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IV.—THE CASES IN WHICH THE MASTER IS LIABLE FOR INJURIES TO SERVANTS IN HIS EMPLOY.

The frequency with which questions arise, and become the subject of legal controversy, concerning the liability of an employer to persons receiving injuries in his service, must be the excuse for the present paper. The legal questions have recently received the attention of many able jurists, and several of the difficulties which surrounded the general subject but a few years ago may now be considered permanently removed. The purpose here will be, to present the general rules which have been laid down by the authorities, with some of the reasons on which they are based.

I. It is now conceded that, in general, the master is not liable to his servant for any injury which the latter, while engaged in the service of the former, may receive from any of the risks incident to it.

For this exemption the reason commonly assigned is, that the servant, in entering into the employment, must be deemed to contemplate all the risks incident to it, and both he and his employer must be supposed to have those risks in view when negotiating for the employment and agreeing upon the compensation. As the servant knows when he engages in the service that he will be exposed to the incidental risk, "he must be supposed to have contracted that, as between himself and the master, he would run this risk." ¹

Another and perhaps not less forcible reason, though not so often assigned, is that on grounds of general public policy the opposite doctrine would be unwise, not only because it would subject employers to unreasonable, and often ruinous responsibilities, but also because it "would be an encouragement to the servant to omit that diligence and caution which

¹ Alderson, B., in *Hutchinson v. Railway Co.*, 5 Exch. 343,351.

he is in duty bound to exercise on 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 the master for damages could possibly afford."² In many employments also, the public are compelled to rely upon the caution and diligence of servants as the chief protection against accidents which may prove destructive of life or limb; and any rule of law which would give the servant a remedy against the master for any injury resulting to himself from such an accident, instead of compelling him to rely for his protection upon his own vigilance, must necessarily tend in the direction of an abatement of his vigilance, and in the same degree to increase the hazards to others. The case of carriers of persons is the most common and most forcible illustration of this remark. It is of the highest importance in that employment that every one who has a duty or service to perform upon which the safety of others may depend, whether in the capacity of master or servant, should be under all reasonable inducements to discharge or perform it with fidelity and prudence, and that no one should be tempted to imperfect vigilance by any promise the law might make to compensate him for injuries against which his own caution might, perhaps, have protected not himself alone, but others also. The inducement to vigilance is sufficiently furnished, in the case of the master, by compelling him to respond to third persons for all injuries, whether caused by his own negligence or by that of his servants; but in the case of servants it is supplied mainly by this rule, which, by denying him the remedy that is allowed to third persons, makes it his special interest to protect others; since it is only in doing so that he protects himself.

II. The rule which exempts the master from responsibility for injuries to his servants, extends to cases where the injury results from the negligence of other servants in the

² Abinger, C. B., in *Priestly v. Fowler*, 3 M. & W. 1, 6.

same employment. This general rule is now conceded on all hands.³ The disputes which remain concern its proper limits, and what and how many are the exceptional cases. In some quarters a strong disposition has been manifested to hold the rule not applicable to the case of a servant who, at the time of the injury, was under the general direction and control of another, who was entrusted with duties of a higher grade, and from whose negligence the injury resulted.⁴ But it cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts or omissions on the part of one class of servants and not those of another class. Nor on grounds of public policy could the distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public who, in their dealings with the employer, may be subjected to risks. 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

³ *Bartonskill Coal Co. v. Reid*, 3 Macq. H. L., p. 266; same v. *McGuire*. Id. 300; *Hutchinson v. Railway Co.*, 5 Exch. 343; *Morgan v. Railway Co.*, L. R. 1 Q. B. 149; *Brown v. Cotton Co.*, 3 H. & N. 511; *Murray v. Railroad Co.*, 1 McMul. 385; *Farwell v. Boston etc, R. R. Co.*, 4 Met. 49; *Caldwell v. Brown*, 53 Penn. St. 453; *Sullivan v. Railroad Co.*, 11 Iowa, 421; *Harper v. Indianapolis, etc, R. R. Co*, 47 Mo. 567; *Davis v. Detroit, etc., R. R. Co.*, 20 Mich. 105; *Lawler v. Androscoggin R. R. Co.*, 62 Me. 463; *Sherman v. Rochester, etc., R. R. Co.*, 17 N. Y. 153; *Illinois Central R. R. Co. v. Cox*, 21 Ill. 20; *Hard v. Vermont, etc., R. R. Co.*, 32 Vt. 473; *Wonder v. Baltimore, etc., R. R. Co.*, 32 Md. 411; *Columbus, etc., R. R. Co. v. Arnold*, 31 Ind. 174; *Hayden v. Smithville Manf. Co*, 29 Conn. 557.

