presented in the cases so far dis
in this section arises where the accident occurred in a state in
common-law doctrines are applied, and the action is brought in
in which those doctrines have been modified by statute. And
circumstances the right of recovery is determined with refer
common-law doctrines.[10]

b. Injury received in state where action is brought.—In Ar
it has been held that, under a constitutional provision to the
that all railroads which are now or may hereafter be built an
ated, either in whole or in part, in Arkansas, shall be respons
all damages to persons and property, under such regulations a
be prescribed by the legislature, a railroad company whose road
erated in part in Arkansas is governed by the statutes of Ar
and is liable to an employee in tort for injuries received there,
by failure to discharge any duties growing out of said statutes,
the contract of service may have been made in another state.[11]

871. —as between Federal and state courts.— A state statu
pressly regulating the extent of an employer's liability is appl
the Federal courts, pursuant to U. S. Rev. Stat. § 721 (U. S.
Stat. 1901, p. 581), as a "law" of the state.[1] So far as those

[9] *Williams* v. *Southern R. Co.* (1901) 128 N. C. 286, 38 S. E. 893. The other judges concurred in the decision on the ground that, even under the law of Tennessee, the defense of coservice would not have been available.

[10] *Atchison, T. & S. F. R. Co.* v. *Lannigan* (1895) 56 Kan. 109, 42 Pac. 343; *Brewster* v. *Chicago & N. W. R. Co.* (1901) 114 Iowa, 144, 89 Am. St. Rep. 348, 86 N. W. 221; *Sanner* v. *Atchison, T. & S. F. R. Co.* (1897) 17 Tex. Civ. App. 357, 43 S. W. 533.

In *Atchison, T. & S. F. R. Co.* v. *Moore* (1883) 29 Kan. 632, instructions were held to be erroneous which allowed the jury to find in the plaintiff's favor if the accident was due to the negligence of any coservant of the plaintiff, whether vice principal or not (such being the effect of the Kansas statute), when it was shown by the evidence that the distinction between a vice principal and a mere servant was recognized in Texas, where the accident occurred.

[11] *Kansas City, Ft. S. & M. R. Co.* v. *Becker* (1899) 67 Ark. 1, 46 L. R. A. 814, 77 Am. St. Rep. 78, 53 S. W. 406. The court took the ground that, although the relation between th
tiff and defendant was created
tract, the duty upon which the
relied as a ground of recovery
posed by law, and arose from t
tion, rather than the contra
conclusion, therefore, was that
ant injur ' by (he nonperform
this duty 'd elect to sue u
contract, or to treat the wrong
as a tort, and bring an action
licto.

The doctrine of the North
court as to the nature of th
seems to be different from that
tions propounded.

[1] *Northern P. R. Co.* v.
(1894) 154 U. S. 349, 38 L. ed.
Sup. Ct. Rep. 983

This rule was applied for the
of servants in *Northern P. R*
Behling (1893) 6 C. C. A. 681,
App. 662, 57 Fed. 1037 (sectio
allowed to recover in the Minne
trict for negligence of trainm
Minnesota statute being contr
Northern P. R. Co. v. *Muse* (1
C. C. A. 63, 27 U. S. App. 238,
114 (decision in Minnesota distr

are concerned, the construction placed upon such a statute by the highest court of the state in which it has been enacted is conclusive.[2]

In one case the theory upon which the court seems to have proceeded was that, if a statute modifying the liability of employers has been enacted in the state which corresponds territorially to the Federal district, in which the injury was received, and in which the action is brought, and the provisions of that statute are substantially identical with those of a statute previously enacted in another state, the more recent of the two statutes should ordinarily receive the same construction as that which has been placed upon the earlier of the statutes by the courts of the state in which it was enacted, unless the courts of the state in which the court is sitting have previously ren-

under Mont. Stat. of 1887, chap. 25, § 697, the conductor of one train was a vice principal as to employees on another train).

On the ground that a receiver might be sued for an injury resulting in death, under the statute of Louisiana, in which the injury was received, it has been held that an action might be maintained in a Federal court sitting in Texas, although, according to the decisions in the latter state, no action lies against a receiver for such an injury. *Texas & P. R. Co.* v. *Cox* (1892) 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905, declining to follow the doctrine laid down in *Turner* v. *Cross* (1892) 83 Tex. 218, 15 L. R. A. 262, 18 S. W. 578; *Texas & P. R. Co.* v. *Collins* (1892) 84 Tex. 121, 19 S. W. 365 (see § 848a, *ante*).

If an action by the representatives of a deceased employee is brought under the damage act of a state other than that in which the contract of employment was made and in which the accident took place, the right to recover, and the limit of the amount of the judgment, are governed by the *lex loci*, and not by the *lex fori*. *Northern P. R. Co.* v. *Babcock* (1894) 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978 (action in district of Minnesota for injury received in Montana). See also next note.

[2] In *Northern P. R. Co.* v. *Hogan* (1894) 11 C. C. A. 51, 27 U. S. App. 184, 63 Fed. 102, the doctrine of *Chicago, M. & St. P. R. Co.* v. *Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, that a conductor is a vice principal, was not followed, where the suit was brought in the Minnesota district for an injury received in North Dakota. "It was ruled in effect," said the court, "that, under the provisions of the Dakota statute, a master is not liable to one employee for the negligent act of another, unless the latter is at the time engaged in the performance of some duty that is personal to the master. There seems to be no valid ground, therefore, for dissenting from the view which is advocated by counsel for the plaintiff in error, that the statute of North Dakota, as construed by the highest court of that state, exempts the railroad company from liability for the injuries complained of, and that in the courts of that state the plaintiff below could not have recovered upon the state of facts proven at the trial. It must also be regarded as a well-established doctrine that the states have the right to regulate the relations existing between employers and employees within their respective borders, and to determine by legislative enactment when and under what circumstances an employer shall be held liable to an employee for an injury sustained by the latter while in his service. So far as we are aware, laws of this description have always been treated as obligatory upon the Federal courts to the same extent and with like limitations as other statutory enactments, even where they modify to some extent the pre-existing rules of the common law; and we can conceive of no sufficient reason why they should not have the same effect in the Federal courts, as rules of decision, which is accorded to other state statutes." The special points raised by counsel, that the statute of Dakota was merely declaratory of the common law, that, in construing the statute, the state court merely gave expression to its view of the common law, and that the Federal courts, being courts of co-ordinate ju-

dered decisions inconsistent with that construction.[3] But in
stances a Federal court of appeals has declined to attach to a
the same interpretation as similar enactments had received in
other than that in which these courts were sitting.[4]

872. — as between Federal and foreign courts. — When an ac
brought in a Federal court for an injury received outside the
torial limits of the United States, the juridical situation is
fected by the peculiar relations existing between the national g
ment and the individual states. Under such circumstances,
fore, the right of action is determined with reference to the g
principles of private interna. tional law.

That an American citizen is entitled to maintain an actio
Federal court for injuries received on the Mexican division of
way which is operated by an American corporation on both si
the frontier has recently been held in several cases.[1]

The doctrines applied are summarized in the propositions set
the subjoined note. These statements constitute the headnotes

risdiction, were not bound by the decision of the state court on questions of that character, were thus disposed of: "The argument is ingenious, but, as we think, it is fallacious. The state statute to which reference has been made supersedes the common law in the state where it was enacted, touching the subject to which it relates; and, while it is true that the state court had occasion to refer to the principles of the common law, yet it must be borne in mind that such reference was made solely for the purpose of ascertaining the intent of the law maker as evidenced by the statute in question. It is the statute, however, and not the common law, which is now in force in the state of North Dakota; and it is the statute, as construed by the highest court of that state, which must determine the rights of the parties and control the decision in the case at bar. Any other view would render the statute inoperative and nugatory."

In *Central Trust Co.* v. *East Tennessee, V. & G. R. Co.* (1888) 69 Fed. 353; *Central Trust Co.* v. *East Tennessee, V. & G. Co.* (1895) 69 Fed. 357, a Federal court sitting in the district of Tennessee applied, as against the servant of a railway company domiciled in Georgia, the doctrine of the courts of that state (see § 848a, *ante*), that employees of a receiver of a railway company are not within the purview of the statute abrogating the defense of common employment as regards employees of railway companies. See chapter XXXIX

See also *New York, N. H. & H.* v. *O'Leary* (1899) 35 C. C. A. Fed. 737, where the general r rights under a state statute ar minable with reference to the d of state courts was recognized.

[1] *Chicago, R. I. & P. R. Co.* v. (1894) 11 C. C. A. 88, 27 U. 157, 62 Fed. 363.

[2] The effect of the cases ref that statutes abrogating the de coservice, so far as regards em of railway companies, are not ble where the action is brought a receiver of a railway. *Ho Eddy* (1893) 5 C. C. A. 360, App. 401, 56 Fed. 461 (Georgi not followed); *Peirce* v. (1897) 24 C. C. A. 280, 47 339, 78 Fed. 693 (Georgia an cases not followed).

As to these cases, see further, *ante*.

As to the rule applied where cident occurs in a state where er may be sued, and the a brought in a state where the co determined that a receiver is not to an action, see *Texas & P. R Coe* (1892) 145 U. S. 593, 36 L. 12 Sup. Ct. Rep. 905, note 2, s

[3] *Erey* v. *Mexican C. R. Co.* 38 L. R. A. 387, 26 C. C. A. 40 S. App. 118, 81 Fed. 294; *Mex R. Co.* v. *Marshall* (1899) 34 C 133, 91 Fed. 933; *Mexican C. R*

report of the first of the three cases cited, and were adopted in the second of those cases as a correct presentment of the law.[2]

On the ground that, under the Civil Code of Quebec (arts. 1053, 1054), a servant can recover for injuries caused by the negligence of a coservant, it was lately held by a Federal court sitting in the district of Vermont that an American company was liable for injuries so caused, if they were received in that part of its system which was operated on Canadian territory.[3]

873. Lex fori controlling, where statute affects merely the remedial procedure.— The general principle, that everything which pertains

fences (1901) 48 C. C. A. 227, 107 Fed. 1.

[2](a) The right of an employee of a railroad company, injured in the Republic of Mexico by the negligence of the company, to recover in a civil action damages for such injury under the law of that republic, may be enforced in a Federal court of the state of Texas, having jurisdiction of the parties and the subject-matter; that law being neither so vague and uncertain nor so dissimilar to the law of the state of Texas as to prevent it from being so enforced, and both parties being citizens of the United States.

(b) A dissimilarity between the law of another country and the law of a state in the Federal court of which it is sought to be enforced will not prevent such enforcement, unless the dissimilarity is so great as to conflict with the settled policy of that state.

(c) The fact that a person injured by the negligence of a railroad company in another country might sue in that country is not sufficient to prevent him from suing in a United States court, particularly where the company owns and operates part of the same line of railroad in the state in which the suit is brought.

(d) The fact that acts of negligence for which the laws of Mexico give a civil remedy constitute also a crime under the laws of that country does not prevent the person injured from maintaining a civil suit therefor in a United States court, the liability not depending on the criminal prosecution or conviction of the defendant.

(e) The fact that the provision of the Penal Code of Mexico (article 323) that the judge may award, as "extraordinary indemnity," any sum that he may determine, considering the "social position" of the person injured, is against the policy of our law, is no obstacle to a suit in a United States court to enforce a right given by the law of Mexico, there being no prayer for such extraordinary indemnity.

(f) The fact that the Mexican courts are not governed by precedent, and have no reports of adjudicated cases, is not an obstacle to an action in a United States court to enforce a right given by the laws of Mexico.

(g) The decisions of a state court that a law of another country is opposed to the policy of the state, and cannot be enforced there, are not controlling in the Federal courts, the question of international comity being controlled by international law and custom.

[3] *Boston & M. R. Co.* v. *McDuffey* (1897) 25 C. C. A. 247, 51 U. S. App. 111, 79 Fed. 934. One of the authorities relied upon was *Dennick* v. *Central R. Co.* (1880) 103 U. S. 11, 26 L. ed. 439, where the court used the following language: "It is indeed a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal, and not a real, action, and is of that character which the law recognizes as transitory, and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance. . . . . Wherever, by either the common law or the statute law of a state, a right of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties."

merely to the remedy is controlled by the law of the state wher
action is brought,[1] involves the corollary that the question wh
the servant's action is barred by the lapse of time is determin
the provisions of the statute of limitations which is in force in t
risdiction where the suit is brought, and not by those of the s
of the state in which the injury was received.[2]

On the ground that a rule of evidence has no extraterritorial
it has been held that a statute which provides that, where an i
is caused by a defect in the appliances of a railway company,
of the existence of that defect shall be presumptive evidence
company's knowledge thereof, is not the law of the case in an
brought in another state, where the ordinary rule still prevails
a master is not liable for injuries caused by defects, unless they
have been discovered by the exercise of ordinary care.[3]

874. Presumptions as to the law prevailing in other states.—
case already cited, where the action was brought in a Federal
in the district of Texas for an injury received in Mexico, it wa
down th in the absence of proof, it was to be presumed that
gard to the liability of an employer for negligence resulting in
ries to an employee, the law of Mexico was the same as the l
Texas, in both of which countries the civil law originally preva

Two courts have held that, in an action brought in one state
injury received in another, it will be presumed, in the absence

[1] *Herrick* v. *Minneapolis & St. L. R. Co.* (1883) 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; 2 Kent, Com. *462.

