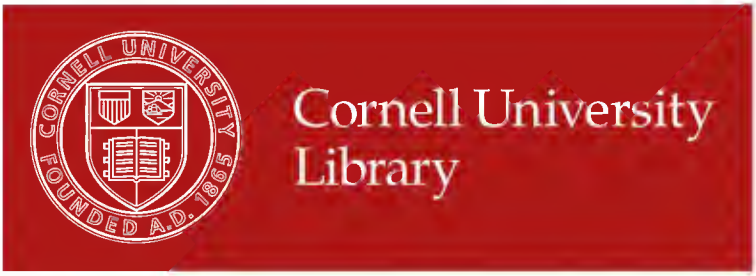

ALGER & SLATER

ON

THE NEW YORK

EMPLOYERS' LIABILITY ACT

SECOND EDITION

REVISED AND ENLARGED

BY

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Of the New York Bar.

ALBANY, N. Y.
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PREFACE TO SECOND EDITION.

The first edition of this book was brought out very shortly after the New York Employers' Liability Act went into effect. At the time it was published there had been very few New York decisions rendered, construing its terms, and the bulk of the work was necessarily given over to decisions rendered in cases arising under similar acts in other States. In the four years that have elapsed since the first edition was published, the number of New York cases brought under the provisions of the act has grown steadily in volume, as the importance of its provisions in accident suits between employer and employee has been more fully appreciated by the Bar. Notwithstanding the absence of citations of New York authorities in the text of the earlier edition it met with general favor among lawyers and was found useful at times by the Bench in construing provisions of the Act. The present edition has been carefully revised and contains a large amount of additional matter rendered possible by numerous decisions of the New York courts upon the act and by recent decisions of States having similar statutes. The purpose of the book will be accomplished if it proves of some substantial assistance to counsel engaged in the prosecution or defense of actions brought under this statute.

New York, *May* 20, 1907.

PREFACE TO FIRST EDITION.

The condition of the New York law relating to actions for negligence brought by employees against employers was, for many years prior to the passage of the Employers' Liability Act of 1902, a subject for consideration at the annual meetings of the Workingmen's Federation of the State of New York, an organization which comprises the principal trades unions throughout the State. One of the writers of the present book (Mr. Alger), was employed as counsel for the Federation, to draft and present before the appropriate legislative committees a bill which should, if enacted into statute, afford an injured workman, in a proper case, a better chance of obtaining redress for his injuries, by law. The bill which was first introduced on behalf of this organization in 1898, and in the sessions of 1899, 1900 and 1901, was much broader in its provisions than is the present law. This bill (and its successors in subsequent years) was vigorously opposed by the great carrying corporations and other large employers of labor, who sent eminent counsel to appear before the committees of the Senate and House to endeavor to prevent the bill from being favorably reported.

As it became apparent in the passage of time and by repeated defeats for four successive years that a less radical measure must be drawn to obtain legislative sanction, owing to the powerful opposition arrayed against it, the present law was drafted rather as a foundation for future legislation than an act complete in itself, though enlarging materially the workingman's common-law rights.

There are undoubtedly many additions which could properly be made to the present law, and in that respect it merits, to a certain extent, the criticism which it receives from Mr. Leavitt in his excellent Code of Negligence. It does, however, make important changes in the New York law which deserve careful consideration by counsel engaged either in the defense or prosecution of negligence cases. The book is, to a large extent, the result of the careful examination both of the New York common law and of the statute laws of other States, which was made imperative in order to meet the strenuous and skillful opposition which counsel for the great railway corporations made to the passage of any statute on this subject.

Mr. Slater, who, as Senator from the Nineteenth District, introduced the bill in the form in which it became a law, had the responsibility of its management in the Senate and House in the year of its final passage. The present book is the result of the knowledge of liability legislation which its joint authors have acquired in their work of promoting the passage of this law, and its purpose will have been accomplished if it affords the New York practitioner a reasonable amount of information concerning the purpose and scope of this important statute as applied to the New York common law and the meaning of its terms as construed by the courts of other States as well as those of our own.

November 1, 1903.

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THE NEW YORK

EMPLOYERS' LIABILITY ACT.

CHAPTER I.

LIABILITY LEGISLATION IN GENERAL—ITS DEVELOPMENT AND CHARACTER—CONSTRUCTION OF LIABILITY ACTS—CONSTITUTIONALITY.

Section 1. History.

Within the past twenty years in this country, there has been a general tendency in legislation towards the enactment of laws regulating and increasing the liability of employers to employees. There are statutes in force in over twenty-eight States on the subject, and, while the phraseology and forms of these enactments are diverse, they are all drawn to accomplish the same general purpose, namely, to change the common law rules applicable to actions between employers and employees and to improve the position of the injured plaintiff who sues his employer for negligence.

The reason for this general tendency towards the enlargement of the liability of the employer is not difficult to find. The rules of the common law, defining the duties of employers to employees, were formulated in the days of the stage-coach and the handloom, and such doubts as have grown up as to the theoretical justice of these rules have been reinforced by considerations of public policy. The growth of the factory system, the

development of railways, and the constant increase in the possibilities of physical injuries from the ordinary occupations in which workmen are engaged to-day have made imperative an increase of legal responsibility on the part of employers, so that, by reason of such increased liability, they shall use the greater care for the safety of their workmen which modern business conditions demand. In New York alone the statistics collected by the State Bureau of Labor Statistics (report of Bureau of Labor Statistics for 1899) show that nearly 700 men are killed annually in the industrial establishments of the State, not including the persons injured in railway service. The number of accidents, not occasioning death, are annually about 40,000. In railway service between 200 and 300 men are annually killed in the State. Increased legal responsibility tends to produce greater care on the part of employers in the performance of duties which humanity enjoins. The main purpose of liability acts, therefore, from the standpoint of the legislator, is the diminution of the number of casualties, and that these acts have to a large extent accomplished that humane purpose there can be little doubt.

Space will not permit an extended analysis of the provisions of the statutes referred to above. They are collected below in a foot note.[1]

1. Alabama (Code of 1886, pt. III, tit. 1, secs. 2590-2592, Act of February 12, 1885). Arkansas (Digest of 1894, ch. 130, secs. 6248-6250). California (Civil Code of 1885, p. 345, secs. 1969-1971). Colorado (art. 15, sec. 15 of the Constitution; also Act of 1893, p. 77, Employers' Liability Act, Act of 1900, ch.). Florida (Revised Statutes of 1892, Appendix, p. 1008, sec. 3). Georgia (Act of 1855, Code of 1882, secs. 2083 and 3036). Indiana (Annotated Statutes of 1894, ch. 81, secs. 7083-7087). Iowa (McClain's Annotated Statutes of 1880, tit. 10, ch. 5,

In four States employers' liability acts have been enacted, modelled upon, and in many essential features following verbatim the English Employers' Liability Act of 1880 (43 and 44 Vict., ch. 42). These States are Alabama,[2] Massachusetts,[3] Colorado,[4] and New York.[5] In Indiana[6] a statute similar in many respects to the English statute is in effect, but made applicable solely to railway and other corporations.

The English cases and the decisions of the courts in these four States will be useful as precedents in the construction of similar provisions contained in the New York law. Inasmuch as the New York Employers' Liability Act is substantially a re-enactment of the English, Massachusetts and Alabama statutes, their decisions are entitled to great weight as throwing light

sec. 1307; also, Act of 1898, ch. 49). Kansas (General Statutes of 1889, ch. 23, par. 1251). Massachusetts (L. 1887, ch. 270, as amended by ch. 260, Acts of 1892, and by ch. 359, Acts of 1893; ch. 499, Acts of 1894; also, ch. 491, L. 1897). Minnesota (General Statutes of 1894, ch. 34, sec. 2701; also, Acts of 1895, ch. 324). Mississippi (Constitution, art. 7, sec. 193; also, Revised Code of 1880, sec. 1054; also, ch. 66 of the L. 1898). Missouri (Acts of 1897, ch. 96.) Montana (Code and Statutes, Sanders' Ed. of 1895, div. I, sec. 105). New Mexico (Acts of 1893, ch. 28). North Carolina (Act of February 23, 1897). North Dakota (L. 1899, ch. 129; also, Revised Code of 1895, Civil Code, ch. 50, secs. 4095 to 4097). Ohio (Acts of 1890, p. 149). Rhode Island (Statutes of 1882, ch. 204, sec. 15). South Corolina (art. 9, sec 15, of Constitution). Texas (Acts of 1897, Special Session, ch. 6). Wisconsin (Acts of 1893, ch. 220). Wyoming (Acts of December 7, 1889; also, art. 10 of Constitution).

2. The Act of February 12, 1885; Civil Code 1896, ch. 43, secs. 1749-1751.

3. L. 1887, ch. 270, as amended by ch. 260, L. 1892; ch. 359 of Acts of 1893; ch. 499 of Acts of 1894, and ch. 491 of Acts of 1897.

4. Acts of 1893, ch. 77.

5. Ch. 600 of L. 1902.

6. Acts of 1893, ch. 130, Annotated Statutes of 1894, ch. 81 secs. 7083-7087.

upon the intention of our own Legislature. "It is a general rule that when a foreign statute is re-enacted it is to be understood as it has been interpreted by the courts of the country from which it is taken (*President, etc., of Waterford & Whitehall Turnpike v. People,* 9 Barb. 161; *Ryalls v. Mechanics Mills,* 150 Mass. 191; *Commonwealth v. Hartnett,* 3 Gray, 450). It is fair to infer that the Legislature intended that the words used should have the meaning given to them by the courts, for if it were intended to exclude any known construction of the statute, the legal presumption is that its terms would be so changed as to effect that intention." (*Bellegarde v. Union Bag & Paper Co.,* 90 A. D. 577, 86 Sup. 72, affd., no opinion, 181 N. Y. 519.)

Sec. 2. Construction.

The general rule of construction is, of course, that statutes in derogation of the common law shall be construed strictly. In *O'Neil v. Karr,* 110 Ap. Div. 571, 97 Sup. 148, the Appellate Division in the Third Department has held that the general rule applies to the Liability Act by a somewhat strained construction of *Gmaehle v. Rosenberg,* 178 N. Y. 152. This rule of strict construction has not been applied to the act in other jurisdictions, and the correctness of this decision just cited is questionable. While the Employers' Liability Act makes changes in the common law, it is, however, a remedial statute in the fullest sense of the term, and, as such, entitled to liberal construction that the purposes of its enactment may be accomplished.[7] The act is, as its title states, one to "Extend and regulate the liabil-

7. *Hudler v. Golden,* 36 N. Y. 446; *Weed v. Tucker,* 19 N. Y. 433; *Berger v. Varrelman,* 127 N. Y. 281-287; *White v. Cotzenhausen,* 129 U. S. 329; *Allen v. Stevens,* 161 N. Y. 122-143.

ity of employers. While the title constitutes no part of the act, it is well established by authority that it may be considered as a key to the correct interpretation of the statute, where that intent is otherwise somewhat ambiguous." *Rosin v. Lidgerwood Mfg. Co.*, 89 A. D. 245, 86 Sup. 49, citing *People ex rel. v. Coleman*, 121 N. Y. 542.

The English courts, in the construction which they have placed upon the Employers' Liability Act of 1880, uniformly give the meaning of the phrases used a liberal interpretation, and hold that the act, so far as reason would justify, is to be considered in favor of the employee.[8]

The same policy in the construction of the Massachusetts Employers' Liability Act has been followed by the courts of that State.[9]

In Alabama the courts have said that in the construction of the act the courts should consider its object, have regard for the intention of the Legislature and take a broad view of its provisions commensurate with its proposed purposes.[10]

In Indiana a policy similar to that of Alabama is pursued. In a recent case, *Hunt, Receiver, v. Connor,*

8. *Griffiths v. The Earl of Dudley*, 9 Q. B. D. 357; *Osborne v. Jackson*, 11 Q. B. D. 619; *Gibbs v. Great Western Ry. Co.*, 12 Q. B. D. 208; *Haske v. Samuelson*, 12 Q. B. D. 30; *Walsh v. Whiteley*, 21 Q. B. D. 371-374; *Clarkson v. Musgrave*, 9 Q. B. D. 386; *Morrison v. Baird*, 10 Sc. Sess. Cas., 4th series, 271; *Weblin v. Ballard*, 17 Q. B. D. 125; *Thomas v. Quartermaine*, 18 Q. B. D. 685, at p. 692; *Yarmouth v. France*, 19 Q. B. D. 647.

9. See *Ryalls v. Mechanics Mills*, 150 Mass. 190; *McPhee v. Scully*, 163 Mass. 216; *White v. Nonantum Worsted Co.*, 144 Mass. 276; *Dale v. W. J. S. & I. Co.*, 155 Mass. 1. See Employers' Liability Act of 1880, etc., by R. M. Milton Senhouse, p. 7.

10. See *Mobile & B. Ry. Co. v. Halborn*, 84 Ala. 133.

Adm., 26 Ind. App. Ct. 41 (59 N. E. 50), the court construes the Indiana Employers' Liability Act and decides that, "being in derogation of the common law, it is to be strictly construed, but, being a remedial act, it must receive such a liberal construction with reference to the objects it was intended to accomplish, and for the purpose of advancing the remedy as well as carrying into effect its true beneficial purpose." (See, also, *Hodges v. Standard Wheel Co.*, 152 Ind. 680.)

Sec. 3. The relation of employer and employee must exist.

It is to be observed that the New York statute is one in favor of the employee, as appears by its title, "An act to extend and regulate the liability of employers to make compensation for personal injuries suffered by employees." The first section of the bill further provides that under it an *employee* shall have the same right to compensation, etc. Only an employee, or the legal representatives of an employee, in case of death, is entitled to benefit under the provisions of the act. This excludes two important classes of negligence cases from the operation of the statute: first, actions by employees of subcontractors against contractors or owners, and second, actions brought by parents or guardians for the loss of services of minor employees. In *Woodward Iron Co. v. Cook*, 124 Ala. 349, the court holds that the statute does not apply to actions brought by parents for services of injured minors. (See, also, *Lovell v. De Bardeleben Coal Co.*, 90 Ala. 13.)

In determining whether the relation of master and servant exists, in *Coughlan v. Cambridge*, 166 Mass. 268, the court says: "It is well settled that one who is the general servant of an owner may be lent or hired by his master to another for a special service so as to be-

come for that service the servant of such third party. The test is whether in the particular service he is engaged to perform he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is hired or lent." The term servant, as defined by the Court of Appeals, is "one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling." "The mere fact that one person renders some service to another for compensation, expressed or implied, does not necessarily create the legal relation of master and servant." *Murray v. Downs,* 161 N. Y. 301. (*Johnson v. Boston,* 118 Mass. 114; *Clapp v. Kemp,* 122 Mass. 481; *Daley v. B. & A. R. Co.,* 147 Mass. 101, 112; *Dane v. Cochrane Chemical Co.,* 164 Mass. 453; *Ward v. New England Fibre Co.,* 154 Mass. 419; *Eldred v. Mackie,* 178 Mass. 1; *Hasty v. Sears,* 157 Mass. 123; *Rourke v. White Moss Colliery Co.,* 2 C. P. D. 205; *Wild v. Waygood,* 61 L. J. Q. B. 91, 1 Q. B. 782; *Butler v. Townshend,* 126 N. Y. 105; *Quarman v. Bennett,* 6 M. & W. 500; *Michael v. Stanton,* 3 Hun, 462; *Higgins v. W. U. Tel. Co.,* 8 Misc. 435.)

The master is the person in whose business the employee is engaged at the time and who has the right to control and direct his conduct. The rule on the subject is well stated by a learned author on the law of negligence, as follows: "He is to be deemed the master who has the supreme choice, control and direction of the servant, and whose will the servant represents not merely in the ultimate result of his work but in all its details. The payment of an employee by the day or the control or supervision of the works by the employer, though important considerations, are not in themselves decisive of the fact that the two are master and servant." (Shear-

man & Redfield on Negligence, 4th ed., p. 269; *Wyllie v. Palmer,* 137 N. Y. 257; see, also, *Lauro v. Standard Oil Co.* 74 App. Div. 4, 76 Supp. 800.)

Sec. 4. The cause of action must accrue within the State.

The statute can have no application to causes of action accruing in other States even when the suit is one maintainable (so far as jurisdiction is concerned) in New York. As the court says in *Kleps v. Bristol Mfg. Co.,* 107 App. Div. 488: "The statute gives no cause of action for an injury sustained in the State of Connecticut by a resident of that State against one of its corporations whose negligence is alleged to have caused the injury."

Sec. 5. Common law rights of action are not affected by the statute.

Both in England and in the several States in which the English statute has been adopted, it has been held that the enactment of the Liability Law has not destroyed or taken away common law rights of action where such right of action would exist if the statute had not been enacted. The Employers' Liability Act is not a substitute for the rights which employees have under existing laws but is an addition to them. The intention of the Legislature has been construed to be "not to change the common law liability, but, as the title of the act declares, to extend and regulate the liability of employers, to make compensation for personal injuries suffered by employees. It did not give a new remedy for acts of negligence resulting in personal injuries but merely extended the liability of employers for the negligence of their superintendents, giving an action in some cases where it would not have existed at common law." (*Mul-*

ligan v. Erie R. R. Co., 99 App. Div. 499.) Chapter 600 of the Laws of 1902 does not apply to a case where the complaint does not charge any liability based upon the provisions of that statute, but only applies to a new or extended liability created thereby. There is, therefore, no necessity for giving notice of the time, place and cause of the accident in order to maintain a common law action for negligence; such notice is required only when the added benefits of the act are sought to be obtained. (*Gmaehle v. Rosenberg,* 178 N. Y. 147; *Rosin v. Lidgerwood Mfg. Co.,* 89 App. Div. 245; *Williams v. Roblin,* 94 App. Div. 177; *Schermerhorn v. Glens Falls Cement Co.,* 94 App. Div. 600.)

In *Ryalls v. Mechanics Mills,* 150 Mass. 190, the court says: "It would not need the aid of previous exposition to show that the main purpose of the statute, as the title intimates, is to extend the liability of employers in favor of employees; that it does not attempt to codify the whole law upon the subject, and that it leaves open some common law defences and some common law liabilities. In view of these general considerations, we are to construe the statute liberally in favor of employees, and we should be slow to conclude that indirectly and without express words to that effect it has limited the workingman's common law rights most materially in respect to the conditions and time of bringing an action and the amount which he can recover." The court concludes by saying: "We are of opinion that in those cases within the statute of 1887, chapter 270, section 1, clause 1, in which the common law gives the employee a remedy, he still has a right to sue under the same conditions and recover damages to the same extent as if the statute had not been passed." (See, also, *Coughlin v. Boston Tow Boat Company,* 151 Mass.

92; *Clark v. Merchants, etc., Co.,* 151 Mass. 352; *Dacey v. Old Colony R. Co.,* 151 Mass. 112-118; *Clark v. N. Y. P. & B. R. Co.,* 160 Mass. 39; *Clare v. N. Y. & N. E. R. Co.,* 172 Mass. 211.)

In *Col. Milling & Elevator Co. v. Mitchell,* 26 Colo. 284, the court holds, that the Colorado Employers' Liability Act does not repeal, modify or change, nor in any manner prejudice the common law right of employees, nor in any way interfere with the enforcement of any right except such as the statute itself creates, and that the notice required to be given to the employer of the time, place and cause of the injury, under the Employers' Liability Act of Colorado, is not necessary where an action exists either at common law or under some other statute. On the general doctrine that the act does not change common law rights or remedies when the action is not brought solely under the statute the cases in Alabama are to the same effect. No notice of the time, place or cause of injury is required, however, by the Alabama statute. (See *Lovell v. De Bardeleben Coal Co.,* 90 Ala. 13; *Mobile, etc., R. Co. v. Holborn,* 84 Ala. 133; *Culver v. Alabama Midland R. Co.,* 108 Ala. 330; *Loughran v. Brewer,* 113 Ala. 509.)

The New York Employers' Liability Act, unlike the English or other American statutes, does not leave this question one fairly open for judicial construction. The statute itself expressly provides: "Section 5. Every *existing* right of action for negligence or recovery of damages 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 notice, provided in section 2 of this act, be a bar to the maintenance of a suit upon any existing right of action."

Notwithstanding the apparently plain wording of

the section just quoted and the decisions of other States above cited, holding that notice is not necessary in cases brought under the common law solely and not under the act, the Appellate Division, First Department, rendered two decisions shortly after the act took effect, which construed the New York Employers' Liability Act as limiting rather than extending the liability of employers and holding that after the passage of the act all master and servant cases were embraced within its provisions and that the giving of notice was a condition precedent to the maintenance of all such actions. These cases (*Gmaehle v. Rosenberg,* 80 App. Div. 541, and 83 App. Div. 339, 80 Supp. 705; *Johnson v. Roach,* 83 App. Div. 351, 82 Supp. 283), held in effect that the cause of action for death by negligence theretofore existing at common law and the cause of action provided under the act were not separate and distinct, but that the statute was intended as a substitute for the common law right of action, and that after the statute took effect the sole right of action for death by negligence in actions between employers and employees was that provided for by the act itself, and could be asserted only by complying with all its conditions precedent as to notice. A contrary decision was rendered in the Appellate Division, Second Department, very shortly after these cases were decided. (*Rosin v. Lidgerwood Mfg. Co.,* 89 App. Div. 245), holding that the remedies at common law and those provided for under the statute were distinct and separate and that the common law rights of action were not affected by the statute. The conflict between the two departments of the Appellate Division was settled by the decision of the Court of Appeals in *Gmaehle v. Rosenberg,* 178 N. Y. 147, which sustained the reasoning of the Appellate Division in

the Second Department. The case thus decided by the Court of Appeals was an ordinary common law action, the complaint charging defendant with having caused the death of plaintiff's intestate by the negligent erection of a scaffold and containing no allegation that a notice of the time, place and cause of the injury had been served on the employer. Defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action. The demurrer was overruled at Trial Term (40 Misc. 267), but was sustained by the Appellate Division, First Department (87 App. Div. 631), and the question certified to the Court of Appeals was whether the service of the notice was a condition precedent to the maintenance of an action against the employer to recover damages for personal injuries sustained by the employee after the passage of the act.

The Court of Appeals held that such notice was not necessary in common law actions. It says, by CULLEN, J.:

"It will be seen that by the terms of the statute the requirement of notice to the employer is limited to 'actions for the recovery of compensation for injury or death under the act.'

"The learned court below, however, was of the opinion that the statute dealt with the whole subject of the master's liability for defective ways, works or machinery, and that therefore from the time of its enactment all causes of action for those defects, whether they were such as previously existed or not, were subjected to the qualification that notice must be given within 120 days after the occurrence of the accident. It is also insisted that the statute gives no new cause of action, and that hence it must be construed as regulating such causes of action as were given by the common

law. . . . We think the legislative intent is reasonably clear, the Legislature, deeming that by the act it was to extend the liabilities of masters to their servants (to what extent they effectuated this purpose, it is unnecessary to determine) thought it wise to safeguard the new liabilities by requiring that notice should be given the master of the extent for which it was sought to recover compensation. But it was only the new or extended liability that it was intended to subject to such safeguard. This intent is clearly expressed when the Legislature limited the requirement for notice to actions for injuries or death '*under this act.*'"

This ruling of the Court of Appeals has been since followed in *Williams v. Roblin,* 94 App. Div. 177, and *Schermerhorn v. Glenns Falls Cement Co.,* 94 App. Div. 600. The decision of the First Department, Appellate Division, above referred to, are no longer authorities, and the contrary rule to that laid down by them on this point is now fully established.

Sec. 6. Contracts exempting employers from liability under the statute.

The general American rule would seem to be that *written* contracts purporting to exempt employers from liability to employee for personal injuries *thereafter* suffered by them from the employer's negligence are void as being against public policy, irrespective of all questions of consideration for the making of the contract.[11]

11. See *Johnson v. Fargo,* 184 N. Y. 379; *Money v. C., B. & Q. Ry. Co.,* 49 Ill. App. Ct. Rep. 105; *Fairbanks Canning Co. v. Innes,* 24 Ill. App. Ct. 33; 125 Ill. 510; *Arnold v. Ill. Cent. R. R. Co.,* 83 Ill. 273; *J., S. & E. Ry. Co. v. Southworth,* 135 Ill. 250; *R. R. Co. v. Spangler,* 44 Ohio St. Rep. 471; *Johnson, Admr., v. R.*

A contrary doctrine, however, permitting written contracts of this character has found sanction in the courts of a few States.[12]

In England *written* agreements of this kind have been upheld as legal,[13] and the value and effect of the English Employers' Liability Act of 1880 was very largely impaired by the rulings of the English courts permitting such contracts, an investigation made by a Parliamentary Commission showing that a large percentage of the great English employers required such contracts as a pre-requisite to employment.[14]

A somewhat singular ruling, however was adopted by the English courts on this subject. While an employee might exonerate his master, under the decision cited, from future liabilities for injuries resulting from the master's failure to obey his common law duties to his employee, and might further exempt him from liability under the Employers' Liability Act, the English courts apparently do not countenance contracts whereby the employee assumes the risk of a violation by his em-

R. Co., 86 Va. 975; *Louisville Ry. v. Orr*, 91 Ala. 548; *Hissong v. Ry. Co.*, 91 Ala. 514; *Roesner v. Herman*, 8 Fed. Rep. 782; *Kas. Pac. Ry. Co. v. Peavey*, 29 Kas. 169; *Memphis, etc., Ry. Co. v. Jones*, 2 Head, 517; *Willis v. Grand Trunk Ry. Co.*, 60 Me. 488.

12. In Georgia such contracts were formerly allowable, except that the employer could not exempt himself from "criminal" negligence. (See *Galloway v. Western Ry. Co.*, 57 Ga. 512; *Fulton Bag, etc., Co. v. Wilson*, 89 Ga. 318; *Cook v. Ry. Co.*, 72 Ga. 48; *W. & A. Ry. Co. v. Strong*, 52 Ga. 461; *Western, etc., Ry. Co. v. Bishop*, 50 Ga. 465; *Hendricks v. W., etc., Ry. Co.*, 52 Ga. 467; see, also, *Mitchell v. Penna. R. R. Co.*, 1 Am. Law Reg. 717.) Such contracts are now void by statutes if made in consideration of employment. (Civil Code, sec. 2613; *Pettus v. Brunswick, etc., R. Co.*, 35 S. E. 82; Ga. 1900.)

13. See *Griffiths v. The Earl of Dudley*, 9 Q. B. D. 357.

14. See Beach on Contributory Negligence (Crawford's Ed.), sec. 380.

ployer of a statute regulating the employer's business and making mandatory provisions for the greater safety of the employee.[15]

The validity of written contracts of this kind has been before the Court of Appeals several times, but the precise question has not been decided until the recent decision of *Johnson v. Fargo,* 184 N. Y. 379, in which the Court of Appeals decides that an agreement relieving an express company from liability to an employee for personal injuries (resulting from the negligence of the company) which he might thereafter receive in the course of his employment is void as against public policy in that its enforcement would nullify the strict and just rule of the common law imposing the duty of care on the part of the employers towards employees, which in the interest of the public should be maintained and enforced. The court considers fully the American and English decisions on this highly important subject, and the reasoning of the court in reaching its conclusion is significant:

"The State is interested in the conservation of the lives and of the healthful vigor of its citizens, and if employers could contract away their responsibility at common law, it would tend to encourage on their part laxity of conduct in, if not an indifference to, the maintenance of proper and reasonable safeguards to human life and limb. The rule of responsibility at common law is as just as it is strict and the interest of the State in its maintenance must be assumed; for its policy has, in recent years, been evidenced in the progressive enactment of many laws, which regulate the employment of

15. See *Baddeley v. Lord Granville,* 19 Q. B. D. 423.

children and the hours of work and impose strict conditions with reference to the safety and healthfulness of the surroundings of the employed, in the factory and in the shop. The employer and the employed, in theory, deal upon equal terms; but, practically that is not always the case. The artisan or workman may be driven by need; or he may be ignorant, or of improvident character. It is, therefore, for the interest of the community that there should be no encouragement for any relaxation on the employer's part in his duty of reasonable care for the safety of his employees. . . . It has been observed that it is still the business of the State in modern times to defend individuals against one another and, though the proposition is a broad one, when considered with reference to penal legislation and all legislation intended for the promotion of the health, welfare and safety of the community, it is not without truth. It is evident, from the course of legislation framed for the purpose of affording greater protection to the class of the employed, that the people of this State have compelled the employer to do many things which at common law he was not under obligation to do. Such legislation may be regarded as supplementing the common law rule of the employer's responsibility and is illustrative of the policy of the State. Therefore it is, when an agreement is sought to be enforced, which suspends the operation of the common law rule of liability and defeats the spirit of existing laws of the State, because tending to destroy the motive of the employer to be vigilant in the performance of his duty towards his employees, that it is the duty of the court to declare it to be invalid and to refuse its enforcement."

Other New York cases in which similar conclusions

have been rendered by lower courts are collected in the footnote.[16] Statutes forbid such contracts in many States.[17]

The reasoning of the court contained in the quotation above would seem to afford ground for argument in favor of the extension to *unwritten* contracts of the

16. *Runt v. Herring*, 2 Misc. 105; *Bossout v. R., W. & O. R. R. Co.*, 32 St. Rep. 884; and dictum in *Simpson v. N. Y. Rubber Co.*, 80 Hun, 239. In *Runt v. Herring*, 2 Misc. 105, the General Term of the Court of Common Pleas, held that an instrument executed by a servant agreeing in consideration of employment and one dollar not to hold his master liable for any injury, whether resulting from the master's negligence or otherwise, or to make any claim for damages, is void on the ground of public policy, though based probably upon sufficient consideration. See, also, *Nicholas v. N. Y. C. R. R. Co.*, 89 N. Y. 370; *Holsapple v. R., W. & O. R. R. Co.*, 86 N. Y. 275; *Blair v. R. R. Co.*, 66 N. Y. 313; *Kenney v. R. R. Co.*, 125 N. Y. 422. It is to be observed that in all these cases defendants were held liable and in none of them was the contract of exemption under inquiry sustained, though the court intimates in all of them that cases might exist where such exemption could be allowed. The New York rule permitting common carriers to exempt themselves from the consequence of their own negligence in the transportation of goods, if expressly stated in the contract itself (*Mynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180), is well known and is contrary to the doctrine of the United States courts (*Lockwood v. Railway Co.*, 17 Wal. 357), and the general opinion of the courts in the various States.

17. Colorado (art. 14, sec. 15, of the Constitution). Florida (Revised Statutes of 1892, Appendix, p. 1008, sec. 3; Ga. Civil Code, sec. 2613). Indiana (Annotated Statutes of 1894, ch. 81, sec. 7087). Iowa (Acts of 1862, McClain's Annotated Statutes of 1880, ch. 10, tit. 5, sec. 1307; also the Acts of 1898, ch. 49, sec. 1). Massachusetts (Acts of 1877, ch. 101, sec. 1). Minnesota (General Statutes of 1894, ch. 34, sec. 2701). Mississippi (Constitution, art. 7, sec. 193). Missouri (Act of 1897, ch. 96, sec. 4). New Mexico (Acts of 1893, ch. 28, sec. 1). North Carolina (Act of February 23, 1897, sec. 2). North Dakota (L. 1899, ch. 29, sec. 1). Ohio (Acts of 1890, p. 149, sec. 1). South Carolina (Constitution, art. 9, sec. 15). Texas (Acts of 1897, ch. 6, sec. 4). Wisconsin (Acts of 1893, ch. 220, sec. 1). Wyoming (Act of December 7, 1869, and art. 10 of Constitution, sec. 4).

public policy principle there laid down against written contracts. The doctrine of assumed risk is based on an implied contract between employer and employee, in which the employee is assumed to have agreed to take his chances of injury from obvious risks, and risks existing by the employer's failure to comply with statutes passed for the employees' protection. If, as the Court of Appeals says, it is against public policy for the employee to make such a contract consciously and in writing, it would seem equally logical that he should not be held by implication of law to have made a similar contract unconsciously and by mere operation of law. (See Chapter V.)

Sec. 7. Constitutionality of liability laws.

There would seem to be no ground for questioning the constitutionality of Employers' Liability Acts, which, like that of New York, change general rules of law relating to *all* classes of employers and employees without laying down special rules applicable to certain industries or exempting certain classes of citizens from their operation. Frequent attacks have been made in the courts upon the provisions of the liability acts of other States which create special rules of responsibility for railway corporations or corporations in general, which are not shared by other citizens, the usual ground of objection being that such statutes are "class legislation," and that they fall within the provisions of the United States Constitution and the Constitutions of the various States forbidding the taking of property without due process of law, or guaranteeing the equal protection of the law. These contentions have been usually disapproved by the courts, and such laws have

been held to be well within the province of the Legislature.[18]

Contrary rulings are to be found only in the State of Arkansas.[19]

A recent case in Pennsylvania has intimated that an act of the Legislature which undertakes to reverse the settled law on the subject of master and servant, and to declare that the employer shall be responsible for an injury resulting from the negligence of a fellow workman, is unconstitutional. (*Durkin v. Kingston Coal Co.*, 171 Pa. St. Rep. 193.) The decision of this point was not directly involved in the case, the question at issue being whether a law which placed upon an employer the duty of employing a particular mine inspector could make him liable for the negligence of an employee thus forced upon him by the statute, without opportunity for personal choice. That such a liability cannot be created can scarcely be questioned in view of the decision of the United States Supreme Court. (*Homer Ramsdell Co. v. Comp. Gen. Trans.*, 182 U. S. 406.) See, however, the comment of Judge PARKER in *National Protective Association of Steam Fitters and Helpers v. Cumming*, 170 N. Y. 315.