⁴ *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415; *Cleveland, etc., R. R. Co. v. Keary*, 3 Ohio N. S. 201. See these cases explained in *Pittsburg, etc., R. R. Co. v. Devinney*, 17 Ohio N. S. 197. See also *Louisville, etc, R. R. Co. v. Collins*, 2 Duv. 114; same v. *Robinson*, 4 Bush, 507. If the master himself works with his servants and injures one of them by his negligence, he is liable therefor, and if he has partners in the business, they are liable also. *Ashworth v. Stanwix*, 3 Ellis & Ellis, 701. See *Mellors v. Shaw*, 1 Best & Smith, 437.

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. And in this regard it can make little difference what is the grade of servant who is found to be negligent, except as superior authority may render the negligence more dangerous, and consequently increase at least the moral responsibility of any other servant who, being aware of the negligence, should fail to report it.⁵

It has also been sometimes insisted that the law should exclude from the scope of the general rule the case of a servant injured by the negligence of another who, though employed in the same general business, had his service in some distinct branch of it; as in the case of a laborer on the track of a railroad injured by the carelessness of a conductor; a carpenter employed on buildings injured by the negligence of a yard-master in making up trains; and the like. But in the main the authorities agree that the general rule must apply to such cases, and that, on the reasons on which the rule is rested, they cannot be distinguished from those in which the service of both persons was in the same line.⁶

⁵ "A foreman is a servant, as much as any other servant whose work he superintends." Willes, J., in *Gallagher v. Pifer*, 16 C. B. N. S. 669, 694. The same doctrine was declared in *Wigmore v. Jay*, 5 Exch. 354, and *Feltham v. England*, L. R. 2 Q. B. 33. In this country it has often been declared that the grade of service of the two servants is unimportant "provided the services of each in his particular sphere and department are directed to the accomplishment of the same general end." Bacon, J., in *Warner v. Erie R. R. Co.*, 39 N. Y. 468, 470. See *Coon v. Syracuse etc. R. R. Co.*, 5 N. Y. 492; *Chicago etc. R. R. Co. v. Murphy*, 53 Ill. 336; *Columbus etc. R. R. Co. v. Arnold*, 31 Ind. 174; *Hayes v. Western R. R. Corp.* 3 Cush. 270; *Hard v. Vermont, etc. R. R. Co.*, 32 Vt. 473; *O'Connell v. B. & O. R. R. Co.*, 20 Md. 212; *Sherman v. Rochester, etc., R. R. Co.*, 17 N. Y., 153; *Ryan v. Cumberland, etc., R. R. Co.*, 23 Penn. St. 384; *Chicago, etc., R. R. Co. v. Keefe*, 47 Ill. 108; *Pittsburgh, etc., R. R. Co. v. Devinney*, 17 Ohio N. S. 197. "No member of an establishment can maintain an action against the master for an injury done to him by another member of that establishment, in respect of which, if it had been a stranger, he might have had a right of action." Pollock, C. B., in *Abraham v. Reynolds*, 5 H. & N. 143.

⁶ It was held in *Morgan v. Railway Co.*, L. R. 1 Q. B. 149, that a railway company was not liable to a carpenter employed to work at his trade

It has also been decided in England that the master is not liable for an injury caused by the negligence of one of his servants to the servant of a sub-contractor, who is engaged in the performance of a part of the same work. If the two servants were at the time engaged in doing the common work of the employer, they must be considered as for this purpose the servants of such employer while doing his work, "each directing and limiting his attention to the particular work necessary to the completion of the whole work," notwithstanding the one was employed by and responsible to the employer directly, and the other to one employed by him.⁷