[2] *Canadian P. R. Co.* v. *Johnston* (1891) 25 L. R. A. 470, 9 C. C. A. 587, 26 U. S. App. 85, 61 Fed. 738 (action held maintainable, although it would have been barred if brought in the jurisdiction where the accident occurred); *Knagg* v. *Atlanta & W. P. R. Co.* (1886) 77 Ga. 202, 4 Am. St. Rep. 79.

See generally, Story, Confl. L. § 576.

This elementary rule seems to have been somewhat strangely lost sight of in *Klingartner* v. *Illinois Steel Co.* (1896) 94 Wis. 70, 34 L. R. A. 503, 59 Am. St. Rep. 859, 68 N. W. 664, where, in an action between parties who were both domiciled in Illinois, it was held that the effect of the statute of limitations which was in force in that state could not be considered, because it had not been put in evidence. The reason thus assigned, in so far as it may be taken to imply that the statute would have been regarded as controlling if it had been properly proved, manifestly places the court in antagonism authorities above cited.

[3] *Jones* v. *Chicago, St. P. M. & Co.* (1900) 80 Minn. 488, 49 L 610, 83 N. W. 446. For a discu the principle here applied, see Ev. § 49; Story, Confl. L. 7th ed

[1] *Mexican C. R. Co.* v. *Marsha* 34 C. C. A. 133, 91 Fed. 933. Th cited Phillipps on Ev. (Cowen & and Edwards' notes), pp. 42 *et s* adjudged cases there cited; 1 Pi p. 65; Wharton, Ev. § 1292; and "Indeed, there is good authori holding that, as the state of Te cently constituted a part of the R of Mexico, the courts in the s Texas, in proper cases, will tak cial notice of the laws common prior to the separation. *Mal McKown* (1830) 1 La. 248, 20 A 279; *Berluchaux* v. *Perluchaux* 7 La. 539. Further than this, i be noticed that, under the laws ico as proved herein, it is clear civil action may be brought to damages resulting from negligen

idence to the contrary, that the rights and liabilities of employers and employees are regulated by the common law.[2] In one of the cases cited, it will be observed, this rule was applied where the question was whether the doctrine of common employment precluded recovery. But the position has also been taken that this doctrine was not a part of the common law existing at the date of the separation of the United States from England, and that for this reason the courts of one state cannot presume that the doctrine exists in another state, and thus cast upon a plaintiff who is seeking to recover for an injury received in such other state through the negligence of a fellow servant the burden of proving that the doctrine has been abrogated by statute.[3] Although the weight of judicial authority is in favor of a different theory, the statement here made with regard to the date at which the doctrine was introduced into English law is possibly accurate. See § 471, *ante*. But even if its accuracy be conceded, the fact relied upon can scarcely be regarded as adequate to support the conclusion deduced from it. A more reasonable theory of the situation, it is submitted, is that any court in which the common law is administered is chargeable with notice of the universal acceptance which the doctrine in question has obtained in all the countries and states in which that system of law prevails, and that, as a result of the imputation of this notice, such a court is bound to entertain a prima facie presumption that the defense of coservice is still open to an employer in each of those countries and states.

These considerations would seem to be decisive against the correctness of another decision also, in which it was laid down that, where an action for an injury received in one state is brought in another state in which an act is in force which abrogates the defense of coservice as regards certain employees, it will be presumed, in the absence of specific testimony to the contrary, that the law of the state in which the injury was received is the same as that of the state in which the action is brought, although the defendants have alleged that the common-law rule prevails in the former state.[4]

[2] *Charleston & W. C. R. Co.* v. *Miller* (1901) 113 Ga. 15, 38 S. E. 338, second appeal (1902) 115 Ga. 92, 41 S. E. 252 (where the correctness of the declaration in an action for injuries caused by defective machinery was tested with reference to the law prevailing in South Carolina); *St. Louis, I. M. & S. R. Co.* v. *Brown* (1899) 67 Ark. 295, 54 S. W. 865 (defense of coservice presumed to be available).

[3] *Williams* v. *Southern R. Co.* (1901) 128 N. C. 236, 38 S. E. 893.

[4] *MacCarthy* v. *Whitcomb* (1901) 11 Wis. 113, 85 N. W. 707.

CHAPTER XLVII.

EMPLOYERS' LIABILITY UNDER THE CIVIL LAW AND SYSTE FOUNDED THEREON.

875. Scope of chapter.

A. Duties of employers to their servants.

876. Generally.

878. — as to methods of work.

877. Duty of employer as to appliances and place of work.

879. — as to rules and regulations.

880. — as to the employment of competent servants.

881. — as to instruction and warning.

882. Duty to save life of imperiled servant.

883. Assurance of safety.

884. Liability to servants working outside the scope of their employment.

885. Obligations of an employer not owed to volunteers.

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B. Defenses available to employers.

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889. Contributory negligence.

890. Common employment.

a. Scotland.

b. France.

c. Italy and Switzerland.

d. Germany and Austria.

e. Quebec.

875. Scope of chapter.— In this chapter it is proposed to give brief summary of the principles by which the extent of an employe liability is determined in countries in which the civil law is the ba of the jurisprudence administered by the courts. The systems w regard to which American lawyers will naturally be most desirous obtaining some information are those which prevail in the countr bordering upon the United States. The greater part of the chapt therefore, is devoted to a review of the doctrines adopted in the Ca dian Province of Quebec and in the Republic of Mexico. But it h been deemed advisable to devote some little space to the law of Con nental Europe also.[1]

[1] For many of the facts which are writer is indebted to Mr. McKinn mentioned regarding European law the treatise on Fellow Servants, § 8, wh

A. Duties of employers to their servants.

876. Generally.— In all the jurisdictions with which we are concerned in this chapter, the extent of an employer's obligations depends, either wholly or partially, upon the construction of general or specific statutory provisions. The effect of the most important of those provisions is stated in the subjoined note.[1]

In the ensuing sections a summary is given of the decisions under the Civil Code of Quebec. As the courts of that Province avowedly

the learned author expresses his own obligations to three works,—viz., a note by Mr. G. W. Easley in 25 Am. & Eng. R. Cas. p. 513; a pamphlet on Employers' Liability by Mr. Fall; and a monograph on the same subject by Mr. Irving Taylor.

See also the English Parliamentary Blue Book, No. 21, of 1886, which contains reports on the liability of employers in foreign countries, the information having been collected in compliance with directions issued by Lord Rosebery to the English consular representatives on the continent of Europe and elsewhere.

[1] *France.* — Code Napoleon, art. 1383. Everyone is responsible for the damage of which he is the cause, not only by his own act, but also by his negligence and imprudence.

Art. 1384. A person is responsible not only for the injury which is caused by his own act, but also for that which is caused by the act of persons for whom he is bound to answer, or of things which he has under his care.

Italy.—Arts. 1153, 1154, of the Italian Code are couched in the same terms as the above-cited provisions in the French Code.

Quebec.—Art. 1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill.

Art. 1054. He is responsible, not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control, and by things which he has under his care. Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

Germany. — Until comparatively recent times the liability of employers was determined with reference entirely to the rules of the Roman law, under which employers are liable only for negligence in selection and supervision (*culpa in eligendo, inspiciendo, et custodiendo*). But some classes of employees have now been placed in a more favorable position by the provisions of the Codes and other enactments.

Mexico.—Several articles of the Codes are set out in the report of *Erey* v. *Mexican C. R. Co.* (1897) 38 L. R. A. 387, 26 C. C. A. 407, 52 U. S. App. 118, 81 Fed. 294.

The effect of art. 11 of the Penal Code, and arts. 301, 304, 307, and 326 of book 2 of the same Code, is to confer on any person injured by and through the negligence of another a right to recover in a civil proceeding all the actual damages sustained.

Art. 330 of the same Code provides that masters may be held civilly liable, through their clerks and servants, according to the provisions of arts. 326 and 327, for the negligence of said clerks and servants within the scope of their employment.

The railroad law declares (art. 184) that railway companies "are liable for all faults or accidents which occur through tardiness, negligence, imprudence, or want of capacity of their employees." By this provision a company is rendered liable for an injury to an employee resulting either solely from its own negligence, or from its own negligence concurring with that of fellow servants. See *Mexican C. R. Co.* v. *Glover* (1901) 46 C. C. A. 334, 107 Fed. 356.

Art. 194 of the act of the Mexican Congress of December 15, 1881, declares that railway companies are liable for all faults or accidents which occur through tardiness, negligence, imprudence, or want of capacity of their employees.

defer to the authority of the judges and juridical writers of F the decisions cited may be regarded as a fairly accurate presen of the law of that country, also. The Code of Italy, being from that of France, receives, it may be presumed, a similar con tion. For an account of the former and the existing law of e ers' liability in Germany and Austria, the reader is referred articles contributed by Mr. Pearce Higgins to the Juridical R vol. IX., pp. 249, 395.

877. Duty of employer as to appliances and place of work.— owners of industrial establishments are bound to provide fully f safety of the workmen employed by them, and they are respo as regards those workmen, for all accidents and injuries which result either from defects of construction, or from the failure t machinery and apparatus in proper condition, or from the negli or unskilfulness of the employees who superintend the differe partments of the business. They cannot escape their responsi except in cases of *force majeure*.[1] The fact that a certain sug precaution would have required a considerable expenditure of is not of itself an adequate excuse for the master's failure t that precaution.[2] Still less will the master be permitted to liability by the plea that the adoption of a different arrang would have entailed a slight increase of expenditure, and some ation of the work.[3]

If a machine used by a master was in good order, negligenc

[1] *Sarault* v. *Viau* (1881) 11 Rev. Leg. (Montreal C. S.) 217, adopting the statement of Laurent, vol. 26, No. 474.

An electric power company is liable for the death of an employee from an electric shock from a wire not properly insulated, where it failed to provide him with protecting gloves, which it was accustomed to furnish its employees when engaged in similar work, and which would have prevented the accident. *Desjardins* v. *Citizens' Light & P. Co.* (1898) Rap. Jud. Quebec, 15 C. S. 28.

Tackle used in loading or unloading a ship ought to be sufficient to withstand any strain that is likely to be put upon it by ordinary, unskilled laborers. *Ross* v. *Langlois* (1885; Quebec) Montreal L. Rep. 1 Q. B. 280.

Whether, in the absence of an express statutory provision requiring that precaution, the failure of an employer to fence dangerous machinery is to be deemed, as respects adults, a c breach of duty, was left unse two cases. *Archambault* v. *De Barb Wire Co.* (1889) 18 Rev (Quebec S. C.) 57 (recovery he denied on the ground of co negligence); *Légaré* v. *Espl* Rap. Jud. Quebec, 12 C. S. 1 gence said to be possibly not p of omission to provide a guar

[2] An employer who has omitted vide a building especially for the ing out of dynamite is not relieve liability for injuries resulting fro omission on the ground that it have been difficult and costly to a building especially for the p *Durand* v. *Asbestos & Asbest* (1898) Rap. Jud. Quebec, 19 C. Affirmed in (1905) 30 Can. S.

[3] *Scanlan* v. *Detroit Bridge & Works* (1899) Rap. Jud. Quebec, S. 264.

not be imputed to him merely on the ground that it was somewhat inferior to more modern machines of the same description.[4]

A master who is dealing with essentially dangerous things is bound to take the utmost care to see that they do not inflict any injury upon his servants, and must endeavor to secure their safety by adopting all known devices which are conducive to that end.[5]

A master is bound to protect his servants, so far as that result can be attained by the adoption of every reasonable precaution which, under the given circumstances, would be deemed necessary and proper by a person possessing that degree of skill and special knowledge which the law imputes to those who engage in any particular trade or business. *Spondet peritiam artis.*[6]

A master is not an insurer or guarantor of the safety of his servants.[7]

The principle which forbids the inference of culpability where the appliances and the methods used by the master are of such a character that his servants can avoid injury by the exercise of ordinary care is recognized, and in some cases is decisive in his favor.[8] But this principle is subject to some important qualifications. Starting from the theory that an employer owes to his workmen the same measure

[4] *Sarault* v. *Viau* (1881) 11 Rev. Leg. Montreal C. S.) 217.

[5] An electric-light and power company owes to a lineman the duty of adopting every precaution which can be taken to prevent live wires causing accidents. *Citizens' Light & P. Co.* v. *Lepitre* (1898) 29 Can. S. C. 1.