The constitutionality of section 2 of the New York Act was considered in *Gmaehle v. Rosenberg*, 83 App. Div. 339, 82 Sup. 366. The court having decided that the requirements of notice of injury applied to all master and servant cases at common law as well as

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18. See *Missouri Ry. Co. v. Mackey*, 127 U. S. 205; *Minneapolis & St. Paul Ry. Co. v. Herrick*, 127 U. S. 210; *Chicago, etc., Ry. v. Pontius*, 157 U. S. 209; *Tull v. Lake Erie & Western Ry. Co.*, 175 U. S. 348; *Indianapolis Union Ry. Co. v. Hookham*, 63 N. E. Rep. 943.

19. *Leep v. Ry. Co.*, 58 Ark. 407; *St. Louis, etc., Ry. Co. v. Paul*, 64 Ark. 83.

those brought under the statute, it was urged that under such a construction the requirement of notice was unconstitutional in death cases under article 1, section 18, of the State Constitution.[20] The court held this objection untenable, as the requirement of notice effects the remedy and not the right of action guaranteed by the Constitution. The Appellate Division, Second Department, reached a precisely contrary conclusion on this point in *Rosin v. Lidgerwood Mfg. Co.,* 89 App. Div. 245. The Court of Appeals, in 178 N. Y. 147, in reversing *Gmaehle v. Rosenberg,* 87 App. Div. 631, refers with approval to *Rosin v. Lidgerwood Mfg. Co.,* but expressly avoids any intimation of approval of that portion of the decision which deals with this constitutional question. This question has, however, become purely academic by the decision of the Court of Appeals in the Rosenberg Case, that the statute does not affect common law rights, "the right of action now existing, etc." protected by the Constitution, but applies solely to the new and added rights created by the act.

20. "The right of action now existing to recover damages for injuries resulting in death shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

CHAPTER II.

Defects in Ways, Works and Machinery.

Sec. 8. Section 1, subd. I, makes no change in existing law.

Subdivision 1 of section 1 of the Employers' Liability Act provides that 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 by reason of any defect in the condition of the ways, works or machinery, connected 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 entrusted by him with the duty of seeing that the ways, works and machinery were in proper condition . . . the employee, or, in case the injury result in death, the executor or administrator of the deceased employee, who has left him surviving a husband, wife or next of kin, shall have the same right to compensation and remedies against the employer as if the employee had not been employed or in the service of the employer nor engaged in his work." This section follows verbatim the wording of the English, Massachusetts and Colorado acts. Under the English law, as it existed prior to the enactment of the English act, it was held in the famous case of *Wilson v. Merry,* L. R., 1 Sc. App. 326, that an employer might delegate to a competent servant, carefully chosen, the power to perform duties, which otherwise the employer himself should perform, and, if he exercised reasonable care in the selection of such a

servant, the master was not responsible for the acts of negligence of such a servant causing injury to other employees. This decision, in effect, held that the master is not bound to use any further care to make or keep the place in which his servants are required to do their work safe for their use than to obtain a competent servant to attend to that matter. The rule in *Wilson v. Merry* has been the subject of severe criticism in the United States,[1] and is not followed in the United States in any jurisdiction. The provision quoted above from the New York Employers' Liability Act was one adopted in the English law for the purpose of avoiding the effect of this case. This subdivision makes no change, however, in the New York law, and is declaratory of existing common law principles, so that an action brought under this subdivision of section 1 could as well be brought under existing provisions of the common law.[2] In *Colorado Milling & Elevator Co. v. Mitchell*, 26 Colo. 284, it was held that no new cause of action was created by a similar provision of the Colorado act, the court saying, that at the time this act was enacted "it was settled law in this State that the master was bound to personally see that reasonable care was used in providing reasonably safe and proper machinery and appliances for use in his business and to use reasonable care in maintaining the same in suitable condition, and that agents to whom he delegated the duty of procuring the machinery and the duty of inspecting it and keeping up the same in suitable repair were not regarded as fellow servants with those employed in the

1. See Shearman & Redfield on Negligence, sec. 228, 5th Ed.

2. See *Wilson v. L. & N. R. Co.*, 85 Ala. 269, 272; *N. Y., N. H. & H. R. v. O'Leary*, 93 Fed. 737; *Murray v. Knight*, 156 Mass. 518; *Ryalls v. Mechanics Mills*, 150 Mass. 190; *Ashley v. Hart*, 147 Mass. 575.

business in which such machinery and appliances were used, and that, therefore, the master was responsible for injuries resulting (without contributory negligence on their part) to servants through the negligence or want of due care on the part of such agents in the discharge of their duties in these respects." (Citing *Willis v. Cole,* 9 Colo. 159; *Colo. Midland Ry. Co. v. O'Brien,* 16 Colo. 319; *Denver, etc., Ry. v. Driscoll,* 12 Colo. 520; *Denver, T. & G. Ry. Co. v. Simson,* 15 Colo. 55.)

This quotation is undoubtedly a correct statement of existing New York law. (See sec. 20, *post,* and cases cited.) This subdivision has in effect simply created new terms by which to designate the master's common law duties and the words, "ways, works and machinery," as used in it, have been subject to judicial construction frequently by the courts in the States in which employers' liability acts are now in force.

Sec. 9. Defence of contributory negligence not affected by the statute.

It is to be observed that the first section of the law provides, as a condition precedent to the right to recover, that the employee is "himself in the exercise of due care and diligence at the time." So far as the question of contributory negligence is concerned, the burden of proof is upon plaintiff under the statute as under the common law, to show the absence of contributory negligence on his part. (*Bauer v. Empire State Dairy Co.,* 115 A. D. 71.)

Section 3 of the act does not change the general rule in this regard, except in one particular, namely, that the question whether an employe was guilty of contributory negligence by continuing at work in the

presence of unnecessary danger created by his employer's negligence is to be submitted to the jury. (*McBride v. N. Y. Tunnel Co.,* 101 A. D. 448, 92 Sup. 282; *Kinney v. Rutland Railway Co.,* 114 A. D. 286, 99 Supp. 800.) In construing section 3 the court in *Wilson v. New York Mills,* 107 A. D. 99, 94 Sup. 1090, says: "The effect of this provision is not to relieve the plaintiff from showing freedom from contributory negligence nor does it require the submission to the jury of this question where there is an utter absence of proof tending to establish the exercise of care by the plaintiff injured." (*Vaughn v. Glens Falls Cement Co.,* 105 A. D. 136, 93 Sup. 979; *Hunt v. Dexter Sulphite Pulp & Paper Co.,* 100 A. D. 119, 91 Sup. 279; *Chisholm v. Manhattan Railway Co.,* 101 Supp. 622.)

Except in the particular just mentioned the Act makes no change in the common law doctrine regarding contributory negligence. In other respects the common law rule applies. A recent case brought in admiralty in the southern district of New York under the Liability Act (*Sievers v. Eyre,* 122 Fed. 734) holds to that effect. The action was one to recover damages for personal injuries occasioned to the libelant who was a seaman on a yacht of the respondent. There was a cannon on the yacht used for firing salutes and the libelant had frequently used it as part of his duty for such purpose. After the gun had been fired one evening the captain of the vessel put in another cartridge, which was left in the gun. The next morning the libelant in the regular course of his duties proceeded to clean the gun. He drew it back on the deck and tipped the muzzle down towards the deck, steadying the gun with his foot under the muzzle and proceeded to polish the brass work of the gun with waste. In doing

so he pulled the spring near the breech which fired the gun and the charge shattered his foot. He did not know that the gun was loaded but could easily have ascertained it by opening the breech before starting to clean the gun. The gun was a perfect one and the danger was a necessary and inherent one. Judge HOLT says on the question of contributory negligence:

"The libelant's counsel claims that this case was governed by the provisions of the Employers' Liability Act either of New York or Massachusetts. It is a question of some doubt whether either of these statutes can be properly considered in this case. The accident occurred at Marblehead, Mass., and the Massachusetts act is not in evidence. The New York act cannot have any application to an act occurring on a vessel in Massachusetts, except on the theory that the vessel was registered or had her home port in New York. I have examined the statutes in both New York and Massachusetts. The New York act (New York Laws of 1902, ch. 600) was based on the Massachusetts act (Massachusetts Law of 1887, ch. 270), although differing from it in various respects. Both acts only apply when an employee is himself in the exercise of due care and diligence at the time. In my opinion Sievers was not exercising due care and diligence at the time. He was entirely familiar with the mechanism of this gun. The breech could have been opened by a single movement in a second and if opened would have shown that the gun was loaded. In my opinion any man who works about a gun having it in a position which, if discharged, it will injure him, is negligent, if he does so without first ascertaining whether it is loaded. Undoubtedly the fact that Sievers was guilty of contributory negligence would not completely bar a recovery under the general

rule in admiralty. It would only lead to a division in damages. But, in my opinion, if a claim is based on either the Employers' Liability Act of New York or Massachusetts any contributory negligence bars the right of recovery."

Sec. 10. What is a "defect?"

A "defect," to be actionable under the act, must be one which is the proximate cause of the resulting accident. (*Hamilton v. Groesbeck,* 18 Ont. Ap. 434; *L. & N. Ry. Co. v. Binion,* 98 Ala. 570; *Mackay v. Watson* (1897), 23 S. C. Sess. Cas., 4th Series, 383; *Fay v. Wilmarth,* 183 Mass. 71.) This term, as interpreted by the courts, is a very broad one, and includes not merely those cases in which the subject of the inquiry is faulty *for any purpose,* but also the cases in which, while perfect as to its general character and condition, it is unsuitable to the uses to which it is applied.

An inquiry into the meaning of the term "defect in condition" was had in *Heske v. Samuelson,* 12 Q. B. D. 30, in which the defect claimed was the absence of fencing or sides to an elevator on which coal was from time to time being elevated to the top of a blasting furnace. Owing to the absence of such fencing a piece of coal fell from one side of the elevator and killed a workman. The argument for the defendant was that the elevator itself was perfect, so far as its condition as a machine was concerned, and that the cause of the accident was simply that the elevator had been put to a purpose for which it was not well suited. The court held, however, that the defendant was liable for using in his works an elevator unsuitable for the purposes for which it was to be employed. In reply to the argument of defendant's counsel the court says: "The accident

in question arose from a part of the plant used being unfit for the purpose, and, that being so, it has arisen from the defective condition of that part of the plant. The condition of the plant was imperfect, *considering the purposes for which it was used.* That being so, it seems to me that there was a defect in its condition within the meaning of the statute." While this action was one brought for a defect in the condition of the "plant," it is equally applicable to ways, works and machinery, no express provision being made under the Massachusetts or New York statutes for defects in "plants."[3]

In *Geloneck v. Dean Steam Pump Co.,* 165 Mass. 202, the action was for personal injuries occasioned to the plaintiff by the falling upon him of a large iron pump, which was loaded upon a truck he and others were moving from one part of the defendant's works to another. Plaintiff's contention was that there were no washers on the truck and that their absence constituted a defect. The court on this point says: "The jury was instructed, in substance, that to constitute a defect in the condition of ways, works or machinery, it was not necessary that any particular instrument should be defective in itself; that, for instance, the plaintiff need not show that there was a fault in the truck; that it had a cracked wheel or a broken axle tree or something of that kind that gave way; that in the sense of the law a thing can be found to be insufficient and unsuitable for the purposes to which it is applied and is intended to be applied, and under conditions in which it is used

3. See, also, *Tate v. Leathem,* 1 Q. B. D. 502-506; *Willey v. Boston El. Light Co.,* 168 Mass. 40-42; *McGiffin v. Palmers S. & J. Co.,* 10 Q. B. D. 5-9; *Gunn v. N. Y., N. H. & H. R. Co.,* 171 Mass. 417.

and is intended to be used; that the condition is not limited to whether there is something that has a weak spot or is cracked or is decayed, but it involves the inquiry whether the appliances, as they are put together and used and intended to be used, are reasonably safe and suitable. In connection with this instruction the jury was also told that the defendant was not obliged to have a faultless arrangement or one with which nobody could find any fault, but only to use reasonable care to have things reasonably safe and suitable. These instructions were correct, and unsuitableness of ways, works or machinery for work intended to be done and actually done by means of them is a defect within the meaning of the statute of 1887, chapter 270, section 1, clause 1, although the ways, works or machinery are perfect in their kind, in good repair and suitable for some work done in the employer's business other than the work in doing which their unsuitableness causes injury to the workman." The statement contained in this case is also well settled at common law in New York.[4]

In *Donohue v. Washburn & Moen Mfg. Co.,* 169 Mass. 574, a set screw, a common device, and not out of order, and which was put on in the usual way, was held not to be in itself a defect in the ways, works and machinery, but the court says it may be so used as to constitute such a defect. (See, also, *Demers v. Marshall,* 178 Mass. 9; *Slattery v. Walker & Pratt Co.,* 179 Mass. 307.)

4. "The test is not whether the master omitted something which he could have done, but whether, in selecting tools and machinery for their use, he was reasonably prudent and careful. Not whether better machinery might not have been obtained, but whether that provided was in fact adequate and proper for the use to which it was to be applied." *Stringham v. Hilton,* 111 N. Y. 188-196.

Sec. 11. Temporary appliances, instrumentalities, etc.

It has been held in Massachusetts that an appliance does not become a part of the ways, works or machinery under the act until it becomes a part of the permanent structure or plant, and if a workman is killed through the negligence of a fellow-servant engaged in adjusting a new appliance to replace an old one which has been broken his next of kin cannot recover. (*Nye v. Dutton,* 187 Mass. 549; *Beique v. Hosmer,* 169 Mass. 541; *Ashley v. Hart,* 147 Mass. 573; *O'Connor v. Neal,* 153 Mass. 281.)

The fact that temporary scaffolding is not part of the ways, etc., does not affect the liability of a defendant for injuries which result from a negligent direction by a superintendent to use uninspected and dangerous staging. (*Feeney v. York Mfg. Co.,* 189 Mass. 336; *White v. William H. Perry Co.,* 190 Mass. 99.)

Under New York law prior to the enactment of the statute, an employer has been held not to be responsible for the defects in the condition of appliances of a temporary nature, which are details in the work to be performed or instrumentalities by which the work is to be done when he has furnished suitable and sufficient material and competent persons to perform the work. In *Butler v. Townsend,* 126 N. Y. 105, the court held that a staging or scaffolding erected for workmen is not a place in which their work is to be done within the meaning of the rule requiring a man to furnish his servants with a suitable and safe place to do their work. It is an appliance, or instrumentality, by which the workmen do their work. Where a master places his workmen upon a scaffolding for the construction of which he has contracted with a careful and competent builder, he is not liable for injury resulting from neglect

in its construction, and he is at liberty to accept it without inspection. In this case the Court of Appeals held that the "scaffolding was a detail of the servants' work and the duty of the operatives, which they, and not the master, were bound to perform." While the rule as to scaffolding has been changed by the Labor Law, chapter 415 of the Laws of 1897, section 18 (see *Chaffee v. Erie R. R. Co.,* 68 App. Div. 578, 73 Supp. 908; *McLoughlin v. Eidlitz,* 50 App. Div. 518), the general statement in this case on the non-liability of the master for so-called details, appliances and instrumentalities of work is still good law. (*Litchfield v. Buffalo P. & P. Ry. Co.,* 73 App. Div. 1, 76 Supp. 80; *De Vito v. Crage,* 165 N. Y. 378; *Golden v. Sieghardt,* 33 App. Div. 161, 53 Supp. 460; *Fink v. Slade,* 66 App. Div. 105, 74 Supp. 578; Leavitt's Code of Negligence, 69-71, and Cases.)

If the employer furnishes suitable materials for the construction of a proper platform and the workmen themselves construct it according to their own judgment, defendant is not liable for the manner in which they use the material so furnished. (*Kimmer v. Webber,* 151 N. Y. 417.) It is undoubtedly true that it is the duty of the master to keep a machine in order and that he cannot delegate the duty so as to escape responsibility. But this is a general rule and has its qualifications and limitations. One of them is that it is not the master's duty to repair defects arising in the daily use of an appliance for which proper and suitable materials are supplied, and which are not of a permanent nature, or requiring the help of skilled mechanics. (*Cregan v. Marston,* 126 N. Y. 568; see, also, *Hussey v. Coger,* 112 N. Y. 618; *Hogan v. Smith,* 125 N. Y. 774; *Harley v. B. C. M. Co.,* 142 N. Y. 31; *McCampbell v.*

Cunard S. S. Co., 144 N. Y. 552; *Webber v. Piper,* 109 N. Y. 496; *Fink v. Slade,* 66 App. Div. 105; *Hackett v. Masterson,* 88 App. Div. 73; *Moran v. Munson Steamship Line,* 82 App. Div. 489; *Reynolds v. Merchants Woolen Co.,* 168 Mass. 501; *Fuller v. N. Y., N. H. & H. R. R. Co.,* 175 Mass. 424; *Mooney v. Beattie,* 180 Mass. 451; *Ashley v. Hart,* 147 Mass. 573.)

Similar rulings have been had under the New York Employers' Liability Act (*Bellegarde v. Union Bag & Paper Co.,* 90 App. Div. 577, 86 Sup. 72), and in Massachusetts and England, holding that temporary structures, staging, etc., are not ways, works and machinery.[5]

In *Miller v. N. Y., N. H. & H. R. R. Co.,* 175 Mass. 263, plaintiff was hurt by the breaking of a link connecting an engine with the car upon which he stood. It was held error to instruct the jury that it was the duty of the defendant to keep the links in such condition that they would be proper and sufficient for the work to be done by them and to prevent the use of unsuitable and unsafe links since defendant's whole duty was performed when it furnished a sufficient supply of suitable links. It is not the duty of the railway company to see that suitable links were selected. (See, also, *Ellsbury v. N. Y., N. H. & H. R. R. Co.,* 172 Mass. 130.) A suitable gang-plank being furnished, there is no duty incumbent upon the employer to see that it was properly placed. (*Trimble v. Whitin Machine Works,* 172 Mass. 150, 51 N. E. 463.) Nor is the employer responsible for lack of appliances arising from temporary conditions in the progress of the work caused

5. *Adasken v. Gilbert,* 165 Mass. 443; *Lynch v. Allen,* 160 Mass. 248; *Burns v. Washburn,* 160 Mass. 457; *Riley v. Tucker,* 179 Mass. 190; *Carroll v. Willcutt,* 163 Mass. 221.

by the negligence of fellow-workmen in their methods adopted to do the work. (*Cogan v. Burnham,* 175 Mass. 391.) Nor is the employer liable for injury resulting from a defective plank and hook used as a temporary incident of a particular job. (*Harnois v. Cutting,* 174 Mass. 398.) Ropes used in lowering timber on a trestle are not part of the ways, works, etc. (*Southern R. R. Co. v. Moore,* 128 Ala. 434, 29 So. 659; see, also, *Georgia Pacific R. R. Co. v. Brooks,* 84 Ala. 138; *Clements v. Alabama, etc., R. W. Co.,* 124 Ala. 166, 28 So. 643; see, also, *Thyng v. Pittsburg R. W. Co.,* 156 Mass. 113; *Allen v. Smith Iron Co.,* 160 Mass. 557; *Reynolds v. Barnard,* 168 Mass. 226; 46 N. E. 703; *Young v. B. & M. R. Co.,* 168 Mass. 219.)

Nor is the employer liable where an injury occurs by a defect in ladders and staging built by another contractor and used by the employer's workmen. (*Riley v. Tucker,* 179 Mass. 190.) Where the injured employee was the agent through whom the employer undertook to see that the ways, etc., are in proper repair and condition, he cannot complain if personal injuries are sustained by him by reason of defects in the construction of such ways. (*Pioneer M. & M. Co. v. Thomas,* 133 Ala. 279.)

Sec. 12. Permanent and quasi-permanent appliances.

As has been shown in the last section, unless covered by mandatory statutes, purely temporary appliances, used simply as a means by which or upon which the work is to be done, do not constitute a part of the general apparatus of the employer regularly used in his business, and do not constitute ways, works or machinery within the act. A different question arises, however, where the injury is occasioned by structures

of a more or less permanent character. In *Prindible v. Conn. River. Mfg. Co.,* 160 Mass. 131, the plaintiff was injured by the fall of a staging upon which he was standing in piling up wood in defendant's yard. This staging was of a permanent character and was moved from place to place and used in piling wood. It was designed to hold a quantity of wood and two men. A defect in the condition of this staging was held to be a defect in the ways, works and machinery of the employer. In *McMahon v. McHale,* 174 Mass. 320, plaintiff was injured by the fall of a derrick, erected for the purpose of moving granite blocks from cars and placing them conveniently for workmen to cut, and for reloading cut stones and disposing of the refuse. This derrick had been in constant use for four weeks and a defect in the derrick which caused it to fall was held a defect in the ways, works and machinery. The court held that for the time being, and with respect to workingmen employed in cutting stone there, the derrick was a piece of machinery, a part of the fitting up of a stone yard, as the staging used in piling piles of wood was a part of the fitting up of a wood yard in the *Prindible case, supra,* rather than an appliance to be put together and set up and moved from place to place by workmen, who were using it, as was the derrick in *McGinty v. Athol Reservoir Co.,* 155 Mass. 183. (See, also, *Drommie v. Hogan,* 153 Mass. 29; *McLean v. Cole,* 175 Mass. 5; *Elmer v. Locke,* 135 Mass. 575, and cases cited; *Lawless v. Conn. Riv. Ry. Co.,* 136 Mass. 1; *Joyce v. Worcester,* 140 Mass. 245; *Leslie v. Granite R. R.,* 172 Mass. 468.)

In *Haskell v. Cape Ann Anchor Works,* 178 Mass. 485, plaintiff was injured by the fall of a bar of steel, caused by the breaking of a defective link in the chain supporting it. The chain used was the only one which

could reasonably have been used under the circumstances, and was made on defendant's premises by a fellow servant of the plaintiff, and the defect in the link was due to its being made of old iron instead of new. The court held that this chain was a permanent instrumentality, for defects in which defendant was liable.

"The plaintiff was not applying it to a special temporary use which might have been in excess of even its expected powers. (*Harnois v. Cutting,* 174 Mass. 398.) The chain was not one of those small things which would be going through a repeated course of wearing out, and replacement which might and would be left to the judgment of the plaintiff and his fellow servants to decide when one was to be discarded, so long as the defendant kept a stock of sound ones within reach. . . . It was not worn out but broke in consequence of inherent defects which could, and should have been avoided in the manufacture, and that could not be found out later. As to permanent appliances in general, the fact that the approximate cause of the damage was the negligence of a fellow servant in making them, is no defense. (*Ryalls v. Mechanics Mills,* 150 Mass. 190-194.)"

Sec. 13. Incomplete buildings.

There is some confusion under the cases as to whether a building in the course of construction or demolition is a part of the ways, works or machinery of the constructor or builder. In *Beique v. Hosmer,* 160 Mass. 541, it was held that incomplete buildings were not within section "1" of the Massachusetts act, and were not part of the ways, etc., of a subcontractor engaged in building the structure, although the courts say a *completed* building would be. A similar ruling is contained

in *Howe v. Finch,* 17 Q. B. D. 187, in which case it was decided that works in the course of erection and only partly finished, which, although intended on completion to be connected with and used in the employers' business, were not so used at the time of the accident could not be regarded as "works" within the meaning of the act. In England the ruling seems to be that "buildings in course of erection or demolition are the works for the time being of the employers or contractors engaged therein." This rule is so clear according to Mr. Ruegg (see Ruegg on Employers' Liability and Workmen's Compensation, 5th ed., p. 81) that it has in numerous cases under the act been assumed as a matter of course. In support of this statement he cites *Reynolds v. Holloway,* 14 T. L. R. 551, which held that a duty lay on an employer to examine the condition of a house before proceeding to demolish it, and that a failure in such duty would render him liable. (See, also, *Carter v. Clarke,* 78 L. T. 76.) In *Brannigan v. Robinson,* 61 L. J. Q. B. 202, 1892; 1 Q. B. 344, it was held that a plot of ground in the course of being cleaned of old buildings, in order to form a site for new buildings, is the works of the employer of labor who has contracted to clean it and whose business it is to perform such contract. This case held that the word "works" is not confined to factories, workshops or permanent premises, of the employer. (See, also, *Bromley v. Cavendish Spinning Co.,* 2 T. L. R. 881.) In this case the plaintiff in the ordinary course of his business had to pass through a mill yard over a hole where a weighing machine was being erected. The hole was covered with boards, and while plaintiff was walking upon it one of the boards tilted and caused the injury. It was held that the place was a defective "way" within the mean-

ing of the act. *Brannigan v. Robinson* (1892, 1 Q. B. 344) cited above, which is the principal English case on defects in incomplete structures, has been disapproved in Massachusetts and not followed. (See *Lynch v. Allen,* 160 Mass. 249, citing *O'Connor v. Neal,* 153 Mass. 281; *May v. Whittier Mach. Co.,* 154 Mass. 29.) In *Pegram v. Dixon,* 55 L. J. Q. B. 447, an unprotected well hole in the house in the course of construction had prior to the accident been used by workmen in ascending to the upper floors. When the accident happened it was being used to convey rubbish to the ground below, and rubbish was thrown into it as plaintiff was ascending. This well hole was held to be a defective "way." (See, also, *Lauter v. Duckworth,* 48 N. E. 336, Ind. Ap. 1897.)

Sec. 14. Temporary conditions and transitory risks not defects in ways, etc.

The general rule as laid down in Massachusetts is that defects which are merely in the temporary condition of the premises, or defects in works not completed, are not defects in ways, works and machinery within the meaning of the statute. "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 (*Johnson v. Boston Tow Boat Co.,* 135 Mass. 209; *Moynhan v. Hills Co.,* 146 Mass. 586, at 592 and 593; *Bjbjian v. Woonsocket Rubber Co.,* 164 Mass. 214-219); nor is there any duty of supervision or warning extending to such temporary and transitory risks when the only thing the employee does not know is the precise time when the danger may exist. (*McCann v. Kennedy,* 167 Mass. 23.) These rulings find further support in

McGiffin v. Palmer Ship Building Co., 10 Q. B. D. 5, which holds that a defect in a way must be something defective in its permanent or quasi-permanent character, and a mere obstruction negligently placed thereon does not make the way defective. (See cases cited above.)

In *Lynch v. Allen*, 160 Mass. 248, the plaintiff was injured by the caving in of a bank of earth on the land of a third person. The court holds that the liability of this bank of earth to fall if not shored up is not a defect in the condition of ways, works and machinery, and says: "The language of this section seems to us to point to ways and works of a permanent character such as are connected with or used in the business of the employer." In *Whittaker v. Bent*, 167 Mass. 588, the question considered by the court was whether the dampness of moulds in a foundry, which is a purely temporary condition and cannot be discovered until the moment of setting them up, was a defect under this subdivision, and it was held that it was not. In *Shea v. Wellington*, 163 Mass. 364, the question considered was whether an exploder used in connection with defendant's business and described as an article of merchandise bought to be used and instantly consumed in producing an explosion was part of the "ways," and it was held to be not within this section. In *Carroll v. Willcutt*, 163 Mass. 221, the court held, that a large stone temporarily placed upon a staging of a building in the course of erection, and in such a position that it was likely to fall, was not a defect in the ways, works or machinery of a contractor, saying: "This was merely a condition of the material upon which the employees were working — caused by their work and necessarily incident to the business on which they were engaged." In *Willetts v. Watts & Co.*, 2 Q. B. D. 92, it was held

that the temporary leaving open of a well hole was not a defect in the condition of a "way," but only a negligent use of the way. In *Welch v. Grace,* 167 Mass. 590, the facts disclosed were these: Several dynamite cartridges were used in blasting rock by being placed in a series of holes drilled in the rock, and discharged by an electric battery. Some of the dynamite cartridges remained undischarged and afterwards exploded and injured a workman trying to withdraw them. "The evidence showed that sometimes the cartridges in one of these holes would fail to discharge, and it appeared that at the time of the accident the plaintiff's husband found one of these deep holes in which the cartridges remained undischarged after a blast in which those in the other holes of the series had exploded. This was merely a condition of the material upon which the employees were working, caused by the work and necessarily incident to the business in which they were engaged. It was in no proper sense a defect in the ways, works or machinery of defendant." (Citing *Lynch v. Allen,* 160 Mass. 242-252; *Carroll v. Willcutt,* 163 Mass. 221; *Willets v. Watts* (1892), 2 Q. B. D. 92; *McGiffin v. Palmer Ship Building Co.,* 10 Q. B. D. 5; *Howe v. Finck,* 17 Q. B. D. 187.)

In *O'Connor v. Neal,* 153 Mass. 281-283, and *May v. Whittier Mach. Co.,* 159 Mass. 29, the accidents were occasioned by rubbish temporarily piled upon the floor and this temporary condition was held not to be a defect under the act. In *Morris v. Walworth Mfg. Co.,* 181 Mass. 326, the court held that planks nailed together for a temporary purpose to make a bridge for workmen could not be considered "ways" within the statute.

In *McKay v. Hand,* 168 Mass. 270 (1897), the question was whether two ladders spliced together were part

of the ways, works and machinery where the splicing is done in the course of the work by the employees as occasion demands. The court says, that while a ladder itself may be part of the ways, works and machinery (See *Cripps v. Judge,* 13 Q. B. D. 583), where ladders are used as material for making a temporary structure they do not fall within the meaning of the act. The court says: "The splicing of the ladders and placing them in position were done by the plaintiff and his fellow workmen, and the connection was a temporary structure put up by workmen out of material selected by them from ladders furnished by defendant. We think the ladders so fastened together do not constitute a part of the ways, works or machinery. (See, also, *Drum v. N. E. Cotton Yarn Co.,* 180 Mass. 113.) In the *Birmingham Furnace & Mfg. Co. v. Gross,* 97 Ala. 220, however, it was held that a ladder was not part of the plant of a furnace company.

The common law rule in New York is to the same effect, that the employer is not responsible and that the principle of "a safe place" does not apply when the prosecution of the work itself makes the place and creates its danger. (See *O'Connell v. Clark,* 22 App. Div. 466, 48 N. Y. Supp. 74; *Brown v. Terry,* 67 App. Div. 223, 73 Supp. 733; *Batley v. Niagara Falls, Etc., Co.,* 79 Hun, 466.) The duty to furnish a safe place to work does not apply to a case where the workman is engaged in making safe an unsafe working place, or where the work as being prosecuted involves the construction of the place itself. The employer under such circumstances fulfils his duty when he furnishes reasonably safe materials and appliances for the performance of the work and selects competent servants to do it. *City of Greeley v. Foster,* 32 Col. 293.

Sec. 15. What are "ways," "works" and "machinery?"

In *Willetts v. Watt & Co.,* 2 Q. B. D. 92, the word "way" is defined by Lord Esher as "the course which a workman would, under ordinary circumstances, take in order to go from one part of the workshop or premises where a part of his employer's business is being done to another part of the workshop or premises where another part of his employer's business is being done, when the business of his employer requires him to go or be there, or when he goes there on business of his employer." On defects in ways, see *Bromley v. Cavendish Spinning Co.,* T. L. R. vol. 2, 881; *Wood v. Dorrell,* T. L. R., vol. 2, 550; *Lauter v. Duckworth,* 48 N. E. 336.

Machinery 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." (*Corning v. Burden,* 15 Howard [U. S.] 267.)

Another definition of "machinery" is given in Alabama, as follows: "The term, machinery, embraces all the parts and instruments intended to be, and actually operated from time to time, exclusively by force created and applied by mechanical apparatus or contrivance, though the initial force may be produced by the muscular strength of man or animals, or by water, or steam, or other inanimate agency. (*Ga. Pac. Ry. Co. v. Brooks,* 84 Ala. 138, 140, 141.)"

Machinery means something more than "machine." It includes whatever appurtenances are necessary to the proper working of the machine, as dies in manufacturing tin-ware, the saw in saw-mills, the pipes of a gas company, or the train on a railway. (*Seavey v. Cent. Ins. Co.,* 11 Mass. 541; *Pierce v. George,* 108 Mass.

78; *State v. Avery,* 44 Vt. 629.) "Works" has been defined as the structure and grounds which compose the factory of a manufacturing establishment, but there are no judicial definitions of the word, as used under the act. The words, "ways, works and machinery," has been given a liberal interpretation under the act. (See *O'Keefe v. Brownell,* 156 Mass. 133; *Coppithorne v. Hardy,* 173 Mass. 400; *Gunn v. N. Y., N. H. & H. Ry. Co.,* 171 Mass. 417.) In *Coppithorne v. Hardy, supra,* the court held that a shafting, consisting of a cone shaft with six pulleys attached to the ceiling by brackets and screws and which fell by reason of its insufficient fastening, was part of the ways, works and machinery. In *Gunn v. N. Y., N. H. & H. Ry. Co.,* a truck consisting of axle wheels and a frame fastened together, and fitted to the tracks of a railway company, and ordinarily used as a part of the appliances of the repair shop of the company, was a part of its ways, works and machinery.

Sec. 16. Ownership of machinery by defendant not essential.

It is not necessary that the ways, works or machinery should be the property of the employer provided they are connected with or used in his business.[5a] (*Moynehan v. Kings Windsor Cement, etc., Co.,* 168 Mass. 450; *Lynch v. Allen,* 160 Mass. 248.) The court says, in *Trask v. Old Colony Ry. Co.,* 156 Mass. 298, "It should at least appear that the employer has the control of them and that they are used in his business with his authority, express or implied." A similar rule has been

5a. In *Regan v. Donovan,* 159 Mass. 1; *Engel v. N. Y., P. & B. R. Co.,* 160 Mass. 260, it was held that a track in a yard of A, owned and repaired by him and used by a railway company under a contract with B to deliver freight, was not part of the "ways," etc., of the railway company.

recently applied, at common law, by the Court of Appeals in a case in which a defective pole used by a telephone company as part of its permanent plant broke and injured plaintiff. The pole was used by the defendant by permission or license of another company, which owned and erected it, and it was held that the defendant was responsible to the injured employee in failing to inspect and discover its defective condition. The fact that the pole belonged to and was erected by another company was held to be no defense. (*McGuire v. Bell Telephone Co.*, 167 N. Y. 208.)