III. The exceptions to the general rule may perhaps be all embraced in one general proposition: That if the servant is injured in consequence of the personal negligence of the

on its line, who was injured by the negligence of its porters in shifting an engine on its turn-table close by the shed on which the carpenter was working. "The plaintiff and the porters were engaged in one common employment, and were doing work for the common object of their masters, viz., fitting the line for traffic." Earl, Ch J., p. 154. "If a carpenter's employment is to be distinguished from that of 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 service, 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." Pollock, C. B., p. 155. And see *Feltham v. England*, L. R. 2 Q. B. 33. It is held in Massachusetts that a railroad company is not responsible to a person employed by it to repair its cars, for a personal injury arising from the negligence of a switchman, in failing properly to adjust a switch on the track over which he is carried by the company to his place of work, unless negligence in the employment of the switchman is made out. *Gilman v. Eastern R. R. Corp.* 10 Allen, 233. In *Albro v. Agawam Canal Co.*, 6 Cush. 75, it was decided that a manufacturing company was not liable to one of its operatives for an injury occasioned by the negligence of the superintendent. And see *Columbus etc. R. R. Co. v. Arnold*, 31 Ind. 174; *Louisville etc. R. R. Co. v. Cavens*, 9 Bush, 559; *Weger v. Pennsylvania R. R. Co.*, 55 Penn. St. 460. The rule of exemption extends to "every member of an establishment." Pollock C. B., in *Abraham v. Reynolds*, 5 H. & N. 143.

⁷ *Wiggett v. Fox*, 36 E. L. & Eq. 486; s. c. 11 Exch. 832. Compare *Murray v. Currie*, L. R. 6 C. P. 24; *Forsythe v. Hooper*, 11 Allen, 419; *Burke v. Norwich etc. R. R. Co.*, 34 Conn. 474; *Hunt v. Pennsylvania R. R. Co.*, 57 Penn. St. 475.

master himself, the latter is responsible for the injury, on the same general grounds and for the same reasons which would render him liable for a like negligent injury to a stranger.

In considering this proposition, it may be remarked:

1. That the master's negligence may consist in subjecting the servant to the dangers of unsafe buildings or machinery, or to other perils on his own premises, which the servant neither knew of nor had reason to anticipate or to provide against when he entered the employment, or subsequently.

The general rule is, that while the owner of real estate is not bound to provide safeguards for wrong-doers, he is bound to take care that those who come upon his premises by his express or implied invitation be protected against injury resulting from the unsafe condition of the premises, or from other perils, the existence of which the invited party had no reason to look for. Thus, a railroad company has been held liable to one who was invited by a signal from its flagman to cross its track, on the supposition that it was clear, and was injured while so doing by a passing train.⁸ So a brewer was held liable to a customer who came to do business with him, and fell through an unguarded trap door.⁹

The invitation to a servant to come upon dangerous premises without apprising him of the danger is just as culpable, and an injury resulting from it is just as deserving of compensation in the case of a servant as in any other case. Moreover, no reason of public policy and none to be deduced from the contract of the parties, can be suggested, which should relieve the culpable master from responsibility. A man cannot be understood as contracting to take upon himself risks which he neither knows or suspects, nor has reason to look for; and it would be more reasonable to imply a contract on the part of the master not to invite the servant into unknown dangers, than one on the part of the servant to run the risk of them. But the question of contract

⁸ *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368. See *Elliott v. Pray*, Id. 378.

⁹ *Chapman v. Rothwell*, El. Bl. & El. 168. See also *Freer v. Cameron*, 4 Rich. 228.

may be put entirely aside from the case, and the responsibility of the master may be planted on the same ground which would render him responsible if the relation had not existed. Whether invited upon his premises by the contract of service, or by the calls of business, or by direct request, is immaterial; the party extending the invitation owes a duty to the party accepting it, to see that at least ordinary care and prudence is exercised to protect him against dangers not within his knowledge, and not open to observation. It is a rule of justice and right which compels the master to respond for a failure to exercise this care and prudence.¹⁰

The terms in which the proposition has been stated will exempt the master from responsibility in all cases where the risks were apparent, and were voluntarily assumed by a person capable of understanding and appreciating them. No employer, by any implied contract, undertakes that his buildings are safe beyond a contingency, or even that they are as safe as those of his neighbors, or that accidents shall not result to those in his service from risks which perhaps others would guard against more effectually than it is done by him.

¹⁰ *Marshall v. Stewart*, 2 Macq. H. L. 20; s. c. 33 Eng. L. & Eq. 1; *Indermaur v. Dames*, L. R. 2 C. P. 311; *Ryan v. Fowler*, 24 N. Y. 410; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Perry v. Marsh*, 25 Ala. 659; *Schooner Norway v. Jenson*, 52 Ill. 373; *Walsh v. Peet Valve Co.*, 110 Mass. 23; *Holmes v. Northeastern Railway Co.*, Law R. 4 Exch. 254; s. c. affirmed, L. R. 6 Exch. 123; *Mellers v. Shaw*, 1 Best & Smith, 437.