In *Asbestos & Asbestic Co.* v. *Durand* (1900) 30 Can. S. C. 285, the court, in holding that negligence might properly be inferred from the fact that an unnecessary and unreasonable quantity of dynamite had been accumulated in dangerous proximity to the place of work, said: "The peril to life from high explosives is so great, and, as shown by the evidence, the cause of their explosion frequently so obscure, that damage may fairly be anticipated as likely to ensue from the act of one who accumulates an unusual and unreasonable quantity in dangerous proximity to others. In placing it where an opportunity for damage may be created, either by the nature of the substance or by fortuitous circumstance or neglect of others or other cause, he takes the chance of the happening of such other event, and cannot disconnect himself from the fairly to be anticipated consequences of his own negligence."

[6] An employer engaged in constructing sewers is liable to an employee for injuries sustained because of his failure to use means known to experts for removing carbonic gas, which would necessarily accumulate at the bottom of the trench, although the employee and his companions undertook the excavation in a certain time at a fixed daily sum. *Dagenais* v. *Houle* (1897) Rap. Jud. Quebec, 11 C. S. 225.

A stevedore is chargeable with knowledge of the danger created by a jet of steam issuing from an unprotected waste pipe. *St. Arraud* v. *Gibson* (1898) Rap. Jud. Quebec, 13 C. S. 22.

[7] *Scanlan* v. *Detroit Bridge & Iron Works* (1899) Rap. Jud. Quebec, 16 C. S. 254; *Corner* v. *Byrd* (1886) Montreal L. Rep. Q. B. 262.

[8] It is not negligence to use a machine which is not dangerous in itself, but merely dangerous to a workman who is negligent and inattentive to his du *Sarault* v. *Viau* (1881) 11 Rev. (Quebec S. C.) 217 (injury caused b machine into which the workman had to insert the paste to be rolled for making biscuits). See also cases cited in § 889, *infra*.

of care as is owed by a *"bon père de famille"* to his own chil courts deduce the consequence that he must protect his s against even the consequences of their own mistakes, imprudenc thoughtlessness, and that he is to this end bound not only to gi orders as, if they are obeyed, will secure their safety, but als that those orders are properly executed.[10] The obligation thu cated is declared to be especially incumbent in the case of children.[11] As applied for the benefit of this class of emp

[9] *McCarthy* v. *Thomas Davidson Mfg. Co.* (1899) Rap. Jud. Quebec, 18 C. S. 272.

[10] *George Matthews Co.* v. *Boxchard* (1887) Rap. Jud. Quebec, 8 B. R. 550 (injury caused by projecting set screw).

In *St. Arnaud* v. *Gibson* (1898) Rap. Jud. Quebec, 13 S. C. 22, the court approved a ruling in the earlier case of *Ibbotson* v. *Trevithick*, Rap. Jud. Quebec, 4 S. C. 518, that "an employer is bound to protect his employees by the best possible means, and even, to some extent, against their own imprudence." The court remarked: "The position of employee is a difficult one. The least exhibition of unwillingness on their part may lead to the loss of their situation; their attention, too, is taken up with the manual labor they are in the act of performing; they are, by education and training, far less capable of foreseeing and avoiding danger than their employers."

In one case the law was summed up in the following propositions: That the master is responsible for his faults of omission as well as his faults of commission; that he is bound to take the precautions necessary to avoid the accidents which may occur to the workmen whom he employs, even by reason of their own imprudence; that it is his duty to see that the measures thus adopted are observed; that it is not even enough for him to have taken serious precautions, if he failed to take all those which were compatible with the necessities of his industry; that he is bound to provide not only for accidents of a usual kind, but for those which are barely possible; that he is responsible for an injury received by his workman while engaged in a dangerous work which he has ordered such workman to perform; that it is his duty to take all necessary precautions to guarantee the workman against the consequences of his own imprudence; that this obligation is still more strict when the servant is a child who is of the danger which he may i has neither the prudence nor th ence necessary to protect himse the master is bound when he children, not to assign to them which brings them into contact dangerous parts of machines; it is his duty to protect them the grave consequences which entailed by acts of levity, tho ness, and the caprices natural time of life. *Archbald* v. *Vell* Rap. Jud. Quebec, 6 B. R. 340.

In *Sarault* v. *Vian* (1881) Leg. (Montreal C. S.) 217, the fers to a passage in which Laur 20, p. 518, No. 438), commenti a French decision to the effect employer is in fault, where he take the most minute precau the protection of his employ that he is bound to safegua against the effects of their own dence, remarks that this doctr seem excessively severe, as reg employer, but that it is, neverth completely conformable to principles as it is to humani much as workmen who are with ention, and wanting in foresi cause they are thus wanting, b familiar with the dangers of th that they neglect the precauti the most simple prudence indica learned author puts the case o tractor for the excavation of who has directed his workmen when there is danger of the slipping down, and lays it do such contractor is responsible event of an accident happenin does not watch over the exec this order, and so protect the against their own imprudence.

The doctrine that a master to see that an order is exec lately applied in *Martel* v. *Ros* Rap. Jud. Quebec, 16 C. S. 1

[11] *Robitaille* v. *White* (190

such a doctrine may be nearly, if not exactly, paralleled in the common law (see § 19, *ante*); but, so far as adults are concerned, it certainly fixes a higher standard of care than that system exacts.

878. — as to methods of work.— In carrying out his work an employer is under the duty of using methods as safe as are practicable.[1] He is negligent if the methods which he employs in carrying on his work are such as expose his servants to unnecessary and avoidable perils.[2]

The test of negligence is not whether greater precautions might have been taken, and the accident avoided, but whether ordinary precautions,—those usual under the circumstances,—were taken.[3]

879. — as to rules and regulations.— Where the conditions under which the master's business is carried on are such that the safety of the servants cannot be adequately secured without the promulgation of rules, an obligation arises to make rules which will be effective for the protection of the servants, and to see not only that those rules are understood, but also that they are obeyed. This duty is more especially obligatory where girls and young persons are employed.[1]

880. — as to the employment of competent servants.— That the master is culpable if he hires or retains an unskilled or otherwise incompetent servant, and must answer for such injuries as other employees may receive in consequence of the unfitness of that servant, has been declared, *arguendo*, in one case.[1] But this principle is of no practical importance, as the common-law doctrine of coservice is not applied in this Province. See § 890, *infra*. In the case cited the actual rationale of the judgment was that recovery could not be had, as there was no evidence to show how the accident occurred.

881. — as to instruction and warning.— The existence of an obligation to impart information as to the proper manner of doing the work in hand, or as to the dangers incident thereto, is inferred in all cases where it should have been apparent to a reasonably intelligent person that the perils to which the work subjected the servant in question

Jud. Quebec, 19 C. S. 431; *McCarthy* v. *Thomas Davidson Mfg. Co.* (1899) Rap. Jud. Quebec, 18 C. S. 272.

[1] *Scanlan* v. *Detroit Bridge & Iron Works* (1899) Rap. Jud. Quebec, 16 C. S. 264.

[2] *Scanlan* v. *Detroit Bridge & Iron Works* (1899) Rap. Jud. Quebec, 16 C. S. 264, where the method adopted for hoisting heavy pieces of iron with a derrick was such that the employees had to stand in a position which exposed them to great peril if the chains or pulleys gave way.

[3] *Richelieu & O. Nav. Co.* v. *St. Jean* (1883) Montreal L. Rep. 9 Q. B. 252, holding that it was not negligence to use only one hawser to fasten together two ships, from one of which goods were to be transhipped to the other.

[1] *Parent* v. *Schloman* (1897) Rap. Jud. Quebec, 12 C. S. 283 (principle laid down as being applicable to factories in which steam power is used).

[1] *St. Lawrence Sugar Ref. Co.* v. *Campbell* (1885) Montreal L. Rep. 1 Q. B. 290.

were probably not appreciated by him.[1] This duty is m
cially obligatory in the case of inexperienced children wh
signed to work of an essentially dangerous character.[2] I
seem, however, that the master discharges his obligations full
such circumstances if the child is given the assistance of a
ence l workman.[3]

Some kinds of work are apparently regarded as being so d
that, where an immature youth has been assigned to them, n
is inferable, irrespective of whether he was or was n
instructed.[4]

882. Duty to save life of imperiled servant.— To charge a
with responsibility for the failure of his agent to save the
servant in jeopardy, it must be shown that such agent was
negligent. He cannot be held liable where the evidence mer
that something might have been done which wa not done,
if that something had been done, death would not have ensue

883. Assurance of safety.— Although the master or his ag
have acted in good faith and in the belief that what he said
he is liable, as for negligence, if he assures his servants that
in no danger, and thus induces them to remain on the premis
it ought to have been apparent to him that, under the circu
their position might at any moment become one of extreme

[1] *Cossett* v. *Leduc* (1883; Quebec Cour de Revision) 6 L. N. 181, citing Laurent, vol. xx., No. 475 (proper way of handling a new tool); *George Matthews Co.* v. *Bouchard* (1897) Rap. Jud. Quebec, 8 B. R. 550; *Parent* v. *Schloman* (1897) Rap. Jud. Quebec, 12 C. S. 283.

Where the lumber on a platform car on which the plaintiff was riding gave way and precipitated him to the ground, the railway company was held liable, on the ground that its officials had omitted to warn him not to ride on this car, and had failed to hold the train until he and his fellow workman had been removed to another car. *Canadian P. R. Co.* v. *Gorgette* (1886) Montreal L. Rep. 2 Q. B. 310.

[2] *McCarthy* v. *Thomas Davidson Mfg Co.* (1899) Rap. Jud. Quebec, 18 C. S. 272 (operation of machine with rapidly revolving knives); *Archbald* v. *Yelle* (1897) Rap. Jud. Quebec, 6 B. R. 340 (boy injured while holding a belt which was under repair, so as to prevent it from touching a transmitting wheel which was in motion).

[3] See *McCarthy* v. *Thomas Davidson Mfg. Co.* (1899) Rap. Jud. C. S. 272.

[4] In one case it was hel gence for an employer to pu fifteen to work at a machine boards, not provided with protect the operator's hand *Esplin* (1897) Rap. Jud. Qu S 113. The employer's fai struct the boy was referred allegations of the plaintiff, l clusion of the court is appa based on this omission.

[1] *Richelieu & O. Nav. Co.* (1883) Montreal L. Rep. 1 There recovery was denied where a member of a ste who fell into the water while being transhipped from anoth was drowned. The captain d er any boats to rescue him. dence was that a number of which were close by hurried t drowning man the moment af cident occurred.

[1] *Macdonald* v. *Thibaude* Rap. Jud. Quebec, 8 B. R. 44 were directed to return to w

884. Liability to servants working outside the scope of their employment.— The owner of a manufacturing establishment who causes a workman to perform very dangerous work, especially when such workman is not accustomed to that description of work, and does not receive a salary in proportion to the risk he runs, is liable in damages for the death of the workman.[1]

885. Obligations of an employer not owed to volunteers.— A master is not bound to protect volunteers or intermeddlers from the dangers of work undertaken by them without his authority.[1]

886. Causation.— No action can be maintained unless the injury is shown by direct testimony, or by presumptions co-existent, weighty, and precise, to have been caused by the negligence of the master or one of his agents. No recovery can be had where, under the evidence, the manner in which the accident occurred is a mere matter of conjecture.[1]

B. Defenses available to employers.

887. Assumption of risks.— As under the common law, every risk which is not shown to have been the result of some distinct negligence on the master's part is regarded as being one which belongs to the ordinary class.[1]

Where a servant has undertaken work which he knows to be dangerous, the master's whole duty is performed when he has furnished everything that is necessary to protect him from peril, so far as the nature of the work allows.[2]

888. Volenti non fit injuria.— The principle embodied in the maxim *volenti non fit injuria* is recognized, and will preclude recovery under circumstances appropriate for its application.[1]

fire had broken out on the uppermost floor of a factory).

[1] *Price* v. *Roy* (1898) Rap. Jud. Quebec, 8 B. R. 170.

[1] *Chartier* v. *Quebec S. S. Co.* (1897) Rap. Jud. Quebec, 12 C. S. 261 (plaintiff joined in the work of the crew of a ship before the arrival of the only agent of the defendant who had the power to employ men).

[1] *Montreal Rolling Mills Co.* v. *Corcoran* (1896) 26 Can. S. C. 595; *St. Lawrence Sugar Ref. Co.* v. *Campbell* (1885) Montreal L. Rep. 1 Q. B. 290.

In one case an injury caused by the rebound of a hawser which broke while the defendant's steamer was putting off from a wharf was held to be presumptively due to the insufficiency of the hawser, or to the carelessness of the crew in paying it out, or to the negligence of the captain in not employing a tug to assist in the operation. The defendant was accordingly held to be responsible in any view of the evidence. *Corner* v. *Byrd* (1886) Montreal L. Rep. 2 Q. B. 262.

[1] *Bourgault* v. *Grand Trunk R. Co.* (1887) Montreal L. Rep. 5 S. C. 219 (allegation that a frog was out of order, not proved).

[2] *Richelieu & O. Nav. Co.* v. *St. Jean* (1883) Montreal L. Rep. 1 Q. B. 252. Reversing (1882) 11 Rev. Leg. 381.

[1] *Richelieu & O. Nav. Co.* v. *St. Jean* (1883) Montreal L. Rep. 1 Q. B. 252.