Sec. 17. Tools not machinery, etc.

In *Ga. Pac. Ry. Co. v. Brooks*, 84 Ala. 138, the court considered whether ordinary tools used by hand in the performance of manual labor were, within the meaning of the act, machinery, the specific tool in question being a hammer. The court says: "A hammer is a tool or instrument ordinarily used by one man in the performance of manual labor; it may be an essential part of the 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." To the same effect is *Clements v. A. G. S. R. R. Co.*, 127 Ala. 166, 28 So. 643, which holds that a steel bar used by a section hand on a railroad, being disconnected from any other mechanical appliances and operated by muscular strength directly applied, is not machinery within the meaning of the statute. Rope, for example, is not part of the ways, etc. (*Southern Ry. Co. v. Moore*, 128 Ala. 484; *Clement v. Ala. Gt. So. R. Co.*, 127 Ala. 166.)

Nor is a piece of wood used as a lever. (*Allen v. Smith Iron Co.*, 160 Mass. 557.) In the New York case of *Buchanan v. Exch. Fire Ins. Co.*, 61 N. Y. 26, the word "machinery" was held to include tools and implements used in the manufacturing of paper, but the case was solely one upon the construction of an insurance policy, and the point at issue was simply the determination as to how much was intended to be covered by the policy. The Court of Appeals held that the word "machinery" was used in its most comprehensive sense—to include all the machinery and the tools and implements used in the manufacture of paper. So broad a definition cannot fairly be said to be given to the word machinery as used in the act.

Sec. 18. Ways, works and machinery of railways.

By an amendment of the Massachusetts statute (R. S., ch. 106, sec. 71, Acts Mass. 1893, ch. 359, sec. 1), the act provides that a "car in use by or in possession of a railway company shall be considered part of the ways, works and machinery of the company, using or having the same in possession within the meaning of this act, where such car is owned by it or by some other company or person." Prior to the enactment of this amendment it was held in *Coffee v. Ry., etc., Co.*, 155 Mass. 1, that an empty foreign car, which is simply being received and forwarded by the defendant without using it for its own benefit, was not part of the ways, works and machinery of a railway within the meaning of the statute, and that accordingly a brake while on such a car was not a defect for which the forwarding company was responsible. It was held, however, in *Bowers v. Conn. River Ry. Co.*, 162 Mass. 312, a decision rendered subsequent to the amendment referred to

above, but not based upon that statue, that a loaded freight car of another railroad company hauled by defendant over its own road, for the purpose of transporting freight in the ordinary course of its railway business and for its own benefit, was part of the ways, works and machinery. (See, also, *L. & N. R. Co. v. Davis,* 91 Ala. 487.) Under the law, as it stood in Massachusetts, before the amendment referred to above, a railway company which is simply engaged in forwarding cars and not using them for its own benefit was not held to any greater duty than the duty of inspection (*Keith v. N. H. & W. R. Co.,* 140 Mass. 175), and defects in the condition of such cars did not fall within the provisions of the act, because the forwarding company owed no duty to its own employees to furnish proper appliances or remedy defects in such cars. (See *Coffee v. N. Y., N. H. & H. R. R. Co.,* 155 Mass. 21; *Thyng v. Fitchburg Ry. Co.,* 156 Mass. 713; *Mackin v. B. & A. R. R. Co.,* 135 Mass. 201.) Where a railroad company had received as consignee certain cars of coal, which coal was for its own use, and a workman of the railroad company engaged in unloading the car was hurt by a defect in it, the railroad which employed him is not liable, for the car was not a part of its ways, works or machinery, and there was, therefore, no duty on the consignee railroad to inspect the car. (*Dunn v. Boston & Northern Ry. Co.,* 189 Mass. 62.) In Massachusetts, moreover, an inspector of cars has been held to be a mere fellow servant with the other railway employees; also in Alabama. (See *Coffee v. N. Y., etc., R. Co.,* 155 Mass. 21; *Mackin v. B. & A. R. R. Co.,* 135 Mass. 201; *Dewey v. Detroit, etc., Ry. Co.,* 97 Mich. 329; *Smoot v. Mobile, etc., Ry. Co.,* 67 Ala. 13. In New York the liability, under the act, of railway companies

handling foreign and defective cars will be somewhat different owing to a difference in the common law between the New York rule and that of Massachusetts and Alabama. In New York the duty of inspection is a duty of the railway company, as employer, and cannot be shifted. (See sec. 20, *post.*) The negligence of a car inspector is not the negligence of a co-employee, but of the railway company itself, for which it is liable. Moreover, under New York law a railway company is bound to inspect foreign cars as it should inspect its own, and is negligent if it takes cars which are known to be defective and unsafe. (See *Gottlieb v. N. Y., etc., Ry. Co.,* 100 N. Y. 462; *Goodrich v. N. Y. C. & H. R. R. Co.,* 116 N. Y. 398; *Eaton v. N. Y. C. & H. R. R. Co.,* 163 N. Y. 391; *B. & P. R. Co. v. Mackey,* 157 U. S. 72; *T. & P. R. Co. v. Archibald,* 170 U. S. 665.) It may reasonably be presumed that the necessity which caused the amendment to the Massachusetts statute, quoted above, would not exist in New York for the reasons just given. It has also been held in Alabama that a railway company using a foreign freight car is liable under the statute for a defect in its condition to the same extent as if the car belonged to the defendant. (*Louisville, etc., Ry. Co. v. Davis,* 91 Ala. 487; *Ala. Gt. So. Ry. Co. v. Carroll,* 97 Ala. 126.)

Wires used as a part of the railway's electric system of signals, transmitting an electric current, are part of the ways, works and machinery of a railroad. (*Brouillette v. Conn. Riv. Ry. Co.,* 162 Mass. 198.) The same is true of a truck used by a railroad company as part of the appliances of a repair shop. (*Gunn v. N. Y., N. H. & H. Ry. Co.,* 171 Mass. 417.) A ladder or hand hold on a freight car is a part of the ways, works and machinery of a railway company in Alabama. (*Louisville, etc., Ry. Co. v. Pearson,* 97 Ala. 211.)

Defective cars used by a railway are within the act (*Louisville & N. Ry. Co. v. Pearson,* 97 Ala. 211), and defects in the permanent appliances ordinarily used upon cars are defects in the ways, works and machinery of railroads. Included among such defects are:

Improper and insufficient brake rods;[6] brakes;[7] draw-bars of unequal height;[8] insufficient or defective coupling or coupling pins;[9] absence of cow catchers from engine;[10] defective boilers on locomotives.[11]

The rule previously set forth at section 11, regarding appliances which are instrumentalities of the work, applies to railways, and negligence cannot be predicated upon defects in such small articles of temporary use, such as links and coupling pins, where the railway company has supplied a sufficient number of such links or pins and the injury results simply from the negligence of the employee in selecting improper links or pins. (See *Ellsbury v. N. Y., N. H. & H. Ry. Co.,* 172 Mass. 130; *Miller v. Same,* 175 Mass. 263; *Thyng v. Pittsburg Ry. Co.,* 156 Mass. 13; *Young v. B. & N. Ry. Co.,* 168 Mass. 219); or in the inspection of the instrumentalities by the employee when it is his duty to keep it in repair; (*Drum v. New England Cotton Yarn Co.,* 180 Mass. 113; *Wyman v. Clark,* 180 Mass. 173); or to adjust it. (*Rodwell v. Moore,* 180 Mass. 590.)

Similar rulings, holding railroads liable for defects,

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6. *L. & N. Ry. Co. v. Campbell,* 97 Ala. 147; *Campbell v. L. & N. Ry. Co.,* 109 Ala. 520.

7. *Spalding v. Flynt Granite Co.,* 159 Mass. 587; *Perdue v. L. & N. Ry. Co.,* 10 Ala. 535; *Binion v. L. & N. Ry. Co.,* 98 Ala. 570.

8. *Bowers v. Conn. R. R. Co.,* 162 Mass. 312.

9. *Boland v. L. & N. Ry. Co.,* 106 Ala. 641; *Boland v. L. & N. Ry. Co.,* 96 Ala. 626.

10. *Tenn. C. & I. Co. v. Kyle,* 93 Ala. 1.

11. *Bridges v. Tenn. C. & I. Co.,* 109 Ala. 287.

have been made under New York law before the passage of the statute. (See for example regarding defective drawheads, *Gottlieb v. N. Y., L. E. & W. Ry. Co.,* 100 N. Y. 462; *Goodrich v. N. Y. C. & H. Riv. Ry. Co.,* 116 N. Y. 398; *Hannigan v. L. & H. Ry. Co.,* 157 N. Y. 244. As to defective engines, see *Kirkpatrick v. N. Y. C., etc.,* Ry. Co., 79 N. Y. 240; *Fuller v. Jewett,* 80 N. Y. 46. Defective boilers, *Keegan v. Western Ry. Co.,* 8 N. Y. 175. Defects in appliances of flat cars for carrying lumber, *Bushby v. N. Y., etc., Ry. Co.,* 107 N. Y. 374. Defective brakes, *Lilly v. N. Y., etc., Ry. Co.,* 107 N. Y. 566, 573. Defective draw bolts, *Rima v. Rossie Iron Works,* 120 N. Y. 433. Defective buffers, *Ellis v. N. Y., L. E. & W. R. Co.,* 95 N. Y. 546.)

Sec. 19. Miscellaneous cases of defects in ways, etc.

In *McNamara v. Logan,* 100 Ala. 187, a boy was injured while driving a mining car down grade in a mine entry. He was crushed in the narrow space between the wall and the car. The evidence for the plaintiff showed that the space between the wall and the car was only a foot and a half wide, and that it was unsafe. This was held a defect in the ways of the defendant.

The absence of hooks or stays to a ladder used in an engine room for the purpose of turning on steam to an engine some distance above the floor may be a defect in the condition of the plant. (*Weblin v. Ballard,* 17 Q. B. D. 122.)

The absence of a lock or other fastening upon a switch may constitute a defect in the ways. (*Birmingham R. R. Co. v. Allen,* 99 Ala. 359.)

An unguarded ditch across a railroad track, into which plaintiff's intestate fell while assisting in pulling a car along a railroad track, may be a defect in the

ways of a railroad company, and the question is one for the jury. (*Gustafson v. Washburn & Moen Mfg. Co.,* 153 Mass. 468.) The absence of a side guard on a circular saw is a defect. (*Tate v. Lathem* [1897], 1 Q. B. D. 502.)

An interesting New York common law case on defects in ways is *Dorney v. O'Neill,* 49 App. Div. 8. In this case a hallway, used for the entrance and exit of employees of the defendant, was dark and several "wheelers" (i. e., baskets on wheels used to cart wood about the building) were stored in this passageway through which plaintiff had to go in leaving his work in the evening. The injuries received by plaintiff were occasioned by coming in contact with one of these wheelers. In reversing a nonsuit the court says: "The duty of the master is not only to furnish his employee with a reasonably safe place to work in and reasonable safe access and egress to and from the premises, but, also, having control of the time, place and conditions under which the servant is required to labor, to guard him against probable danger in all cases in which that may be done by the exercise of reasonable cars. (*McGovern v. C. V. R. R. Co.,* 123 N. Y. 280, 287.) It cannot be said, as a matter of law, that this duty has been discharged by furnishing a hallway through which the servant must pass at night, and in the dark, and in which the master has caused to be placed material of such a character that involuntary contact must cause injuries as serious as that which the plaintiff has sustained."

CHAPTER III.

CHANGES EFFECTED BY THE ACT IN THE RESPONSIBILITY OF EMPLOYERS FOR THE ACTS OF PERSONS EXERCISING SUPERINTENDENCE.

Sec. 20. Common law, "fellow servant," rule in New York.

The common law rule, so thoroughly established in all jurisdictions that citation upon it is unnecessary, is that an employer is, ordinarily, not responsible to an employee who is injured by the negligence of a fellow servant in the same general employment of the same employer. The courts have differed in their methods of determining what servants are fellow servants for whom the employer is not liable, and what servants are such representatives of the master, that he becomes responsible for their negligence. The New York rule for determining this question is the so-called rule of *Crispin v. Babbitt* (81 N. Y. 516), which is the leading case on this subject and which lays down the following doctrine: "The liability of the master does not depend upon the grade or the rank of the employee whose negligence occasioned the injury. However low the grade or rank of the employee, the master is liable for the injuries caused by him to another servant, *if they result from the omission of some duty of the master* which he had evaded. But such inferior employee, if the act is one which pertains only to the duty of the operative, the employee performing it is a mere servant, and the master, though liable to strangers, is not liable

to a fellow servant for his improper performances." Under this rule the question to determine in all cases is this — Is the duty, the negligent discharge or omission of which causes injury, one which is imposed on the master *as such* by law? There are certain definite duties imposed upon the employer for the greater safety of his employees, which are well known and elementary. He must, for example, exercise reasonable care to furnish the employee a safe place in which to work; he must use reasonable care in the selection of his co-employees and in selecting competent fellow servants in sufficient number to do the work in safety, and in providing instrumentalities of service; he is bound to use ordinary care, diligence and skill to keep them in safe condition by such proper inspection as the circumstances may require; he must prescribe and enforce rules sufficient for the orderly and safe management of his business and keep the servants informed of these rules so fas as may be needed for their guidance to warn them against unusual risks. Those duties imposed by law upon the master for the safety of his employees cannot be shifted from his shoulders so as to change his liability. Where the law requires the master to exercise reasonable care, for example, to furnish his employees with a reasonably safe place to work, the employer is responsible for such safety, and if such safety is not provided, either owing to his personal negligence or the negligence of any one, no matter what his name, grade or rank may be, to whom he entrusts the performance of that duty, no matter how generally competent and efficient this agent may be to whom is entrusted the performance of their duties, the employer still remains liable for negligence in the performance of that duty. Cases illustrative of this rule are collected

below.[1] (See exhaustive collection of New York cases in Leavitt's Code of Negligence, p. 60, and following.)

From an examination of the foregoing cases it will be found that the New York common law test for an employer's liability consists solely in determining whether or not the act done, which is claimed to have been negligent, was an act which the law requires the master to do in carrying out his common law functions as master. The fact, standing alone, that the person performing the negligent act was a person placed in actual control over the one whom his negligence has injured, does not at common law enlarge the employer's responsibility, even though the negligent act was an act performed in the exercise of superintendence.[2]

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1. *Simone v. Kirk*, 173 N. Y. 7; *Laning v. Ry. Co.*, 49 N. Y. 521; *Flike v. Ry. Co.*, 53 N. Y. 549; *Crispin v. Babbitt*, 81 N. Y. 516; *McCosker v. Long Island R. R. Co.*, 84 N. Y. 77; *Brick v. Rochester Ry. Co.*, 98 N. Y. 211; *Hankins v. N. Y., L. E. & W. Ry. Co.*, 142 N. Y. 416; *Cullen v. Norton*, 126 N. Y. 1; *Hussey v. Coger*, 112 N. Y. 614; *Perry v. Rogers*, 157 N. Y. 251; *Cappaso v. Woolfolk*, 163 N. Y. 472; *Byrne v. Eastman's Co. of N. Y.*, 163 N. Y. 461; *Neubauer v. Ry. Co.*, 101 N. Y. 607; *Keenan v. N. Y. C. R. R. Co.*, 145 N. Y. 190; *Loughlin v. State*, 105 N. Y. 159; *Scarff v. Metcalfe*, 107 N. Y. 211; *Gabrielson v. Waydell*, 135 N. Y. 1; *Geoghan v. Atlas S. S. Co.*, 146 N. Y. 369; *Mancuso v. Cataract Constr. Co.*, 87 Hun, 519; *Vitto v. Keagan*, 15 App. Div. 329; *Murphy v. Coney Island and B. R. Co.*, 65 App. Div. 546, 73 Supp. 18; *Tully v. N. Y. & Texas S. S. Co.*, 10 App. Div. 463; *Daly v. Brown*, 45 App. Div. 428; *Schott v. Onondaga Bank*, 49 App. Div. 503; *Reilly v. O'Brien*, 53 Hun, 147; *Walters v. Geo. A. Fuller Co.*, 74 App. Div. 388, 77 Supp. 681; *Madigan v. Oceanic Steam Navigation Co.*, 82 A. D. 206; *Hoelter v. McDonald*, 82 A. D. 423.

2. The court says, in *Hofnagle v. N. Y. Central R. R. Co.*, 55 N. Y. 608, "The functions 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 the master is responsible whatever agents he may employ." (*McCosker v. L. I. R. R. Co.*, 84 N. Y. 77;

A similar rule exists under the common law in Massachusetts and is applied in the cases not brought under the Employers' Liability Act.[3]

The Court of Appeals has usually given the rule just set forth a narrow construction, unfavorable to the injured employee. (See cases cited in note two and the criticism upon them contained in note to section 231 of Shearman & Redfield on Negligence, 5th edition.)

Sec. 21. The superior servant rule.

The rule as modified by the Employers' Liability Act of 1902 does not diminish or take away in any respect the liability of the employer for his personal negligence, or for the negligence of any person to whom he has seen fit to intrust the performance of his personal duty. His liability as declared in *Crispin v. Babbitt* and the cases following its doctrine still remains. The Employers'

Loughlin v. The State, 105 N. Y. 129; *Cullen v. Norton*, 126 N. Y. 1; *Reilly v. O'Brien*, 53 Hun, 147; *Flet v. Hunter Arms Co.*, 74 App. Div. 572, 77 Supp. 752; *Mahoney v. Oil Co.*, 76 Hun, 579, 28 Supp. 196.)

3. In 1887 it was settled law in Massachusetts that masters were personally bound to see that reasonable care was used, to provide reasonably safe and proper machinery so that if the duty was entrusted to another and was not performed, the fact that the proximate cause of the damage was the negligence of a fellow servant, was no defence. (*Ryalls v. Mechanics Mills*, 150 Mass. 190-194; *Lawless v. Conn. River R. R. Co.*, 136 Mass. 1; *Gillman v. Great Eastern R. W. Co.*, 13 Allen, 440.) "The rule accepted by the great majority of 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 in giving orders whereby injury is sustained by the inferior servant." (*Moody v. Hamilton Manufacturing Co.*, 159 Mass. 70; also, *Howard v. Hood*, 155 Mass. 391; *Benson v. Goodwin*, 147 Mass. 237; *Flynn v. Campbell*, 160 Mass. 128.)

Liability Act, however, supplements this existing liability by making an employer also responsible for an injury which occurs to his employee occasioned "by reason of the negligence of any person in the service of the employer, entrusted 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."

As has just been observed, under the New York common law rule, as laid down in *Crispin v. Babbitt,* the fact that the negligent employee actually exercises superintendence over the employee injured, is not conclusive in determining whether the negligent employee is a co-employee, for whose negligence the master is not liable, or a vice-principal or agent for whose negligence he is legally bound. There are other States, however, in which, irrespective of statute law, the question whether a negligent employee was exercising superintendence and supervision is controlling in determining the employer's responsibility. In these States where a negligent act is done by a person superior to the person injured, *the fact of superiority* makes the negligent person not a fellow servant but a vice-principal, for whose acts the master is liable. There is much confusion among the cases as to the exact meaning of a "superior" person. The rule is clear, but its application leads to many uncertainties. Among the States following this doctrine, the liability of the master attaches to a negligent act or omission of such superior person, quite irrespective of whether the act was or was not one, the performance of which would be under the New York rule a non-deligible personal duty of the master. The act done by the superior servant, however,

from which the injury occurs, must relate to his duties and powers and be within the scope of his authority as a superior servant, and must not be simply an act done in a relation of co-servant to the injured employee. "Where the master appoints an agent with a superintending control over the work and with power to employ and discharge hands and to direct and control their movements in and about the works, the agent stands in the place of the master." (*Stephens v. Hannibal & St. Jo. R. R. Co.,* 86 Missouri, 221.) If the servant has been injured by the negligence of a superior servant having the right to control, and while executing the order of the superior about a matter which the superior has a right to control, then such a superior servant is as to the inferior a vice-principal, and his negligence is that of the master. (*Coal Creek Mining Co. v. Davis,* 90 Tenn. 711.) The cases given in the note below illustrate the extent to which this so-called superior servant doctrine is adopted in the United States.[4]

Under the cases given below, the right and power to direct employees and the power to employ or discharge become important in determining whether the master, who has delegated such powers to the negligent servant, shall be responsible.

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4. Reference should be had to the remarkably full and exhaustive note covering the cases contained in 51 Lawyers' Reps. Ann. 513, giving the citation both of the New York rule and the superior servant doctrine. (See, also, Beach on Contributory Negligence, sec. 327, Crawford's Ed.; *Chic. & Alton R. R. Co. v. May,* 108 Ill. 288; *L. & N. R. R. Co. v. Lahr,* 86 Tenn. 335; *Cowles v. Richmond, etc., Ry. Co.,* 84 N. C. 309; *Patton v. Western, etc., Ry. Co.,* 96 N. C. 455; *Carlson v. N. W. Tel. Ex. Co.,* 63 Minn. 438; *Moon v. Richmond, etc., Ry. Co.,* 78 Va. 745; *Mo. Pac. R. R. Co. v. Williams,* 75 Tex. 4; *Galveston, etc., R. R. Co. v. Smith,* 76 Tex. 611.)

Sec. 22. The added rule as to acts of superintendence; statutes compared.

The New York act provides that "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, by reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, and 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" . . . "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 Massachusetts act is similar to the New York law in the provision quoted above. The English act provides, "where, after the enactment of this act, personal injury is caused to a workman." . . . "2, by reason of the negligence of any person in the service of the employer, who has any superintendence entrusted to him, whilst in the exercise of such superintendence" . . . "the workman" . . . "shall have the same rights of compensation and remedy 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."

The English law provides, however, at section 8, that the expression "a person who has superintendence entrusted to him" means "a person whose sole or principal duty is that of superintendence and who is not ordinarily engaged in manual labor." The Alabama law provides that "when personal injury is received by a person 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. . . . 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 entrusted to him, whilst in the exercise of such superintendence." The Alabama law, however, does not qualify or define superintendence in the manner in which the English act qualifies and defines the term as quoted above. No case in Alabama has yet decided whether superintendence is to be understood in the limited sense in which it is used in the other liability acts, meaning simply the acts of those persons whose sole or principal duty is superintendence, or whether it includes persons who exercise *any* superintendence. It is to be assumed, however, that having enacted substantially the English law, it takes the word "superintendent" with the meaning which attaches to it in England under the statute there. (*Birmingham Ry. Co. v. Allen,* 99 Ala. 359; *Mobile, etc., Ry. Co. v. Holborn,* 84 Ala. 133.) The question, however, seems to be still an open one.

Sec. 23. Meaning of superintendence clause.

The effect of subdivision 2 of section 1 of the Employers' Liability Act given above, is to ingraft to a limited extent upon the New York law the so-called superior servant doctrine as defined in the cases cited in section 21, so that in an action brought under this subdivision of the Employers' Liability Act, the master becomes responsible for the negligent act of one servant causing injury to another, not only when the act itself is one, the performance of which is a non-deligible duty

of the master himself under the common law doctrine of *Crispin v. Babbitt* (see section 20), but the master also becomes responsible where the negligent act was done by one exercising superintendence, when the act or omission itself was done in the process of superintendence by a person whose sole or principal duty was one of superintendence. The addition which the Liability Act makes to the law, as a supplement to the common law doctrine of the *Crispin v. Babbitt* case, has been recognized by the Court of Appeals. As that court observes in *Gmaehle v. Rosenberg* (178 N. Y. 147), "Now while we are not prepared to say whether the statute has in any respect increased the liability of the master for defective ways, works or machinery, *it is clear that it has given an additional cause of action where it prescribes that the master shall be liable for the negligence of the superintendent or any person acting as such.* At common law while the master was liable for the fault of his *alter ego* to whom he entrusted the whole management of the work, with the power to employ or discharge servants, he was not liable for the negligence of a foreman merely as such."

As that court has more recently observed in *Harris v. Baltimore Machine and Elevator Works* (188 N. Y. 141): "It [the Employers' Liability Act] gave an additional cause of action because it prescribed that a master shall be liable for the negligence of the superintendent or the person acting as such (*Gmaehle v. Rosenberg,* 178 N. Y. 147). At common law such a liability was not recognized unless the superintending servant was the *alter ego* of the master with respect to the work."

As the Appellate Division, Second Department, has said in *Rosin v. Lidgerwood Mfg. Company* (89 App.

Div. 245): "The mischief against which the common law did not provide was that it did not provide for damages for one who was injured through the negligence of a fellow servant, unless that servant was in a position where he acted for and in the discharge of a duty owed by the master. To cure this supposed defect, the Legislature has extended the liability of the master who must answer for an injury due to the negligence of any person in the service of the employer entrusted with and exercising superintendence. . . . That is, the Legislature has given to employees a new cause of action; a cause of action which did not accrue at common law because of the negligence of a superintendent, unless he was discharging a duty which belonged to the master, and it has provided that such employee shall have the same right of compensation and remedies as though the relation of master and servant did not exist. In other words, facts and circumstances which did not heretofore constitute actionable negligence are by the statute placed upon the same footing with common law actions for negligence, and the remedy provided for this new right, which must be exclusive (*City of Rochester v. Campbell,* 123 N. Y. 425), is by section 2 of the statute made to depend upon the service of a notice giving the time, place and cause of the injury to the employer within 120 days after the injury."

"The Employers' Liability Act 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." (*Bellegarde v. Union Bag & Paper Co.,* 90 App. Div. 577, affirmed, no opinion, 181 N. Y. 519, citing *Griffiths v. Lord Dudley,* 9 Q. B. D. 357.

The Appellate Division in the First Department has said in *Curran v. Manhattan Railway Co.,* 103 Supp. 351, 118 App. Div. 347: "At common law the master is not liable to his employee for the negligent acts of a superintendent in the management and detail of the work. Although the superintendent is of a higher degree than the one injured, he is still a servant as to the detail and management of the work, and not the *alter ego* of the master, and his negligence in those respects is the negligence of a co-servant, for which the master is not responsible. (*Loughlin v. State of New York,* 105 N. Y. 159; *Cullen v. Norton,* 126 N. Y. 1; *Ryan v. Third Avenue Railroad Company,* 92 App. Div. 306.) It was to relieve from the harshness of this rule that the Employers' Liability Act was enacted by the legislatures. (*Bellegarde v. Union Bag & Paper Co.,* 90 App. Div. 577; affirmed, 181 N. Y. 519; *Gmaehle v. Rosenberg,* 178 N. Y. 147.) (See, also, *Chisholm v. Manhattan Ry. Co.,* 116 App. Div. 320, 101 Supp. 622.)

The Appellate Division, Fourth Department, in *Guilmartin v. Solvay Process Company,* 101 Supp. 118, has apparently given the superintendence clause of the act a construction not in accord with the decisions above cited and not in accord with the act itself. The court in that case substantially holds that the superintendence clause is nothing more than a re-enactment in statutory form of the common law rule laid down in *Crispin v. Babbitt* (81 N. Y. 516) and *McCosker v. Long Island Ry. Co.* (84 N. Y. 77).

In the *Guilmartin case* the negligent act was clearly done by one entrusted with superintendence, and under the authorities, (though the decision holds to the contrary), was also one done in the exercise of superintendence. The act, however, was not one of the non-de-

ligible duties of the master in such sense that in performing it the superintendent at common law would be construed as a vice-principal under the rules laid down in *Crispin v. Babbitt* and *McCosker v. Long Island Railroad Co.* The court holds that the superintendence clause of the Liability Act does not change the rule in these two cases so as to enlarge the responsibility of the employer. It gives the act such construction that instead of being as its title would indicate "an act to *extend* the liability of employers," etc., it is one rather to codify and declare existing law. It construes the superintendence clause in such manner that an injured plaintiff must show, in order to obtain relief under this clause, not only that the accident resulted from the negligence of a superintendent, exercising superintendence (that is, that the negligent act itself was an act or omission in superintendence), but also, what the act nowhere provides, that the negligent thing done by this superintendent should be an act, the performance of which is expressly charged by law upon the employer as a duty which he cannot delegate to another. The decision is contrary to the New York cases and to decisions of other states and of England on this matter and engrafts upon the act a limitation not contained in it and which is contrary to its express purpose.

Sec. 24. The effect of the "superintendence clause."

There are many cases construing the meaning of this section (subd. 2 of sec. 1), and the greater portion of the cases brought under the Liability Acts have been brought under its provisions. It will be observed from a consideration of these cases, which will be given more in detail later in the chapter, that to create a

liability under this subdivision, three elements must concur: 1st, a negligent act or omission; 2d, which is performed or omitted by a person whose sole or principal duty is that of superintendence, and 3d, the negligent act or omission itself must be done or omitted in the exercise of superintendence. (*Quinlan v. Lackawanna Steele Co.,* 107 A. D. 176, 94 Sup. 942; *Bellegarde v. Union Bag & Paper Co.,* 90 A. D. 577, 86 Sup. 72; *McBride v. New York Tunnel Co.,* 101 A. D. 448, 92 Sup. 282; *McHugh v. Manhattan Ry. Co.,* 179 N. Y. 378; *McLaughlin v. Interurban St. Ry. Co.,* 101 A. D. 134, 91 Sup. 883; *Hughes v. Russell,* 104 A. D. 144, 93 Sup. 307.) When these three elements concur, and not otherwise, the statute gives the injured employee "the same right of compensation and remedy 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." After some uncertainty the construction finally adopted for these words last quoted (which occur in the English, Massachusetts and New York laws), is that the defense of common employment is removed when the action is brought for an injury occasioned by any negligent act or omission specified in this section of the law. The employer has left to him then as against his employee only the same defenses which he would have against any other person who comes into his premises upon business (*Thomas v. Quartermaine,* 18 Q. B. D. 685, 700), and who is neither a trespasser nor a bare licensee (*Mobile, etc., Ry. Co. v. Holborn,* 84 Ala. 133, 136; *Coffee v. N. Y., etc., Ry. Co.,* 155 Mass. 21, 22.) The Appellate Division, Third Department, in *Bellegarde v. Union Bag & Paper Co.,* 90 A. D. 577, 86 Sup. 72, affd. no opinion 181 N. Y. 519, says on this point: "We do not think the language of the

act has the effect of making an employee a mere licensee upon the employer's premises, or that it was the intent of the Legislature to put him in the class of persons to whom the employer owed no duty of exercising reasonable care." The early English cases on the construction of the English Act of 1880 (*Weblin v. Ballard,* 17 Q. B. D. 122) hold that these words quoted above had the further effect of taking away the defense that the employee had assumed the risk of injury from any of the causes specified in section 1 of the act, and this construction was apparently considered the proper one in Massachusetts in *Ryalls v. Mechanics Mills,* 150 Mass. 190. On this point these cases have not been followed, however, and the rule is well established, both in England and Massachusetts, that the section quoted above has had no effect in modifying or changing the doctrine of assumed risk. (See chap. V.)

Sec. 25. The employee does not assume the risk of superintendent's negligence.

Under the common law one of the ordinary risks of an employment is the possibility of injury by a fellow servant. Under the general common law rule, in force in New York, the fact that a negligent person whose act causes the injury is in control of the person who is injured thereby, does not add to or take from the liability of the master, unless the injury was occasioned while the negligent servant was performing some nondeligible duty of the employer. (*Simone v. Kirk,* 173 N. Y. 7.) The negligence of a fellow servant gives the injured servant no cause of action at common law against the employer, and one of the reasons for this established and elementary rule is that the employee injured, by his contract of employment, is held to have assumed

the risk of injury by the negligence of a fellow employee. The employee at common law is presumed to have assumed the risk of being injured by the negligence of the foreman when the foreman is performing his ordinary functions (*Ryan v. Third Ave. Ry. Co.*, 92 A. D. 306; *Cullen v. Norton*, 126 N. Y. 1; *Perry v. Rogers*, 157 N. Y. 251), and is not performing one of the personal, non-deligible duties of the master. (*Hawkins v. N. Y., L. E. & W. Ry. Co.*, 142 N. Y. 416.)

If the employee, under the Liability Act, by entering upon or continuing in the business of the employer assumes the risk of injury by the negligent act or omission of the person "whose sole or principal duty is that of superintendence," in the same way that he assumes the risk of the foreman's negligence at common law, the provisions of subdivision 2 of article 1 are obviously without force. It has been held, however, that this defense has been taken away by the statute and that the employee does not assume the risk of injury either from the incompetence or the negligence of a person whose principal duty is that of superintendence. (*Faith v. N. Y. Central & H. R. R. Co.*, 109 A. D. 222, 95 Sup. 774, affd. no opinion 185 N. Y. 556; *Bellegarde v. Union B. & P. Co.*, 90 A. D. 577, 86 Sup. 72.) This question was first raised in Massachusetts, in *Malcolm v. Fuller*, 152 Mass. 160. In this case a quarryman, in general charge of a quarry, finding that the wadding still remained in a hole which he had assisted in drilling and loading with powder and had attempted to discharge, negligently assumed that the charge had exploded and had passed off through another hole by a crevice in the rock, and, deciding to drill out the wadding, directed a fellow servant to hold the drill. The servant did so, while the quarryman did the

striking, whereupon the charge exploded, injuring the workman. It was contended by the defendant that the risk of such an explosion was one of the assumed risks of the employment, and that the negligence of the superintendent was also one of the assumed risks. Defendant relied upon *Kenney v. Shaw,* 133 Mass. 501, which, in its facts, closely resembled the case at bar, and which held that the plaintiff assumed the risk of his own negligence, of the negligence of the superintendent and of the explosion of gunpowder without negligence. The court, after citing this case, says: "The object of the statute of 1887, chapter 270, section 1, clause 2, is to make the defendant liable for and to prevent the plaintiff from assuming one of those risks, and the one which the jury found caused his injury. This plaintiff clearly did not assume the risk of all danger from explosions of gunpowder, however caused, in the course of his employment, and the instruction given at the request of the defendant that 'if the plaintiff, when he undertook to hold the drill in the hole, knew that it was dangerous and continued to hold it, although he did so unwillingly and under orders of another, he cannot recover, but must be taken to have assumed the risk which he has knowingly undertaken,' was certainly sufficiently favorable to the defendant. The risk that the defendant or his superintendent would negligently attempt to remove a charge of gunpowder by drilling into a hole that had been charged before ascertaining that the charge had exploded, was not one of the risks of his employment which the plaintiff assumes."[5]

5. With this case should be contrasted the case of *Cullen v. Norton,* 126 N. Y. 1, which sets forth the New York common law rule on a state of facts very nearly the same as in the case above cited.