The rule has been applied against railroad companies, in the case of injuries to their servants in consequence of the road-bed being out of repair. See *Snow v. Housatonic R. R. Co.*, 8 Allen, 441. "There is no rule better settled than this: that it is the duty of railroad companies to keep their roads and works, and all portions of the track, in such repair, and so watched and tended, as to insure the safety of all who may lawfully be upon them, whether passengers, or servants or others. They are bound to furnish a safe road, and sufficient and safe machinery and cars." Breese, Ch. J., in *Chicago etc. R. R. Co. v. Swett*, 45 Ill. 197, 203. But a railroad company is not liable to one of its employees for an injury occasioned by a latent defect in one of its bridges, where the company employed competent persons to supervise and inspect the bridge, by whom the defect was not discovered. *Warner v. Erie Railway Co.*, 39 N. Y. 468.

Neither can a duty rest upon any one which can bind him to so extensive a responsibility. There are degrees of safety in buildings which differ in age, construction, and state of repair, as there are also in the different methods of conducting business; and these, not the servant only, but any person doing business with the proprietor, is supposed to inform himself about and keep in mind when he enters upon the premises. Negligence does not consist in not putting one's buildings or machinery in the safest possible condition, or in not conducting one's business in the safest way; but there is negligence in not exercising ordinary care that the buildings and machinery, such as they are, shall not cause injury, and that the business as conducted shall not inflict damage upon those who themselves are guilty of no neglect of prudence.

The principle is well stated by the Supreme Court of Connecticut in a case where the injury the servant complained of was caused by his coming accidentally in contact with machinery which, it was claimed, ought to have been covered so as to protect against such an accident. "The employee here was acquainted with the hazards of the business in which he was engaged, and with the kind of machinery made use of in carrying on the business. He must be held to have understood the ordinary hazards attending his employment, and therefore to have voluntarily taken upon himself this hazard when he entered into the defendant's service. Every manufacturer has a right to choose the machinery to be used in his business, and to control that business in the manner most agreeable to himself, provided he does not thereby violate the law of the land. He may select his appliances, and run his mill with old or new machinery, just as he may ride in an old or new carriage, navigate an old or new vessel, occupy an old or new house, as he pleases. The employee having knowledge of the circumstances on entering his service for the stipulated reward, cannot complain of the peculiar taste and habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service."¹¹

¹¹ *Hayden v. Smithville Manf. Co.*, 29 Conn. 548 553, per Ellsworth J., who in citing authorities refers among others to what is said by Bramwell

2. The master may also be guilty of actionable negligence in exposing persons to perils in his service which, though open to observation, they by reason of their youth or inexperience do not fully understand and appreciate, and are injured in consequence. Such cases occur most frequently in the employment of infants. It has been repeatedly held that the case of an infant is no exception to the general rule which exempts the master from responsibility for injuries arising from the hazards of his service.¹² But while this is unquestionably true as a rule, it would be gross injustice, not to say absurdity, to apply in the case of infants the same tests of the master's culpable negligence which are applied in the case of persons of maturity and experience. It may be ordinary caution in one case to apprise the servant of the danger he must guard against, while in the case of another, not yet beyond the years of thoughtless childhood, it would be gross and most culpable, if not criminal carelessness for the master to content himself with pointing out dangers which were not likely to be appreciated, or if appreciated, not likely to be kept with sufficient distinctness and caution in mind, and against which, therefore, effectual protections ought to be provided. The duty of the employer to take

B. in *Williams v. Clough*, 3 H. & N. 258, 260. See also *Priestley v. Fowler*, 3 M. & W. 1; *Dynen v. Leach*, 26 L. J. Exch. 221; s. c. 40 Eng. L. & Eq. 491; *Seymour v. Maddox*, 16 Q. B. 326. This last case was thought by the Court of Appeals of New York to have gone too far. See *Rynan v. Fowler*, 24 N. Y. 410. A railway company is not bound to change its machinery in order to apply every new improvement, or supposed improvement, in appliances; and an employee who consents to operate the machinery already provided by the company, knowing its defects, does so at his own risk. *Wonder v. B. & O. R. R. Co.*, 32 Md. 411. The case of *Combs v. New Bedford Cordage Co.*, 102 Mass. 572, was very similar in many respects to that of *Hayden v. Smithville Manf. Co.* *supra*, and the same general principle was laid down. The failure to employ sufficient assistance does not render the employer liable to a servant who, knowing the facts, had continued in the business without objection. *Skip v. Eastern Counties R. R. Co.*, 9 Exch. 223; s. c. 24 Eng. L. & Eq. 396.