889. Contributory negligence.— If the servant's own ne was the sole cause of his injury, he cannot recover any damag ever.[1] The theory upon which recovery is denied in this in the same as that which is the basis of the similar rule which under the common law, *viz.*, that the fault of the servant breaks the connection between the delinquency complained the injury received.[2] But the doctrine of Anglo-American j dence, that no action is maintainable in any case where the negligence contributed even in the smallest degree to the has not been adopted. If it appears that the injury was partly by the negligence of the master and partly by the negli the servant, the damages awarded will be reduced by such a as may be deemed equitable in view of all the circu involved.[3]

The standards by which the culpable or nonculpable qua servant's acts is ganged are, it would seem, not materially from those which are applied under the common law. On hand we find the general principle formulated that, if a man

The effect of the ruling was that, even if the method adopted for doing the work in hand is a negligent one, a servant who is injured by its adoption cannot recover in a case where he is himself the person who is in control of the work.

[1] *Cossett* v. *Leduc* (1883; Quebec Cour de Revision) 6 L. N. 181, citing Laurent, vol. xx., No. 475; *Richelieu & O. Nav. Co.* v. *St. Jean* (1883) Montreal L. Rep. 1 Q. B. 252, Reversing 11 Rev. Leg. 381, and approving *Sarault* v. *Viau* (1882) 11 Rev. Leg. 216; *Fortier* v. *Lauzier* (1898) Rap. Jud. Quebec, 14 C. S. 359; *Archambault* v. *Dominion Barb Wire Co.* (1889) 18 Rev. Leg. (Quebec C. S.) 57; *Globe Woolen Mills Co.* v. *Poitras* (1895) Rap. Jud. Quebec, 4 B. R. 126, Reversing Montreal L. Rep. 5 S. C. 391; *Robitaille* v. *White* (1901) Rap. Jud. Quebec, 19 C. S. 431; *Roberts* v. *Dorion* (1895) Rap. Jud. Quebec, 4 B. R. 117, Reversing Rap. Jud. Quebec, 5 C. S. 411; *Currie* v. *Couture* (1887) 19 Rev. Leg. (Quebec Q. B.) 443; *Dominion Oil Cloth Co.* v. *Coallier* (1890) Montreal L. Rep. 6 Q. B. 268, Reversing (1888) Montreal L. Rep. 5 S. C. 97; *Desroches* v. *Gauthier* (1882) 5 L. N. 404, 3 Dor. Q. B. 33; *Scanlan* v. *Detroit Bridge & Iron Works* (1899) Rap. Jud. Quebec, 16 C. S. 264; *Tooke* v. *Bergeron* (1897) 27 Can. S. C. 567.

A workman injured in the execution of a piece of work which ber gerous only when the person it fails to pay proper attentio he is doing cannot recover d he, being fully aware of all t precautions to take, can only the victim of an accident in c of his own fault and his ow dence. Dalloz et Vergé, Co tées, Code Civ. 2, 1st pt., p. 1383, No. 101.

[2] According to a standard t French law a servant who re injury through his own fault on the footing of a person wh been injured at all. *Quod q culpa damnum sentit, non i damnum sentire.* Laromblière des Obligations, vol. 5, p. 70 The same author also observe frequently happens that the putable to the person who all sc[?] to be injured is of such that the act complained of, hurtful it may be, does not p longer the characteristics of a quasi delict.

[3] *Fortier* v. *Lauzier* (1898) Quebec, 14 C. S. 359; *Pri* (1899) 29 Can. S. C. 494, Re part (1898) Rap. Jud. Quebe 170 (employee of mill owner the manifestly dangerous wor ing a bridge from destruct flood).

what the majority of men would have done under the circumstances, it cannot be said that he is culpable.[4] On the other hand, the right of recovery has been denied where a skilled workman continued to use an appliance, the insufficiency of which for the purpose for which it was supplied he should have comprehended;[5] where a servant unnecessarily exposed himself to peril by using an appliance while it was temporarily in an abnormally dangerous condition;[6] where a servant, as a result of using for a particular piece of work an implement which, as he knew, was not designed to be used for such a purpose, suffered an injury which would not have been received if he had used the appropriate implement;[7] and where the injury was the result of the servant's disobedience to the master's orders,[8] or was due to the servant's disregard of the instructions which he had received as to the manner in which the work assigned to him was to be done.[9]

An act of an indisputably negligent quality will not preclude recovery, if the adoption of the course of conduct which the servant ought to have followed would not have enabled him to avoid the danger to which he was exposed when the accident occurred.[10]

As is the rule under the common law, the fact that, at the time of the accident, the injured servant was absorbed in duties which engrossed his attention is an adequate excuse for his temporary forget-

[4] *Cossett* v. *Leduc* (1883; Quebec Cour de Revision) 6 L. N. 181, citing Laurent, vol. xx., No. 475.

[5] Laurent, vol. 20, p. 517, No. 486, quoted in *Sarault* v. *Viau* (1881) 11 Rev. Leg. (Montreal C. S.) 217.

[6] *Roberts* v. *Dorion* (1895) Rap. Jud. Quebec, 4 B. R. 117, Reversing Montreal L. Rep. 5 S. C. 411 (servant undertook to operate a planer from which the guard ordinarily provided had been removed).

[7] *Portier* v. *Lauzier* (1898) Rap. Jud. Quebec, 14 C. S. 359. The court held that the diversion of the implement to an improper purpose was not excused by the fact that other workmen had been guilty of similar misconduct.

[8] *Desroches* v. *Gauthier* (1882) 5 L. N. 404 (Quebec) 33; *Globe Woollen Mills Co.* v. *Poitras* (1895) Rap. Jud. Quebec, 4 Q. B. 116, Reversing Rap. Jud. Quebec, 5 C. S. 361 (servant cleaned machinery while in motion); *Archambault* v. *Dominion Barb Wire Co.* (1889) 18 Rev. Leg. (Quebec S. C.) 57 (servant attempted to replace a belt while the machinery was in motion, when it was not his duty to do so, and another employee was specially charged with this function); *Dominion Oil Cloth Co.* v. *Coallier* (1890) Montreal L. Rep. 6 Q. B. 268, Reversing (1888) Montreal L. Rep. 5 S. C. 97 (servant undertook to shift a belt while the machinery was in motion).

[9] *Carrie* v. *Couture* (1887) 19 Rev. Leg. (Quebec Q. B.) 443 (furnace in which "black ash" was made exploded); *Robitaille* v. *White* (1901) Rap. Jud. Quebec, 19 C. S. 431 (boy who had been duly instructed as to the proper way of doing the work and the dangers to be guarded against allowed his hand to be drawn between the cylinders of a leather slicing machine); *Scanlan* v. *Detroit Bridge & Iron Works* (1899) Rap. Jud. Quebec, 16 C. S. 264.

[10] In *Scanlan* v. *Detroit Bridge & Iron Works* (1899) Rap. Jud. Quebec, 16 C. S. 264, a servant was injured as a result of the breaking of some chains and pulleys by which a bridge girder was being raised, while he was standing in a position which he had been forbidden to take while this operation was in progress. The court awarded him damages on the ground that he would in all probability have been injured, even if he had complied with the employer's directions.

fulness of a known danger.[11] So, also, negligence is sometime
tived by the fact that, at the time when the servant did the act
was the immediate cause of the injury, extreme terror crea
great peril confused his reasoning faculties.[12]

890. Common employment.—*a. Scotland.*—It has been sta
Sir Frederick Pollock that the doctrine of common employme
not so much adopted from England, as thrust upon the Scottish
by decisions of the House of Lords."[1] This remark is fulli
fied by the language used in the earlier cases.[2] Upon the fa
possible to reconcile the decisions cited with the doctrines app
the English courts; and it is upon this footing that they are ex
in the judgment of the Lord Chancellor in the decision which
assimilated the law of Scotland to that of England.[3] But th
unsatisfactory, not to say disingenuous, method of making out
trinal identity is entirely forbidden by the circumstances invo
another case in which the judges, with a full knowledge of t
which had been formulated a few years previously by the
court of exchequer, deliberately held, upon the broadest groun
a master was liable to a servant who was injured by the negli
a coservant.[4] This piece of legal history, however, is no lo
any practical interest since the consummation of the coercive
referred to by Sir Frederick Pollock, and the subject is refe
in the present connection chiefly for the purpose of explain
manner in which it has happened that in Scotland, a country in
the civil law furnishes to a large extent the basis of the juris-p
administered, a doctrine is now applied which has been repudi
all other countries in which that system prevails.

[11] A servant engaged in performing a piece of work which requires the exercise of his whole physical strength should not be held responsible for having momentarily forgotten a source of danger behind him to which he was exposed by the master's nonobservance of proper precautions. *George Matthews Co.* v. *Bouchard* (1897) Rap. Jud. Quebec, 8 B. R. 550.

[12] Contributory negligence is not predicable of the act of a female employee in leaping out of a window in the upper story of a burning building, under the belief that she could not save herself in any other way, although she could readily have escaped by the staircase. *Macdonald* v. *Thibaudeau* (1893) Rap. Jud. Quebec, 8 B. R. 409.

[1] Essays on Jurisprudence, p. 115.

[2] See *Sword* v. *Cameron* (1839) 1 Sc. Sess. Cas. 2d series, 493, *Grey* *sey* (1852) 15 Sc. Sess. Cas. 2 135 (see, especially, remarks Cunningham); *Dixon* v. *Rankc* 14 Sc. Sess. Cas. 2d series, opinions of Lords Moncrieff a burn).

[3] *Bartonshill Coal Co.* v. (1858) 3 Macq. H. L. Cas. 266 N. S. 767, 6 Week. Rep. 664

[4] *M'Naughton* v. *Caledonian* (1857) 19 Sc. Sess. Cas. 2d se (car repairer injured by negli engineer). This decision is significant in the present point as it was delivered after the h the English case just cited, bu the rendition of the judgment court explicitly declined to a doctrine of coservice, unless th of Lords should pronounce in

b. France.—In 1834, three years before the leading English decision of *Priestley* v. *Fowler*, it was held by the Cour de Cassation, affirming the decision of the lower court, that the risk of being injured by the negligence of a fellow workman was presumed to be sufficiently compensated for by the wages paid, and that such a risk was, for this reason, one of those which are presumed to have been accepted by every employee.[5] This decision was soon afterwards followed by another to the same effect.[6] But the doctrine thus laid down was finally repudiated, and the rule which now prevails is that an employer is not absolved from liability by the fact that the injury was due to the negligence of a coservant.[7]

c. Italy and Switzerland.—It has been stated by Mr. Bateson in the Law Quarterly Review (vol. 5, p. 181) that the doctrine applied in these countries is the same as that which prevails in France.

d. Germany and Austria.—It is stated by Mr. Pearce Higgins (9 Jurid. Rev. p. 271) that, so far as regards the liability of an employer, the public and workmen are on the same footing in these countries, and their systems of law know nothing of any doctrine of common employment.

e. Quebec.—In some of the earlier cases the courts, influenced, possibly, by the contiguity of jurisdictions in which the common-law rule was applied, rendered decisions based upon the theory that the risk of being injured by the negligence of a fellow servant was assumed, as being one of those ordinarily incident to every employment.[8] But the doctrine now established is the same as that which prevails in France.[9]

[5] Dalloz, Jurisp. Générale de Royaume, 1837, 2d partie, p. 161.

[6] Dalloz, 2d partie, p. 168.

[7] Dalloz, 1841, 1st partie, p. 271. See also Demolombe, vol. 31, No. 368; Sourdat, vol. 2, No. 911.

[8] *Cutler* v. *Grand Trunk R. Co.* (1868; Quebec) 1 L. C. L. J. 68; *Hall* v. *Canadian Copper & Sulphur Co.* (1879; Mont. Ct. of Rev.) 2 L. N. 215; *Bourdeau* v. *Grand Trunk R. Co.* (1866; Quebec) 2 L. C. L. J. 186.

In one case a foreman was held to be vice principal. *Hall* v. *Canadian Copper & Sulphur Co.* (1879; Quebec) 2 L. N. 215.

[9] *Canadian P. R. Co.* v. *Robinson* (1887) 14 Can. S. C. 105, per Strong, J.; *Asbestos & Asbestic Co.* v. *Durand* (1900) 30 Can. S. C. 285; *Filion* v. *Queen* (1891) 4 Can. Exch. 134. Affirmed in (1895) 24 Can. S. C. 182; *Robinson* v. *Riopel* (1887; Quebec Montreal L. Rep. 3 S. C. 198 (master held liable for negligent construction of a scaffold by a fellow servant).

In a recent case one of the Federal courts of appeal applied this doctrine in a case where the servant of an American railway company was injured in Canada. *Boston & M. R. Co.* v. *McDonald* (1897) 25 C. C. A. 247, 51 U. S. App. 111, 73 Fed. 934.

STATUTES AND CONSTITUTIONS.

The following schedule contains a reference to various constitutions and statutes which affect, either directly or indirectly, the liability of employers to their employees for personal injuries. It also contains a reference to the pages herein where any of such statutes or constitutions are commented upon.