In *Davis v. N. Y., N. H. & Hartford R. R. Co.,* 159 Mass. 532, cited with approval in *McHugh v. Manhattan Ry. Co.,* 179 N. Y. 378, on this point the court says: "It is suggested that the plaintiff took the risks of the danger. In general, it is not negligent not to anticipate wrongful negligence on the part of defendant (*Hayes v. Hyde Park,* 153 Mass. 514), and assuming that there is a difference in the proposition, a workman does not take the risk that a person entrusted by his employer with, and exercising superintendence will be negligent in the exercise of that duty. If he were held to do so, the statute would be made of no avail." (See, also, *Smith v. Baker* [1891], A. C. 325; *McPhee v. Scully,* 163 Mass. 216; *Murphy v. N. Y., N. H. & H. Ry. Co.,* 187 Mass. 18; *Rapson v. Leighton,* 187 Mass. 432; *Meagher v. Crawford Laundry Machine Co.,* 172 Mass. 324; *Mahoney v. Bay State Pink Granite Co.,* 184 Mass. 287; *Murphy v. City Coal Co.,* 172 Mass. 324.)

In this action, plaintiff's intestate was killed while employed as a laborer by defendant in his quarry and engaged in drilling rock for blasting under the direction of defendant's foreman. After a blast it was found that the charge in one of the holes had not exploded. The foreman examined it and found the fuse unconsumed but failed to remove it. He set other workmen to work, drilling, within two feet, and directed plaintiff's intestate to drill at a place some thirty feet distant. The fuse caught fire and the charge in the hole exploded, killing plaintiff's intestate. The Court of Appeals held that the negligence of the foreman was that of a fellow servant, for which the master was not liable, and that the plaintiff's intestate had assumed the risk; "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 plaintiff's intestate took the risk of by accepting the employment." The court held that the injury resulted from a detail of the working or management of the business, the risks attending which had been assumed by the party taking the employment.

This doctrine, that a servant does not assume the risk of injury by the negligence of his superintendent, does not mean that a servant can blindly rely on the direction of the superintendent in disregard of an obvious risk of danger concerning which he needs no warning. The superintendent owes no duty of warning the employee against obvious dangers. (*Gavin v. Fall River Automatic Telephone Co.*, 185 Mass. 78; *Stuart v. West End Ry. Co.*, 163 Mass. 391; *Meehan v. Holyoke Street Ry. Co.*, 186 Mass. 571; *Downey v. Sawyer*, 157 Mass. 418.) If injury follows under such circumstances, plaintiff cannot recover because the risk of injury has been assumed. (See sec. 52 and following.) In *Tanner v. N. Y., etc., R. R. Co.*, 180 Mass. 572, the plaintiff was employed in transferring wires from an old set of poles to a new one. He climbed one of the old poles for the purpose of throwing down the wires from the cross arms, and these wires fell across a wire guy connecting the pole with the fence. There was an overseer standing near the foot of the pole directing the work, and plaintiff told him that the wires were crossed on the guy and asked him what to do. The overseer told him to cut the guy, which the plaintiff did, and the pole fell causing the injuries for which the action was brought.

The court held that plaintiff could not recover, on the ground that the risk of the falling of the decayed pole was an assumed risk which plaintiff accepted in his employment of dismantling the old pole. The denial of recovery, however, was not based on the ground that plaintiff had assumed the risk of the overseer's carelessness, the court apparently assuming both that this overseer was a superintendent, and that the direction to cut the guy was itself an act of superintendence.

Sec. 26. Who are superintendents?

It has been said that "The use of the word superintendent in the statute suggests to the mind at once the idea of one who superintends, of one who has general authority, who stands in relation to the particular work in the same relation as the master would stand if he were personally present. The statute in its spirit says that it proposes to enlarge the liability of the master by making him liable for the negligence of the master as represented by the superintendent whom he has selected. That in addition to the common law duties, the master shall see to it that the man who is placed in charge of his work shall not in the exercise of the authority of the master involve the employees in danger, and the scope of the enactment should not be enlarged to attempt to hold the employer liable for every act of every individual who at any given moment assumes to be acting with authority." (*Abrahamson v. General Supply & Construction Co.*, 112 App. Div. 318.)

The test for the master's responsibility suggested by this quotation that a superintendent must be one who has *general* authority is not in accord with the cases, and brings into the act a limitation not contained in its language. The test which the act declares for the master's responsibility is whether or not the person charged with negligence has been entrusted with superintendence to such an extent that superintendence is his principal employment. This is the sole test which the act itself supplies and no requirement is contained in it that the person charged with negligence should be one entrusted with general authority, but the question is solely as to whether superintendence over men of some sort is his principal occupation. As will

be seen by cases reviewed in subsequent sections, the test for the employer's liability, under this section, depends on adequate proof that the negligent person was, at the time of the injury, entrusted with and exercising superintendence, and that his sole or principal duty was that of superintendence. (*Bannon v. N. Y. C. & H. R. R. Co.,* 112 A. D. 552, 98 Sup. 770.) In determining the question whether a person is acting as superintendent, within the meaning of this section, various elements have been made important as evidence. (See, for illustrative cases, secs. 26 and 29 following.) The fact that the person charged with being superintendent was accustomed to give directions to other employees; that he had power to employ and discharge; that he gave directions as to the commencement or termination of the work; that he received greater pay than the other employees to whom he gave directions; that his work was to a less extent manual labor, or the portion of his duty which consisted of manual labor was less than that of the other employees; that he customarily exercised authority, (*McBride v. N. Y. Tunnel Co.,* 101 A. D. 448, 92 Sup. 282; *Brauberg v. Solomon,* 102 A. D. 330, 92 Sup. 506; *McHugh v. Manhattan Ry. Co.,* 179 N. Y. 378; *Hughes v. Russell,* 104 A. D. 144, 93 Sup. 307; *McLaughlin v. Interurban Street Ry. Co.,* 101 A. D. 134, 91 Sup. 883), and facts and circumstances are admissible from which it might be assumed by the jury that such a person was acting as superintendent, or where his authority to do the act complained of is denied, the course of business in general practice, showing that such act was ordinarily done by the person alleged to be superintendent may raise the inference that his actions were known to and approved by the defendant. (*Edgar v. N. Y., N. H. & H. Ry. Co.,* 188 Mass. 420; *McCabe v. Shields,* 175 Mass. 438.)

Sec. 27. The question of superintendence ordinarily one for the jury.

The inference to be drawn from the evidence touching the question whether the person whose negligence caused the injury was or was not a superintendent, is ordinarily one for the jury, and it is only in those rare cases where the facts are undisputed that such question becomes one of law for the court.[6]

Sec. 28. What is sufficient evidence of superintendence?

The following are some of the cases which have passed upon the question as to who are superintendents within the meaning of the act.

In *McHugh v. Manhattan Railway Company* (170 N. Y. 378), the person charged with negligence was a train dispatcher, whose duty it was to see that coupling was made between cars and of giving signals to start trains. He was held to be a superintendent.

In *McBride v. New York Tunnel Company* (101 App. Div. 448, 92 Supp. 282), the negligence charged was of one Martin, who represented defendant in directing drillers where they should drill for inserting explosives. He directed the preparation of blasting and had immediate and general superintendence of the prosecution of the work in a heading, having general direction and control with authority to discharge men in this work. He was held to be a superintendent.

In *Randall v. Holbrook Contracting Company* (95

6. *Eaves v. Atlantic Novelty Mfg. Co.*, 176 Mass. 369; *Knight v. Overman Wheel Co.*, 174 Mass. 455; *Brady v. Norcross*, 174 Mass. 442; *Trimble v. Whitin Machine Co.*, 172 Mass. 150; *Cunningham v. Lynn & Boston S. R. Co.*, 170 Mass. 298; *O'Brien v. Rideout*, 161 Mass. 170; *Burns v. Washburn*, 160 Mass. 457; *Roseback v. Aetna Mills*, 158 Mass. 379; *Cashman v. Chase*, 156 Mass. 342; *Shaffers v. Gen. S. N. Co.*, 10 Q. B. D. 356.

App. Div. 336, 88 Sup. 681), the negligence charged was of one Domenico who was known as foreman on the work and who had given orders in the prosecution of the work. He was held to be a superintendent.

In *Braunberg v. Solomon* (102 App. Div. 330, 92 Supp. 506), the person charged with negligence was an ordinary foreman who had and exercised the power of directing employees in their work. He was held to be a superintendent. (See, also, *Carlson v. United Eng. & Con. Co.,* 113 App. Div. 371, 98 Sup. 1036.)

In *Mahoney v. N. Y. & N. E. R. R. Co.,* 160 Mass. 573, the person upon whose superintendence the defendant's liability depended was a section foreman in the employ of a railroad corporation, having charge and superintendence over a gang of five men, his duty being to take receipts, check freight into cars, see that it was loaded into the right cars, and under his direction the five men were working all the time in handling freight. This was held sufficient to authorize a finding that his principal duty was that of superintendence. In *Riou v. Rockport Granite Co.,* 171 Mass. 162, defendant's foreman was called as a witness by plaintiff and testified, in answer to questions put to him, that it took most of his time telling the men what to do and giving them work, and in reply to the question: "During the whole day did you keep run of the men and keep them at work and tell them what to do and what not to do?" he answered, "Yes." This was held sufficient evidence that his principal duty was superintendence.

In *Prendible v. Conn. Riv. Mfg. Co.,* 160 Mass. 131, an action was brought for injuries occasioned by the falling of a staging, which was erected in the yard of defendant's saw mill by the side of wood pile, for the purpose of enabling the workmen to pile the wood

higher. There was evidence that the staging was built by one Campbell, who was in the defendant's employ, assisted by a number of the "piling gang;" that no one gave any orders to this gang besides Campbell, who was its foreman; 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 men at work whenever he saw fit and hired workmen at different times on their application to him for work. Two of defendant's witnesses also testified that Campbell had general authority over the gang of workmen. The court held that a jury would be warranted in finding that Campbell's principal duty was superintendence. In *McCabe v. Shields,* 175 Mass. 438, the court permitted proof to be introduced of acts of an alleged superintendent in putting people out of the shop and his language at the time he did it, as bearing upon his conduct in the shop in matters of control. Similar statements of an alleged superintendent have been permitted as proof of his superintendence in *Osborne v. Jackson,* 11 Q. B. D. 619. In *Gardner v. N. E. Tele. Co.,* 170 Mass. 156, the foreman, known as such, and employed by the defendant, sometimes did work of the same character as the other employees. They received their orders from him alone, and he employed and discharged men for the defendant. In field work and elsewhere he had entire charge of the men, and his wages were $20 per month more than those of the plaintiff. It was held that the jury could determine from these facts that he was acting as superintendent. In *O'Brien v. Look,* 171 Mass. 36, there was evidence that the foreman employed and discharged men; that he had seventeen men to whom he gave orders as to the time in

which to begin and quit work and as to the manner of its performance; and also that he received higher wages than the others because he was boss or foreman. This was sufficient evidence of superintendence. In *Davis v. N. Y., etc., R. R. Co.,* 159 Mass. 532, the foreman of a gang of laborers, engaged in track repairing, not at work himself, but looking on and seeing that the work was done, and who was there among other purposes to warn the section men of the approach of the trains, was held to be a person entrusted with superintendence, distinguishing *Shepard v. B. & M. R. Co.,* 158 Mass. 174, which held without qualification that a section foreman was not a superintendent for whose negligence the railroad should answer when the injuries were occasioned by the negligent movement of a hand car on which a gang of workmen was riding. (See, also, *Murphy v. N. Y., N. H. & H. Ry. Co.,* 187 Mass. 18.)

In *Malcolm v. Fuller,* 152 Mass. 160, the action was for injuries received by the employee of a quarryman, claimed to have been received from the negligence of a superintendent named Stewart. Plaintiff's evidence showed that Stewart, while he assisted in the various manual labors of blasting, such as striking the drill and sinking and loading the hole in the rock, getting the powder out of the powder house and discharging the blasts, was the only one at the quarry in general charge of the work, being most of his time occupied in superintending men; that he put them to work and told them to leave off when the time came, and they got their orders from him alone; that he looked about to see who was working, and, if there was a man lacking anywhere would supply his place; that in particular he saw to it that the cutters of paving stones had plenty of stock

with which to work. This, with other evidence, was held sufficient evidence of superintendence. In *Reynolds v. Barnard,* 168 Mass. 226 (1897), it was shown that defendant's son was foreman of the job on which the accident occurred, and that he had charge of it. The majority of the court held that this was enough to justify plaintiff in his contention that it was a question for the jury as to whether the principal duty of this foreman was not superintendence, notwithstanding the fact that this foreman did manual labor and was engaged in laying slate on another section of the roof at the time of the accident.

In *Geloneck v. Dean Steam Pump Co.,* 165 Mass. 202, the negligence complained of was of one Ryan. Plaintiff was injured while working in defendant's yard, engaged in loading and unloading pumps for transportation. The testimony showed that Ryan had charge of the yard, loading and unloading, and in responses to the question as to whether or not Ryan used to work with his hands, plaintiff answered, "Just telling the people to do their work; just taking charge of them." Ryan himself said that he was engaged principally in loading and unloading and had been yard foreman for eight or ten years, and that he worked principally with his hands. The question was one for the jury.

In *Carroll v. Willcutt,* 163 Mass. 221, the negligence complained of was of one George Grant. Plaintiff testified, "George Grant had charge of the work there; he gave his orders to every man in the place; I got my orders from him; I didn't notice any difference when Willcutt (the defendant) was there; he (Grant) acted all the time as though he were boss there, foreman; he took the plans and read them and laid out the work for them." The question was one for the jury. In

Mahoney v. Bay State Pink Granite Co., 184 Mass. 287, the person claimed to be a superintendent was one who gave directions to 22 men employed in a stone quarry, who marked with chalk the places where drilling was to be done and he did no drilling himself. It was held that he was a superintendent.

Sec. 29. Superintendence must be of men and not of things.

The word superintendence itself, in its ordinary meaning, of course implies direction, and directions can only be given to persons. It has accordingly been held that persons whose sole or principal duty is the control or operation of machinery, or who have the superintendence of machinery rather than of the individuals who operate it, are not within the meaning of the act. The only superintendence covered by the act is the superintendence exercised over employees.[7] It has been held accordingly that the employer is not liable for the negligence of a person whose duty is the operation of a piece of machinery, though in so doing he necessarily exercises some control over other employees who are affected by its movements. (*Farnham v. New Bank Coal Co.* (1896), 23 Sc. Sess. Cas., 4th Series, 722.) In this case a recovery was denied where the negligence was that of the engineer of a hoisting cage in a mine. Nor is the employer liable for a person in charge of a lever by which a steam hammer is

7. See *Dantzley v. DeBardeleben C. & I. Co.*, 101 Ala. 309; *Cashman v. Chase*, 156 Mass. 342; *Shaffers v. General Steam Navigation Co.*, 10 Q. B. D. 356; *Kansas City M. & B. Ry. Co. v. Burton*, 97 Ala. 240; *Culver v. Ala. M. Ry. Co.*, 108 Ala. 330; *Birmingham Ry. & E. Co. v. Baylor*, 101 Ala. 488; *Roseback v. Aetna Mills*, 158 Mass. 379.

worked and whose business it is to let fall the hammer. (*Hannan v. Hudson,* 7 W. N. 105.) Nor for the negligence of 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 directions when the chain fall is to be lowered or hoisted. (*Shaffers v. General Steam Nav. Co.* (1883), L. R. 10 Q. B. Div. 356. Nor for the negligence of a banksman engaged in loading a barge, whose duty it is to give signals to the driver of the crane when to raise or lower the bucket. (*Claxton v. Mowlen* (1888), 4 Times L. R. 756.)

Nor is an employee whose usual work it is to operate a machine made a vice-principal by the fact that it is his business when the machine gets out of order to notify the employee who does the repairs to put it in order. (*Roseback v. Aetna Mills* (1893), 158 Mass. 379.)

Applying this principle that the superintendence must be directed to the superintendence of persons, it was held in *Sullivan v. Thorndyke Co.,* 175 Mass. 41, that an instruction to the jury was correct, when they were told that if the person, whom it was claimed was a superintendent, 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 superintendence; but if the delinquent merely pointed out where the goods were to go, that would not be superintendence.

Sec. 30. Manual labor to disprove superintendence.

Ordinarily the fact that the alleged superintendent is engaged in manual labor and the portion of time ordinarily spent by him in manual labor, is important in determining the question whether he was acting as

superintendent as his sole or principal duty. (*Hughes v. Russell,* 104 App. Div. 144, 93 Sup. 307; *McConnell v. Morse Iron Works & Dry Dock Co.,* 187, N. Y. 341); *McLaughlin v. Interurban Street Railway Co.,* 101 App. Div. 134, 91 Supp. 83; *Abrahamson v. General Supply & Construction Co.,* 112 App. Div. 318.) (See sec. 31, *post.*) The fact of manual labor, however, is not conclusive of the question as to whether his principal duty is that of superintendence. "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." *Kellard v. Rooke,* L. R., 19 Q. B. Div. 585; (*Crowley v. Cutting,* 165 Mass. 436; *Malcolm v. Fuller,* 152 Mass. 160; *Reynolds v. Barnard,* 168 Mass. 226; *Gardner v. New England Teleph. & Teleg. Co.,* 170 Mass. 156.) As the court says in *Canney v. Walkeine,* 51 C. C. A. 63, 113 Fed. 66, 58 L. R. A. 33: "The result of these decisions undoubtedly establishes as a general rule what is restated in *Reynolds v. Barnard,* 168 Mass. 226, that when an employee works with his hands the greater portion of the time, he cannot superintend, within the purview of the statute; but they do not compel us to the conclusion that this rule is absolute, and to be applied without qualification under exceptional circumstances. When, as said in what we have already quoted from *Gardner v. New England Telephone & Telegraph Co.,* the alleged superintendent is only 'a mere laborer in charge of the gang,' this general rule might well be applied, if not as a rule of law, at least as a rule of presumption of fact so forcible that the court would not allow a jury to disregard it. To go further, however,

than to state it ordinarily as illustrative for the guidance of juries, would give an artificial construction to a statute which seems simple, plain on its face, and reasonable in its purpose and it would also hold that the court could assume to know that a man cannot work constantly with his hands, and yet exercise superintendence in such manner that that is his principal duty. Such an assumption would be so forced as to exclude the possibility, which the common mind knows to exist,— that not only may an employee be engaged at all times in labor with his hands, and yet exercise superintendence under such circumstances that that is his principal duty, but that also he may be so engaged under such peculiar circumstances that quite continuous laboring with his hands is a necessary part of the duty of superintendence." In *Geloneck v. Dean Steam Pump Co.*, 165 Mass. 202 (see page 73), it was shown that the foreman in defendant's yard had time to work with his hands and did so work. The court held, notwithstanding this fact, that the question of superintendence was one for the jury. In *Knight v. Overman Wheel Co.*, 174 Mass. 455, there was a conflict of evidence, one side offering proof that the alleged superintendent's work was manual labor, and the other side showed that he worked very little and was principally employed in directing the men, and the question was held to be one for the jury. (See, also, *McPhee v. Scully*, 163 Mass. 216; *Mahoney v. N. Y. & N. E. R. R. Co.*, 160 Mass. 573; *Dean v. Smith*, 165 Mass. 569.)

Sec. 31. Insufficient proof of superintendence.

Mere incidental authority to exercise some minor authority over others possessed by one whose general work is that of an ordinary co-employee is not enough to

charge the employer. The work of superintendence must be the "sole or principal duty" of the person to make him a superintendent under the act. Thus in *McConnell v. Morse Iron Works & Dry Dock Co.*, decided by the Court of Appeals in 187 N. Y. 341, the person who was charged to have been a superintendent was a steam-fitter, for whose error in judgment resulting in the death of his helper, defendant is sued. The court said:

"It will be observed that the statute refers to the individual whom the employer has intrusted with and whose sole and (sic) principal duty is that of exercising superintendence. Were such the duties of Wilson? He was employed by the defendant as a steam-fitter or plumber and had been occupied as such during the entire time that he had been in the defendant's service. As he testified, he had no power to hire or discharge his helper, but that McConnell was employed by the defendant and was directed to serve as Wilson's helper. It thus appears that they were laborers engaged together doing the same class of work. Wilson, as the mechanic fitting or repairing pipes, and McConnell assisting him in the work. While it is true that it was McConnell's duty to obey Wilson's directions with reference to handing him tools and waiting upon him in various ways which were necessary in the conduct of the work, we are clearly of the opinion that the relation between them was merely that of co-employees and that Wilson did not occupy the position of and had never been intrusted with the powers of superintendent within the meaning of the statute to which we have referred. Wilson was employed as a steam-fitter or plumber; his duties pertained to that class of work. McConnell was employed to help and assist him, nothing

more. The case, therefore, is brought within the rule so often recognized and applied in this court, to the effect that where the master has upon hand at the place where the work is performed sufficient suitable material or appliances for the doing of the work, he is not liable for injuries resulting to a workman by reason of an error in judgment of the foreman or of a co-employee in selecting defective material or appliance. (*Vogel v. Am. Bridge Co.,* 180 N. Y. 373; *Kimmer v. Webber,* 151 N. Y. 417, and cases cited.)"

In *Abrahamson v. General Supply & Construction Co.* (112 App. Div. 318), the person charged with negligence, as an alleged superintendent, was the leader of a gang of six men not selected by the employer or entrusted by the employer with superintendence, but chosen "by a process of natural selection from the gang itself" and known in the business as a "pusher." He was engaged in manual labor the same as the others. He was not a superintendent of construction and had no voice in determining anything in relation to the general work, but was simply pointed out as the leader of the gang for the purpose of securing greater efficiency in the detail of the work assigned to the particular gang. His position differed from that of the other employees in that he had received a slight advance in pay and it was his business to keep things moving. There was also evidence that the work from which the accident arose was being done under the superintendence of another person who was actually present and in charge of the work at the time of the accident. The court held that the pusher was not a superintendent within the meaning of the act.

In *Hughes v. Russell,* 104 App. Div. 144, the person charged with negligence was described as a foreman.

There was no other proof that he was a superintendent except the inference to be drawn from the name applied to him. The court held that this was insufficient in view of the fact that the foreman's own testimony showed that he was a stamper engaged in employment on a machine near the place of the accident, and that there was another superintendent absent from the factory at the time, and that there was no proof that in his absence his functions had devolved upon this foreman.

In *McLaughlin v. Interurban Street Railway Co.*, 101 App. Div. 134, 91 Supp. 83, the person charged with negligence was an ordinary conductor on a street car who had directed another employee of the railroad who was riding on the car, to stand on the front platform, where he was thrown off by a violent jerk of the car. The court held that this conductor was not a superintendent, saying:

"It is true that in a general sense the duties both of a car conductor and a car driver require the exercise of superintendence to the extent that intelligent watchfulness is essential to the careful performance of their work, but the superintendence referred to in the statute is something more than this, and is intended to relate to that class of servants who are generally known as superintendents, and whose sole or principal duty is to oversee the work of others."

In *Quinlan v. Lackawanna Steel Co.*, 107 App. Div. 176, the person charged with negligence was one Knapp, who, among other duties, had charge of the operation of a crane in defendant's employ. The testimony with reference to Knapp's position was to the effect that plaintiff obeyed his instructions in operating the crane; that there was a general superintendent whom plaintiff

never saw give any orders to any of the men connected with the gang on which he was at work, but that this general superintendent gave his instructions to Knapp and Knapp gave the orders to the men, and Knapp directed plaintiff's movements on the day in question. Knapp occupied a position on the floor and when the crane was ready for operation, he gave the signal to plaintiff. The court held that Knapp was not a superintendent within the meaning of the act. The decision is an extremely doubtful one and was rendered by a divided court, two justices writing a dissenting opinion. The court says:

"It would seem that the position of Knapp was that of a foreman or man employed to give directions for the efficient carrying out of the orders of the superintendent, Greenough. It is not simply the power to instruct or even to direct in a particular manner that constitutes superintendence within the meaning of the law, but it must be such a supervision and charge as gives power of direction, and it must be with authority to direct the manner and means of prosecuting the work in charge. It is not sufficient to show that a man directed another as to the time when it was necessary to operate a crane or that he even directed a number of men with reference to the unimportant details of their work; but the proof should be further, it should show that the man was vested with some power of discretion to exercise authority beyond the narrow limits of one acting under a special direction."

This decision if followed robs the Liability Act of the greater part of its remedial effect. So far as it finds as a matter of law that this man Knapp was not a superintendent, it does so in the face of facts which clearly point in the other direction. Knapp had charge of forty

or fifty men. The testimony fails to show that he did anything else but direct them. He was the only person from whom plaintiff had ever received orders. If he was not a person "entrusted with and exercising superintendence" the nature of his occupation would indeed be hard to define. The limitation upon the meaning of superintendence which the court endeavors to read into the act in the quotation just cited is justified neither by the wording of the act itself nor constructions contained in any decisions in either our own State or in other States in which similar acts exist. (See section 26, *supra.*) It is undoubtedly true that a man is not a superintendent whose occupation is to *repeat* slavishly the directions given through him by some one else, using no discretion himself, but simply affording the vocal channel for another's thoughts. But where, though subject to the directions of a superior from whom he receives his own general instructions, he is engaged as his sole occupation in the work of directing forty or fifty men, even "with reference to unimportant details of their work," then he is a person "entrusted with and exercising superintendence" whose sole or principal duty is that of superintendence within the meaning of the act. The act does not require that such a superintendent (in order to retain an identity as such in law which he clearly has in fact) should have broad powers or that his delegated authority should cover what the court construes "important matters," and it does not say that an injured employee who has been hurt by the negligence of such a person has the burden of proof to show that the superintendent "was vested with some power of discretion to exercise authority beyond the narrow limits of one acting under a special direction."

In *Adasken v. Gilbert,* 165 Mass. 443, it was held that a workman who was employed on a job as a common painter, receiving the same pay as his two fellow servants and doing the same work, is not one entrusted with and exercising superintendence, notwithstanding the fact that the injury complained of results from the negligent direction given by him. In *O'Brien v. Rideout,* 161 Mass. 170, the proof showed that the foreman whose negligence was claimed to have caused the injury was kept at work mainly in getting out lumber, piling it up, arranging it and operating saws in defendant's mill. It was held there was insufficient evidence to justify a finding that he was principally engaged in superintendence though the injury resulted from an act of superintendence. In *O'Neil v. O'Leary,* 164 Mass. 387, the evidence showed that a person employed as superintendent of the blasting of a ledge of rock, worked with his own hands in attending to the fire under the steam boilers and in sharpening tools, in charging the drill holes and cleaning them out, and other acts of manual labor which occupied most of his time. The court says: "The words 'sole or principal duty of superintendence' must have a reasonable interpretation given to them, and a majority of the court is of the opinion that it could not be said of a person who works at manual labor to the extent shown in this case that his principal duty is that of superintendence."

In *Cashman v. Chase,* 156 Mass. 342, the person whose superintendence was in question was an engineer in charge of a steam engine used for raising and lowering a fall on a lighter between a vessel and the wharf. The engineer employed the men in the first instance and set them to work. He went into the hold of the

vessel on several occasions and showed them how to adjust the rope around bundles of lathes which were being taken out of the hold; he discharged and employed men. The engineer did no manual labor except the running of the engine. The court says: "Upon the facts it might be competent to find that the engineer was to some extent a superintendent. The employment and discharge of the workmen, setting them at work and showing them how to do the work are acts consistent with superintendence, 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 him from others, show that neither his sole or principal duty was that of superintendence." In *Dowd v. B. & A. R. R. Co.*, 162 Mass. 185, the person whose negligence occasioned the injury, and who was claimed to have been acting as superintendent at the time, worked with his hands and drew the same wages as the plaintiff and other workmen. He gave directions in the absence of the general superintendent. A verdict was directed for the defendant as the evidence did not justify the finding that his sole or principal duty was that of superintendence. In *Roseback v. Aetna Mills*, 158 Mass. 379, it was held that an ordinary weaver, whose usual work is that of an operator of a loom, is not a person entrusted with and exercising superintendence merely because it was also his duty when his loom got out of order to notify the loom fixer to repair it.

Sec. 32. The negligent act must be an act of superintendence.

"Liability for negligence in superintending is what is created by the statute and not for the negligent act of the

superintendent in no manner connected with his duties as such." (*Bannon v. N. Y. Central, etc., Ry. Co.*, 112 A. D. 552, 98 Sup. 770, citing *Quinlan v. Lackawanna Steel Co.*, 67 A. D. 176, 94 Sup. 942. In *Cashman v. Chase*, 156 Mass. 342, the following rule is laid down for determining whether or not the act is one of superintendence: "Unless the act itself is one of direction or other oversight tending to control others and to vary their situations or actions because of his direction, it cannot fairly be said to be one in the doing of which the person entrusted with superintendence is in the exercise of superintendence. For the negligence of such a person in doing the mere act of an ordinary workman in which there is no exercise of superintendence the employer is not made responsible by the statute."

The statute uses the words "by reason of the negligence of any person in the service of the employer entrusted with *and exercising superintendence*. It is well settled on authority that no recovery can be had for negligent acts of persons, whose general duties are those of superintendence, unless the act itself be an act of superintendence and a negligent act as well.

"To hold a master or employer liable under this provision, the negligence must be that of some agent or employee who is in the exercise of superintendence, and to whose negligence as such superintendent the disaster is traced." (*City Council of Sheffield v. Harris*, 101 Ala. 564, 569 and 570.) In *Shaffers v. Gen. S. N. Co.*, 10 Q. B. D. 356, the action was brought to recover for the alleged negligence of a person having superintendence entrusted whilst in the exercise of superintendence. The plaintiff was stowing sacks of corn in the hold of a ship, the sacks being lowered by a steam crank. A guy rope was attached to the crane of the

derrick to control the movements of the crane, and this rope was in the charge of a gangway man, whose duty it was to stand at the hatchway and call out to the men when the crane of the derrick had swung around so that the sacks of corn were ready to be dropped in the hold, and he further had authority to direct the derrick by means of the guy rope, and to direct the man who was working the crane when to raise and when to lower. The actual negligence which occasioned plaintiff's injury was a neglect in failing to use the guy rope to check the swinging of the derrick.

The court of Queen's Bench held that even assuming that this gangway man was a superintendent, within the meaning of the section, that a negligent failure to use the guy rope was not a negligent act done in the exercise of superintendence, but that the accident arose from the negligence in the capacity of workman. Compare with *Carlson v. United Engineering & Contracting Co.*, 113 A. D. 37, 98 Sup. 1036, in which a direction to start a stationary engine under other circumstances was held "not like unto a direction for that purpose given in the course of its ordinary intermittent working, a mere detail of the work, but rather a direction in the course of his superintendence of its adjustment and repair." In *Joseph v. George C. Whitney Co.*, 177 Mass. 176, plaintiff was injured by the negligence of defendant's superintendent. The plaintiff had his hand between the jaws of an embossing machine, the power being turned off. Another workman had called to the superintendent for instruction, and the superintendent came and leaned over between plaintiff's machine and that of the other workman, with his back to plaintiff's machine, and accidentally touched it so as to start it up. The jaws closed and cut off the greater portion of the plaintiff's hand.

The court held that the negligence was not done in the exercise of superintendence.

"The precise place in which Meyer (the superintendent) should be while giving his directions, the way in which he should stand and sit, 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 may be regarded as a part of the act of superintendence, the fact that he was superintendent was in no way a necessary element in producing the injury, but we are of the opinion that by a true construction of the statute, the superintendence *must contribute as such,* and that when, as here, it had nothing to do with the injury, *qua* superintendent, the case is not within the act."

"The employer is not answerable for the negligence of a person entrusted with superintendence, who, at the time, and in doing the act complained of, is not exercising superintendence, but is engaged in manual labor — the duty of a common workman. The law recognizes that a common workman may have two duties— that he may be a superintendent for some purposes, and also an ordinary workman, and that, if negligent in the latter capacity, the employer is not answerable." (*Cashman v. Chase, supra.*) Other cases holding that the negligent act must in itself be an act of superintendence are given below.[8]

8. *Joseph v. George C. Whitney Co.*, 177 Mass. 176; *Malcolm v. Fuller*, 152 Mass. 160; *McCauley v. Norcross*, 155 Mass. 584; *Fitzgerald v. B. & A. R. R. Co.*, 156 Mass. 293; *Green v. Smith*, 169

A test is suggested in *Abrahamson v. General Supply & Construction Co.*, 112 App. Div. 318, for determining whether a given act was one of superintendence or of manual labor. The court says, citing *McHugh v. Manhattan Ry. Co.*, 179 N. Y. 378: "'There are many acts,' says the court in *McHugh v. Manhattan Ry. Co.*, 'the nature of which is such as to clearly establish their character, whether of ordinary labor or of superintendence, and this regardless of whether the act may be done on a particular occasion by a superintendent or by an ordinary workman,' and this we take is the real test to be applied, *whether the occasion is one demanding superintendence,* and whether the master has authorized any one to assume that relation to the work."