¹² *King v. Boston etc. R. R. Co.*, 9 Cush. 112; *Gartland v. Toledo etc. R. R. Co.*, 67 Ill. 498. See a hard case in *Murphy v. Smith*, 19 C. B. N. S. 361.

special precautions in such cases, has sometimes been very emphatically asserted by the courts.¹³ The Supreme Court of Massachusetts has very properly said, in a case in which defendants relied for their protection upon a notice of danger which they had given to the party injured: "The notice which the defendants were bound to give the plaintiff of the nature of the risks incident to the service which he undertook, must be such as to enable a person of his youth and inexperience in the business intelligently to appreciate the nature of the danger attending its performance. The question, indeed, on this branch of the case is not of due care on the part of the plaintiff, but whether the cause of the injury was one of which, by reason of his incapacity to understand and appreciate its dangerous character, or the neglect of the defendants to take due precautions to effectually inform him thereof, the defendants were bound to indemnify him against the consequences. But in determining this question it is proper and necessary to take into consideration, not only the plaintiff's youth and inexperience, but also the nature of the service which he was to perform, and the degree to which his attention, while at work, would need to be devoted to its performance. The obligation of the defendants would not necessarily be discharged by merely informing the boy that the employment itself, or a particular place or machine in the building or room in which he was set to work, was dangerous. Mere representation in advance that the service generally, or a particular thing connected with it, was dangerous, might give him no adequate notice or understanding of the kind and degree of the danger which would necessarily attend the actual performance of his work."¹⁴ This is not a rule which in

¹³ *Guzzle v. Frost*, 3 Fost. & Finl. 622; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572. In *Bartonskill Coal Co. v. McGuire*, 3 Macq. 300, 311, Lord Chelmsford, in speaking of an injury to a young girl from exposure to machinery in the building where she was employed, says: "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."

¹⁴ Gray J., in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 596. A similar requirement of extra caution and care in the case of

its application is confined exclusively to infants: the principle is a general one, which requires good faith and reasonable prudence on the part of the employer, under the special circumstances of the particular case; of which infancy, if it exists, may be a very important one, but possibly not more so than some others.

3. The master may also be negligent in commanding the servant to go into exceptionally dangerous places, or to subject himself to risks which, though he may be aware of the danger, are not such as he had reason to expect, or to consider as being within the employment.

It has been often—and very justly—remarked, that a man may decline any exceptionally dangerous employment, but if he voluntarily engages in it he should not complain because it is dangerous.¹⁵ Nevertheless, where one has entered upon the employment and assumed the incidental risks, it is not reasonable to hold, that other risks which he is directed by the master to assume, are to be left to rest upon his shoulders, merely because he did not take upon himself the responsibility of throwing up the employment instead of obeying the order. Many considerations might reasonably induce the servant to hesitate under such circumstances. In many cases the consequences might be very serious should he refuse to obey a lawful command of the master; and any command may not be clearly and manifestly unlawful which directs the doing of nothing beyond the general scope of the business. The servant who refuses to obey must consequently expect to take upon himself the burden of showing a sufficient cause for the refusal. However clear the case might be to him, it might not be easy to make a showing satisfactory to third parties, who would naturally assume

small children received by carriers without attendants, was laid down in *East Saginaw City Railway Co. v. Bohn*, 27 Mich. 503.

¹⁵ "A master cannot be held liable for an accident to his servant while using machinery in his employment, simply because the master knows that such machinery is unsafe, if the servant has the same means of knowledge as the master." *Bramwell, B.*, in *Williams v. Clough*, 3 H. & N. 258, 260. See *Mad River etc. R. R. Co. v. Barber*, 5 Ohio, N. S. 541.

that the order was given in good faith, and that the master understood better than another the risks to be encountered in his business. The servant, also, it may reasonably be assumed, would to some extent have his fears allayed by the commands of a master, whose duty it would be not to send him into danger, and who might therefore be supposed to know when he gave the command, that the dangers were not such or so great as the servant had apprehended.¹⁶ In these cases, also, the age and immaturity of the child are of the highest importance; for a child, inexperienced in affairs and ignorant of the law, might well believe the obligation to obey was implicit, and might do so, consequently, under a species of coercion to which the will was wholly subjected.