Ala. Code, § 1144. Requiring the ringing of bell or blowing of whistle when approaching public crossing, see herein p. 1874.

Ala. Stat. 1887, 47. Relating to employment of persons who are color blind.

Ala. Stat. 1887, 59. Engineers must be examined as to fitness.

Ala. Laws 1884–85, p. 115. Civ. Cod 1886, § 2590. Employers' Liability Act, see herein p. 1930.

Ala. Act Feb. 14, 1893, chap. 241. Requiring railroad companies to hold examinations of applicants for positions.

Ala. Act Feb. 16, 1893, chap. 266. Inspection and regulation: ventilation, props, hoisting cages, gas and water in mines, scales, etc. Classification as to danger. Notice of accidents. Report of product.

Ala. Act Dec. 9, 1890, chap. 51. Apprenticing of minors.

Ala. Act Dec. 5, 1894, chap. 15. Repealing law to prevent compelling women and children and permitting children under 14 to labor more than eight hours.

Ala. Act Feb. 18, 1895, chap. 568. Mines. Inspection. Safety. Amending and extending law. Qualifications of bosses. Penalties for injuries to apparatus, carelessness, etc. Abstract of law to be posted at mines.

Ala. Act Feb. 16, 1897, chap. 186. Coal mines. Revised general law. Inspectors' duties. Provisions for safety of employees.

Ala. Act Feb. 23, 1899, p. 86. In mines employing not over 20 men owner or operator may, on application to mine inspector, be allowed to act as foreman without examination, certain counties excepted.

Ark. Const. 19, 18. Legislature shall pass laws for protection of miners.

Ark. Laws 1893, chap. 46, p. 68. Declaring who are vice principals of railroad companies, see herein p. 2082.

Cal. Civ. Code, § 1970. Excepting employer from liability for negligence of fellow servant, see herein, p. 1889.

Cal. Civ. Code, §§ 1970, 1971. Declaratory of common law liability of master, see herein p. 1918.

Cal. Stat. 6969 6971. Obligations of employer.

Cal. Stat. 6975 6992. Obligations of employee.

Cal. Act March 8, 1893, chap. 74. Mine bell signals. Establishing uniform system for all mines. Violation sufficient ground for discharge of employee. Corporations not responsible for accidents to men disobeying rules and signals. Failure to carry out provisions renders corporations responsible.

Cal. Const. 20, 17. Cal. Act March 20, 1899, chap. 144. Eight hours a legal day's work on all public works.

Colo. Const. 16, 2. Legislature shall pass laws for protection of miners.

Colo. Stat. 1891, p. 280. No railway shall employ telegraph operator under 18, nor one who has not had one year's experience.

Colo. Act April 13, 1891, p. 284. Rail

road employees not to be required to work more than 18 consecutive hours.

Colo. Act March 27, 1893, chap. 113. Eight hours to constitute day's work on all state, county, and municipal works.

Colo. Act April 8, 1893, chap. 123. Precautions in working mines near abandoned mines.

Colo. Laws 1893, chap. 77. Employers' Liability Act, see herein p. 1935.

Colo. Act March 16, 1899, chap. 103. Eight hours to be a day's work except in emergencies, in mines, smelters, and reduction works.

Colo. Sess. Laws 1901, chap. 67. Relating to liability of employers for death of employees, see herein p. 2107.

Conn. Act June 14, 1893, chap. 204. Preservation of health of employees in factories by removal of excessive dust.

Conn. Act April 25, 1893, chap. 77. Employers required to provide seats for women and girls.

Conn. Act May 9, 1895, chap. 118. Minors under 14 (formerly 13) shall not be employed.

Conn. Act April 5, 1899, chap. 41. Children under 14 not to be employed at labor during school hours. Penalty.

Conn. Act July 4, 1895, chap. 295. Alien laborers shall be informed of their rights from time to time in their own language by special agent of labor bureau. Penalty for imposing on such laborers.

Conn. Act July 9, 1895, chap. 206. Penalty for hindering inspectors in performing duties. Appeal to court from orders.

Conn. Act May 25, 1897, chap. 174. Regulating sanitation, inspection, and health of employees in bakeries.

Conn. Act May 31, 1899, chap. 140. Cellars not to be used as bakeshops. Exception.

Other amendments to 1897, chap. 174, § 2.

Conn. Act June 2, 1897, chap. 209. Employees on St. Ry. Penalty for failure to make returns to railway commissioners in conformity with prescribed forms.

Conn. Act June 11, 1897, chap. 241. Railway commissioners may direct that platforms of cars be inclosed by gates or vestibules.

Conn. Act May 17, 1899, chap. 119. Factories to be well light tilated, and kept clean. Amending G. L. 1888, § 2265.

Conn. Act June 20, 1899, cha Inspector of factories to tenements and dwelling wholly or in part as wor

Dak. Civ. Code, 1129–1131. Ob of employer, see herein p

Dak. Civ. Code, 1132–1149. Ob of employee.

Del. Acts May 10, 1897, cha May 28, 1897, chap. 453. 10 or more women are e employers must furnish and toilet rooms and seat cases in mercantile e ments; rooms to be w abusive language and n ment prohibited: female or to enforce law.

Fla. Act May 4, 1891, chap. 62 roads. Employment by c not a bar to recovery of d Contracts restricting void.

Fla. Stat. 1891, 4071. Railwa pany liable for damage o to employee through ne of other em e, where tributory n gence.

Fla. Act May 22, 1893, chap. 8 ing hours of labor for t

Fla. Laws 1897, chap. 3741. tioning damages in case tual fault, see herein p.

Fla. Laws, 1897, chap. 3744. ing doctrine of common ment in case of injury to employee, see herein p. 2

Fla. Act June 3, 1899, chap. 10 chants to provide seats ployees.

Ga. Code 1895, § 2297. Renderi road companies liable to ees as in case of injury to gers, see herein p. 2108.

Ga. Civ. Code 1895, §§ 2611, 26 quiring masters to furni sonably safe machinery.

Ga. Code § 2979. Requiring the ing of alarm whistle when or other obstruction appe on track, see herein p. 18

Ga. Stat. 3036. Railway comp ble for damage or injury ployee through negli other employee, where no utory negligence.

Ga. Stat. 1890, 148. No railwa employ telegraph operato 18, nor one who has not year's experience.

Ga. Act Oct. 20, 1891, p. 186. Unlawful to require railroad employees to make runs of over 13 hours each, except where train is detained. Ten hours of rest.

Ga. Act Dec. 16, 1895, p. 97. Contracts exempting master from liability to servant for negligence of master or other servant are void.

Ga. Act Dec. 16, 1895, p. 103. Receivers of railways have same liability to employees as corporations.

Idaho Act March 6, 1893, p. 152. Appointment, powers, and duties of state mine inspector.

Idaho Act March 11, 1895, p. 160. Inspector of mines. Amending and extending law. Deputies may be appointed. Investigation of accidents.

Idaho Act March 9, 1891, p. 169. Eight hours to constitute day's labor on all state, county, and municipal works.

Idaho Act Feb. 6, 1899, p. 113. Eight hours a day's work on all public work. 1890-1891, p. 169, re-enacted to correct illegality in passage.

Ill. Crim. Code, chap. 38, §§ 77, 80. Provides that it shall be unlawful for any person, firm, or corporation to employ or hire any child under thirteen years of age unless a school board gives a certificate that an aged or infirm relative is dependent in whole or in part upon said child.

Ill. Act 1872. Ill. Act 1877, § 3. Ill. Act, May 28, 1879, § 3. Requiring that a second escapement be provided in mines, see herein p. 2199.

Ill. Const. 4, 29. Legislature shall pass laws for protection of miners.

Ill. Rev. Stat. chap. 93, § 14. Requiring the inspection of mines before men begin work, see herein p. 2210.

Ill. Rev. Stat. 1874, chap. 93, § 9, amended by Act May 11, 1877. Requiring the report of accidents to mine inspectors, see herein p. 2197.

Ill. Rev. Stat. 1874, chap. 93, § 14. Requiring that drums shall be provided with brakes, see herein p. 2197.

Ill. Rev. Stat. chap. 93, § 16. Requiring the use and furnishing of timber to be used as props in coal mines, see herein p. 2198.

Ill. Rev. Stat. chap. 93, § 8. Providing for signals in coal mines, see herein p. 2198.

Ill. Rev. Laws 1874, chap. 70, § 14. Relating to the covering of hoisting cages used in mine shafts, see herein p. 2197.

Ill. Laws 1883, p. 114. Relating to the protection and safety of miners, see herein p. 2197.

Ill. Act 1872, § 8. Top of shaft to be securely fenced.

Ill. Laws 1879, p. 207. Requiring the top of each shaft and entrance to a vein to be fenced.

Ill. Laws 1879, p. 207. Providing for the health and safety of persons employed in coal mines.

Ill. Sess. Laws 1887, p. 235. Relating to mines.

Ill. Act June 17, 1891, p. 87. Prohibiting employment of children under 13.

Ill. Act June 18, 1891, p. 168. Managers of coal mines required to pass examinations.

Ill. Act, 1891, p. 168, § 5. Miner's death or injury in mine where manager has no certificate of competency as provided in act, a cause of action.

Ill. Act June 17, 1893, p. 99. Children under 14 prohibited employment in manufacturing establishment. Register of children under 16 to be kept. Employment of children between 14 and 16 forbidden, except with affidavit of parent or guardian as to age, date, and place of birth. Certificates of health may be demanded by inspectors.

Ill. Act June 17, 1893, p. 99. No female shall be employed in any factory or workshop more than eight hours in any one day or 48 hours in any one week. Hours of required work to be kept posted by employers.

Ill. Act June 9, 1897, p. 90. Child Labor. Not permitted to work for wages if under 14 nor if under 16 more than 60 hours per week or at hazardous employment. Penalty. Register of children.

Ill. Act June 17, 1893, p. 99. Manufacture of clothing, artificial flowers, and cigars prohibited in apartments, tenements, and living rooms, except by families living therein. Every such workshop to be kept clean, free from vermin, infectious, or contagious matter,

and subject to inspection. To be reported to board of health.

Ill. Act April 30, 1895, p. 256. Illumination of coal mines. Prescribing kinds of oil which may be used. Tests. Penalties. Inspection.

Ill. Act June 4, 1895, p. 255. Mine inspectors shall inspect scales in coal mines.

Ill. Act June 21, 1895, p. 250. Coal mines. Hoisting engineers and fire bosses must secure license from state, on examination or proof of four years experience.

Ill. Act June 15, 1895, p. 254. Mines. Inspector. Amending law. Fees to be paid by mines. Statement of condition of mine to be posted at mine.

Ill. Act June 21, 1895, p. 255. Mine managers. Examinations given only to those having four years' experience as miners.

Ill. Act June 21, 1895, p. 258. Regulating filling cartridges and firing shots in mines.

Ill. Act June 7, 1897, p. 269. Sanitary regulations only applicable in mines where more than five are employed.

Ill. Act June 7, 1897, p. 268. No person shall mine by himself unless with two years' practical experience. Otherwise must be accompanied by practical miner.

Ill. Act June 11, 1897, p. 250. Dust blowers required on polishing machinery, emery wheels, etc.

Ill. Act April 21, 1899, p. 139. Penalty for use of deception or unlawful force in employing workmen, and for guarding with deadly weapons certain workmen or property without written permit from governor.

Ill. (Hurd's Stat. chap. 114, § 62). Relating to duty of railroad companies to fence right of way, see herein p. 1877.

Ill. (2 Starr & C. Anno. Stat. 2719, chap. 92, §§ 4, 14). Relating to the inspection of mines, see herein p. 2197.

Ill. (Hurd's Rev. Stat., chap. 114, § 90). Requiring the use of brakes and employment of skilful brakemen on trains, see herein p. 2188.

Ill. (Hurd's Rev. Stat. 1899, chap. 93, § 6). Requiring the furnishing of sufficient light at top of mine shafts, see herein p. 2198.

Ind. Act March 2, 1891, chap. 49. Coal mines. Inspection. Re
Escape shafts. Stairwa

Ind. (Burns's Rev. Stat. 19
359a). Placing on the
the burden of proving
tory negligence, see
2368.

Ind. Act March 6, 1891, ch
Manufacturing and
houses required to pro
for women and girls ca
them.

Ind. Act March 4, 1893, chap.
ployers required to pro
for women and girls.

Ind. Act March 2, 1891, chap
bidding employment of
der 14 and of female
mines.

Ind. Act Feb. 25, 1893, chap.
lawful to employ child
14 in manufacture of
nails, metals, machine
bacco. Unlawful for
turers permitted to em
labor to work children
more than eight hours a

Ind. Act 1893, chap. 130, p. 2
ployers' Liability Act,
p. 1936.

Ind. Act June 3, 1891, § 9.
owners and operators
mines to cover cages for
persons descending and
shafts, see herein p. 219

Ind. (Burns's Rev. Stat. 1894,
Providing for the emplo
mining boss, see herein

Ind. Rev. Stat. 1894, § 7472
inspection of working
mine by mining boss,
p. 1903.