It is doubtful whether there is anything in the act which justifies the italicized portion of this test. The court says further in this opinion: "if the work is such that the master owed no duty of furnishing a superintendent as a part of the corps of competent fellow-servants" there is no liability. This seems also unwarranted. The test which the act itself suggests is whether or not the master has *in fact* supplied a superintendent, not whether the occasion demands one.

Sec. 33. Negligent acts of superintendence.

1. *Superintendence and manual labor.*— As the Court of Appeals has observed in *McHugh v. Manhattan Ry. Co.*, 179 N. Y. 378: "There are many acts the nature of which is such as to clearly establish their character whether of ordinary labor or of superintendence, and this regardless of whether the act may be

Mass. 485; *Douin v. Wampanoag Mills*, 172 Mass. 221; *Fleming v. Elston*, 171 Mass. 187; *O'Brien v. Look*, 171 Mass. 36; *O'Keefe v. Brownell*, 156 Mass. 133; *Cunningham v. Lynn Str. Ry. Co.*, 170 Mass. 298; *Dantzler v. Bardeleben Coal Co.*, 101 Ala. 309; *Kellard v. Rooke*, 19 Q. B. D. 585; *Osborne v. Jackson*, 11 Q. B. D. 619.

done on a particular occasion by a superintendent or by an ordinary workman. On the other hand there are many acts which are indeterminate in their character and whether they are to be deemed acts of superintendence or not may depend on the manner in which the business is conducted, and the rank and position of the employee to whom the performance of these acts is entrusted." For mere acts of manual labor done in the course of the work, unconnected with any act or exercise of superintendence, the employer is not liable, though done by a superintendent. (See sec. 32.) Much difficulty is found in determining what acts are merely manual labor and what are acts of superintendence, and there are many border-line cases. This is particularly true in cases where the negligent act of superintendence is closely connected in point of time with an act of manual labor. "When one person acts both as a common laborer and a boss, and is expected to work with and as other workmen, even his words of command are not necessarily acts of superintendence." (*Hoffman v. Holt,* 186 Mass. 572; *Whittaker v. Bent,* 167 Mass. 588. Where, however, an act of manual labor by the superintendent is performed as a part of an act of superintendence, as an exercise of the judgment of the superintendent and an expression of his decision as to how or when the work shall be done, the rule is clearer. In *Meagher v. Crawford Laundry Company* (185 Mass. 586), employees, including plaintiff, were moving a heavy bar of iron over a rough floor, using a truck which was too small, with wheels only at one end, although there was a four-wheel truck in the building suitable for use in moving the bar. After the truck had become stuck in the floor the superintendent took charge and instead of sending

for the four-wheel truck, tried to lift one of the wheels of the truck himself, and in so doing made the bar lurch so as to hurt the plaintiff. The court says: "It is strongly urged by defendant that the act of the superintendent in raising the wheel was one of manual labor and not of superintendence, and that as it contributed to the injury there can be no recovery. But at the time he was actively engaged in forwarding the work. The plaintiff and his fellow servants were under his immediate supervision. He was not engaged in work with the men in a common task of manual labor. *When he had decided to make no change, but to proceed, his use of the lever was not an independent act of work with his hands, but was part of the plan or one of the conditions of his superintendence, and the moment of time taken for its performance cannot be signaled out for the purpose of saying that he was at that instant a common laborer, although immediately before and after he was clothed with the authority of his superior position.*" (Citing *O'Brien v. Look,* 171 Mass. 36; *Joseph v. George C. Whitney Co.,* 177 Mass. 176; *Roche v. Lowell Bleachery,* 181 Mass. 480. In *McBride v. New York Tunnel Company,* 101 App. Div. 448, 92 Supp. 282, affirmed in Court of Appeals without opinion, 187 N. Y. 59, the negligent act was the turning on of an electric current. It was claimed to have been turned on by a superintendent. Plaintiff's intestate was engaged as a driller and in blasting for defendant. The method used was to drill holes, insert explosives and connect them with electric wires. When connected the men were directed to pass out to a place of safety and it was intestate's duty to apply the electric current which exploded the blast. The superintendent, after having been informed that

four men were still in the heading near the blast, and after having himself hastily looked for these men without seeing them, passed himself to the switchboard and turned on the switch, setting off the blast. The act so done was not a part of the usual duty of the superintendent, but was the duty of the deceased, and the court below had held that the setting off of the blast in this manner was not an act of superintendence, and that for such reason the case was not within the act. This was reversed on appeal. The Appellate Division says: "Martin had charge of the prosecution of the work, the preparation and firing of the blast and the removal of the men to a place of safety. In the discharge of these duties he was acting as superintendent and within the terms of the act liability is imposed on the master for his neglect."

In *McHugh v. Manhattan Railway Co.* (179 N. Y. 378), cited in the *McBride case,* an employee of defendant, whose business it was to couple the engine to a train where the same was made up, was killed by the starting of the train by the direction of a train dispatcher while he was engaged in making a coupling. The decision of the case turned upon whether the starting of the train was an act of superintendence or a mere detail of the work. One Flanagan had been substituted to perform the duties of the regular train dispatcher at the time the accident occurred. The Court of Appeals says: "In the present case, under the defendant's rules already quoted, and the ordinary conduct of its business, the making up of trains and their dispatch from the yard were functions imposed on the superintendent or train dispatcher as a part of his duty as such. Both were duties or functions of superintendence. The failure of Flanagan, if there were such, was

in his failure to properly supervise the preparation of the train, and in failing to ascertain that the engine had been connected with the cars and that the employee engaged in that labor had withdrawn to a place of safety."

A case in conflict with *McBride v. New York Tunnel Company, supra,* which was decided in the First Department, is *Quinlan v. Lackawanna Steel Company* (107 App. Div. 176, 94 Sup. 942), decided in the Fourth Department. The negligent act in question in this case was in turning on an electric current, which is claimed to have been done by a superintendent, one Knapp. The court says: "In this case the evidence does not show that Knapp turned on the current, yet assuming that the evidence would warrant a deduction that the current was turned on by Knapp, it was clearly not an act of superintendence at that time. . . . In the case under consideration, under the evidence it was Knapp's duty to maintain his position on the floor. He was called by plaintiff the floor boss, and directed the plaintiff when to operate the crane. If he exceeded his duty in that regard and negligently turned on the current, it was not an act of superintendence but an act of interference for which the master was not liable."

The testimony clearly shows that Knapp was a superintendent within the meaning of the act, though the court held that he was not a superintendent. The real question in the case, however, was whether or not the act of turning on the current, if done by this superintendent, was an act of superintendence or one of manual labor. The decision that it was not an act of superintendence is reached by a majority of the court, but with two dissenting opinions. The prevailing opinion sought to sustain its findings on the authority of

Cashman v. Chase (156 Mass. 342), and the dissenting judges cited in support of their dissent *Roche v. Lowell Bleachery Co.* (181 Mass. 480). The reasoning by which the court reaches its conclusion very seriously limits the act in its scope and substantially nullifies the superintendence clause. The dissenting opinions are in accord with the Massachusetts cases.

A very recent case in Massachusetts, for example, supports the reasoning of *McBride v. New York Tunnel Company* (101 App. Div. 448, 92 Supp. 282, *supra*), and indicates the line of distinction between manual labor and superintendence not recognized in the *Quinlan case* and which is to be followed in construing the superintendence clause of the act. In this case (*McPhee against New England Structural Company,* 188 Mass. 141), a person in charge of a gang (who also took part in working and in the running of an engine used in hoisting), negligently started the engine after sending workmen upon a truss and before they had cleared it from the wall of a brick building against which it was jammed. The machinery was started before the truss was clear of the building and a rope broke causing the death of plaintiff's intestate. The court held that the superintendent's act *in deciding to start the engine* might be found to be an act of superintendence, although he used manual labor in setting it in motion. The court says: "The negligence, if there was negligence, in starting the engine consisted *in causing the engine to be started at all under the circumstances then existing,* namely, when the truss was jammed against the wall and when something had to give way if the engine was set in motion then. This is not a case when it was proper to start the engine and there was negligence in the way in which the starting

of the engine was carried in effect. In the former case the decision that the engine was to be started is an act of superintendence and is not the less so because the manual work of setting the engine in motion is done by the superintendent. The cases of *O'Brien v. Look* (171 Mass. 30); *Roche v. Lowell Bleachery Co.* (181 Mass. 480); *Meagher v. Crawford Laundry Co.* (187 Mass. 580), are cases applying to this class. In the latter case the act of negligence is the way the engine is set in motion, *it being proper to set it in motion at the time.* That is not an act of superintendence, but is an act of a fellow servant, and for that the employer is not liable at common law or under the Liability Act. The cases of *Cashman v. Chase* (156 Mass. 342); *Riou v. Rockport Granite Co.* (171 Mass. 162); *Flynn v. Boston Electric Light Co.* (171 Mass. 395); *Joseph v. Whitney Co.* (177 Mass. 176); *Hoffman v. Holt* (186 Mass. 572), are in this class. It is said in *Whittaker v. Bent* (167 Mass. 588), that when the superintendent in that case said 'go ahead,' these words were said in the course of his work as a fellow servant, not as a direction given by him as a superintendent, and for that reason that case comes within this class." See, also, *Britton v. West End Street R. R. Co.* (168 Mass. 10).

This distinction would apparently require a different conclusion from that reached by the Fourth Department, Appellate Division, both in *Quinlan v. Lackawanna Steel Co.* (107 App. Div. 176), and *Guilmartin v. Solvay Process Co.* (101 Supp. 122). It should be noted, however, in considering these Massachusetts cases, that the Court of Appeals has said in *McHugh v. Manhattan Ry. Co.* (179 N. Y. 378): "There may not be entire harmony between the various Massachusetts decisions that have arisen under this legislation. Pos-

sibly they give more weight to the consideration of the general character of the foreman's or superintendent's duties and less to the character of the particular act in which the misconduct occurs than we would be disposed to accord to these factors."

Another test for determining whether a given act done by a superintendent is an act of superintendence or of manual labor is suggested in *Osborne v. Jackson*, 11 Q. B. D. 619. In that case plaintiff, who was a bricklayer in defendant's employ, was at work near a shoring where scaffolding was being taken down by other workmen. Defendant's foreman personally handed a plank in this scaffolding to another workman and called to him to take it. The laborer took the end of it, but was so far off that he could not hold the plank, and the foreman letting go of his end of the plank, it slipped and knocked down the shoring, which fell upon and injured plaintiff. It seems extremely doubtful as to whether this foreman was not engaged in an act of manual labor rather than of superintendence, but the court held that in directing the laborer to take the plank when he could not do so safely, the foreman thrust upon him a duty which he could not safely perform. (Compare with *Flet v. Hunter Arms Co.*, 74 App. Div. 572, 77 Supp. 752.) The court says: "If Thomas (the foreman) had directed another to do what he did himself, he would surely have been negligent in the exercise of superintendence." In *Malcolm v. Fuller*, 152 Mass. 160, the facts shown were these: A quarryman in general charge of a quarry, finding that wadding still remained in a hole which he assisted in drilling and loading with powder and had attempted to discharge, negligently assumed that the charge had exploded and passed off through another hole by a con-

necting crevice in the rock, and deciding to drill out the wadding, directed a fellow servant to hold the drill while he did the striking, whereupon the charge exploded, injuring the workman. The defendant insisted that, assuming that the foreman was a general superintendent, that, notwithstanding, in the act that caused the plaintiff's injury, he was acting as a servant and was not exercising superintendence. "The evidence shows that Stewart (the foreman) had been engaged in manual labor in drilling the holes for blasting, and that his act in striking the drill, held by the plaintiff, was the immediate occasion of the explosion which caused the injury; that the plaintiff does not rely upon any evidence of negligence of Stewart in the manner of drilling the holes or of striking the drill. The negligence which the evidence tended to prove is the manner of clearing out the hole in which the tamping remained after the discharge. If Stewart was superintendent, he was exercising superintendence in determining the manner in which the hole should be cleared out and in directing the plaintiff to assist, and himself assisting in drilling it out. In that respect it is immaterial whether he himself struck the drill or ordered another person to do it."

In *Carlson v. United Engineering & Contracting Co.*, 113 App. Div. 371, 98 Sup. 1036, defendant used a stationary engine for hoisting in construction work. The engine was stopped for adjustment of a wire rope running over the drums. The plaintiff, when engaged in that work, placed his foot in a place dangerous if the machinery were moving. The superintendent gave the order to start the engine without warning and before he saw that the plaintiff was in a place of safety. "The direction to start the

engine after the stop of two hours for the repairs and adjustment under his charge was not like unto a direction for that purpose given in the course of its ordinary intermittent working, a mere detail of the work, but rather a direction in the course of his superintendence of its adjustment and repairs. It was his duty in the course of such superintendence before he directed that the engine should be started to exercise reasonable care to see that the workmen engaged in the labor of repair or adjustment were in places of safety." Citing *McBride v. N. Y. Tunnel Co.,* 101 A. D. 448; 92 Sup. 282; *McHugh v. Manhattan Ry. Co.,* 179 N. Y. 378.

In *Roche v. Lowell Bleachery,* 181 Mass. 480, plaintiff was a workman in defendant's bleachery, and sued for injuries received while tightening certain cylinders, called binders, connected with a washing machine operated by the plaintiff, the injuries being occasioned by reason of the negligence of one Royer, the defendant's superintendent, in starting plaintiff's machine. In order to tighten the machine plaintiff had to stop it and go up to another floor, out of sight of it. At the time of the accident the binders had become loose and the plaintiff was tightening them, having first stopped his machine, when the superintendent came along and personally set the machine running, by reason of which the plaintiff was caught in the shafting above. The court held that a recovery by the plaintiff was proper on the theory that it was an act of superintendence which caused the injury.

In *Greenstein v. Chick,* 187 Mass. 157, the superintendent, one Pratt, told the plaintiff that he would go to the enginee room and have the power turned off so that a belt could be removed, and told the plaintiff to then go on a platform and unwind the belt. A few minutes

later the machinery stopped and as the workman began to unwind the belt the machinery started, causing the injury. The court said: "The accident was of a kind easily preventable by the exercise of due care and superintendence on the part of Pratt. He had put plaintiff in a dangerous place to work, if the power started, and it was his duty to look after and see that the machinery did not start. Citing *Scullane v. Kellogg,* 169 Mass. 544; *Davis v. N. Y., N. H. & H. Ry. Co.,* 159 Mass. 532; *O'Brien v. West End St. Ry. Co.,* 173 Mass. 105.

2. *Failure to direct or warn.*—It is not negligent in the superintendent not to anticipate that an experienced servant will fail to use ordinary precautions where, if such precautions are taken, there is no danger. (*Buston v. Harvard Brewing Co.,* 183 Mass. 438.) In *Faith v. New York Central & H. R. R. R. Co.,* 109 App. Div. 222, 95 Sup. 774, affirmed, no opinion, 185 N. Y. 556, plaintiff's intestate was killed while working under one Norris, a foreman, who gave instructions in a repair shop of defendant. Deceased was killed while repairing a locomotive; the foreman stood by directing the work and allowed all the bolts of a locomotive boiler to be cut away so that the boiler fell upon deceased, a workman, who was trying to attach the tackle for which he had been sent during the cutting of the bolts. Norris was superintendent in the absence of the general superintendent, and this was held to be a negligent failure to warn deceased, for which defendant was liable. In *Davis v. N. Y. & H. R. R. Co.,* 159 Mass. 532, the plaintiff was injured by reason of his foreman failing to give warning of the approach of a train. Plaintiff was employed by the railroad company as one of a gang of workmen engaged in repairing the track. The nature

of his work required him to bend over with his back in the opposite direction from that in which the train was coming. The court held that this employee had the right to rely upon the fact that it was the duty of the foreman of the gang to warn him of the approach of the train, and if, by reason of the foreman's neglect to give him such warning, he was struck by the train and injured, he could maintain an action against the corporation for his injury, alleging that the foreman, being the person entrusted with and exercising superintendence, negligently failed to give notice of the train's approach. (Compare with New York common law rule in *McCosker v. Long Island R. Co.*, 84 N. Y. 77.)

In *McCoy v. Inhabitants of Westbury,* 172 Mass. 504, plaintiff was injured whilst engaged in digging a sewer trench by reason of the bank, upon which defendant's superintendent was standing, and at a place where there was a crack in the earth, falling upon him. The superintendent, who had general control of the whole work of digging the trench, walked along the bank and stopped to look down at the workmen. On these facts the jury was justified in holding that the superintendent was exercising oversight of the work, and, therefore, engaged in an act of superintendence; the jury was also entitled to consider whether or not it was negligent for the superintendent to stand where he did without giving any warning to the plaintiff. (See, also, *Cole v. Lawrence Mfg. Co.,* 178 Mass. 295.)

In *Jarvis v. Coes' Wrench Co.,* 177 Mass. 170, plaintiff was a boy fifteen years of age who was injured while sawing blocks with a circular saw. He had been doing this work for two or three days, but on the morning of the accident a block of wood, which he was sawing,

bounded back and his left hand went under the saw. He had received no warning when put to work upon the saw that wood was likely to bound back in this fashion. The danger was one well known to the defendant but not obvious to an inexperienced workman, and the court held that the jury was justified in finding it negligence for defendant's superintendent to set the plaintiff at work without instruction on this point. (See, also, *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294, to the same effect.)

In *Grimaldi v. Lane*, 177 Mass. 565, plaintiff was a workman in defendant's quarry, his employment consisting of breaking stone. He had nothing to do with the blasting and knew little about it. Plaintiff discovered a blasting hole loaded with dynamite cartridges which had failed to explode and informed defendant's superintendent, who, thereupon, ordered a workman to unload the hole, which the workman attempted to do by using an iron scraper, which was a dangerous instrument to use for that purpose. The superintendent stayed at the hole to watch the scraper for some minutes, and then left without warning the plaintiff, who was working near by, to move away. An explosion followed, caused by the use of the scraper, and plaintiff was injured. The court held that there was sufficient evidence of negligence on the part of the superintendent, and that plaintiff could not be held guilty of contributory negligence as the risk of an explosion, under the circumstances of the case, was not obvious to a man whose experience in dynamite was no more extensive than plaintiff's was shown to have been.

3. *Negligent directions or omissions.*—When the direction given by the superintendent is in itself safe and proper, the employer is not liable if the employee

injured uses an unsafe method of carrying out the order. (*Kennedy v. Merrimack Paving Co.*, 185 Mass. 442.)

In *Bellegarde v. Union Bag & Paper Co.*, 90 App. Div. 577, 86 Sup. 72, plaintiff was employed under a superintendent in the erection of a building. For the purpose of hoisting timber the superintendent erected on the floor of the upper story a "shear derrick." At the time of its erection the superintendent's attention was called to the fact that a guy rope at the front was necessary, but he declined to support the derrick in that way. As the first timber was lifted to the level of the flooring, the superintendent called the plaintiff and directed him to help in hauling it in between the legs of the derrick. As this was being done by the plaintiff in conjunction with the superintendent, the derrick was pulled up to a perpendicular position and over backwards, striking the plaintiff and injuring him. The derrick was a proper one and defendant had furnished sufficient ropes to guy it properly. The alleged negligence consisted in the failure of the superintendent to guy the derrick in front. It was held that the failure to guy the derrick was an act of superintendence and that the superintendent was guilty of negligence in not properly guying it after his attention had been called to the insufficiency of its support.

In *Di Stefeno v. Peekskill Lighting & R. R. Co.*, 107 App. Div. 293, plaintiff was engaged as a laborer in a quarry under defendant's foreman. Plaintiff knew nothing of the qualities of dynamite and did not know that there was a charge in some stone. When he first struck the stone he heard a noise like a gun shot, but was thereafter told by the foreman, who personally examined the stone, that there was no danger, and to strike at a place which he indicated. Plaintiff did as he was directed, struck the stone again and was injured

by an explosion. It was held to be a negligent direction. See, also, *Carey v. Manhattan Ry. Co.*, 101 Sup. 631.

In *Biogioni v. Eglee Bunting Co.*, 112 A. D. 338, 98 Sup. 591, plaintiff, a boy of 17, was employed by defendant in constructing a piece of railroad. A car loaded with stones and dirt was being pushed up an inclined track of this railroad, and plaintiff was one of the men so employed under the direction of one Doran, a foreman. When the car was on this incline, the whistle blew, the gang abandoned their work of pushing the car and started away. The car thus left, started back down the track, and the foreman ordered the plaintiff to take his crow bar, put it under one of the wheels and stop the car. In attempting to obey this order of the foreman, plaintiff's leg was crushed under the bar. It was held to be a negligent direction given by the foreman as an exercise of superintendence.

In *Braunberg v. Solomon,* 102 App. Div. 330, 92 Sup. 506, plaintiff was injured by obeying the direction of a foreman to use a cloth cutting machine upon a table not suited to its use. The direction was found to be negligent and the verdict sustained. In *Green v. Smith,* 169 Mass. 485, plaintiff's intestate was killed by an explosion of dynamite in a tunnel. It appeared that after a blast had been exploded in the tunnel, defendant's workmen, including the intestate and the person who was in superintendence of the work, returned down the shaft to the tunnel, carrying dynamite with them. The only survivor of the explosion testified that as soon as they reached the tunnel the superintendent told the witness to go and get the loading stick, which he did and gave to another workman near whom the superintendent was standing; that the witness saw the dynamite placed in

the holes, after which the superintendent gave them orders to go after the main wire; that the witness had gone fifteen or twenty feet when the explosion occurred, and that this was from fifteen to twenty minutes after they started down the shaft. An expert witness testified that the explosion of dynamite was caused by the rock in which the hole was drilled becoming heated by the drilling and that it was dangerous to place dynamite in a rock which was so heated, and that in his opinion the second explosion was caused by heated holes. The court says: "There was some evidence for the jury that the defendant's superintendent, whilst exercising superintendence, directed dynamite to be put into a hole while the rock was heated from the effect of a recent explosion; that under such circumstances an explosion was likely or liable to occur, and that the explosion which followed and caused the death of the plaintiff's husband was the result of negligence on the part of the superintendent in thus directing dynamite to be put in before the rock had begun to cool.

In *Berthelson v. Gabler,* 111 A. D. 142, 97 Supp. 421, plaintiff was injured by the fall of a scaffold. As originally constructed the scaffold was safe but it was rendered unsafe by the removal of a brick pier forming a portion of the building under repair and which gave some support to a joist which formed part of the scaffold. The pier was removed at the instance and by the direction of a person intrusted with superintendence. The court held that there was evidence to warrant the finding of negligence in the proof that the superintendent was present at the work after the scaffold was completed and that he personally directed the removal of the old front of the building, in doing which the center

pier, which partly supported the scaffold, had to be removed.

In *Murray v. Rivers,* 174 Mass. 46, the plaintiff was injured by the premature falling of the hammer of a pile driver. The defendant's superintendent gave the engineer in charge of the pile driver word to start the hammer before he had received word from the plaintiff, who was at work below in the crib in the ground under the pile driver, that he was ready for the hammer to fall. Plaintiff had his right hand on the end of the pile that was being driven to the ground at the time the superintendent gave the direction, and it was injured. The case was properly sent to the jury.

In *Eaves v. Atlantic Novelty Mfg. Co.,* 176 Mass. 369, plaintiff was injured by having her fingers cut off by a machine known as an "ending machine" while in defendant's employ. The negligence claimed was that a person exercising superintendence negligently ordered the plaintiff to start the machine when he had reason to know that it was in an unsafe condition to start, and dangerous for a person in plaintiff's position to obey the order, and while the plaintiff did not know of the danger. Plaintiff's claim was that she had been working on this machine when it became apparent that there was something the matter with it. The superintendent's attention was called to it, and he came to see what was the matter and to remedy the trouble if there was any. He got down behind the machine and ordered the plaintiff to start the machine up. She did so, and by obeying the order plaintiff was injured. A recovery for the plaintiff was sustained.

In *McCabe v. Shields,* 175 Mass. 438, defendant's foreman, while acting as superintendent, was held negli-

gent in placing a dangerous appliance in the hands of a workman with instructions to use it.

In *Keating v. Coon,* 102 App. Div. 112, 92 Sup. 474, plaintiff, a minor, was hurt on machinery. The court held on appeal that the failure to instruct this boy adequately in the use of the machinery might be construed as the negligence of the superintendent.

In *O'Brien v. Nute-Hallett Co.,* 177 Mass. 422, plaintiff was a laborer employed by defendant in delivering grain. Plaintiff and defendant's superintendent examined a bin in which plaintiff was to work. The bin was dark and the plaintiff told the superintendent that he could not see the bottom of it, whereupon the superintendent told him it was all right and to come away. He afterwards ordered plaintiff to go into the bin and go to work. Plaintiff jumped in and instead of falling on the floor or bottom of the bin, fell astride a joist and was injured. The court held that the assurance of the superintendent that the bin was all right when he and the plaintiff were examining it, coupled with the order to come away from it and the subsequent order for the plaintiff to get into the bin, justified a finding that the plaintiff was in the exercise of due care and that the superintendent was negligent in ordering the plaintiff into the bin.

In *Cavagnaro v. Clarke,* 171 Mass. 359, plaintiff was engaged in carrying bricks in a wheelbarrow from an elevator to masons at work on a building. He was returning with his empty wheelbarrow for the purpose of descending on the elevator. Smith, defendant's superintendent, was standing on the elevator as he approached it, and it was customary when a person had so placed himself on the elevator for any one

standing near to press the button nearby as a signal to lower the elevator. Plaintiff asked the foreman if he had room to put his wheelbarrow on, and he replied that there was not much room. Plaintiff then put the wheelbarrow on the elevator and had one foot on it when it started down, causing him to fall. The foreman himself testified that he jumped upon the elevator and said, "let her go;" that the workman who was standing near pressed the button and shouted "stand clear," and a minute or so later the elevator started down, and that the first he knew of the plaintiff being near was when he turned and saw him falling. The court said the order "let her go" was itself an act of direction or oversight tending to control others and to vary their situation or action because of his direction. (*Cashman v. Chase,* 156 Mass. 342.) Having given the order and seen that it was followed by the signal, the giving of which would cause the elevator to descend, it was his duty to countermand the order and to take means to prevent the elevator from going down, if, after giving the signal, he had reason to suppose that another person was about to attempt to put a wheelbarrow on the platform, and that he had such reason may be found from the plaintiff's testimony. This duty of countermanding the order which he had given, or of taking some meaus to prevent the injury to a workman whom he knew was about to put himself in danger by doing an act which would have been safe but for the fact that the elevator was about to go down, was itself a duty of superintendence, a duty to perform an act of direction or oversight tending to control others, and which his position as superintendent required him to give, and made it negligence in his work of superintendence not to give. (*McCauley v. Norcross,* 155 Mass.

584.) In *Millard v. West End Street Ry. Co.,* 173 Mass. 512, a pile of lumber had been erected for a temporary purpose in a careless manner. Defendant's superintendent directed plaintiff to go upon the lumber, and he was injured by complying with the direction. Held, to be negligence of the superintendent.

Where the direction by the superintendent is in itself proper it is not a negligent act of the superintendent not to wait and see whether the direction is properly carried out by the workman. (*White v. Unwin,* 188 Mass. 490.) In *O'Brien v. West End Ry. Co.,* 173 Mass. 105, a motorman employed by defendant was injured. Defendant's superintendent gave an order to the motorman, which placed him in a dangerous position if a car should come forward on the other track. While the motorman was in this position the superintendent gave an order to the motor man of another car on the other track, standing six or eight feet from the front end of the plaintiff's car, to come ahead. As the car did so, plaintiff, while raising himself from a stooping position, was caught between the guard rails of the two cars and injured. Held, to be a negligent direction given in the exercise of superintendence. See, also, *Carlson v. United Engineering & Construction Co.,* 113 A. D. 371, 98 Sup. 1036; *Cunningham v. Atlas Tack Co.,* 187 Mass. 57; *Martin v. Merchants and Miners Transportation Co.,* 185 Mass. 487.

O'Brien v. West End Ry. Co., 173 Mass. 105, *supra,* is similar in its facts to the case of *McCosker v. L. I. R. R. Co.,* 84 N. Y. 77. In this case McCosker, plaintiff's intestate, was employed by and under the control and supervision of a yardmaster. While engaged under the yardmaster's direction in attaching a damaged car standing on the track in the yard to another car, the yardmaster

negligently signalled to the engineer, whose train stood upon the track, to back his train, which he did without signalling or warning, and in consequence, McCosker was crushed between the cars, receiving injuries which caused his death. The New York Court of Appeals held *under the common law* that the yardmaster was fellow servant with the deceased as to all acts done in the range of their common employment, except those done in the performance of some duty which defendant owed to its servants, that the act in question was not one of that character, and that, therefore, defendant was not liable.

4. *Failure to inspect or superintend.*—The liability of the employer is not limited to what the superintendent or acting superintendent actually knows, but includes liability for what such superintendent ought to have known through proper inspection. (*Feeney v. York Mfg. Co.*, 189 Mass. 336; *Arkerson v. Dennison*, 117 Mass. 407; *Connolly v. Waltham*, 156 Mass. 368.) In *Meehan v. Atlas Safe Moving Co.*, 94 A. D. 306 (affd. 185 N. Y. 586), plaintiff's intestate was killed by the breaking of a piece of timber known as a jack used to support a safe which intestate was engaged in hoisting into the second story of a building. The timber had dry rot, to which hickory is especially susceptible, and which condition is not visible from the outside and can only be detected by boring. The court held defendant negligent, both under the Liability Act and at common law, for failure to establish a system of inspection for such defects. See, also, *Low v. Wakefield*, 185 Mass. 214; *McKee v. Tourtelotte*, 167 Mass. 69; *Solvari v. Clark*, 187 Mass. 229; *Dawson v. Lawrence Gaslight Co.*, 188 Mass. 481. It may be said, however, as to tools, that ordinarily the superintendent is under no obliga-

tion to examine them for latent defects. (*Murphy v. Marston Coal Co.*, 183 Mass. 385.) In *McCauley v. Norcross*, 155 Mass. 584, plaintiff was injured while working in the erection of a large building under defendant's superintendent. Some iron beams were placed about three and one-half feet from an opening on one of the floors and had been there for two or three days before the accident. On the day of the accident defendant's superintendent, who was on crutches and in the exercise of his duty, was walking about the floor upon which the beams were placed. In order to pass between a pile of planks and these beams he touched the beams and they swung round on other beams and fell through the hole in the floor upon the plaintiff. The court says that the fact that the superintendent himself happened to be the person who pushed the beams with his foot is of no importance, because that is not an act of superintendence. If, however, 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 through the floor, the fact that an intervening act or agency occurred which directly produced the injuries, resulting, would not necessarily exonerate the defendant 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 should be guarded against. The question is whether the moving of the beams was so likely to occur that it should have been provided against by the superintendent. This question was one properly for the jury.[9]

9. Compare with *Carroll v. Willcutt*, 163 Mass. 221.

In *Slattery v. Walker & Pratt Manufacturing Co.,* 179 Mass. 307, the court held that the proprietor of a factory was liable to an employee who was injured by the breaking of a check valve of a hoisting machine. The defendant's superintendent, without ascertaining how much pressure the valve would stand, had negligently substituted an insufficient valve for the one which came with the machine, and the injury was occasioned by the plaintiff's putting too much pressure upon it. The court held that the defendant company was liable for this act of negligence by the superintendent.

In *Reynolds v. Barnard,* 168 Mass. 220, the personal injuries were caused to plaintiff by the breaking of a temporary staging put up by workmen for their own use while slating a roof. The staging broke by being overloaded with slate, and the court held that it was a question for the jury whether a careful oversight of the work by the superintendent would not have prevented the loading of the staging with slate to such an extent as to make it dangerous.

In *Rapson v. Leighton,* 187 Mass. 432, the superintendent interfered with plasterers who were erecting a temporary staging and ordered them to use a certain ledger board to support the staging at one end, without making any inspection. The board was obviously unfit for this purpose and another employee later was injured by its giving way. This was held to be a negligent act of superintendence. See, also, *Murphy v. N. Y., N. H. & H. Ry. Co.,* 187 Mass. 18.

In *Feeney v. York Mfg. Co.,* 189 Mass. 336, the accident resulted from a defective scaffolding which the superintendent directed plaintiff to use, without having inspected it, the defect being one easily discoverable on

inspection. The court says: "By the statute the right to recovery is not limited to injuries caused to employees by defective permanent appliances, but also embraces wrongs that may arise from the negligence of the employer or of those properly representing him in directing an employee to use an unsafe appliance, even though of a temporary character. Citing *Arkerson v. Dennison,* 117 Mass. 407; *Ryan v. Tarbox,* 135 Mass. 207; *Haley v. Case,* 142 Mass. 316; *Meagher v. Crawford Laundry Co.,* 185 Mass. 586.

Sec. 34. What are not acts of superintendence.

The meaning of the words "exercising superintendence" and "whilst in the exercise of superintendence" may perhaps be made clearer by considering some of the cases in which the acts of the negligent person were held not to be acts of superintendence. As has been seen (see sec. 32, *supra*) the liability of the master for the negligence of a superintendent must be ascertained by determining whether or not the act done or omitted by the person exercising superintendence was also done in the exercise of the superintendence itself. If not, if the act itself was one which related only to the duty of an ordinary employee, liability does not attach. If, however, the act was one done in the exercise of superintendence, it is immaterial whether the act through which that superintendence was expressed was itself one of manual labor. It makes no difference in the master's liability, moreover, that the work upon which men are engaged under the direction of a superintendent is that of making a temporary appliance or a structure of a temporary nature, provided it be done under the direction of a superintendent and according to such direction. (*Berthelson v. Gabler,* 111 App. Div. 142, 97

Sup. 421; *White v. William H. Perry Co.,* 190 Mass. 99; *Feeney v. York Mfg. Co.,* 189 Mass. 336; *Murphy v. N. Y., N. H. & H. Railroad Co.,* 187 Mass. 18; *Millard v. West End Street Railway Co.,* 173 Mass. 512.)