4. The master may also be negligent in not exercising ordinary care to provide suitable and safe machinery or appliances, or in making use of those which he knows have become defective, but the defects in which he does not explain to the servant, or in continuing ignorantly to make use of those which are defective, where his ignorance is due to a neglect to use ordinary prudence and diligence to discover defects.

The point here is, not that the master warrants the strength or safety of his machinery or appliances, but that he is per-

¹⁶In *Lalor v. Chicago etc. R. R. Co.*, 52 Ill. 401, the declaration averred an employment of the plaintiff's intestate as a common laborer in the business of loading and unloading cars, and for no other purpose; and that while he was engaged in loading a freight car with iron, the deceased was ordered by the superintendent or foreman of the company, employed to manage, direct and superintend the business of the company about the depot, to couple and connect a freight car with other cars, contrary to the special engagement of the deceased, etc., in doing which he was crushed to death. This was held to set out a good cause of action. "The company was constructively present, by and through this officer, and must be charged accordingly. It was, then, by the direct command of the company the deceased was exposed to this peril, and one out of the line of the business he had contracted to perform. He was killed by the negligence of the driver in charge of the locomotive while thus exposed. The law would be lamentably deficient did it furnish no remedy in such a case." Breese, Ch. J., p. 404. See also, *Indianapolis etc. R. R. Co. v. Love*, 10 Ind. 556.

sonally negligent in not taking proper precautions to see that they are reasonably strong and safe. The law does not require him to guaranty the prudence, skill or fidelity of those from whom he obtains his tools or machinery, or the strength or fitness of the materials they make use of. If he employs such reasonable care and prudence in selecting or ordering what he requires in his business, such as every prudent man is expected to employ in providing himself with the conveniences of his occupation, this is all that can be required of him; but for an injury resulting to the servant from a failure to exercise this care and prudence he may be and ought to be held responsible.¹⁷

5. The master's negligence may also consist in employing servants who are wanting in the requisite care, skill or prudence for the business entrusted to them, or in continuing such persons in his employ after their unfitness has become known to him, or when, by the exercise of ordinary care, it would

¹⁷ Keegan v. Western R. R. Co., 8 N. Y. 175, is a leading case. The injury occurred from continuing to use a defective and dangerous locomotive after notice to the company of its dangerous condition. And see McGatrick v. Wason, 4 Ohio, N. S. 566; Cayzer v. Taylor, 10 Gray, 274; Columbus etc. R. R. Co. v. Arnold, 31 Ind. 174. In Noyes v. Smith, 28 Vt. 59, a declaration was sustained which charged the defendants with negligence in putting the plaintiff, their servant, in charge of an insufficient engine, whose insufficiency was unknown to the plaintiff, and but for the want of care and diligence would have been known to the defendants. The like doctrine is declared in Snow v. Housatonic R. R. Co., 8 Allen, 441; Seaver v. Boston etc. R. R. Co., 14 Gray, 466; Hackett v. Middlesex Manuf. Co., 101 Mass. 101; Laning v. N. Y. Cent. R. R. Co., 49 N. Y. 521; and Illinois Central R. R. Co. v. Welch, 52 Ill. 183. The peril in the case last cited was the projecting awning of the station house, which was liable to strike a passing car. Say the court: "The evidence shows that the peril had long before been observed by other employees, and the attention of both the division superintendent and division engineer called to it. This circumstance takes away all excuse from the company, and brings the case within the legal proposition of appellant's counsel, since it was a peril known to the employer and not revealed to the employee." The rule has been applied to the case of a railroad company which was charged with negligence in permitting its road to become blocked with snow and ice, and a car to be out of repair, by means whereof the plaintiff was injured. Fifield v. Northern R. R. Co. 42 N. H. 225.

have been known. "The servant when he engages to run the risks of the 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."¹⁸