Ind. Act Feb. 25, 1893, c
Coal Mines. Requiring
boards" to be provided.

Ind. Act Feb. 27, 1893, chap.
of state inspector of co
to attend to enforceme
mining laws.

Ind. Act March 3, 1899, chap.
tablishing standards
for miner's oil.

Ind. Act March 4, 1889, chap.
blasting in mines during
hours; innermost shot
fired first; depth of hole
in coal mine; not over
of powder.

Ind. Act March 4, 1897, chap.
and fire bosses and hoi
gineers must be exam
mine inspector. Requir
cure certificate of comp

Ind. Act March 6, 1897, chap. 111. All accidents causing 24 hours delay shall be investigated by mine inspector; mine boss shall give receipt for notice from miner of unsafety of mine.

Ind. Act March 8, 1897, chap. 145. Stricter regulations as to escapement outlets in coal mines.

Ind. Act March 7, 1895, chap. 71. Platforms of street railway cars to be inclosed for protection in winter.

Ind. Act March 2, 1897, chap. 65. Factory Inspection. General law (first in state). Regulation of child and female labor. Hours, machinery, ventilation, fire escapes, sweatshops, etc.

Ind. Act 1897, p. 101. Providing that machinery shall be properly guarded, see herein p. 2191.

Ind. Acts 1899, p. 234, § 9 (Burns's Rev. Stat. 1901, § 7087). Requiring all machinery of every description to be properly guarded.

Ind. Act March 2, 1899, chap. 142. General factory inspection law. Hours of women and children. Safety of employees. Accidents. Sweatshops. Department of inspection created.

Iowa Act 1853. Relating to liability of railroad companies, see herein p. 1884.

Iowa Laws 1880, chap. 202, § 15. Declaring it a misdemeanor to ride upon loaded car in shaft or slope, see herein, p. 2200.

Iowa Act April 17, 1890, chap. 46. Escape shafts in coal mines.

Iowa (McClain's Code, §§ 2463, 2465). Requiring employees in mines to prop roofs and entries, see herein pp. 1909, 2199.

Iowa Code, § 2488. Requires adoption of means for efficient ventilation in mines.

Iowa Act March 23, 1900, chap. 82. Mine foremen, pit bosses, and hoisting engineers to be examined and to hold certificates of competency. Amending Code 1897, chap. 9, p. 12.

Iowa Code 1873, § 1307; Code 1897, § 2071. Relating to liability of railroad companies for injuries to employees, see herein p. 2112.

Iowa Civ. Code, § 4064. Fencing machinery.

Iowa Act March 19, 1896, chap. 92. Iowa Act April 8, 1896, chap. 93. Mines. Only pure animal or vegetable oil or paraffin to be used for illumination. Standard.

Iowa Act March 25, 1898, chap. 60. Illuminating oil for use in coal mines to be inspected and branded by inspector of petroleum products (formerly branded by state mine inspector). Amending § 2194-95 Code 1897.

Iowa Act March 28, 1898, chap. 59. Mines. Amending law (§ 2488 Code 1897) relative to ventilation: air current not to be more than 60 feet from working face except in certain cases.

Kan. Act March 2, 1870. Relating to liability of railroad companies for injuries to persons or property, see herein p. 1884.

Kan. Stat. 23, 93. Railroad companies liable for injury to employees.

Kan. Act March 10, 1891, chap. 114. Eight hours to constitute day's labor for all workmen, mechanics, and others employed by state, city, or town, or by contractors on public works.

Kan. Act March 19, 1891, chap. 117. Mines. Use of explosives.

Kan. Act April 4, 1893, chap. 125. Inspection of mines. Health and safety of employees.

Kan. Act Mar. 21, 1895, chap. 171. Regulation, ventilation, and inspection of coal mines.

Kan. Gen. Stat. 1897, chap. 70, § 15. Relating to liability of railroad companies for injuries to employees, see herein p. 2119.

Kan. Act March 6, 1897, chap. 172. Platforms of electric street railways to be inclosed for protection in winter.

Kan. Act March 4, 1899, chap. 165. Compelling sinking of escape shafts at coal mines; to be 300 feet from main shaft; regulations.

Kan. Act March 13, 1897, chap. 159. Coal operators to make quarterly report to inspectors, coal mined, number of miners and other men and boys employed, prices paid, accidents, deaths, etc.

2 Ky. Rev. Stat. (Act March 10, 1854). Relating to liability of railroad companies for wilful acts of servant, see herein p. 1885.

La. Gen. Stat. chap. 37, § 3. Giving widow of one killed through wilful neglect a right to recover punitive damages, see herein p. 1889.

Ky. Stat. 1854. Providing for the recovery of punitive damages for wilful neglect resulting in loss of life, see herein p. 1911.

Ky. Const. § 241. Relating to liability for death by wrongful act, see herein p. 1885.

Ky. Stat. § 2732. Making it a misdemeanor to neglect to properly secure roofs of mines, see herein p. 2200.

Ky. Act Feb. 15, 1893, chap. 142. Mines. Inspection. Regulation. Ventilation. Protection of miners.

Ky. Act March 3, 1894, chap. 37. Providing for and regulating ventilation of coal mines.

La. (Code of Napoleon, § 1382). Relating to liability for causing damage to another, see herein p. 1882.

La. Const. 175. Legislature shall pass laws to protect laborers on public works, canals, railroads, etc.

La. Stat. 162–9, 175–7. General law of Master and Servant.

La. Act April 6, 1892, chap. 47. Manufacturing and mercantile houses required to provide seats for female employees.

La. Act July 6, 1892, chap. 60. Prohibiting employment of children under 12 in cleaning or operating dangerous machinery.

La. Labor Laws (Wolf's Rev. Laws 1897, p. 515). Employment of children, etc.

La. Act July 5, 1900, chap. 55. Seats to be maintained for female employees; at least 30 minutes for lunch.

La. Act June 30, 1894, chap. 13. Prohibiting employment of women in houses where spirituous liquors are sold at retail.

Me. Rev. Stat. chap. 17, §§ 23, 24. Requiring that blasting shall be preceded by warning, see herein p. 1879.

Me. Rev. Stat. chap. 81, § 21. Relating to liability of railroad companies for personal injuries, see herein p. 1883.

Me. Stat. 1889, chap. 216. Blocking of frogs.

Me. Act March 29, 1893, chap. 292. Duty to prosecute for violations of fortnightly payment law, to examine into sanitary condition of factories, etc., to enforce law relative to swinging of doors in factories and to make annual report to commissioner of industrial and labor statistics.

Md. Act March 29, 1894, chap. for protection of work gaged on scaffolding. by police.

Md. Act April 2, 1896, chap. 1 for women employees in mercantile establishment

Md. Act April 2, 1896, chap. eries and Confectionerie council of Baltimore late and inspect.

Md. Act April 6, 1894, chap. fining sweat shops and penalties for sale and ture of infected clothi ingly made therein.

Md. Act April 4, 1896, chap. 3 tories and Sweatshops, more not to use oil or g light or heat. To hav capes.

Md. Act April 4, 1896, chap. 4 alty for allowing good made up in sweatshops *sonable means of knowl* merly knowingly).

Mass. Pub. Stat. chap. 112. amended by Statute chap. 243. Relating to negligent act, see herein

Mass. Pub. Stat. chap. 104. the guarding of dange chinery, see herein p. 21

Mass. Pub. Stat. chap. 104, § viding for the protection ways and elevators, see 2194.

Mass. Stat. 1882, chap. 208, Mass. Pub. Stat. chap. Requiring elevators to vided with prescribed safety devices, see herein

Mass. Pub. Stat. chap. 104, § viding that all factories well ventilated and kept

Mass. Pub. Stat. chap. 112, § quiring the mainten guards at cornices of joining railroads, see 2188.

Mass. Stat. 1885, chap. 374, § quiring elevator cars to nished with automatic

Mass. Stat. 1885, chap. 374, § tomatic gates to elevato

Mass. Laws 1887, chap. 270, § ployers' Liability Act, s p. 1931.

Mass. Act, July 10 1900, ch Employers' liability. T compensation under liability act notice must employer within 60 (form

days of accident; executor may give such notice within 60 (formerly 30) days of his appointment. Amending 1887, chap. 270, § 3, as amended by 1888, chap. 155.

Mass. Stat. 1877, chap. 214. As to provision of fire-escapes.

Mass. Act April 11, 1890, chap. 179. Communication to be provided in manufacturing establishments between rooms containing machinery and engine room.

Mass. Act March 10, 1890, chap. 83. Accidents to employees to be reported by proprietors of manufacturing establishments.

Mass. Act March 13, 1890, chap. 90. Prohibiting employment of persons under 15 years of age in care or management of elevators, or of persons under 18 years of age for elevators running at a speed of over 200 feet a minute.

Mass. Act April 11, 1890, chap. 183. To limit hours of labor for women and children in manufacturing establishments.

Mass. Act June 3, 1890, chap. 375. Nine hours to constitute day's works for laborers employed by state, city, or town.

Mass. Act May 6, 1899, chap. 344. 8 hours a days work for city and town employees.

Mass. Act May 31, 1900, chap. 357. Law relative to hours of labor for city and town employees shall on petition be submitted to voters for acceptance. Amending 1899, chap. 344, § 3.

Mass. Act May 21, 1891, chap. 350. Nine hours to constitute day's work for laborers employed by counties.

Mass. Act June 3, 1893, chap. 406. Nine hours to constitute day's work for manual laborers employed by the state.

Mass. Act May 23, 1893, chap. 386. Ten hours to constitute days work for conductors, drivers, and motormen employed by street railway companies. Work to be performed within 12 consecutive hours. On holidays, etc., and in case of accidents extra labor may be performed for extra pay.

Mass. Act June 11, 1892, chap. 357. No minor under 18 and no woman shall be employed in any manufacturing or mechanical establishment more than 58 hours per week.

Mass. Act June 13, 1900, chap. 378. Minors under 18 and women not to labor in mercantile establishments more than 58 (formerly 60) hours per week except in retail shops during December. Amending 1891, chap. 508, § 10.

Mass. Act June 2, 1898, chap. 494. Factories. Generally amending law relative to employment of minors.

Mass. Act March 9, 1898, chap. 150. Factories. Revising law relative to manufacture and sale of clothing made in tenements (amending an act regulating employment of labor, chap. 508, 1894).

Mass. Act April 24, 1893, chap. 246. Dwellings used for manufacture of clothing brought under system of inspection. Families engaged in such manufacture in dwelling rooms must be licensed. Conditions of disease to be reported to health officers. Tenement made goods must be labeled.

Mass. Act May 19, 1896, chap. 418. Bakeries and Confectioneries. Not more than 60 hours work per week. Regulating sanitation. Health of employees.

Mass. Act June 29, 1900, chap. 425. Hours of labor for employees of county jails and houses of correction not to exceed 60 per week.

Mass. Stat. 112, 179, 1883, 125. Employment of person who is color blind.

Mass. Act April 28, 1896, chap. 343. No traversing carriage shall pass within a foot of a pillar or fixed structure in cotton factory.

Mass. Act May 6, 1892, chap. 260. Employers' liability. When death of employee is not instantaneous, or is preceded by conscious suffering.

Mass. Act Feb. 17, 1894, chap. 41. Railroad corporations must block frogs, switches, etc., on its tracks to prevent employees from being caught.

Mass. Act June 10, 1897, chap. 491. Defining "train" and "persons in charge of signal, switch, or train."

Mass. Act June 3, 1897, chap. 452. Cars of St. Ry. procured after Jan. 1, 1898, in cities under 50,000 must have platforms inclosed for pro-

tection in winter. Larger cities also on decision by railroad commission as to safety of operating with inclosed platforms.

Mass. Act June 27, 1903, p. 414. Platforms of street cars to be inclosed Dec. 1 to March 31 for protection of employees.

Mich. Stat. (Laws 1883 Act No. 174, § 22). Relating to blocking of frogs, see herein p. 2189.

Mich. Pub. Acts, 1883, p. 191. Blocking of switches and frogs.

Mich. Stat. 3369. Copies of rules and regulations must be furnished railroad employees.

Mich. Stat. 3367. Railway liable to penalty for employing men addicted to drink.

Mich. Act Feb. 26, 1895, chap. 9. Platforms of street railway cars to be inclosed for protection in winter.

Mich. Act May 20, 1893, chap. 91. Employers required to provide seats for women and girls.

Mich. Act May 27, 1893, chap. 126. Regulating employment of women and children in manufacturing establishments and providing for inspection of such establishments.

Mich. Act May 22, 1895, chap. 184. Factory inspection. Amending general law. Elevators, fire-escapes, stairways, water-closets. Organization of labor department. Reports. Annual inspection required.

Mich. Act May 31, 1893, chap. 177. Ten hours labor performed within 12 consecutive hours shall constitute day's labor in the operation of all steam, surface, and elevated railroads.