In *Guilmartin v. Solvay Process Company* (101 Supp. 118), the plaintiff had been injured while engaged in untangling a belt under the direction of a foreman, who directed the plaintiff in assisting him. The question of negligence arose as to the foreman's failure to stop the machinery while this work was going on. The foreman directed this workman to get over on the other side of the shaft and throw the belt off, and while the plaintiff was doing it, his foot was caught by the belt, causing his injuries. The court says "that the attempt to extricate the belt without stopping the machinery was a mere detail of the work and for that reason the defendant was not liable." It cites *Foster v. International Paper Company,* 183 N. Y. 50, in support of its conclusion. The correctness of the reasoning of this case is very doubtful. There is nothing in the act which prevents the liability of the employer attaching to a negligent act or direction of a superintendent in the exercise of superintendence simply because the direction given to the employee happens to relate to a detail of the work. If such act of the superintendent was a negligent one, or such direction given in relation to this detail was an improper one under the circumstances, there is no reason which the statute affords why the employer should not be held responsible, nor is the fact that the foreman was taking part himself in this work of extricating the belt a reason why *his determination as to how that work should be done* should not be considered as the exercise of superintendence and the employer held

liable for his negligence, if it was negligence, in directing the work of repairing the difficulty to be carried on with the machinery in motion. The application of common law principles to this section of the act in this case is clearly erroneous and has been criticised elsewhere in a preceding section of this work.

In *Bannon v. N. Y. Central,* 112 App. Div. 552, 98 Supp. 770, plaintiff was engaged with others in repairing bridges on a railroad. He was a member of the bridge gang under one Mickel, an acting superintendent of defendant. On the day of the injury the bridge gang was engaged in repairing a stone culvert. The material for the repairs was placed between the tracks, near the culvert, and in the progress of the work it became necessary to build fires on such material to thaw it out so that it could be handled, and the men went to work gathering material, old ties, etc., with which to make a fire. In the course of the work Mickel, who was in charge of the men, himself attempted to draw ties across one of the tracks for the purpose of putting it on the fire, the plaintiff at the time being upon the track adjoining. Before Mickel got the tie entirely across the track an express train, going at a rate of fifty or sixty miles an hour, struck the tie in such a manner that it was thrown upon the adjoining track, struck the plaintiff and broke his leg. It was sought to hold defendant on two grounds, first because Mickel, while acting as superintendent, attempted to move the tie in front of the train and was negligent in performing such work, and second, because he failed to give warning of the approach of the train. The court says: "As to the first ground upon liability which is sought to be predicated, we think it is apparent that the act of Mickel in attempting to re-

move the tie across the track was not an act of superintendence, but was the act of a co-employee for which the defendant is not liable. Liability for negligence in superintending is what is created by the statute and not for the negligent act of a superintendent, in no manner connected with his duties as such." (Citing *Quinlan v. Lackawanna Steel Co.,* 107 App. Div. 176, 94 Sup. 942.)

As to the second ground, the failure of Mickel to give warning, the court held it was not the proximate cause of the accident as the plaintiff was in a safe place, except as it was rendered unsafe by the negligent act of Mickel.

In *Hoffman v. Holt,* 186 Mass. 572, two painters were at work on a job, one being in charge of it. One of them climbed a ladder which had no hook or cleat to hold it to the roof, and the other, who was in charge of the job and who was to hold the ladder while the other one climbed, let go of the ladder so that it slipped, throwing plaintiff from it. The court held that the act of holding the ladder was not an act of superintendence. "When one person acts as both a common laborer and a boss and is expected to work with and as the other workman, even his words of command are not necessarily acts of superintendence. (*Whittaker v. Bent,* 167 Mass. 588.) We think that the act of Donovan in attempting to hold the ladder and letting it slip was not an act of superintendence but of simple manual labor." (Citing *Riou v. Rockport Granite Co.,* 171 Mass. 162; *Flynn v. Boston Electric Light Co.,* 171 Mass. 395.)

In *Riou v. Rockport Granite Co.,* 171 Mass. 162, plaintiff was injured by the explosion of a can of blasting powder which defendant's superintendent had

put on a sliding ledge on the side of the pit in defendant's quarry above the place where the plaintiff was working. The court says: "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 (the foreman). When a person is employed to work with his hands as well as to exercise superintendence, as was the case with Labelle, 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 manual labor, which manifestly would be unjust. We think that in this case the act of fetching and putting down a can of powder must be regarded as an act of manual labor." (See, also, *Quinlan v. Lackawanna Steel Co.*, 107 App. Div. 176, and sec. 30, *supra.*)

In *Cashman v. Chase*, 156 Mass. 342, the plaintiff, while at work in the hold of a vessel, was struck by a hook swinging at the end of a fall of rope which escaped from the control of a fellow workman. The fall was raised and lowered by a steam engine placed on a lighter between the vessel and the wharf. The order to raise and lower were given by a workman in the hold to the stageman on the deck of the vessel and by him repeated to the engineer. The hook was in the hands of a workman in the hold, and it was necessary to lower the fall to enable him to attach the hook to a bundle of laths. The order to lower was correctly given to the stageman and repeated by him to the engineer, who raised the fall when he was told to lower, and the hook was thus pulled away from the workman who held

it and swung against the plaintiff. The plaintiff contended that the engineer was a person entrusted with and exercising superintendence, and whose sole and principal duty was that of superintendence, and that the act of raising the fall was an act of superintendence. After considering the question as to whether the facts in the case showed that the engineer was a superintendent, the court said that aside from this the act of improperly raising the fall was not an act of superintendence. It was evident that in operating the engine, he was doing the work of a laborer acting upon the directions of others and not directing them.

In *Cunningham v. Lynn Str. Ry. Co.,* 170 Mass. 298, the foreman of a repair shop ordered the employees under him to take a defective truck out of the shop, and, directing their movements, assisted them in so doing, and performed some of the work himself. The court held that the facts would not justify the jury in finding that while so working the foreman was exercising superintendence.

In *O'Keefe v. Brownell,* 156 Mass. 133, a truck consisting of a plank about four feet long and a foot or more wide was used by defendant in his business. Across one surface of this truck and near its centre was attached an iron roller, revolving upon an axis held to the side of the plank by suitable bearings. When placed upon the floor with the roller down, the instrument could be moved about with a load resting on the plank, and when placed with the plank downward it was intended to remain stationary, and beams or planks could then be moved by resting them upon the roller and moving them when so started. It was a movable tool in good order. It was liable when used for certain purposes at the edge of an open well to fall

into the well, to prevent which, 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, such fastening or blocking would wholly prevent such use. While placed with the plank down, and stationary and being used by fellow workmen in landing upon the floor of an upper story heavy planks, which were being hoisted by a block and fall, the truck fell through a hole in the floor upon plaintiff's intestate, who was on the floor below. It was held that the duty of using this truck in a safe manner was the duty of ordinary workmen who handled and used it rather than a duty of the employer, or a duty of superintendence, and the omission to use appliances for blocking or fastening was not the negligence of a superintendent but the negligence of fellow workmen.

In *Fleming v. Elston,* 171 Mass. 187, the cause of plaintiff's injuries were somewhat obscure. He was employed in taking down a building, and in lifting a piece of iron, which he was not able to lift alone, and which had become loosened from the outer wall and had to be lifted from the floor. While in this position something struck him upon his leg and he lost his balance and fell into the street and was injured. There was evidence that the superintendent was near the plaintiff just before the accident with a crowbar in his hand, and the plaintiff sought to raise the inference that he had been struck by the crowbar. The court says: "None of the circumstances appear, and even if it were admitted that the injury was caused by the superintendent's negligence, there is nothing to show that it was negligence in the exercise of superintendence rather than manual labor, in doing which the superintendent stood like any fellow servant. Per-

mitting himself or another laborer to be in the plaintiff's neighborhood with a crowbar in his hands, cannot be found to be negligent superintendence, without more, merely because the event showed that it was possible to do harm by negligently handling or by dropping the bar.

In *Whelton v. West End Street Ry. Co.*, 172 Mass. 556, a person was employed by a street railway company as car shifter, whose duty it was to get cars ready for conductors and motormen. Upon the occasion when the accident occurred he went into a car house for a car which had to be moved to the main track by means of a transfer table, moved by electric power and operated by the car shifter himself. He ran the car on to the table, handed the trolley rope, which had to be shifted to the other end of the car, to the conductor, saying, "here's the rope," and when the conductor had walked with the rope half-way around to the middle of the car the car shifter started the car. The conductor called on him to wait, as a spring attached to the roof of the car was caught, and the conductor, while trying to free the spring, was injured by the moving of the table. There was a foreman who had charge of the car house, but he was not present at the time of the accident. The court held that neither the starting of the table, nor the failure to stop it, were acts of superintendence.

Wanton and wilful acts by superintendents.— There is nothing in the wording of the liability acts which expressly covers wanton or malicious acts done by superintendents. Nor, however, is there anything in the wording of the act which would necessarily restrict the scope of the law to negligent acts and omissions. While it is still uncertain in most of the States whether

the master is responsible under the act for wilful injuries inflicted by a superintendent, it is settled in Alabama that such liability exists, and that contributory negligence is no defence when the injuries are thus occasioned. Nor does the employee assume the risk of injury from the wilful act of a superintendent. (See *Southern Ry. Co. v. Moore,* 128 Ala. 434; *Louisville & Nashville R. R. Co. v. York,* 128 Ala. 305; *Louisville & Nashville R. R. Co. v. Trammell,* 93 Ala. 350; *Kansas City M. & B. R. R. Co. v. Crocker,* 95 Ala. 412; *Richmond & D. R. R. Co. v. Farmer,* 97 Ala. 141; *Lee v. De Bardeleben Coal & Iron Co.,* 102 Ala. 628; *Chambliss v. Mary Lee Coal, etc., Co.,* 104 Ala. 655; *Alabama & G. S. R. R. Co. v. Hall,* 105 Ala. 599; *L. & N. R. R. Co. v. Markee,* 103 Ala. 160; *L. & N. R. R. Co. v. Crawford,* 89 Ala. 245; *L. & N. R. R. Co. v. Watson,* 90 Ala. 68.)

It is difficult to understand how a wanton and malicious act can be done "in the exercise of superintendence" and be in itself "an act of superintendence," and this point does not seem to be discussed in the Alabama cases.

A New York case, *Gabrielson v. Waydell,* 135 N. Y. 1, holds that the risk of being assaulted and injured by an officer of a vessel is one of the assumed risks which a sailor takes in his employment, and that the ship's owner is not liable for such injuries.

Sec. 35. Acting superintendents.

The employer is under the same liability for the negligence of a person "acting as superintendent with the authority or consent of such employer" in the absence of the superintendent, as if the negligence were that of the superintendent himself. This liability is proved only in cases where it is shown (1) that the superin-

tendent or person, whose sole or principal duty is that of superintendence, is absent; (2) that the negligent act was done in his absence by some one acting as such superintendent; (3) that in so acting, he had the authority or consent of the employer; (4) that the act or omission done by this person was so done in the exercise of superintendence.

The authority or consent of the employer is sufficiently shown by the manner of doing business, where, for example, it appears that the person charged with negligence has acted for a considerable period as superintendent during the absence of the superintendent. (*Faith v. New York Central & H. R. R. Co.,* 109 App. Div. 222, 95 Sup. 774; affirmed, no opinion, 185 N. Y. 556.) See, also, *McHugh v. Manhattan Ry. Co.,* 179 N.Y. 378. The "consent" or "authority" may be shown by proving that the superintendent delegated his duty in his absence to the person charged with negligence. (*McBride v. N. Y. Tunnel Co.,* 101 App. Div. 448, 92 Supp. 222; *Knight v. Overman Wheel Co.,* 174 Mass. 455.) Unless there be evidence that the functions of the superintendent have devolved upon an acting superintendent, the master is not responsible. When, for example, it is shown that there is a superintendent elsewhere engaged, defendant is not liable for the negligence of another acting in his absence merely because he is described as "foreman." (*Hughes v. Russell,* 104 App. Div. 144, 93 Sup. 307; *Abrahamson v. General Supply & Construction Co.,* 112 App. Div. 318.) In *Quinlan v. Lackawanna Steel Co.,* 107 App. Div. 176, 94 Sup. 942, it has been said that in determining whether or not a person is an acting superintendent within the meaning of this section, the test for it "is not simply the power to instruct or even to direct

in a particular manner that constitutes superintendence within the meaning of the law, but it must be such a supervision and charge as gives power of direction; and it must be with authority to direct the manner and means of prosecuting the work in charge." The fact that there is in the master's service a general superintendent will not relieve him from responsibility for the acts of a foreman whose principal duty is superintendence. (*Carlson v. United Engineering & Contracting Co.*, 113 App. Div. 371, 98 Sup. 1036. See, also, *Mahoney v. Bay State Pink Granite Co.*, 184 Mass. 287.)

Sec. 36. Superintendence need not be over injured person.

It is not necessary that the person injured should be personally under the direct control of the superintendent, in order to make the master liable for injuries received by a negligent act of superintendence. As the court says in *Kansas City M. & B. Rd. Co. v. Burton*, 97 Ala. 240: "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 entrusted with it.' The remedy for negligence of superior in the control of inferior employees, whereby injury results to the latter, is given by subsection 3 of sec. 2590, Code. Under subsection 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 negligent and the injured person. If the former has superintendence entrusted 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."

In *Kearney v. Nicholl* (1880), 76 L. T. Jour. 63, a machinist was injured owing to negligence of a person superintending the structural alterations in a mill. It was held that the statute applied whenever there is a common master though the injured servant is employed in a department distinct from that controlled by the negligent servant. (See, also, *Ray v. Wallis* (1887), 51 J. P. 519.)

CHAPTER IV.

NOTICE OF INJURY.

Sec. 37. The statutes compared.

No notice to the employer of the time, place or cause of injury is required in Indiana or Alabama. In Massachusetts and Colorado a notice must be given within sixty days after the accident. The action must be commenced, in Massachusetts and New York, within a year after the accident, and in Colorado within two years. Under the Massachusetts law the notice must be in writing, signed by the person injured, or by some one in his behalf, but if, for physical or mental incapacity, it is impossible for the person injured to give the notice within the time provided, he may give the same within ten days after such incapacity is removed, and, in case of his death, without having given such 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." The Colorado law has no such provision relieving plaintiff from the operation of the limitation upon the time of commencing the action. In every case the notice must be given within sixty days after the accident. The Massachusetts, Colorado and New York statutes, in substantially the same language, provide that a notice given under the provisions of this act shall not be held invalid or insufficient solely by reason of any 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 English law provides that an action for the recovery of compensation under the act shall not be maintainable unless notice that injury has been sustained is given within six weeks and the action is commenced within six months after the accident, or, in case of death within twelve months after the death, provided, that in case of death, the want of such notice shall be no bar to the maintenance of an action if the judge shall be of the opinion that there was reasonable excuse for such want of notice. The notice required by the English act includes the name and address of the person injured, which is not required in New York or Massachusetts, and a statement in ordinary language of the cause of the injury and the date at which it was sustained. The English law does not require a statement of the place where the injury occurred. The provisions of the English statute regarding service of notice are substantially similar to the New York law and will be considered later. The English law further provides that the notice shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action is of the opinion that the defendant is prejudiced in his defense by the defect or inaccuracy, and also that the defect or inaccuracy was for the purpose of misleading. The notice required by the New York statute contains features in common with both the Massachusetts and the English laws, but it differs in important particulars from both. Under the New York statute, section 2, 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 injury is given to the employer within 120 days and the action is commenced within one year after the occurrence of the accident causing injury or death. The word "maintained," as used in this section of the New York statute, has been held to be synonomous with "begun" or "commenced." (*Grasso v. Holbrook, Cabot & Daly Co.*, 102 A.D. 49, 92 Sup. 474.) In the time allowed for giving notice it will be seen that the New York statute is much more liberal than either the English, Massachusetts or Colorado laws. The contents of the notice required is similar to that of the Massachusetts law. It must be in writing, signed by the person injured, or by some one in his behalf, but if from physical or mental incapacity it is impossible for the person injured to give notice within the time provided by the law he may give the notice within ten days after his incapacity is removed.

Sec. 38. Notice by executors or administrators.

The New York statute is more liberal than the Massachusetts law in cases where the injury results in death. Under the Massachusetts law, if an employee is injured and dies, the right of action under the Liability Act is absolutely lost if the employee survive the accident ten days, and during these ten days was mentally clear-minded enough to authorize or procure another to give the notice for him and the notice was not given.[1] This provision is omitted by the New York statute, and the statute provides that in case the employee dies without having given notice, his executor or administrator may give such notice within

1. *Nash v. Inhabitants of South Hadley*, 145 Mass. 105; *Barclay v. City of Boston*, 173 Mass. 311.

sixty days after his appointment. It would appear, therefore, that a liberal construction of this notice clause would permit the executor or administrator to give the notice required at any time within one year. As will be seen later (sec. 42) notice must be served before the action is brought, and as the action must be brought within a year the notice must, therefore, be served within that period.

In death cases where timely notice was given by the injured party in his lifetime no new notice need be given by the administrator. Where no such notice was so given by the injured person, the statute provides that the administrator may give notice of the time, place and cause of the accident within 60 days after his appointment. An interesting question on which conflicting decisions have been rendered arises in cases where the notice was not given by the administrator within 60 days after his appointment, but was, however, given within 120 days after the injury had been received, being the period within which the injured person, if living, might have given the notice. It has been argued in such cases that inasmuch as the deceased himself could have given notice at any time within 120 days after the accident, it was not intended that the administrator should be required to give the notice in a shorter period. In *Hoehn v. Lautz,* 94 App. Div. 14, 87 Sup. 921, the Appellate Division of the Fourth Department decided in such a case that a notice served 97 days after the appointment of the administratrix and 107 days after the death of the intestate was timely. The court says: "The notice in this case was served within 120 days after the accident but not within 60 days after the appointment of the administratrix. Was it served in due time so as to give the plaintiff the benefit of the provisions of the

act? We think it was. It seems to us the real intention of the statute was to give 120 days in all cases to serve the notice and to give time beyond that in cases of incompetency or death, if additional time was necessary; ten days after the incapacity was removed or 60 days after the appointment of the administratrix. We do not think the intention in either case was to shorten the 120 days in which the notice might be given. We see no reason to hold so strict a rule against a plaintiff in an action under the statute."

In *Randall v. Holbrook Contracting Company,* 95 App. Div. 337, 88 Sup. 681, a contrary conclusion was reached by the Appellate Division in the First Department. The accident happened on November 28, 1902; the deceased died December 22, 1902. Letters were issued to plaintiff on December 31, 1902, and the notice was given seventy-six days after the plaintiff's appointment but less than 120 days after the happening of the accident. The trial court had held that if the notice was served within 120 days of the accident the requirement of the law was complied with. On the appeal the attention of the court was not called to the earlier case last cited. The court said: "No notice in this case was given by the injured employee or by any one in his behalf. It is not claimed that he authorized a notice to be given nor that the plaintiff acted in his behalf in giving the notice. The right of action in the injured employee abated at his death. His estate had no right of action to recover for the injury. If his death was caused by the negligence of the defendant a right of action is given by section 1 of the statute to his administrator, not as representing the decedent, but for the benefit of his next of kin, and that right of action arose upon the death of the decedent if

caused by an injury for which the defendant was liable. As to that cause of action it could be maintained only upon the administrator giving the notice that section 2 of the act required, and the provisions of this act is explicit that such a notice must be given by the administrator within 60 days of his appointment as such. If a notice had been given by the decedent during his life, it was evidently the intention of the statute that such notice should inure to the benefit of the administrator in enforcing the right of action which the statute gives to the administrator for the benefit of the next of kin of the decedent. *But the cause of action which the decedent had prior to his death having abated by his death, and a new cause of action having been given to his administrator for the benefit of the next of kin, it would seem to follow that such cause of action could only be enforced by the administrator giving notice as required by section 2 of the statute and such notice must be given within 60 days of the appointment of the administrator.* Whether this was a greater or less period than the 120 days within which the employee was required to give notice to sustain the action against the employer would seem to be immaterial. What the statute requires is that the executor or administrator, to maintain the action, must give the notice required by section 2 of the statute within 60 days of the time of his appointment; and this notice not having been given within sixty days, the action cannot be maintained."

This decision was followed by a similar ruling in the same department in *Holm v. Empire Hardware Co.*, 102 A. D. 505. The more liberal construction of the statute given in *Hoehn against Lautz* would seem to be more within the policy of the courts as declared by the Court of Appeals. (See *Conolly v. Hyams*, 176 N. Y. 403; *Mc-*

Knight v. City of New York, 186 N. Y. 35.) Neither of the conflicting cases cited above have yet been heard, however, by the Court of Appeals.

Sec. 39. Service of notice.

The Massachusetts act provides for a written notice given to the employer, but contains no other provision regarding its service upon him. The English act of 1880 and the New York act both contain provisions regulating the manner in which notice shall be given. The English law provides (sec. 7, p. 253) that notice shall served on the employer, or, if there be more than one employer, upon one of such employers. It may be served by delivering it to the employer in person, wherever he may be found, or at his residence or place of business. Notice can be served by post by registered letter addressed to the person on whom it is to be served at his last known residence or place of business, and, if so served, 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 proof of the service of notice, it shall be sufficient to prove that the notice was properly addressed and registered. When the employer is a corporation, or a body of persons incorporated, notice shall be served by delivering the same at the office of such employer, or, if there is more than one office, at any of its offices, or the notice may be served by sending it by post in a registered letter addressed to the office. The New York statute in the main follows the English law. Notice, under the New York law (sec. 2, p. 241), 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 the employer, or by leaving it at the residence or

place of business of the person on whom it is to be served. The notice can be served by mail by letter (which need not be registered), addressed to the person on whom it is to be served at his last known place of residence or place of business. If served by letter, the notice is deemed to have been served at the time any letter containing the same would be delivered in the ordinary course of post. Service can be had on a corporation by delivering the notice at the office or principal place of business of the corporation, or by sending it by post to such address. In *Hunt v. Dexter Sulphite Pulp & Paper Co.,* 100 App. Div. 119, 91 Sup. 279, the question was raised whether service of a typewritten notice was a sufficient "notice in writing," as required by the act. The court held the typewritten notice sufficient, saying, "Typewriting has largely taken the place of handwriting and may well be considered as handwriting. It would be too strict a construction of the statute to hold this notice invalid because in typewriting instead of handwriting." A notice signed in the attorney's name by his stenographer has also been held to be valid. (*Greenstein v. Chick,* 187 Mass. 157; *Dolan v. Alley,* 153 Mass. 380-382.) It has been held in Massachusetts that the manner in which the notice is sent or given is immaterial if it be shown that the person entitled to notice actually received it within the statutory period. (*Shea v. N. Y., N. H. & H. R. Co.,* 173 Mass. 177.)

A somewhat contrary doctrine is laid down, however, in *Healey v. George F. Blake Mfg. Co.,* 180 Mass. 270. The defendant was a Jersey corporation and had executed a power of attorney as required by Massachusetts law, appointing the commissioner of corporations as its attorney upon whom all lawful processes in any

action or proceeding might be served. A notice of the time, place and cause of plaintiff's injury was served by plaintiff on this commissioner, who sent to the defendant a complete copy of the notice within thirty days after the happening of the accident. No other notice was given and the court held that this was insufficient, and that notice to the commissioner was not notice to the corporation, notwithstanding the fact that the notice was proper in form and the commissioner sent an exact copy to the defendant. The court held that while this notice could be given to the defendant wherever he could be found, whether within or without the State, the notice given by this commissioner was not given by him *as an agent of plaintiff or on plaintiff's behalf*, but simply as a public officer acting in the discharge of a public duty.

"Since he was not in fact an agent of either party, and did not act or intend to act as such, the plaintiff cannot now, on the ground of attempted or intended agency, ratify the act as his or hold the defendant as though it were his act." [1a]

The construction given to the Massachusetts law in this case is far less liberal than has been given in quite similar cases in New York, under statutes requiring notice to municipalities in actions for negligence against them and will probably not be followed in the construction of the New York Liability Act. (*Shaw v. City of New York*, 83 App. Div. 212, 82 Supp. 44; *Missano v. The Mayor*, 160 N. Y. 123; *Sheehy v. City of New York*, 160 N. Y. 139.)

1a. A notice signed "C. & T., attorneys for A," purports to be signed in behalf of A, and sufficiently shows authority to sign it. *Dolan v. Alley*, 153 Mass. 380.

In *De Forge v. N. Y., N. H. & H. Ry. Co.,* 178 Mass. 59, the notice was given to the freight agent of the defendant, who testified that he sent it to the defendant's attorneys at New Haven in pursuance of general printed instructions directing him to send such notices to them, and that he had received such notices and so disposed of them for five years. The court does not determine whether this mode of service would, under ordinary circumstances, be legal, but held that where it appeared that this practice of giving notice in this way had been going on for so long a time without any objection being made, it might be found that defendant had recognized and acquiesced in the practice. (Citing *McCabe v. Cambridge,* 134 Mass. 484; *Shea v. N. Y., N. H. & H. Ry. Co.,* 173 Mass. 177.)

Sec. 40. Excuses for failure to give notice.

The provisions limiting the time in which to give notice are not strictly statutes of limitations but rather constitute a condition imposed upon the enforcement of a new remedy. (*Grasso v. Holbrook, Cabot & Daly Co.,* 102 App. Div. 49, 92 Sup. 474; *Harris v. Baltimore Machine & Elevator Works,* 188 N. Y. 141 [see sec. 42, *post*]; *Gmaehle v. Rosenberg,* 80 App. Div. 541, 80 Supp. 705; *Johnson v. Roach,* 83 App. Div. 357, 82 Supp. 203.) The disabilities provided by the New York and Massachusetts acts which relieve the injured person or his representatives from the necessity of furnishing the notice within the time limit have received consideration in several cases. The statute says that "if from physical or mental incapacity it is impossible for the person injured to give notice within the time provided . . . he may give the same within ten days after such incapacity is re-

moved." The burden is upon the plaintiff or his representatives to show the disability or incapacity, and the question is usually one for the jury. (*Mitchell v. City of Worcester,* 129 Mass. 525; *Ledwidge v. Hathaway,* 170 Mass. 348.) The disability which will excuse the failure to give notice under the Massachusetts cases must be *both* physical and mental. If the employee is of sufficient *mental* capacity to explain his injury and its cause to another so that the notice could be given on his behalf, the cases in that State hold that the employee's failure to do so within the time limit is a bar. (*Cogan v. Burnham,* 175 Mass. 391.) Under a highway statute requiring a similar notice the court says: "It has repeatedly been held that a plaintiff cannot take advantage of this last provision of the statute if his physical and mental capacity would enable him to procure another person to give the notice in his behalf even though he could not give it personally." (*Saunders v. City of Boston,* 167 Mass. 595.) If the plaintiff is conscious and mentally sound, but is confined in bed at home or at a hospital, he must cause notice to be given and his personal inability to give it is not an excuse.[2] These rulings of the Massachusetts courts on the meaning of the words "physical or mental incapacity," it is submitted, are unreasonable, not required by the statute and not in accordance with the decisions which hold that the statute is to be liberally interpreted in favor of the injured employee. (See sec. 2, *supra.*) The statute says: "If from physical *or* mental incapacity it

2. *Cogan v. Burnham,* 175 Mass. 391; *McNulta v. City of Cambridge,* 130 Mass. 275; *Saunders v. City of Boston,* 167 Mass. 595; *Ledwidge v. Hathaway,* 170 Mass. 348; *Lyons v. Cambridge,* 132 Mass. 534; *May v. Boston,* 150 Mass. 517; *Mitchell v. Worcester,* 129 Mass. 525.

is impossible for a person injured to give notice within the time provided he may give the same within ten days after such incapacity is removed." The construction placed upon these words by the case just cited gives no effect whatever to the word "physical" or the word "or." The statute is construed as though it read "physical *and* mental incapacity," and under this construction both must co-exist to excuse the absence of notice. In nearly all of the cases cited below physical incapacity existed of such a character as absolutely to preclude plaintiff from personally giving notice, and the only ground on which the failure to give notice was held fatal was because notwithstanding his physical helplessness plaintiff's mind was clear. Under the ruling of the Massachusetts cases the statute is interpreted as though it read, "if from mental incapacity it is impossible for the person to give the notice within the time provided in said section or to authorize some one else to give the notice in his behalf." It leaves out of consideration entirely the question whether the injured employee knew anyone who would consent to serve this notice in his behalf or suffered from any *inability* to give it other than that caused by mental incapacity. A man without friends who is seriously injured and who remains in a conscious state for sixty days though absolutely unable to deliver any notice in person or to investigate the cause of his injury, is absolutely precluded, under the Massachusetts cases, from any right of redress under the statute. This rule is a harsh and illiberal one, unjustified by the wording of the statute itself and it is to be assumed it will not be followed by the New York courts. (See *Forsyth v. City of Oswego,* 114 App. Div. 616, and cases; *Barry v. Village*

of Port Jervis, 64 App. Div. 268, 93 App. Div. 269, affirmed 180 N. Y. 521; *Williams v. Village of Port Chester,* 72 App. Div. 505, 76 Supp. 631; same case, also, 97 App. Div. 84, affirmed, no opinion, 183 N. Y. 550. The case last cited involves the consideration of a thirty day statute of limitations for the presentation of claims against a municipal corporation, which provided that no action for injuries caused by defects in sidewalks could be maintained without such previously given notice. The court held that this statute, in so far as it applies to a claim with respect to which the claimant was so injured as to be unable to present it within the period specified, is unreasonable and unconstitutional, and that a presentation of the claim within thirty days after the claimant had sufficiently recovered from his injuries to enable him to make it would support his action.

Sec. 41. Defects in notice; statutory provisions.

The English act provides (sec. 7, p. 253) that a notice required under the act shall not be deemed invalid by reason of any *defect or* inaccuracy in it, unless the judge who tries the action arising from the injury mentioned in the notice is of the opinion that the defendant is prejudiced in his defense by such defects or inaccuracies, and is further of the opinion that the defect or inaccuracy was for the purpose of misleading. The judge further has power under the English law to excuse the entire absence of notice in death cases if he is of opinion that there is reasonable excuse for the want of such notice. The Massachusetts law and the New York statute provide that "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 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 important difference between the wording of the English statute and that of the Massachusetts and New York statutes should be observed. The English statute provides, as appears above, that the notice shall not be deemed invalid by reason of any *defect* or inaccuracy in it, etc. The Massachusetts and New York statutes provide only for cases of *inaccuracy* and not for cases in which there is not merely inaccuracy in the statement of the time, place or cause, but an omission of one or all of these requirements.

Under the English cases, therefore, the *omission* of one or more of the requirements may be excused unless the judge is of the opinion that this omission has prejudiced the defendant, and, also, that the defect or inaccuracy was intended for this purpose; see *Stone v. Hyde,* 9 Q. B. D. 76, in which the notice was contained in a letter which omitted entirely a statement of the cause of the injury; also *Keene v. Millwall Dock Co.,* 8 Q. B. D. 482, where there was an omission of the cause of the injury. In *Carter v. Drysdale,* 12 Q. B. D. 91, there was an omission of the date of the injury. In *Prevesi v. Gatti,* T. L. R. (vol. 4), 487, the cause of the injury and the address of the plaintiff were omitted and the date of the injury was misstated. In all these cases the notices were held not to be fatally defective.

Under the Massachusetts and New York statutes plaintiff can claim relief from *errors* but not from *omissions,* by showing that he had no intention to mislead and that the defendant was not actually misled. Where there is, for example, no statement whatever of the cause of the injury, the omission is more than an inaccuracy

and the notice is fatally defective. (*Gardner v. Inhabitants of Waymouth,* 155 Mass. 595; *Fortin v. Inhabitants of Easthampton,* 142 Mass. 486.) As will be seen later the construction of notices is extremely liberal, and the courts will go to great extremes in spelling out a statement of the time, place or cause from the language used rather than hold the notice a nullity.

Technical defects in notice of injuries are less available to defendants in Massachusetts than formerly by reason of a recent amendment to the Liability Law, which requires the defendant upon whom a defective notice has been served, to notify the plaintiff, or the person serving the defective notice, of the nature of the defect, and without such a notice given within five days, the defect is not available to the defendant on trial.

"A defendant shall not avail himself in defense of any omission to state in such notice the time, place or cause of an injury or damage unless within five days after receipt of a notice given within the time required by law and by an authorized person, referring to the injuries sustained and claiming damages therefor, the person receiving such notice, or some person in his behalf, notifies in writing the person injured, his executor or administrator, or the person giving or serving such notice in his behalf, that his notice is insufficient, and requests forthwith a written notice in compliance with the law. If the person authorized to give such notice, within five days after the receipt of such request, gives a written notice complying with the law as to the time, place and cause of the injury or damage, such notice shall have the effect of an original notice and shall be considered a part thereof." (Ch. 51, Laws of 1902, sec. 22.)

Sec. 42. The giving of written notice a condition precedent.