The obligation to employ suitable servants is precisely the same as that to provide suitable machinery and appliances for the business. It has been thus stated in a railroad case: "A railroad corporation is bound to provide proper road, machinery and equipment, and proper servants. It must do this through appropriate officers. If acting through appropriate officers it knowingly and negligently employs incompetent servants, it is liable for an injury occasioned to a fellow servant by their incompetency. If it continues in its employment an incompetent servant after his incompetency is known to its officers, or is so manifest that its officers, using due care, would have known it, such continuance in employment is as much a breach of duty and a ground of liability as the original employment of an incompetent servant."¹⁹

6. It is also negligence for which the master may be held responsible, if knowing of any peril which is known to the servant also, he fails to remove it in accordance with assurances made by him to the servant that he will do so. This case may also be planted on contract, or on the less questionable ground of duty. If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and

¹⁸ Alderson, B. in *Hutchinson v. Railway Co.*, 5 Exch. 343.

¹⁹ Gray, J. in *Gilman v. Eastern R. R. Co.*, 13 Allen, 433. The same point is strongly put by Folger, J. in *Laning v. N. Y. Cent R. R. Co.*, 49 N. Y. 521, 533. See also *Tarrant v. Webb*, 18 C. B. 797; s. c. 37 E. L. & Eq. 281; *Illinois Cent. R. R. Co. v. Jewell*, 46 Ill. 99; *Harper v. Indianapolis etc. R. R. Co.*, 47 Mo. 567, and cases cited; *Moss v. Pacific R. R. Co.*, 49 Mo. 167; *Pittsburg etc. R. R. Co. v. Ruby*, 38 Ind. 294; *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 105; *McMahon v. Davidson*, 12 Minn. 357; *Weger v. Pennsylvania R. R. Co.*, 55 Penn. St. 460.

imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover the assurances remove all ground for the argument that the servant, by continuing the employment engages to assume its risks. So far as the particular peril is concerned the implication of law is rebutted by the giving and accepting of the assurance; for nothing is plainer or more reasonable than that parties may and should, where practicable, come to an understanding between themselves regarding matters of this nature.²⁰

7. As the servant only undertakes to assume the hazards of his own employment, it must follow that if the master carries on another and wholly distinct business, an injury occasioned by the negligence of a servant in such other business, not being within the contemplation of the employment, will give ground for an action under the same circumstances which would render liable any stranger who might have been the employer of the negligent servant.²¹

IV. It has now been seen that the master is liable in all cases where the injury has resulted from his own negligence, and not from any of the customary risks of the employment.²² But there still remains the very serious difficulty

²⁰ See *Patterson v. Wallace*, 1 Macq. H. L. 748; s. c. 28 Eng. L. & Eq. 48; *Laning v. N. Y. Cent. R. R. Co.*, 49 N. Y. 521.

²¹ This is implied in all the cases which hold the master not responsible to a servant injured by the negligence of another servant in the same employment. See *Farwell v. Boston etc. R. R. Co.*, 4 Met. 49.

²² For this general rule the following additional cases may be cited: *Roberts v. Smith*, 2 H. & N. 213; *Mellors v. Shaw*, 1 Best & Smith, 437; *Ashworth v. Stanwix*, 3 Ellis & Ellis, 701; *Columbus etc. R. R. Co. v. Webb*, 12 Ohio, N. S. 475; *O'Donnell v. Alleghany Valley R. R. Co.*, 59 Penn. St. 239; *Johnson v. Bruner*, 61 Id. 58; *Harrison v. Central R. R. Co.*, 31 N. J. 293; *Paulmeiser v. Erie R. R. Co.*, 34 N. J. 151; *Chicago etc. R. R. Co. v. Harney*, 28 Ind. 28; *McGlyn v. Brodie*, 31 Cal. 376; *Chicago etc. R. R. Co. v. Jackson*, 55 Ill. 492; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282. The rule was carried so far in *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549, as to hold (four judges to three) a railroad company liable as for its own negligence for the act of a subordinate in sending out a train insufficiently supplied with brakemen. But compare *Mad River etc. R. R. Co. v. Barber*, 5 Ohio, N. S. 541; *Skip v. Eastern Counties R.*, 9 Exch. 223.

of determining what, in particular cases, is fairly imputable to the master as a neglect of personal duty, or on the other hand, is to be regarded as neglect on the part of one of his subordinates for which the master could not be called upon to respond to those in his service.