Mich. (3 How. Anno. Stat. § 1997, cl. 7). Forbidding the employment of children under fourteen years of age without written permission of parent or guardian, see herein p. 2203.

Mich. Act April 24, 1897, chap. 92. Child Labor. Statement of age by parents must be sworn to.

Mich. Act May 17, 1899, chap. 77. Children not to be employed in manufactories between 6 P. M. and 7 A. M. Parent must swear child can read and write. Amending C. L. § 5343, 536.

Mich. (3 How. Anno. Stat. chap. 5, § 1997). Providing for the guarding of dangerous machinery, see herein p. 2191.

Mich. Act May 7, 1897, chap. [illegible] sponsibility for construction repairing fire escapes, [illegible] and other permanent [illegible] ments ordered by inspec[illegible] on owner of building.

Mich. Act May 13, 1897, chap. [illegible] (formerly iron) [illegible] in every 60 days.

Mich [illegible] il 21 1897, chap. [illegible] inspectors to inspe[illegible] in manufacturing [illegible] me[illegible]s yearly.

Mich. Act April 24, 1897, chap. [illegible] tories shall have prope[illegible] and dressing rooms.

Mich. Act May 2, 1899, chap. [illegible] ulating coal mining; ins[illegible] be appointed by commis[illegible] labor; escape shafts in a[illegible] 300 to 400 feet from mai[illegible] only competent engineer[illegible] rate cages and hoists; [illegible] have safety catches and [illegible] 10 only to ride; employ[illegible] name check weighman; [illegible] supply timber for props.

Mich. Act May 17, 1899, c[illegible] Emery wheels and belt[illegible] provided with fans or[illegible] commissioner of labor.

Mich. June 9, 1899, chap. 233. [illegible] factnre of wearing [illegible] flowers, cigarettes, etc., f[illegible] in dwellings except on[illegible] permit of factory [illegible] granted after inspection[illegible] number to be employed [illegible] building is fit. Permit[illegible] framed and posted i[illegible] Firms giving out work [illegible] quire production of per[illegible] keep register of persons [illegible] given. Family may emp[illegible] stress. Amending 189[illegible] 184.

Minn. Stat. Requiring fencing [illegible] chinery, see herein p. 21[illegible]

Minn. Stat. Unlawful to limit [illegible] tract liability of railro[illegible] pany to employee for inj[illegible]

Minn. Stat. 2606. Railway [illegible] liable for damage or[illegible] to employee through n[illegible] of other employee, where [illegible] trilotory negligence.

Minn. Laws 1887, chap. 13. [illegible] liabilities of railroad c[illegible] for injuries sustained [illegible] ployees, see herein p. 21[illegible]

Minn. Rev. Stat. 1878, chap. [illegible] Relating to duty of railr[illegible]

panies to erect fences and cattle guards, see herein p. 1878.

Minn. Stat. 1891, chap. 17. Railway shall not permit engineer, conductor, fireman, trainman, or brakeman or telegrapher, who has worked for 18 hours consecutively to go on duty again without 8 hours rest.

Minn. Laws 1893, chap. 63. Requiring street railway companies to inclose front platform of cars, see herein p. 1896.

Minn. Act March 30, 1893, chap. 7. Inspection and regulation of machinery and sanitary arrangements. Requiring guards to be placed about dangerous machinery. Duty of factory inspectors.

Minn. Gen. Stat. 1894, § 2218. Requiring saws to be guarded.

Minn. Gen. Laws 1895, chap. 173. Defining duties of employers to employees in certain cases, see herein p. 1917.

Minn. Act Mar. 27, 1895, chap. 123. Fire escapes. Amending law. Requirements.

Minn. Act. Mar. 27, 1895, chap. 123. Duty of occupant or lessee to conform to orders of inspectors. May recover from owner or other person justly chargeable.

Minn. Act Mar. 23, 1895, chap. 49. No person (formerly under 18 and women) to be compelled to labor over ten hours, but may work extra time for extra pay. Exception for domestic and farm labor.

Minn. Act April 19, 1893, chap. 96. Misdemeanor to compel child under 16 to labor more than 10 hours a day in factory or mercantile establishment or to employ such child at labor of any kind, outside family, before 7 A. M. or after 6 P. M.

Minn. Act April 5, 1895, chap. 171. Child labor. General law. No child under 14 may be employed in factory, workshop, or mine; or anywhere before 7 A. M. or after 6 P. M.; or during school period. Exception to latter provision when necessary for support. Physician's certificate. School attendance. Running elevators.

Minn. Act April 23, 1897, chap. 360. Child labor. Extending law. Children under 11 not to be employed in mercantile establishments except during vacation. Children under 16 not at night or over 60 hours a week.

Miss. Anno. Code 1892, § 3557. Relating to liability of railroad companies for personal injuries, see herein p. 1883.

Miss. Laws 1896, chap. 87. Relating to liability of railroad corporations to employees, see herein p. 2084.

Miss. Act March 11, 1896, chap. 87. Liability for injuries through fellow servants extended to all corporations (formerly only railroads). Distribution of damages to relatives.

Miss. Act March. 23, 1896, chap. 86, Employers' liability. For personal injuries due to negligence. Who may bring suit.

Mo. Gen. Stat. 1865, chap. 63, § 38. Requiring the blowing of whistle or ringing of bell when approaching crossing, see herein p. 1874.

Mo. Acts 1881, p. 168. Providing for the health and safety of persons in coal mines, and providing for the inspection of the same.

Mo. Act June 2, 1899, p. 273. Limiting number of persons who may work in tenement or dwelling at manufacture of wearing apparel. Firms contracting for such articles to keep register of names and addresses of workers. No firm to sell article made in violation.

Mo. Act June 2, 1899, p. 308. Miners to have certificate of competency from state inspector. Amending R. S. 1889, chap. 115, art. 2.

Mo. Acts 1881, p. 188. Providing for liability for failure to fence the shaft opening.

Mo. Damage Act, § 2. Relating to liability for death by negligent act, see herein p. 1880.

Mo. Act March 23, 1881, §§ 14, 16. Giving right of action for injury caused by wilful neglect of owner of coal mine, see herein p. 1889.

Mo. Act 1881. Respecting supplying of timber props; requiring cages for lowering and hoisting miners, see herein p. 2200.

Mo. Rev. Stat. 1889. Relating to mines; authorizing servants to sue for injuries caused by its violation, see herein p. 2183.

Mo. Rev. Stat. chap. 93, § 6, as amended by act July 1, 1887. Requiring the owner, etc., of mines to provide "safe means" for carrying persons in and out of mines.

Mo. Act July 1, 1887. Requires that the owner, etc., of every coal mine shall provide a sufficient amount of ventilation.

Mo. Act April 20, 1891. Requiring the guarding of dangerous shafting and gearing, see herein p. 2191.

Mo. Sess. Acts 1891, § 3, p. 160. Requiring guarding of belting, shafting, gearing, and drums, see herein p. 2187.

Mo. Act 1891, amending Rev. Stat., 1889, § 7074. Increasing the amount of damages recoverable in case of death of a miner, see herein p. 1889.

Mo. Act April 20, 1891, p. 179. Factories. Sanitary conditions. Ventilation.

Mo. Act April 20, 1891, p. 159. Health and safety of employees in factory.

Mo. Act March 26, 1891, p. 179. Manufacturing and mercantile houses required to provide seats for women and girls employed by them.

Mo. Act April 18, 1893, p. 209. Appointment of mine inspectors; one for coal mines and one for lead, zinc, iron, and other mines.

Mo. Act Mar. 18, 1895, p. 227. Room and pillar mines must have two parallel entries for ingress of air. Cross cuts not to exceed 50 feet apart. No rooms to start inside last cross cut till next one is made.

Mo. Act April 9, 1895, p. 225. Illumination of coal mines. Proscribing kinds of oil which may be used. Tests. Penalties. Inspection.

Mo. Act April 9 1895, p. 228. Ventilation of coal mines. Amending law and increasing requirements and powers of inspectors.

Mo. Act April 11, 1895, p. 226. Powder, Blasting. Amending law for coal mines. Penalties for violation.

Mo. Act Feb. 9, 1897, p. 96. Railway's liability for injury to employee through negligence of any other agent or servant unless contributory negligence. Vice principals and fellow servants defined. No contract to avoid.

Mo. Act March 5, 1897. Requiring electric street cars to be provided during the winter with screens for protection of motormen, see herein p. 1898.

Mo. Act March 23, 1897, p. 143. Child labor. Penalty for employment under 14 in manufacturi lishments. Extreme po parents a defense.

Mo. Act March 9, 1897, p. 113 spectors and state labor sioner or deputies may dust fans or blowers be

Mo. Act March 15, 1897, p. gineer in mine not to ha of hoisting machinery can be near enough to gine and drum to contro

Mo. Act March 24, 1897, p. Stricter regulations fo ment shafts.

Mo. Rev. Stat. 1899, § 2873 liabilities of railroad tions to employees, see 2086.

Mo. Rev Stat. 1899, § 2873 vice principals and fell ants of railroad corpora herein p. 2086.

Mo. Act March 15, 1899, p. man shall be placed a shaft and one at botto swer signals for low hoisting men.

Mo. Act May 11, 1899, p. 312. at depth of 200 feet other than coal mines s be day's work.

Mo. Act May 29, 1899, p. 274. hours of labor and sani ditions in bakeries and tioneries. Repealing 18 § 17-18.

Mont. Rev. Stat. 1879, § 31, p. fining liability of railro rations for acts of supe ants, see herein p. 2087.

Mont. Act March 6, 1891, p. 2 mines. Inspection. E Escape shafts. Stairw

Mont. Act Feb. 16, 1893, p. 1 hours to constitute da for stationary engineers.

Mont. Pol. Code, § 3652. Mar Mine signals. State ins provide uniform systen mines.

Mont. Act March 1, 1897, p. 6 mines operated by stopp be provided with separat ment shaft.

Mont. Act March 1, 1897, p. 2 Manner of constructin cage for lowering and men. Inspection.

Mont. Laws 1897, p. 245 that mining shafts of n a prescribed depth shal

vided with safety cages, see herein p. 1899.

Mont. Act Feb. 19, 1897, p. 67. Penalty for employing more than 8 hours a day engineers of hoisting engines in mines where 15 men are employed underground.

Neb. Sess. Laws, 1891, chap. 19. Making it unlawful to use new cars in equipping of automatic couplers, see herein p. 2188.

Neb. Act April 7, 1891, chap. 51. Eight hours to constitute legal day's labor for all classes of mechanics, servants, and laborers, except those engaged in farm or domestic labor.

Neb. Act March 31, 1897, chap 54. Platforms of electric, steam, and cable cars to be inclosed for protection in winter. Penalty.

Neb. Act March 31, 1899, chap. 108. Child under 10 not to be employed in manufacturing or mercantile establishments. Children under 14 not to be employed except during vacation. Exceptions. In each establishment must be kept for inspection a record of age and residence of each employee under 16 (formerly children under 12 not to be employed more than 4 months a year). Amending C. S. 1897, § 6953-55.

Neb. Act March 31, 1899, chap. 107. Limiting hours of employment of females in manufacturing establishments, hotels, etc. Not more than 10 hours a day or 60 hours a week. Seats to be provided.

Neb. Act April 1, 1899, chap. 77. Railroad companies not to permit workmen to work more than 18 consecutive hours without 8 hours for rest.

N. H. Pub. Stat. § 26, cl. 159. Bridgeguards.

N. H. Act March 10, 1899, chap. 69. Platforms of street cars to be inclosed during certain months.

N. H. Act Feb. 26, 1895, chap. 16. Seats for female employees must be provided in manufacturing and mercantile establishments.

N. H. Act March 11, 1899, chap. 84. Children graduates of grammar school may be granted certificates allowing them to work in manufacturing establishments. Amending P. S. 1891, chap. 93, § 12.

N. J. Act April 16, 1898, chap. 181. Bakeries and confectioneries. Not over 60 hours labor per week. Regulating sanitation. Health of employees.

N. J. Act Feb. 25, 1892, chap. 24. Appointment of commissioner of mines and duties as to inspection.

N. J. Act March 18, 1893, chap. 216. Forbidding manufacture of clothing, etc., in tenements or dwellings, except by written permit from factory and workshop inspector or deputy.

N. J. Act April 11, 1898, chap. 172. Factories. Water-closets must secure absolute privacy.

N. J. Act May 11, 1897, chap. 190. Platforms of electric street railways to be inclosed for protection in winter.

N. J. Act May 18, 1898 chap. 192 Amending penalities and proceedings in case of violation of law (chap. 119, 1883) requiring seats to be provided for female employees in certain establishments.

N. J. Act April 18, 1891, chap. 41. Factory inspector. Defining duties of. Office to include inspection mines and enforcement of regulations for increased safety to those employed therein.

N. M. Act Feb. 17, 1893, chap. 25. Liability of railroad companies for damages to employees in certain cases. Unlawful to use defective locomotives, cars, and machinery.

N. Y. General Railroad act 1850, § 44. Relating to duties of railroad companies to fence right of way, see herein p. 1876.