The notice given must be in writing. Actual knowledge given defendant verbally of the time, place and cause of the accident is insufficient. (*Keene v. Millwall Dock Co.*, 8 Q. B. D. 482; *Chisholm v. Manhattan Ry. Co.*, 101 Sup. 622, 116 A. D. 320.) The construction of this notice of injury clause, which is adopted by the Massachusetts and New York courts, is that the notice itself must be given before the commencement of an action and is a condition precedent to the maintenance of the action itself, and the same rule has been followed in England. (*Gmaehle v. Rosenberg*, 178 N. Y. 147; *Rettagliata v. Hayward*, 180 N. Y. 512; *Chisholm v. Manhattan Ry. Co.*, 116 A. D. 320, 101 Sup. 622; *Hoehn v. Lautz*, 94 A. D. 74, 87 Sup. 921; *Rosin v. Lidgerwood Mfg. Co.*, 89 A. D. 245, 86 Sup. 49; *Grasso v. Holbrook, etc., Contracting Co.*, 102 A. D. 49, 92 Sup. 474; *Johnson v. Roach*, 83 A. D. 351, 82 Sup. 203; *Randall v. Holbrook Contracting Co.*, 95 A. D. 336, 88 Sup. 681; *O'Neil v. Karr*, 110 A. D. 571, 97 Sup. 148; *Healey v. George F. Blake Mfg. Co.*, 180 Mass. 270; *Foley v. Pettee Mach. Co.*, 149 Mass. 294, 296; *Veginan v. Morse*, 169 Mass. 142, at p. 146; *Moyle v. Jenkins*, 8 Q. B. D. 116, 118; *Keen v. Millwall Dock Co.*, 8 Q. B. D. 482, 484.) In this respect the notice required by the Employers' Liability Act is similar to the well established rule adopted by New York courts in notices to municipalities of personal injuries. It is to be presumed that the same purposes are to be subserved by the notice required by the Liability Law as are subserved by the notices required by the various statutes incorporating municipalities, and which require notices of claim for injuries—that an investigation can be made by the defendant of the claim.

(*Miller v. Solvay Process Co.,* 109 App. Div. 135, 95 Sup. 1020.) The rule in actions against municipalities is well settled in New York, that where a statute provided for notice of the time, place and cause of injury, such notice is a pre-requisite to the commencement of the action, and the failure to give such notice is a bar to the maintenance of a suit for injuries.[3]

The commencement of an action within the statutory period is not sufficient as notice under the act, even if the complaint gives the time, place and cause of the injury. The notice must be served *before* the complaint. (*Chisholm v. Manhattan Ry. Co.,* 116 App. Div. 320, 101 Supp. 622; *Curry v. City of Buffalo,* 135 N. Y. 366-370; *Veginan v. Morse,* 160 Mass. 142.)

In *Chisholm v. Manhattan Ry. Co.,* 116 App. Div. 320, 101 Supp. 622, a complaint had been served which did not allege the giving of notice and which did not allege the negligence of a superintendent. This action was discontinued and another action begun which alleged that notice under the statute had been given. On trial it was sought to show that the first complaint, as served, was a notice sufficient under the statute. It was held to be insufficient for that purpose. As the court says in *Kennedy v. City of Lawrence,* 128 Mass. 318, cited with approval in the *Chisholm case* (*supra*): "No statement of the facts of an injury can be regarded as notice under the

3. See *Reining v. City of Buffalo,* 102 N. Y. 308; *Curry v. City of Buffalo,* 135 N. Y. 366; *Merz v. City of Brooklyn,* 33 St. Rep. 517, 128 N. Y. 617; *Dawson v. City of Troy,* 49 Hun, 322; *Krall v. City of New York,* 44 App. Div. 259, 60 Supp. 661; *Foley v. Mayor, etc.,* 1 App. Div. 586, 37 Supp. 465; *White v. Mayor, etc.,* 15 App. Div. 442. The same rule has been held to apply to actions under the Liability Act. *Johnson v. Roach,* 83 App. Div. 357, 82 Supp. 203; *Gmaehle v. Rosenberg,* 80 App. Div. 541, 80 Supp. 705.

statute unless it appears to have been made with the intention of giving that notice."

Sec. 43. Notice to be pleaded.

The cases cited in the last section are all authorities upon the proposition that a notice of the time, place and cause of injury, being a condition precedent to the maintenance of the action, must be pleaded in the complaint. The well settled rule to this effect often declared in actions against municipalities for injuries, is equally applicable to actions under the statute. (*Steffe v. Old Colony R. R. Co.*, 156 Mass. 262; see sec. 71.)

Sec. 44. Liberal construction allowed as to notice.

It has been held by the New York courts that notices of this character relate to the remedy and not to the right, and a reasonable construction has uniformly been allowed in actions in which such notices are necessary.[4] As the court says, in *Sheehy v. City of New York*, 160 N. Y. 139, "While in an action like this the statute must be substantially complied with, or the plaintiff cannot recover, still, where an effort to comply with it has been made and the notice served, reasonably construed, is such as to accomplish the object of the statute, it should, we think, be regarded as sufficient." (See, also, *Missano v. Mayor*, 160 N. Y. 123; *Blount v. City of Troy*, 110 App. Div. 609; *Beyer v. City of North Tonawanda*, 183 N. Y. 338; *Walden v. City of Jamestown*, 178 N. Y. 213; *Shaw v. City of New York*, 83 App. Div. 212, 82 Supp. 44.) A defective notice, however,

4. *Masters v. City of Troy*, 50 Hun, 485; *Sullivan v. City of Syracuse*, 77 Hun, 440; *Cross v. City of Elmira*, 86 Hun, 467; *Werner v. City of Rochester*, 77 Hun, 33; *Stedman v. City of Rome*, 88 Hun, 279.

can not be amended upon trial. (*Kleyle v. City of Oswego,* 109 App. Div. 330.) A very liberal construction of the provisions requiring notice has been followed by the English courts.[5]

While, as appears at section 36, a notice to be valid under the Massachusetts statutes must state the time, place and cause of the accident, and an entire omission to state one of these essentials is fatal to the action under the statute; the courts are very liberal in construing the language of notices so that an inaccuracy shall not be fatal. For example, in *Carberry v. Inhabitants of Sharon,* 166 Mass. 32, the notice was claimed to be defective for the absence of the statement of the cause, and the court held that the words, "thrown from her carriage caused by a defect in the road," while inaccurate, was not fatally defective. Other cases in which the courts have construed notice as inaccurate but not fatally defective under the act or under other statutes requiring notice of the time, place and cause are collected in the note.[6]

Sec. 45. Question of intent to mislead one for the jury.

As has been seen under the English act, the question of intent to mislead by insufficient notices and the effect upon the defendant of misleading notices are to be determined by the judge. The rulings of the English court follow in this respect the strict wording of the statute

5. *Carter v. Drysdale,* 12 Q. B. D. 91; *Clarkson v. Musgrave,* 9 Q. B. D. 386; *Keen v. Millwall Dock Co.,* 8 Q. B. D. 482; *Hearn v. Philips,* T. L. R., vol. 1, 475; *Previsi v. Gatti,* T. L. R., vol. 4, 487; *Fortin v. Inhabitants of Easthampton,* 142 Mass. 486.

6. *McCabe v. Cambridge,* 134 Mass. 484; *Bailey v. Everett,* 132 Mass. 441; *Whiteman v. Groveland,* 131 Mass. 553; *Fortin v. Inhabitants of Easthampton,* 142 Mass. 486; *Driscoll v. Fall River,* 163 Mass. 105, 39 N. E. 1003.

which requires the judge to pass upon such questions. The Massachusetts courts have held that the question, whether an inaccuracy in stating time, place and cause of the injury was intended to mislead, and whether the party entitled to notice was misled thereby, are questions of fact for the jury.[7] The province of the court seems to be simply in determining whether the paper which is claimed to have been a notice can in any sense be called such.[8]

It has been held that the burden of proof is upon the plaintiff to establish not merely his own good faith in sending an inaccurate notice, but also to show that it did not mislead the defendant. (See *Hughes v. Russell,* 104 App. Div. 144, 93 Sup. 307; *Drommie v. Hogan,* 153 Mass. 29; *Liffin v. Inhabitants of Beverly,* 145 Mass. 549.) Where from the face of the notice itself it is apparent that defendant could not have been misled by it because the notice itself has no tendency to mislead, the jury is authorized to find the notice sufficient. (See *Conners v. City of Lowell,* 158 Mass. 336; *Dolan v. Alley,* 153 Mass. 380.) In determining whether the defendant has been misled the facts and circumstances showing defendant's knowledge of the details of the accident may be proved to show that no actual notice was necessary to acquaint him with the facts. In *Drommie v. Hogan,* 153 Mass. 29, the actual cause of the injury was a defective condition of a ledger board which broke and caused the staging on which plaintiff was at work to fall. The notice given contained no reference to the

7. See *Drommie v. Hogan,* 153 Mass. 29; *Beauregard v. Webb Granite Co.,* 160 Mass. 201; *Canterbury v. City of Boston,* 141 Mass. 215.

8. *Shea v. City of Lowell,* 132 Mass. 187.

ledger board, but stated that the injury was caused "by reason of the defective or insufficient staging, and the fall of the staging." The defendant contended that he had been misled, and to meet this contention plaintiff showed that after the accident defendant had come to the place where it occurred and helped carry away the plaintiff, and that at the time he did so the staging and the ledger board were lying in a heap upon the ground. This was held sufficient evidence to warrant a jury in finding that the plaintiff had no intention to mislead and that defendant was not misled.

Reference should be had to the New York cases, cited in section 44, which illustrate the liberality of the New York courts in the construction of similar notices under statutes calling for notice of the time, place and cause of injuries in streets.

Sec. 46. Notice to indicate that claim is made for compensation.

While there is nothing contained in the language of the section expressly requiring the notice to state that a claim for compensation is made, the notice must contain something to indicate its purpose as the basis for a claim for damages. "The liability of the employer under the common law and under the act being different so far at least as his liability for the negligence of his superintendent is concerned, the notice in order to permit the bringing of an action under the statute should be sufficient to apprise him that liability is claimed because of the statute and under its provisions." (*Chisholm v. Manhattan Ry.,* 101 Sup. 622, 116 A.D. 320; *Driscoll v. Fall River,* 163 Mass. 105; *Kennedy v. Lawrence,* 128 Mass. 318.) In *Driscoll v. Fall River, supra,* the court says: "The notice is not to be

construed with technical strictness, but enough should appear in it to show that it is intended as a basis of a claim on behalf of the person who brings the suit." The amount claimed in compensation need not be stated in the notice. (*Reed v. City of New York,* 97 N. Y. 621.)

Sec. 47. Notice need not state a cause of action.

It is not necessary that the notice should contain a statement of the facts and circumstances which plaintiff would be obliged to prove to make out a case in law for negligence, nor need he allege that the injury was occasioned by the negligence of any particular individual. (See *Werner v. City of Rochester,* 77 Hun, 33.) As stated in *Canterbury v. Boston,* 141 Mass. 215, notices of this character are required not for the purpose of setting out in writing the legal liability of the city or town but for the purpose of calling the attention of the proper authorities to the physical objects in the highway, or to the physical condition of it, which caused the injury, that they may make the necessary investigation. (*Bailey v. Everett,* 132 Mass. 441; *Dalton v. Salem,* 136 Mass. 278; *Lynch v. Allyn,* 160 Mass. 248.)

Sec. 48. What is a sufficient notice?

In *Miller against Solvay Process Company,* 109 App. Div. 135, 95 Sup. 1020, the notice stated in substance that the claimant was injured by reason of the negligence, etc., of defendant, its agents, servants and employees, in not providing competent servants in the work of unloading coal from its cars, in not stationing guards or persons to warn claimant of danger and in failing to properly protect its employees while engaged in the performance of their various duties. The notice stated that unless

the matter was adjusted claimant would bring an action against the company under the act and that the notice was served in accordance therewith. The court held the notice defective in several particulars. It failed to sufficiently describe the place where the accident occurred, there being four or five places in the yard where coal cars were unloaded; that the notice did not state how the injury was received nor wherein the defendant's agents, servants, etc., were negligent in not providing competent servants, and that there was no particular act of incompetency mentioned. The court says: "The notice is too general and insufficient to furnish any substantial assistance to the defendant in the investigation of the claim either as to the place or cause of the injury and therefore does not meet the requirements of the statute."

The court further found that the evidence adduced on trial did not show that the injury was received at all in accord with the claim of the notice.

In *Hughes v. Russell,* 104 App. Div. 144, 93 Sup. 307, the notice given was given in behalf of "John" Hughes instead of Michael J. Hughes, the plaintiff. It stated the cause of the injury to be the defective condition of the stamping press in that the whole machine was out of plumb. There was no evidence tending to show that the accident was due to such cause. The court says: "The insufficiency of the notice might have been obviated by proof under the statute that there was no intention to mislead and that the party entitled to the notice was not in fact misled thereby, but the record contains no testimony tending to establish either of these facts."

In *Beauregard v. Webb Granite Co.,* 160 Mass. 201, the notice described a defect in the ways, works and

machinery, and charged negligence on the part of the person entrusted with, and exercising superintendence, and particularly state that deceased was killed "by a stone being precipitated upon him from your derrick, as a result of your negligence and the negligence of some person for whose negligence you are liable." The real cause of the death was that a stone fell upon the deceased through negligence in raising it without warning being given to him. It was held that the notice was either sufficient notice, or, if insufficient, was not fatally defective as there was no intention to mislead, and that, in fact, the defendant was not misled by it. In *Lynch v. Allyn,* 160 Mass. 248, the notice given set forth the time, place and cause of the injury, stating the cause to be "the falling of a bank of earth." The only objection taken by the defendant was that the notice did not refer to the defendant's superintendent or to his conduct. The negligence in the case was the negligence of the superintendent. The court did not think it was necessary that the notice should contain a reference to the superintendent, and it was held that the cause of the injury was properly stated. It was not necessary for the plaintiff to state the cause of that cause. (Citing *Whitman v. Groveland,* 131 Mass. 553; *Donahue v. Old Colony R. R. Co.,* 153 Mass. 356.) In *Donahue v. Old Colony R. R. Co., supra,* the notice is as follows: "The Old Colony Railroad Company is hereby notified that on the 15th day of October, 1888, when within 100 yards northerly from the railroad station at Readville, Massachusetts, on that part of said Old Colony Railroad Company, formerly known as the Boston & Providence Railroad Company, I was injured by my right leg being caught between a dumping car and tender of an engine, I was at the time

standing on the dumping car, which was the first car of a train of cars to which said tender of said engine was attached. Said injury was caused by reason of a broken bar on the dumping car, which allowed the dolly varden of the tender of the engine to run up against the end of the dumping car, which caught and injured my leg. This notice is given under the provisions of chapter 270 of the acts and resolves of Massachusetts of the year 1887, and of chapter 155 of the said acts of the year 1888." Held sufficient.

In *Brick v. Bosworth,* 162 Mass. 334, a death case, the notice stated that injury was received as follows: "The cause of the death of my said husband was the falling of a derrick upon him, the same being improperly or insecurely fastened." This notice was held sufficient to entitle the plaintiff to recover either on the ground of the superintendent's negligence, or for a defect in the ways, works and machinery.

In *Coughlan v. Cambridge,* 166 Mass. 268, it was held that a notice was not defective which alleged different causes of the same accident, each being adequately stated.

CHAPTER V.

THE ASSUMED RISKS OF EMPLOYMENT.

Sec. 49. Assumed risks ordinarily not affected by liability acts.

The decisions of the courts of the various States in which liability acts, similar to the English act, are in force are in accord on the proposition that these statutes have not changed the common law rules upon the doctrine of assumed risk.[1]

In the *O'Malley case,* cited below, the court says: "If the action were at common law it would be too plain for argument that the plaintiff took the risk of such accidents as that which happened." . . . "But it is contended that under the statute referred to the rule is different. The statute does not attempt to take away the right of the parties to make such contracts as they choose which will establish their respective rights and duties." . . . "But it would be unreasonable to attempt to require every one ever hiring laborers to have the best place and best machinery possible for carrying on his business. It would be an

1. See *O'Maley v. South Boston Gaslight Co.,* 158 Mass. 135; *Woodridge v. Washington Mills Co.,* 160 Mass. 234; *Cunningham v. Lynn, etc., Str. Ry. Co.,* 170 Mass. 298; *Donohue v. Washburn & Moen Mfg. Co.,* 169 Mass. 574; *Goodnow v. Walpole Emery Co.,* 146 Mass. 261-267; *Hale v. Cheney,* 169 Mass. 268; *Rooney v. Cordage Co.,* 161 Mass. 153; *Connolly v. Hamilton Woolen Co.,* 153 Mass. 156; *McAuliffe v. Gall,* 180 Mass. 361; *Ladd v. Brockton Street Railway Co.,* 180 Mass. 454.

unwarranted construction of the statute which would tend to defeat its object to hold that laborers are no longer permitted to contract to take the risk of working where there are peculiar dangers from the arrangement of the place and from the kind or quality of machinery used. Nothing but the plainest expression of intention on the part of the Legislature would warrant giving the statute such an interpretation." . . . "We have no doubt that any one may contract to take the obvious risks of danger from injury from defective machinery as well since the enactment of this statute as before."

In England some slight confusion exists in the cases on the effect of the Employers' Liability Act of 1880 as to the defense that the risk of injury was assumed by the employee. In the case of *Weblin v. Ballard,* 17 Q. B. D. 122, the court was of the opinion that the statute had affected the doctrine of assumed risk. In construing the words in the first section of the act, which state that the workman shall have the same rights of compensation and remedies as if he had not been a workman of, nor in the service of the employer, nor engaged in his work, the court says: "What is the meaning of this? In our judgment it means that the workman, when he sues his master under the provisions of the act for any of the five matters designated in it, shall be in the position of one of the public suing and shall not be in the position of a servant theretofore when he sued his master. In other words, that the master shall have all the defenses he theretofore had against any of the public suing him, but shall not have any special defense that he theretofore had when sued by a servant."

"What then is the result? It is this: that the

defense of contributory negligence is still left to the employer, but the defense of common employment and also the defense that the servant had contracted to take upon himself the known risks attendant upon the engagement are taken away from him, when sued by a workman under the act."

This decision, so far as its ruling upon the defenses of assumed risk is concerned, has not been followed, and the later decisions of the English courts are in accordance with those of Massachusetts. (See *Yarmouth v. France,* 19 Q. B. D. 647; *Thomas v. Quartermaine,* 18 Q. B. D. 685.) Similar rulings to those of the English and Massachusetts courts are to be found in Alabama. (*Birmingham Ry. v. Allen,* 99 Ala. 359.)

Sec. 50. Statutory modifications of assumed risk in general.

So far as a careful examination of the statutes has revealed, there are no State statutes in force in the United States, other than the New York statute, attempting to deal with the doctrine of assumed risk, or to modify that rule. There is, however, a provision somewhat similar to the New York statute contained in the Constitution of the State of Mississippi, which is given below in a note.[2]

2. Constitution, art. 7, sec. 193. "Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the act or omission of said corporation or its employees, as are allowed 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 and 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 by a fellow servant on another train of cars or one engaged about a different piece of work. *Knowledge by an employee injured of the defect or unsafe*

A similar provision to that in the Mississippi Constitution is contained in the Constitution of South Carolina.[3]

A provision somewhat similar to section 3 of the New York law is contained in the Revised Statutes of Ontario, chapter 160, section 6, which contains the following: "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 injury."

Apart from the statutes quoted above, the New York law is the first attempt to deal by statute with the doctrine of assumed risk.

Sec. 51. Necessary risks always assumed.

The employee, by entering upon or continuing in a given employment, takes the employment at common law subject to the usual risks inherent in the business itself, and which are necessary elements of the work to be done. This is presumed to be part of his contract of employment, and he can have no claim against his employer for injuries resulting therefrom, for the employer owes him no duty of obviating such danger, neither can the employee be heard to say that he did not so contract. His action founded on an injury caused by a necessary risk or danger must fail on either one of two theories: 1st, that the law presumes that he had

character or condition of any of the machinery, ways or appliances shall be no defense to an action for injuries caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them."

3. Art. 9, sec. 15, Constitution of South Carolina.

contracted to take the risk of an injury resulting from such cause, or, 2d, that the employer has violated no legal duty in failing to obviate the necessary dangers of the occupation. When the injury results from a necessary risk of the employment the defendant is usually entitled to a nonsuit.[4]

Necessary risks have been indifferently described in the books as "risks of the service" and "ordinary risks," and if the language of some of the decisions were taken strictly, these risks are the only ones assumed by the employee under existing law. "It may, we think, be laid down as a general rule that the dangers connected with the business, which are unavoidable after the exercise by the master of proper care and precaution in guarding against them, are risks incident to the employment and are assumed by those who consent to accept employment under such circumstances. Those dangers which are known and can be mitigated or avoided by the exercise of reasonable care and precaution on the part of those carrying on the business, and injuries which happen through neglect to exercise such care are not incident to the business, and the master is generally liable for dangers accruing therefrom." (*McGovern v. Central Vermont R. R.*, 123 N. Y. 287.) As the court says in *Pantzar v. Tilly Foster Mining Co.*, 99 N. Y. 368: "The rule that the servant takes the risk of the service presupposes that the master had performed the duties of caution, care and vigilance which the law casts upon him. It is these risks alone

4. *Hannigan v. L. & H. R. R. Co.*, 157 N. Y. 244; *Arnold v. D. & H. R. Co.*, 125 N. Y. 15; *Sisco v. L. & H. R. Co.*, 145 N. Y. 296; *Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y. 520; *DeGraff v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 125; *Bohn v. Havemeyer*, 114 N. Y. 296.

that cannot be obviated by a reasonable measure of precaution by the master that the servant assumes. (See, also, *Benzing v. Steinway,* 101 N. Y. 552; *Hickey v. Taafe,* 105 N. Y. 26.

These quotations, however, are not accurate statements of the law under the more recent cases, and under these cases, as will be seen, the employee assumes at common law not only the necessary risks of a dangerous employment, but such other obvious risks as may be created either by his master's negligence or by a violation of the statute.[5]

Sec. 52. Continuance in employment and unnecessary risks; at common law.

Where the defect or negligence is one known to the employee, and its dangerous possibilities are appreciated by him, and he still continues at his work, the fact of continuance is generally used as a defense by the employer in one of three forms: 1st, that the employee who knows and appreciates such a danger and continues at work without any change in the dangerous conditions of his employment, is thereby guilty of contributory negligence; 2d, that by continuing at his employment with knowledge and appreciation of the risk of danger therefrom, the employee impliedly contracts with the employer to assume all risk of injury therefrom, and by reason of such implied contract cannot claim compensation for his injuries from his negligent employer for his breach of duty; 3d, that the employer

5. *Knisley v. Pratt,* 148 N. Y. 372; *Freeman v. Paper Mill Co.,* 70 Hun, 530, 24 Supp. 403; affirmed without opinion 142 N. Y. 639; *Crown v. Orr,* 140 N. Y. 450; *Sherlock v. Sherlock,* 66 App. Div. 328, 72 Supp. 712; *Burns v. Nichols Chemical Co.,* 65 App. Div. 424, 72 Supp. 919.

owes no legal duty of care to an employee who continues in the course of his employment, knowing that such a danger exists therein — a defense which is usually expressed in the maxim "*volenti fit injuria.*" These three grounds of defense are usually interposed together, and while there is a logical difference between the defenses of contributory negligence, the maxim, and assumed risk, they are usually considered by the courts as practically one defense expressed in three different forms, and the terms have been used loosely and almost interchangeably. The difference between the terms "assumed risks" and "contributory negligence" has been recently considered by the Court of Appeals, in *Dowd v. N. Y., O. & W. R. Co.,* 170 N. Y. 459, and the distinction between them pointed out.

No useful purpose would be served at this time in attempting to lay down what should be a true rule in the application of these three defenses, as the scope of this chapter is confined to a consideration of the legal effect of continuance in employment by an employee with knowledge of a defect negligently created by his employer. The courts in all jurisdictions are agreed that where an employee voluntarily consents to the continuance of a defect and voluntarily agrees to take his chances of being injured thereby, he can have no just claim for compensation against his employer for such an injury. The courts differ, however, in determining the effect of continuance in employment with full appreciation of the danger, upon the question, whether the employee actually did voluntarily agree to take his chances of being injured. In some jurisdictions continuance with knowledge of an imminent danger, involving serious bodily injury, constitutes, as a matter of law, contributory negligence. (See *Pittsburgh & W.*

R. R. Co. v. Esteneniard, 52 Ohio, 43; *Rush v. Mo. Pac. R. Co.,* 36 Kans. 129; *Leary v. B. & A. R. Co.,* 139 Mass. 580; *Wheeler v. Berry,* 95 Mich. 250; *Reese v. Clark,* 146 Pa. 465; *Marean v. N. Y., S. & W. R. Co.,* 167 Pa. 220; *Crutchfield v. Richmond D. R. Co.,* 76 N. C. 320; *Illinois Paper Co. v. Albert,* 49 Ill. App. 363; *Highland Ave. & B. R. Co. v. Walters,* 91 Ala. 442; *Western & A. R. Co. v. Bishop,* 50 Ga. 465.) In other jurisdictions, continuance with adequate knowledge of the possibility of the danger, is equivalent, as a matter of law, to the assumption of risk. (See *McAulliffe v. Gall,* 180 Mass. 361; *Ladd v. Brockton St. Ry. Co.,* 180 Mass. 454; *Dobbins v. Lang,* 181 Mass. 397; *Langley v. Wheelock,* 181 Mass. 471; *Kenney v. Hingham Cordage Co.,* 168 Mass. 278; *Whelton v. West End Street Railway Co.,* 172 Mass. 555; *Fuller v. N. Y., N. H. & H. R. R. Co.,* 175 Mass. 424; *Le Moine v. Aldrich,* 177 Mass. 89; *Lampson v. Am. Axe & Tool Co.,* 177 Mass. 144; *Kelley v. Calumet Woolen Co.,* 177 Mass. 128.) In Massachusetts, as will be seen by the cases just cited, both rules seem to be applied, and not much distinction seems to be made between contributory negligence and assumption of risk, in the application of these terms to an employee who continues at work with knowledge of the possibilities of injury to which he has been exposed by his employer's negligence (*Sylvia v. Wampanoag Mills,* 177 Mass. 194), a non-suit or directed verdict being ordered sometimes on an application of one theory and sometimes on the other. (*Barry v. N. Y. Biscuit Co.,* 177 Mass. 449.) The English courts, under the modern cases, follow neither of these rules. The continuance by the employee at his work with knowledge of the danger is a consideration which may or may not be conclusive in determining whether he has voluntarily

assumed the risk, and the rule as laid down by the English cases will be considered at length in a subsequent section.

Sec. 53. The New York common law rule on assumed risk. The employee in New York assumes at common law not merely those risks necessary and incident to the business in which he is employed, but, ordinarily, assumes also such obvious risks as become known to him in the course of his employment if after such knowledge he continues in the same general place of employment.[6]

"A servant when he enters into the relation assumes not only all the risks incident to such employment, but all dangers which are obvious and apparent. The law imposes upon him the duty of self-protection and always assumes that this instinct, so deeply rooted in human nature, will guard him against all risks and dangers incident to the employment arising in the course of the business of which he has knowledge or the means of knowledge. If he voluntarily enters into or continues in the service without objection or complaint, having knowledge or the means of knowing the dangers involved, he is deemed to assume the risk and to waive any claim for damages against the master in case of personal injury to him." (*Crown v. Orr*, 140 N. Y. 450; *Dowd v. N. Y., O. & W. R. Co.*, 170 N. Y. 459.)

The ordinary common law rule, moreover, in New York is that where the danger is so clearly apparent that the knowledge and appreciation of it by the employee is also certain, there is no question for the jury

6. *McQuigan v. D., L. & W. R. Co.*, 122 N. Y. 618; *Hart v. Naumburg*, 123 N. Y. 641; *Arnold v. D. & H. Canal Co.*, 125 N. Y. 15; *Kaare v. Troy S. & I. Works*, 139 N. Y. 369; *Gibson v. Erie R Co.*, 63 N. Y. 449.

as to whether the employee assumed the risk voluntarily or not. As the Court of Appeals says, in *Kennedy v. Manhattan R. R. Co.*, 145 N. Y. 95, "We have carefully read over all the testimony in the case, and we have come to the conclusion that the evidence showed, beyond any doubt, that the deceased was fully aware of the general condition of this yard at the time when he went on duty on the night in question. He had been there daily for more than three weeks, and had been a watchman at times and at times a car cleaner. He was necessarily familiar with the locality; with the fact that the yard was not complete; with the fact that the carpenters were at work daily, and with the fact that the planking did not entirely cover the yard. Knowing these facts he must be held to have assumed the risk which accompanied such a situation, and that he did know these facts we think there is no possible room for doubt. It was not a question to be submitted to the jury." (See, also, *Kaare v. Troy S. & I. Co.*, 139 N. Y. 369.)[7]

Where the circumstances of the employment are such that the condition of the place of employment is obvious, but the danger to life or limb involved in that condition is not obvious, or to determine which might

7. *Appel v. Buffalo, etc., R. W. Co.*, 111 N. Y. 550 (in which a refusal to nonsuit where risk was obvious was held error); *DeForrest v. Jewett*, 88 N. Y. 264; *Gibson v. Erie R. R. Co.*, 63 N. Y. 449; *Arnold v. D. & H. Canal Co.*, 125 N. Y. 15 (in which a nonsuit was affirmed); *Williams v. D., L. & W. R. R. Co.*, 116 N. Y. 628 (in which a refusal to nonsuit was held error); *Knisley v. Pratt*, 148 N. Y. 372 (reversing an order setting aside a nonsuit); also, *Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 566; *Powers v. N. Y. & L. E. R. Co.*, 98 N. Y. 274; *Marsh v. Chickering*, 101 N. Y. 396; *Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y. 520; *Shaw v. Sheldon*, 103 N. Y. 667; *Hickey v. Taafe*, 105 N. Y. 26; *Buckley v. G. & P. Manufacturing Co.*, 113 N. Y. 540; *Mull v. Curtice Bros. Co.*, 74 App. Div. 561, 77 Supp. 813.

require special skill or judgment not possessed by the ordinary employee to determine, the situation would be different and the assumption of the risk by the servant is then a question of fact for the jury. This is also true where the servant has been too short a time in the employment from which the injury occurred to have had opportunity to acquaint himself with the risk to which he is exposed. The knowledge by the servant, which constitutes an assumption of risk on his part, is not merely of what appears to him to be the situation or condition of his place of employment, but of the possibility of danger and the consequences which might result from it. The leading case on this doctrine is *Davidson v. Cornell,* 132 N. Y. 228, a case in which the injuries resulted from the fall of some girders insufficiently held together. The court there said that the defect in the structure was apparent. The court held, however, that "where it may require skill and judgment not possessed by ordinary observers or by the servant to give knowledge of hazards which may be apprehended therefrom, he does not assume those hazards." (See, also, *Kain v. Smith,* 89 N. Y. 375; *Smith v. King,* 74 App. Div. 1; *Allison v. Long Clove Flat Rock Co.,* 75 App. Div. 267; *Sullivan v. Thorndike Co.,* 175 Mass. 41; *Flint v. Kelly,* 180 Mass. 181.) The New York rule, as stated in these cases, is the same as that laid down in the leading English cases of *Clarke v. Holmes,* 7 H. and N. Exchequer Rep. 937; *Thomas v. Quartermaine,* 18 Q. B. D. 685. As BYLES, J., says, in *Clarke v. Holmes, supra,* "a servant knowing the facts may be utterly ignorant of the risks," and as Lord ESHER says, in *Thomas v. Quartermaine,* "mere knowledge may not be a conclusive defense. There may be a perception of the existence of the danger without comprehension of the

risk, as where the workman is of imperfect intelligence, and although he knows the danger remains imperfectly informed of its nature or extent."

The statement contained in the quotation given above, from *Crown v. Orr,* 140 N. Y. 450, in which the absence of objection or complaint by the employee is suggested as one of the grounds for denying the relief, and for assuming that the employee has consented to the risk, is misleading. Such a complaint or objection avails nothing to the servant who continues at work with knowledge of the danger, and the courts both in Massachusetts and New York hold that it is no value to the employee to prove actual complaint made by him or objection to the continuance of the danger involved in his master's negligence.[8]

Sec. 54. Promise to repair as affecting assumption of risk.

There has been until recently much confusion among the New York cases as to the effect at common law of an express promise made by or on behalf of the employer to repair a negligent defect complained of by the employee. The general rule which has been recognized for years in most jurisdictions is, that "where the master has expressly promised to repair the defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for

8. *Lamson v. American Axe & Tool Co.,* 177 Mass. 144; *Carrigan v. Washburn & Moen Manufacturing Co.,* 170 Mass. 79, 81; *Louis v. N. Y. & N. E. R. Co.,* 153 Mass. 73; *Leary v. B. & A. R. R. Co.,* 139 Mass. 580-587; *Haley v. Case,* 142 Mass. 316, 322; *Westcott v. N. Y. & N. E. R. Co.,* 153 Mass. 460.

New York cases to the same effect are *Sweeney v. Berlin & Jones Envelope Co.,* 101 N. Y. 520; *Gibson v. Erie R. Co.,* 63 N. Y. 499; *Hannigan v. Smith,* 28 App. Div. 176, 50 Supp. 845.

injuries suffered within any period which would not preclude all reasonable expectation that the promise might be kept."[9]

The quotation just cited finds support in one of the older leading New York cases, *Laning v. N. Y. Cen. Ry. Co.*, 49 N. Y. 521, which held that a promise to discharge a drunken, incompetent employee, if he did not do better, was sufficient to make contributory negligence by continuing at work a question of fact for the jury in an action brought by an employee injured from the negligence of such intoxicated employee. The court says:

"But in this case the question whether the plaintiff was so negligent as to be contributory to the injury which he received was a question for the jury, for Laning had testified that Colby had said to him that if Westman did not do better he would have to discharge him.