We have seen that in some cases the master is charged with a duty to those serving him which he cannot divest himself of by any delegation to others. He is charged with such a duty as regards the safety of his premises, the suitability of the tools, implements, machinery or materials he procures or employs, and the servants he engages or makes use of. Whoever is permitted to exercise the master's authority in respect to these matters is charged with the master's duty, and the latter is responsible for a want of proper caution on the part of the agent, as for his own personal negligence.²³ But these are not the only cases in which the master is to be considered as represented by an agent, who for the time being is charged with his duty. A corporation can only manage its affairs through officers and agents, and if it is to be held responsible to its servants for negligence in any case, it must be because some of these are negligent. But whose negligence shall be imputed to the corporation as the negligence of the principal itself? Certainly not that of all its officers and agents, for this would be to abolish wholly, in its application to the case of corporations, of a rule alike reasonable and of high importance.

So far as the board of directors are concerned, no question can be made that for any such purpose they represent the corporation, and its acts, as a board, are the acts of a principal. They constitute the highest and most authoritative expression of corporate volition, and the corporate duties are duties to be performed by the board. But such a board holds only periodical meetings, and at other times the powers of the corporation are usually expected to be, and actually are, exercised by some officer or general superintendent with

²³ *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y. 562; *Laning v. N. Y. Cent. R. R. Co.*, 49 N. Y. 529; *Chicago etc. R. R. Co. v. Jackson*, 55 Ill. 492.

large discretionary powers. Unless such officer or superintendent is to be considered as occupying, for all the purposes of the rule now under consideration, the position of the principal itself, it is obvious that there must be assumed in the case of corporations, and indeed in other cases where the whole charge of the business is delegated to another, some risks which the servant does not assume where the master himself takes general charge in person.

It has been seen that the superior position of the negligent servant, as that of a foreman, conductor, etc., is not regarded as affecting the case. But a foreman is not necessarily or usually, perhaps, entrusted with any large share of the master's discretionary authority. Neither is the conductor of a train of cars, except as to the particular duty of taking it safely to its destination. His duty may be and probably is less responsible than that of the telegraph operator who directs his movements and those of others in charge of trains on the line; and if the conductor is to be regarded as principal for some purposes, so should the operator be for others. But this would suggest questions and distinctions that could only be confusing, and would preclude the possibility of any settled rule whatsoever. It would seem that the law could go no farther than to hold the corporation liable for the acts and neglects of the officer exercising the powers and authority of general superintendent; but that for these it ought to respond to its servants, as for its own acts or neglects.²⁴ But this in no way affects the general rule which requires of any employer, whether corporate or not, to employ suitable servants, and to make use of safe tools, machinery, etc., or at least, to take care that there is no negligence in procuring them.

V. Where the master is sued by his servant for an injury which it is claimed has been occasioned by his negligence, the same rule applies as in other cases, that the plaintiff is not to recover if his own negligence contributed with that of the plaintiff in producing the injury.²⁵ This subject will not

²⁴ See Shearm. & Redf. on Neg., §§ 101-104.

²⁵ *Hayden v. Smithville Manf. Co.*, 29 Conn. 548; *Johnson v. Bruner*, 61 Penn. St. 58.

be discussed here, but it may be remarked that if the injury has resulted from a peril which had come to the knowledge of the plaintiff and ought to have been known to the master, it may justly be held to be contributory negligence on the plaintiff's part if he failed to report it.²⁶ It may also be remarked that in all cases where the servant claims to recover on the ground of the master's negligence, the burden of proof will be upon him, not only because as a plaintiff he must make out his case, but also because all presumptions will favor the proper performance of duty.²⁷

VI. Perhaps this whole subject may be accurately summed up in a single sentence as follows: The rule that the master is responsible to persons who are injured by the negligence of those in his service, is subject to this general exception: that he is not responsible to one person in his employ for an injury occasioned by the negligence of another in the same service, unless generally or in respect of the particular duty then resting upon the negligent employee, the latter so far occupied the position of his principal as to render the principal chargeable for his negligence as for a personal fault.

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²⁶ See *Kroy v. Chicago etc. R. R. Co.*, 32 Iowa, 357; *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 105; *Mad River etc. R. R. Co. v. Barber*, 5 Ohio N. S. 541.

²⁷ See *Gilman v. Eastern R. R. Co.*, 10 Allen, 233; *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y. 562; *Hildebrand v. Toledo etc. R. R. Co.*, 47 Ind. 399.