N. Y. Laws 1876, chap. 122. Relating to the employment of children, see herein p. 2203.

N. Y. Laws 1886, chap. 409. Requiring the posting of notice of hours of labor required for employees under sixteen, see herein p. 2210.

N. Y. Laws, 1889, chap. 560. Forbidding the employment of children under fourteen years in manufacturing establishments, see herein p. 2203.

N. Y. Laws 1897, chap. 415, § 70. Relating to the employment of children in factories, see herein p. 1902.

N. Y. Laws 1884, chap. 439, § 2. Warning signals at low bridges on railways.

N. Y. Acts 1886, 1887. Automatic doors in elevator shafts.

N. Y. Laws 1887, chap. 566. Providing

for the protection of openings of hoistways in warehouses, see herein p. 2194.

N. Y. Laws, 1887, chap. 462, § 8. Requiring the inclosing of elevator shafts, see herein p. 2194.

N. Y. Laws 1886, chap. 409, § 8, amended Laws 1892, chap. 673, § 8. Requiring the guarding of cogs, belting, shafting, etc., see herein pp. 1914, 2192.

N. Y. Laws 1890, chap. 398, § 12, p. 756. Providing that it shall be the duty of the owner of any manufacturing establishment to furnish, in the discretion of the factory inspector, belt shifters, and requiring the guarding of cog-wheels, see herein, p. 1915.

N. Y. Act April 20, 1891, chap. 214. Safety railings on hanging scaffolds more than 20 feet above ground.

N. Y. Laws, 1897, chap. 415. Requiring the furnishing of safe and proper scaffoldings, see herein p. 2192.

N. Y. Laws 1892, chap. 673, § 8. Prohibiting employers to allow servants to grease elevator cables while in motion.

N. Y. Act May 21, 1890, chap. 398. To limit hours of labor for women and children in manufacturing establishments.

N. Y. Act May 20, 1892, chap. 711. Conductors, engineers, firemen, and train men, having worked 24 hours, not to be permitted or required to go on duty again until they have had eight hours rest. Ten hours labor performed within 12 consecutive hours to constitute day's labor.

N. Y. Act May 18, 1892, chap 673. Requiring notices of time of beginning and ending of day's labor to be posted in factories where women and children are employed.

N. Y. Act April 23, 1896, chap. 381. Children and women. Employment in mercantile establishments. Not over 10 hours a day for minors. No children under 14 except in school vacation. Toilet rooms. Seats for women. Employment in basements. Penalties.

N. Y. Act May 11, 1893, chap. 691. Ten hours, exclusive of meal times, to constitute day's work in brick yards owned or operated by corporations.

N. Y. Act May 2, 1895, chap
erties. Hours of work
per week. Inspection
regulations for protec
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N. Y. Act May 17, 1892, ch
room used for eati
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N. Y. Act March 22, 189
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feet articles found t
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conditions.

N. Y. Act May 21, 1890, c
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ployees.

N. Y. Laws 1890, chap. 391
chap. 415. Relating

N. Y. Act May 17, 1892,
Providing for openin
of mines.

N. Y. Act May 27, 1895, cha
requiring two openin
apply to iron mines
talc mines allowed t
complete second open

N. Y. Laws 1890, chap. 39
Laws 1897, chap. 415,
quiring that tunnels
timbered, and roofs
cured, see herein p. 2

N. Y. Act May 9, 1896, cha
Use of "Coe" drawi
tain railroads restric

N. Y. Act May 14, 1896,
Automatic couplers
on engines.

N. Y. Act March 23, 1896,
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N. Y. Act May 14, 1896 cha
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dren in mfg. establishments. Certificate from board of health necessary when child under 14. School attendance. Work during vacations and other regulations.

N. Y. Act May 29, 1896, chap. 991. Factory inspectors to report contagious diseases or unwholesome goods to board of health.

N. Y. Act April 1, 1899, chap. 192. Factory inspector (formerly commissioner of police) to inspect scaffolding. To inspect certain boilers in factories. 50 (formerly 36) deputy inspectors may be appointed. Amending 1897, chap. 415.

N. Y. Laws 1897, chap. 415, § 20. Relating to construction of buildings; see herein, p. 2210.

N. Y. Act April 1, 1899, chap. 191. Fencement not to be used for mfg. unless license obtained of factory inspector. Amending 1897, chap. 415, art. 7.

N. Y. Act April 1, 1899, chap. 192. No minor under 18 and no female (formerly no female under 21 nor male under 18) to be employed in factory before 6 a. m. or after 9 p. m. Amending 1897, chap. 415, § 77.

N. Y. Act April 1, 1899, chap. 192. Children under 16 not to operate dangerous machines in factory. Amending 1897, chap. 415, § 81.

N. Y. Act April 19, 1899, chap. 375. No female and no male under 18 years to be employed in factory in operating emery wheel for polishing or buffing. Amending 1897, chap. 415, art. 6.

N. Y. Act May 12, 1899, chap. 567. Each contract to which state or municipal corporation is party and which may involve employment of mechanics or laborers, to stipulate that 8 hours is to be a day's work. Penalty. Amending, 1897, chap. 415, §§ 3, 4.

N. Y. Act April 6, 1900, chap. 298. Eight hour law does not apply to engineers, electricians, and elevatormen in department of public buildings during session of legislature. Amending 1897 chap. 415, § 3.

N. Y. Act April 14, 1900, chap. 453. Pharmacists and drug clerks in cities of 1,000,000 shall not work more than 70 hours a week; may work six hours overtime for shorter succeeding week; hours to be consecutive; one hour for each meal and full holiday every two weeks.

N. Y. Act April 19, 1900, chap. 533. Requiring seats for waitresses in hotels and restaurants. Amending 1897, chap. 415, § 17.

N. Y. Laws 1902, chap. 600. Employers' Liability Act; see herein, p. 1938.

N. Y. Stat. Requiring the construction of fire escapes; see herein p. 2144.

N. C. Act Feb. 14, 1897, chap. 114. Railroad brakemen. Misdemeanor to be intoxicated.

N. C. Act Feb. 4, 1897, chap. 301. Protection of miners hired to assist in mining at time of raw material by piece or pound.

N. C. Act March 9, 1897, chap. 241. Mines. General regulation. Ventilation, accidents, etc.

N. C. Private Laws 1897, chap. 1, p. 83. Prescribing liability of railroad companies for injuries to employees; see herein p. 2124.

N. D. Civ. Code, §§ 3000, 3007. Fixing liability of employers to employees for injury; see herein p. 1980.

N. D. Act March 6, 1899, chap. 120. Railroad companies liable for all damages sustained by employees by reason of negligence of other employees. Liability not impaired by contract. Does not apply to construction of new road.

Ohio Act 1872, 69 Ohio Laws, 191. Requiring the sounding of the whistle and ringing of bell at public crossing; see herein p. 1873.

Ohio Rev. Stat. § 3365. Requiring railroad companies to fill or block frogs, switches, and guard rails; see herein p. 2189.

Ohio Rev. Stat. § 6948. Prohibition of the employment of color-line persons.

Ohio Act April 2, 1890. Providing regulations for protection of railway employees; see herein p. 2088.

Ohio Act April 2, 1890. Defining fellow servants and railroad corporations; see herein p. 2089.

Ohio Act April 2, 1890, chap. 125. To forbid all rules or contracts by which railroad employees surrender right to damages. Use of defective machinery by railroad companies to be prima facie evi

dence of neglect. To define superior officer and fellow servant of railroad employees.

Ohio Act March 26, 1890, chap. 104. To forbid working of railroad employees more than 24 hours consecutively.

Ohio Act March 26, 1890, chap. 104. Ten hours to constitute day's work for railroad employees.

Ohio Act April 23, 1891, chap. 233. Railroads. Number of hours of consecutive service limited to 24.

Ohio Act April 15, 1892, chap. 259. Conductors, engineers, firemen, brakemen, trainmen, and telegraph operators who have worked for 15 consecutive hours entitled to eight hours rest.

Ohio Act April 29, 1891, chap. 303. Railroad forbidden to employ engineers addicted to drink.

Ohio Stat. 1891, p. 320. Railway not to employ conductor who has not had two years' experience as trainman nor an engineer who has not had three as fireman.

Ohio Rev. Stat. § 6871. Making it a misdemeanor for employees to neglect to prop securely roofs and entries to mines. see herein p. 2201.

Ohio Rev. Stat. §§ 298, 301. Giving a miner injured by an explosion of gas a right of action against his employer.

Ohio Act April 19, 1894, chap. 153. Quality of oils for illuminating mines.

Ohio Act April 18, 1892, chap. 314. Inspection of mines. Two additional district inspectors.

Ohio Act April 27, 1896, p. 393. Bakeries and confectionaries. Not over 60 hours labor per week. Regulating sanitation. Health of employees.

Ohio Act March 6, 1891, chap 75. Requiring manufacturing and mercantile establishments to provide seperate toilet rooms for female employees.

Ohio Act March 9, 1898, p. 35. Violation of law (p. 132, 1885 and p. 87, 1891) relating to seats and toilet rooms for female employees a misdemeanor; amending provision relative to toilet rooms.

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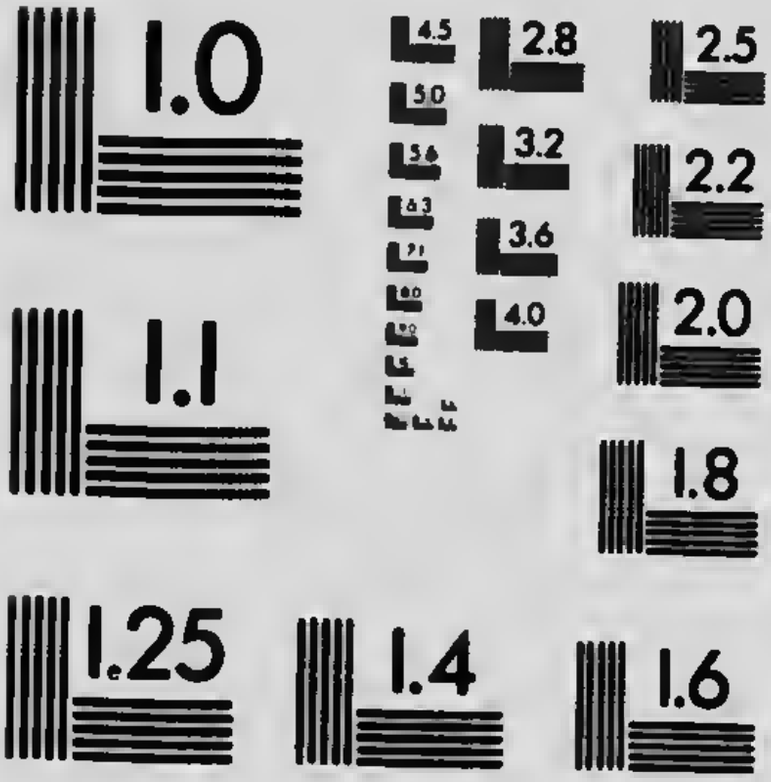

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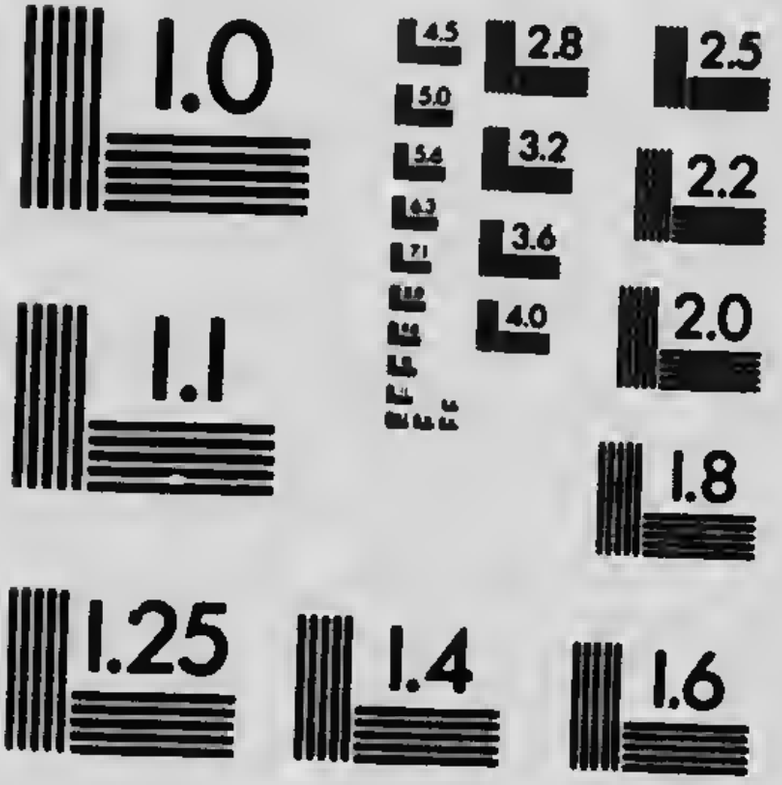

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