"It has been held that there is a formal distinction between the case of a servant who knowingly enters into a contract to work on defective machinery, and that of one, who, on a temporary defect arising, is in-

9. *Hough v. Railroad Co.*, 100 U. S. 225. (The quotation above is cited by the court from Sherman & Redfield on Negligence, sec. 96, 3d ed.; sec. 372, 5th ed.) *Swift & Co. v. O'Neil*, 187 Ill. 337; *Illinois Steel Co. v. Mann*, 170 Ill. 200; *Ferries v. Berlin Machine Works*, 90 Wis. 541; *Snowberg v. Wellson Paper Co.*, 43 Minn. 532; *Tyberb v. N. Pac. R. R. Co.*, 39 Minn. 15; *Manufacturing Co. v. Morrissey*, 40 Ohio, 148; *Patterson v. Pittsburg, etc., R. R. Co.*, 76 Penn. St. 389; *Counsel v. Hall*, 145 Mass. 468; *Nor. Pac. R. R. Co. v. Babcock*, 154 U. S. 190; *Kane v. Northern Cent. R. R. Co.*, 128 U. S. 91; also, Cooley on Torts, 2d ed., 559-560; Sherman & Redfield on Negligence, 5th ed., 372; Bailey's "Master's Liability to Servant," 207; see, also, the exhaustive note collating the cases appended to *Illinois Steel Co. v. Mann*, 170 Ill. 200, in 40 L. R. A. 781.

duced by the master after the defect has been brought to the knowledge of the latter, to continue to perform his services under promise that the defect should be remedied. (See *Holmes v. Clark,* 10 Wend. 405.) Knowledge in such a case is not of itself, in point of law, an answer to the action."

To the same effect is *Healy v. Ryan,* 25 Wk. Dig. 23, affirmed, without opinion, 116 N. Y. 657; *Stevens v. Hudson Valley Knitting Co.,* 69 Hun, 375.

A series of decisions contrary to this rule, based mainly upon a somewhat anomalous and entirely illogical decision, *Marsh v. Chickering,* 101 N. Y. 400, have been decided in the Appellate Division. (See *McCarthy v. Washburn,* 42 App. Div. 252, 58 Supp. 1125; *Mull v. Curtice Bros. Co.,* 74 App. Div. 561, 77 Supp. 813; *Hannigan v. Smith,* 28 App. Div. 176, 50 Supp. 845; *Obanhein v. Arbuckle,* 80 App. Div. 465; *Spencer v. Worthington,* 44 App. Div. 496, 60 Supp. 873; *Rice v. Eureka Paper Co.,* 70 App. Div. 339, 75 Supp. 49.)

The authority, however, of these cases has been largely, if not entirely, taken away by a reversal of the last cited case by the Court of Appeals (*Rice v. Eureka Paper Co.,* 174 N. Y. 385), which attempts to distinguish the cases last cited. The plaintiff in this case was working on a machine which needed a belt shifter to make it safe. He complained and "on the Saturday night preceding the Wednesday on which he was injured, he told the defendant's treasurer that the machine ought to be provided with a shifter and that he would quit if one was not put on. He says that the treasurer then told him the mill would be shut down for repairs the fore part of the following week and while shut down they would put on a shaft or tightener, and that relying upon this promise he continued work until

he was injured." He was injured on Wednesday of the next week before the mill was shut down or a shifter put on. The court definitely decided two things: (1) The promise to repair was in effect at the time of the accident; (2) it adopts the general rule "under which a servant may be relieved from an assumed risk of his employment by the master's promise to remove the danger which creates the risk," and applies it to this case as justifying a recovery by plaintiff. The court considers at some length a distinction which has been noticed in a number of cases between a *general* promise to repair and a promise to repair at a definite future time. The court below had held that under a promise to take effect *in the future,* the risk remained that of the servant *until the time for the fulfillment of the promise,* when and for a reasonable time thereafter, the risk became the master's. The authorities support this doctrine in some jurisdictions. (*Standard Oil Co. v. Helmick,* 148 Ind. 457; *Indiana, etc., Rd. Co. v. Watson,* 114 Ind. 120; *McFarlan Carriage Co. v. Potter* (Ind. App), 52 N. E. 209; *Southern Pacific Co. v. Leash,* 2 Texas Civ. App. 68. See, however, *Andrecsik v. N. Y. Tube Co.* (1906) (N. J.) L. R. A., N. S., 1906, No. 4.) The Court of Appeals does not take a definite position in regard to this distinction but leaves it open for future decision, saying: "At this point the question arises, however, whether the rule should be adopted without qualification, or as limited by some of the courts, and particularly by the Appellate Division, from whose order this appeal is taken. Since, under our construction of the master's promise herein, it may fairly be said to fall within the general rule without qualification; and in view of the fact that under the so-called Employers' Liability Act (ch. 600, L. of 1902) now

in force, the rule above referred to may in the future present a question of purely academic interest, we do not now decide the general question whether it would be wiser to adopt the rule in its entirety or as modified by the limitation referred to."

The Court of Appeals *apparently* holds that when a promise to repair is made, such as that shown in the *Rice case,* that is, one "capable of the construction that it was to be fulfilled within a reasonable time" then "during that reasonable time covered by defendant's promise, the risk theretofore voluntarily accepted by the plaintiff was assumed by the defendant" *as a matter of law.* The decision is not clear on this point, but it has been so construed. (*Citrone v. O'Rourke Engineering & Construction Co.,* 99 Supp. 241; *Tannheuser v. Uptigrove,* 100 Supp. 245; *Schwarts v. R. N. Wilson Mfg. Co.,* 100 Supp. 1054.) This conclusion while logically unobjectionable, is contrary to the decisions in other jurisdictions which hold as in the old *Laning case* (49 N. Y. 521), that the general effect of a promise to repair is to make *a question of fact* for the jury, whether the employee, by continuing at work, assumed the risk or was guilty of contributory negligence.[10] The *Citrone case, supra,* decides the question which the Court of Appeals did not decide in the *Rice case,* and which as quotation of that decision given above would indicate, was left open to future decision. In the *Citrone case* the promise was to be performed at a definite future time, and *before that time had arrived* plaintiff

10. *Counsel v. Hall,* 145 Mass. 470; *District of Columbia v. McElligott,* 117 U. S. 621; *Schlitz v. Pabst Brewing Co.,* 57 Minn. 303; *Hough v. Railroad Co.,* 100 U. S. 213; *Smith v. E. W. Backus Lumber Co.,* 64 Minn. 447; *Rice v. Eureka Paper Co.,* 174 N. Y. 385.

was injured. It holds that the master assumed the risk *from the making of the promise* as a matter of law. The decision is based solely on the authority of the *Rice case.* With all due deference to the very learned justice who writes the opinion, we think the *Rice case* will not bear the construction given it. It is in accord, however, with a well-considered case in New Jersey (*Andrecsik v. New Jersey Tube Co.* (1906), L. R. A., New Series, 1906, No. 4.) In that case the promise was made by the superintendent at 10 a. m. to repair at noon. The repair was not made at noon, and plaintiff was injured at 3 p. m. The court held that the promise was definite and specific as to the time of performance and that there was no question for the jury, saying: "A promise made by the master, acted upon by the servant, to repair a specific defect at a definite time thereafter, creates an assumption of risk by the master. This assumption of risk began forthwith upon the making of the promise and continued thereafter and throughout the period fixed for the repair, but this undertaking of the master terminates and his liability thereunder ceases at the end of that period. The termination of the master's undertaking and the termination of the period fixed for the repair are identical. In such case it would be error to submit to the jury any question relating thereto which would enable the jury to find in conflict with the terms of the contract that the responsibility on the part of the master still existed after the expiration of the period during which the master had agreed to undertake it."

It is well settled that if the risk of injury from the defect itself in a given case is so great that no one but a reckless man would continue at work under the condi-

tions existing at the time, the defendant nevertheless is entitled to a verdict.[11]

The promise to repair to be effective must be made by a person authorized to make a contract in defendant's behalf, has been decided in *Hempstock v. Lackawanna Iron Co.*, 98 App. Div. 332, holding that a promise to fix a brace made by a foreman in charge of the construction of a scaffolding to an employee under him, was not binding upon the employer. (See, also, *Riola v. N. Y. Central, etc., Ry. Co.*, 97 App. Div. 252; see, however, *Larkin v. Washington Mills Co.*, 45 App. Div. 6.)

Sec. 55. Assurance of safety, express instructions, etc., and assumption of risk.

Where a servant is apprehensive of the possible danger concerning which, however, his mind is in doubt, and makes inquiry of his master and is assured that the condition concerning which he is apprehensive is safe, the continuance then in employment will not constitute an assumption of risk as a matter of law. An application of this rule can be made, however, only where the condition concerning which the inquiry is made is one of which an employee has imperfect knowledge, and which is not obviously dangerous.[12] The brakeman is justified, where the condition is not obviously dangerous, in relying on the superior knowledge

11. *Kane v. Northern Cent. Ry. Co.*, 128 U. S. 91; *Ind. & St. L. Ry. Co. v. Watson*, 114 Ind. 20; *Clarke v. Holmes*, 7 H. & N. 937; *Bromfield v. Hughes*, 128 Penn. 194; *District of Columbia v. McElligott*, 117 U. S. 621.

12. *Siedentop v. Buse*, 21 App. Div. 592, 47 Supp. 809; *Daly v. Schaff*, 28 Hun, 314; *Eicholz v. Niagara Falls Hydraulic P. & Mfg. Co.*, 68 App. Div. 441, 73 Supp. 842; *Chadwick v. Brewster*, 15 Supp. 598; *Floettl v. Third Ave. Ry. Co.*, 10 App. Div. 308, 41 Supp. 792; *Tremblay v. Mapes Reeve Construction Co.*, 169 Mass. 284; *Dean v. Smith*, 169 Mass. 569; *McKee*

and experience of his superintendent. (*Low v. Wakefield,* 185 Mass. 214); see also, *Murphy v. N. Y., N. H. & H. Ry. Co.,* 187 Mass. 18; *Gregory v. American Thread Company,* 187 Mass. 239; *Di Stefeno v. Peekskill Lighting & Ry. Co.,* 107 A. D. 293.

An employee cannot rely on his master's peremptory order or his express or implied assurance of safety when the danger itself is apparent to the employee and the master can have no superior knowledge,[13] but where the superintendent having been warned by the employee of the latter's danger in his work, said, "You go back to work and I'll take care of you," the employee can recover when the superintendent thereafter failed to keep his promise. (*McKinnon v. Ritter-Conly Co.,* 186 Mass. 155.) A servant of tender years or low mentality expressly instructed as to dangerous duty may rely upon the master's presumed superior knowledge in the premises and perform the duty according to such instructions without being held to be deprived of his right of action against the master under the doctrine of assuming an obvious risk. (*Koren v. National Conduit Co.,* 82 A. D. 527; *Owens v. Ernst,* 1 Misc. 388, affd. 142 N. Y. 661.)

v. Tourtellotte, 167 Mass. 69; *O'Brien v. Nute Hallett Co.,* 177 Mass. 422; *Denning v. Gould,* 157 Mass. 563; *Helfenstein v. Medart,* 136 Mo. 575; *Chicago Edison Co. v. Hudson,* 66 Ill. App. 639; *Haas v. Balch,* 12 U. S. App. 534 (6 C. C. A. 201); *Bradbury v. Goodwin,* 108 Ind. 286.

13. See *Perschke v. Hencken,* 44 Supp. 265; *Date v. N. Y. Glucose Co.,* 104 A. D. 207; *Graves v. Brewer,* 4 A. D. 327, 38 N. Y. Supp. 566; *Marsh v. Chickering,* 101 N. Y. 396; also, *Hawley v. Northern Cent. Ry. Co.,* 82 N. Y. 370; *O'Connell v. Clark,* 22 App. Div. 466, 48 Supp. 74; *Lowery v. Lake Shore, etc., Ry. Co.,* 13 Misc. 641; 8 Supp. 1089; *Tanner v. N. Y., etc., R. R. Co.,* 180 Mass. 572; *Meunier v. Chemical Paper Co.,* 180 Mass. 109; *Sullivan v. Simplex Electric Co.,* 178 Mass. 35; *McClusky v. Garfield & Proctor Coal Co.,* 180 Mass. 115.

Sec. 56. Assumption of risk; burden of proof.

A very important question relating to the doctrine of assumed risk is whether the burden is upon plaintiff of showing that he had not assumed the risk of injury, or upon the defendant to show that plaintiff had done so. This question has been considered by the Court of Appeals in a very important recent case. (*Dowd v. N. Y., Ont. & Western Ry. Co.*, 170 N. Y. 459), which holds that the burden of proof is upon the defendant to show that the plaintiff had assumed the risk of injury. This was an action brought by an administrator whose intestate had been killed by a negligent practice of defendants in "kicking" cars. The intestate had been at work for defendant about six weeks before his death. There was no evidence showing that the decedent was ever in such a position as necessarily to have seen cars kicked on the track where repairers were at work. The court says:

"If the burden of proof was on the plaintiff to show affirmatively the absence of knowledge on the part of her intestate, it may be that the evidence was insufficient for the purpose. If, however, the burden of proof in this regard is upon the defendant the finding of the jury should be sustained because the evidence did not conclusively establish the fact in accordance with this theory. . . . Whether the fact that a known or obvious risk is proved by one party or the other is immaterial, provided it is proved at all, but the question now before us is upon whom rests the burden of proof in this respect. If the plaintiff knows the danger, under ordinary circumstances he waives it, but is the waiver a defense to be alleged and proved by the defendant, or only the fact of contributory negligence, the absence of which is a part of plaintiff's case?"

The court holds, after considering the logical difference between contributory negligence and assumed risk, and defining those terms, that "the burden of showing that a servant assumed the risk of obvious danger rests upon the master and hence we cannot say, as a matter of law, that the jury, in the case before us, was compelled to find that the plaintiff's intestate knew or should have known of the practice of 'kicking' cars on the track where car repairers were at work. If he did not know of the practice he did not waive the danger."

This case is the first authoritative decision in New York on this important point. The rule has been applied to the act and the burden of proof as to assumed risk is upon defendant. (*Hunt v. Dexter Sulphite, etc., Co.,* 100 App. Div. 119, 91 Supp. 279; *Freemont v. Boston & M. Ry. Co.,* 111 App. Div. 831, 98 Sup. 179.) Subsequent decisions have intimated, though not definitely decided, that the defence of assumed risk must now be pleaded specially, and is not available under the usual general denial and plea of contributory negligence. In *Scheir v. Quirin,* 77 App. Div. 624, the Appellate Division, Fourth Department, uses the following language:

"The answer itself does not set forth the defense of assumption of risk by Scheir. (*Dowd v. Ry. Co.,* 170 N. Y. 459.) The facts, however, all came out upon the trial without any objection, and the question of a defect in the answer was not raised. Had it been, an opportunity would probably have been given to amend the answer upon such terms as would have been proper. We think it is too late upon this appeal to raise this objection." (*Kilkin v. N. Y. Cen., etc., Ry. Co.,* 76 App. Div. 529; *Overbaugh v. Wilber,* 106 A. D. 283.)

The employee not only assumes as a matter of law

the defects which he actually knows, but he also assumes the risk of injury from defects which he ought to have known or could have known by the use of reasonable care.[14]

Sec. 57. New York common law rule on "statutory risks." The employee in New York, with an exception which is considered in the next section, assumes at common law not merely those risks mentioned above and created by his master's ordinary negligence, but by continuance in the employment he assumes the risk of injury from a violation by the employer of any statute which may be passed to provide greater safety for the employee in the course of his employment. (See *Knisley v. Pratt*, 148 N. Y. 372; *De Young v. Irving*, 5 App. Div. 499, 38 Supp. 1089; *E. S. Higgins Carpet Co. v. O'Keefe*, 79 Fed. Rep. 810; *White v. Witteman Lithographic Co.*, 131 N. Y. 631; *Graves v. Brewer*, 4 App. Div. 327, 38 Supp. 566.) In the leading case on this subject, *Knisley v. Pratt*, 148 N. Y. 372, the employee, a young woman, was injured because of the failure of the defendant to comply with the mandatory provisions of the Labor Law (ch. 15 of L. of 1897, sec. 81) requiring cog-wheels to be guarded. The Court of Appeals held that by continuing in the employment with knowledge of the failure of her employer to comply with the statute she waived all right to claim compensation for injuries resulting therefrom, and that she was properly non-suited by the trial court. The court says:

"In order to sustain the judgment in favor of the

14. *Williams v. D., L. & W. Ry. Co.*, 116 N. Y. 626; *Appel v. B. & N. Y. P. R. Co.*, 111 N. Y. 550; *Gibson v. Erie Ry. Co.*, 63 N. Y. 449; *Powers v. Same*, 98 N. Y. 274.

plaintiff it is necessary to hold that where the statute imposes a duty upon the employer, performance of which will afford greater protection to the employee, it is not possible for the latter to waive the protection of the statute under the common law doctrine of obvious risks. We regard this as a new and startling doctrine calculated to establish a measure of liability unknown to the common law and which is contrary to the decisions of Massachusetts and England under similar statutes."

The question of public policy involved received very little consideration from the court. Notwithstanding the statement of the court quoted above, the doctrine that public policy will not permit an employer to escape his statutory obligation to provide for the safety of his employees under any such theory of assumed risks is neither new nor startling nor contrary to the English decisions. *Knisley v. Pratt, supra,* is itself contrary to the English doctrine and to the rule laid down in many jurisdictions in the United States, and has been criticised and not followed in many other courts.[15]

In England the case of *Baddesley v. Lord Granville,* 9 Q. B. D. 435, lays down a rule precisely contrary to the doctrine of *Knisley v. Pratt.* The action was brought for the death of a miner, caused by a violation

15. *Narramore v. C. C. C. & St. L. Ry. Co.,* 96 Fed. Rep. 298; *Greenlee v. Southern Ry. Co.,* 30 Southeastern Rep. (N. C.) 115; also, *Boyd v. Brazil Block Coal Co.,* 50 N. E. Rep. 368 (Ind.); *Durant v. Mining Co.,* 97 Mo. 62; *Distr., etc., R. R. Co. v. Moore,* 152 Ind. 350; *East St. Louis Ry. Co. v. Eggman,* 170 Ill. 538; *Ill. Cent. R. R. Co. v. Gilbert,* 107 Ill. 354; *Bluedorn v. Mo. Pac. R. R. Co.,* 108 Mo. 439; also, *Litchfield Coal Co. v. Taylor,* 81 Ill. 590; *Wesley Coal Co. v. Taylor,* 84 Ill. 126. The *Narramore case, supra,* considers and disapproves of the New York decision of *Knisley v. Pratt;* see, also, *Simpson v. N. Y. Rubber Co.,* 80 Hun, 415.

of the Coal Mines Regulation Act, which requires that a banksman be kept at the mouth of coal pits while miners are going up and down the shaft. The court held that the fact that the deceased knew that no banksman was employed by defendant and yet continued at work at the mine did not constitute a defense. Says Baron WILLS: "There should be no encouragement given to the making of an agreement between A and B; that B shall be at liberty to break the law which has been passed for the protection of A. If the supposed agreement between the deceased and the defendant, 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 upon him by statute, and shall connive at his disregard of the statutory obligation imposed upon him for the benefit of others as well as himself" . . . "such an agreement would be in violation of public policy and ought not to be listened to."

Sec. 58. Statutory risks; assumption by minors.

A recent case, establishing a new principle as to the liability of employers to minor employees, has been decided by the Court of Appeals in *Marino v. Lehmaier,* 173 N. Y. 530. It creates an important modification of the *Knisley v. Pratt* doctrine commented upon in the last section. In this case an infant of thirteen years was injured while working for defendant as a feeder of a printing press, which he was required to clean every night. While engaged in cleaning the press his fingers were caught between the cog-wheels and cut off. The machine was not in motion at the time he

commenced to clean it, and the court finds that the evidence is not clear as to the precise manner in which the machine was started. On receiving the injury the boy fainted and was unable to state whether or not he had previously taken hold of the fly wheel and in so doing started the motion of the machine. There is apparently no evidence to show that the machine itself was a defective one or as to the precise way in which the accident happened. The Labor Law, however (L. of 1897, ch. 415, sec. 70), provides: "A child under the age of fourteen years shall not be employed in any factory in this State. A child between the ages of fourteen and sixteen years shall not be so employed unless a certificate executed by the health officer be filed in the office of the employer." As this law prohibited defendant from employing a child of this age, the court held that the employment is in and of itself evidence of negligence sufficient to send the case to the jury on the ground that the case was one in which the accident could not have happened but for the employment. The court further held that a child under the age specified by the statute—fourteen years—does not possess the judgment, discretion, care and caution necessary for engagement in such a dangerous avocation, and, therefore, is not, as a matter of law, chargeable either with contributory negligence or with having assumed the risks of the employment. Two opinions are written in this case, one by Justice HAIGHT and the other by Judge PARKER, which agree in effect. Judge HAIGHT says:

"It has been said of the last century that it was the age of invention. Machines had been devised and constructed with which very many of the articles used by mankind were manufactured. Numerous factories had been established throughout the country filled with

machines, many of which were easily operated, and the practice of employing boys and girls in their operation had become extensive, with the result that injuries were of frequent occurrence. We think it is very evident that these reasons induced the Legislature to establish definitely the age limit under which children should not be employed in factories, and, to our minds, *the statute in effect declares that a child under the age specified presumably does not possess the judgment, discretion, care and caution necessary for the engagement in such a dangerous avocation, and is, therefore, not, as a matter of law, chargeable with contributory negligence or with having assumed the risks of the employment in such occupation.*"

He concludes that under the evidence a question of fact was presented for the jury; that the violation of the statute by defendant was evidence of negligence, and that if the jury found that the plaintiff was not chargeable with contributory negligence, the defendant was certainly liable, as well as liable for the penalty provided by the statute. There is apparently no evidence on the question of the absence of contributory negligence by this little child, but this point receives no consideration by the court in the prevailing opinions.

That the decision lays down a very vague rule of liability must be admitted. The principle upon which the questions of negligence, contributory negligence and assumption of risk are to be considered by the jury is far from clear. The criticism of the case contained in *Lee v. Sterling Silk Mfg. Co.*, 47 Misc. 182, is a very cogent one. It is a public misfortune that the Appellate Division in reversing this last-mentioned decision was forced to reverse its conclusion that the injured child illegally employed on machinery was entitled under the

Marino case to a directed verdict and an assessment of damages. Decisions construing and following the *Marino case* have held that the effect of this decision is that hereafter in cases involving violation of the Factory Act in the forbidden employment of minor children, the employment itself is "some," but not conclusive evidence of negligence on the employer's part (*Lee v. Sterling Silk Mfg. Co.,* 101 Sup. 78), and the question of assumption of risk by the injured child and of contributory negligence on its part is to go to the jury. (See *Regling v. Lehmaier,* 98 Sup. 642; *Gallenkamp v. Garvin Machine Co.,* 91 A. D. 141; *Sitts v. Waiontha Knitting Co., (Ltd.),* 94 A. D. 38; *Rahn v. Standard Optical Co.,* 110 A. D. 501; *Dragatti v. Plunkett,* 99 Sup. 361.) The burden of proof is on plaintiff, where the illegal employment alleged is that of a child between 14 and 16 years of age to show that no employment certificate has been issued authorizing the employment of the child, when the particular work at which the child was hurt has not been forbidden by law. (*Sitts v. Waiontha Knitting Co.,* 94 A. D. 38.) The Court of Appeals has not yet taken the position of the English courts as to the requirements of public policy in cases involving the violation by an employer of a remedial statute passed for the greater protection of his employees. It is, however, a step in that direction, and will materially assist practical enforcement of these provisions of the Labor Law.

Sec. 59. The assumed risk rule in England.

A somewhat extended examination of the common law rule on the subject of assumed risk in England is advisable owing to the fact that the purpose of the New York Employers' Liability Act is to engraft upon the

law of that State the common law rule on assumed risk as applied by English courts.

As will be seen by an examination of the English cases, the question whether the employee has agreed to take his chances of being injured by a defect which exists by his employer's negligence, is a question of fact to be determined by the jury upon the consideration of all the circumstances in the case. The character of the defect or negligence, the actions of the parties, the fact that the employee has complained or has failed to complain of the defect, the wages paid to the employee in comparison with wages ordinarily received by employees in the same general kind of work where such unnecessary dangers do not exist, the nature of the danger itself, are all elements to be considered. Adequate knowledge by the employee of the danger inherent in a defective condition standing alone is not in itself, under all circumstances, a complete defense even if the employee continues thereafter at his work in the same general course of employment. There may, undoubtedly, be cases in which knowledge of the danger, coupled with continuance in the employment, is sufficient to show the voluntary encountering of the risk. This, however, is not true in all cases, and the ordinary rule as laid down by the English courts is that mere knowledge by the workman of the risk involved is not sufficient to deprive him of the right to recover. There must be a thorough comprehension on his part of the danger and a voluntary undertaking by him of that risk and danger. (*Brooke v. Ramsden,* 63 L. T. & S. 287, 55 J. P. 262.) There must be an assent on the part of the workman to accept the risk with a full appreciation of its extent, to bring him within the maxim. Plaintiff is entitled to recover unless the circumstances are such

as to warrant the jury in coming to the conclusion that the plaintiff freely, voluntarily, and with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.[16]

The evolution of the English law on assumed risks and upon the effect of continuance in employment may perhaps best be understood by a consideration of the three leading English cases on the subject.

Sec. 60. Same; Thomas v. Quartermaine.

In *Thomas v. Quartermaine,* 18 Q. B. D. 685, the plaintiff, a brewery worker, sued to recover damages under the Liability Act of 1880 for injuries received from a fall into a cooling vat used by defendants in their brewery, the claim being that the vat should have been fenced, and that the injuries were occasioned by the absence of fencing. It appeared that a boiling vat and a cooling vat were placed in the same room in the brewery; a passage, which was in one part only three feet wide, ran between these two vats, the rim of the cooling vat rising sixteen inches above the passage. The plaintiff, who was employed in this room, went along the passage in order to get from under the boiling vat a board which was used as a lid. As this lid stuck, plaintiff gave an extra pull and it came away suddenly, and the plaintiff, falling back into the cooling vat, was severely scalded. There was no statute shown requiring any fencing upon such vats. Plaintiff had been employed for a long time at this place and was thor-

16. *Amos v. Duffy,* 71 L. R. 21; *Osborne v. London & Southwestern Ry. Co.,* 21 Q. B. D. 221; *Thrussell v. Handyside,* 20 Q. B. D. 359; *Williams v. Birmingham Battery & Metal Co.,* 2 Q. B. D. 338; *Yarmouth v. France,* L. R., 19 Q. B. D. 647, 657; *Thomas v. Quartermaine,* 18 Q. B. D. 685.

oughly familiar with the situation. On the trial before the County Court the judge held that there was evidence of a defect in the condition of the works at defendants' brewery, there being no sufficient fence to the cooling vat. He found that the condition of the vat was known to both plaintiff and defendant; that the plaintiff had not been guilty of contributory negligence, and he gave judgment for the plaintiff. The divisional court set aside this judgment and directed a judgment for the defendant, and the plaintiff appealed to the Court of Appeal. It was held by the Court of Appeal that there was no evidence of negligence arising from a breach of duty on the part of the defendant towards plaintiff, and owing to the fact that plaintiff had assumed the risk that he was not entitled to recover. The appeal was accordingly dismissed and no new trial ordered. A portion of the court's attention was occupied with the consideration of the effect of the English statute of 1880 upon the defense of "*volenti non fit injuria,*" which need not be considered at this point. The court disapproved of the ruling in *Weblin v. Ballard,* 17 Q. B. D. 122, which held that the defense of assumed risk had been taken away by the statute. The leading opinion is by BOWEN, L. J., who, upon the question of the effect of continuance in employment upon the assumption of risk, says: "In the absence of any further act of omission or commission by the occupier of the premises or his servants, or in disregard of statutory provisions or of individual rights, it can not properly be said that there has been upon his part any breach of duty towards the person who, knowing and appreciating the danger and risks, elects voluntarily to encounter them. I employ a builder to mend the broken slates upon my roof, and he tumbles off. Have I been guilty

of any negligence or breach of duty towards him? Was I bound to erect a parapet around my roof before I had my slate mended? In the case now before us, the negligence relied on by the plaintiff is that a vat in the room in which he worked was left without railing. Let us suppose that the defendant, impressed with the danger, had actually sent for a builder to put one up, and the builder had fallen in while executing the work. Would the defendant have been guilty of a breach of duty towards the builder? The duty of an occupier of premises, which have an element of danger upon them, reaches its vanishing point in the case of those who are cognizant of the danger and voluntarily run the risk. . . . Where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is in the absence of further acts of omission or commission no evidence of negligence on the part of the occupier at all. *Knowledge is not a conclusive defense in itself, but when it is a knowledge under circumstances that leave no inference open but one, viz.: that the risk has been voluntarily encountered, the defense seems to me complete.*" After commenting upon the confusion of the English law, between contributory negligence and assumed risk as defenses, the court says: "The Employers' Liability Act of 1880 makes precision on this point necessary and renders it important to remember, quite apart from the relation of master and servant, and independent altogether of it, one man cannot sue another in respect to a danger or a risk not unlawful in itself that was visibly apparent and voluntarily encountered by the injured person. The

county judge, in the case now under appeal, while negativing contributory negligence, has found the issue of *knowledge* against the plaintiff. In what sense must this finding be read, having regard to the undisputed facts? Knowledge, as we have seen, is not conclusive where it is not consistent with the facts that from its imperfect character or otherwise the entire risk, though in one sense known, was not voluntarily encountered, but here, on the plain facts of the case, knowledge on the plaintiff's part can mean only one thing. For many months, the plaintiff, a man of full intelligence, had seen this vat, known all about it, appreciated its danger — elected to continue working near it. It seems to me that legal language has no meaning unless it were held that knowledge such as this amounts to voluntary encounter of the risk." The language used by BOWEN, L. J., resembles very closely the language used in those courts in this country which hold that continuance in employment with knowledge of a defect or danger constitute an assumption of risk. It is to be observed, moreover, that the question of assumption of risk is passed upon by the court as though it were a question of law, and no new trial was ordered by the Court of Appeal. The facts in *Thomas v. Quartermaine* are somewhat meagre. Subsequent opinions in other cases have not followed the decision of Judge BOWEN, and, while the case has never been distinctly overruled, it has been distinguished and not followed on this point now under consideration.

One of the cases in which *Thomas v. Quartermaine* has been considered and its application been restricted, occurred in the following year; that case is *Yarmouth v. France*, decided in the Queen's Bench in 1887 (see 19 Q. B. D. 647.)

Sec. 61. Same; Yarmouth v. France.

In this case the plaintiff was in the employ of the defendant, who was a warehouseman in London, to unload and deliver goods. In his work he drove a horse belonging to the defendant, who was put under plaintiff's control by defendant's stable foreman. The plaintiff found that the horse was vicious and altogether dangerous and unfit to be driven, and he repeatedly complained of it to the stable foreman, who had the general management and control of the defendant's horses, telling him that he objected to driving so unsafe an animal. The foreman's answer was "Go on; you must keep driving," adding, "If you meet with an accident we shall have to stand responsibility for that." Some three months after plaintiff began to drive the horse, the horse kicked him and broke one of his legs. The county judge held that plaintiff was a "workman" and that a kicking horse was a "defect" in defendant's plant within the meaning of the act, but he further held, on the authority of *Thomas v. Quartermaine,* that the plaintiff continued to drive the horse after he had become aware of its vicious nature, and that he must, therefore, be considered to have assented to take upon himself the attending risk, and he accordingly gave judgment for the defendant. On appeal before the divisional court this judgment was reversed. The leading opinion in the case was written by Lord ESHER, who sat in *Thomas v. Quartermaine* and wrote a dissenting opinion to the judgment of the court in that case. After reciting the facts given above, he says: "The judge of the City of London Court did that which, I believe, many county court judges have done since the decision of the Court of Appeal in *Thomas v. Quartermaine.* The moment it was proved before him that the plaintiff

knew the horse to be vicious but continued to drive him, the judge said it was useless to enquire further, for that alone disentitled him to recover, upon an application of what is called the maxim of '*volenti non fit injuria.*'" . . . "We are called upon now to say whether that is the true effect of the decision." . . . "Does the *maxim of 'volenti non fit injuria' go to this length that the mere fact of the workman, knowing that a thing is dangerous and yet using it, is conclusive to show that he voluntarily incurs the risk?* The answer to that question, so far as this court is concerned, depends upon whether *Thomas v. Quartermaine* has so decided. Taking the whole of that judgment together, it seems to me to amount to this: that mere knowledge of danger will not do; there must be an assent on the part of the workman to accept the risk with a full appreciation of its extent to bring a workman within the maxim of '*volenti non fit injuria.*' If so, that is a question of fact. Here the judge of the court below has come to the conclusion that the moment it appeared that the plaintiff knew and appreciated the danger and did not at once quit the defendant's employ he came within the maxim, and was, therefore, in the authority of *Thomas v. Quartermaine,* disentitled to recover. He did not bring his mind to bear upon the motive which induced the plaintiff to act as he did — whether he relied upon the foreman's statement that the employer would be responsible in case of accident or whether he was influenced by fear of being thrown out of employment if he failed to perform the foreman's orders. All that was for the jury." In this judgment LINDLEY, L. J., concurred.

This judgment certainly does not follow that of *Thomas v. Quartermaine* and limits the application of the rule laid down by BOWEN, L. J., in that case most

materially. This is made quite clear in the dissenting opinion of LOPES, C. J. (Citing *Woodley v. Metropolitan District Ry. Co.,* 2 Exch. Div. 384; *Griffiths v. London & St. Katharine Docks Co.,* 13 Q. B. D. 260.)

The decision in *Yarmouth v. France,* however, as has been observed, was by the divisional court, subordinate to and bound by the decision of the Court of Appeal in *Thomas v. Quartermaine.* The question, however, which is considered in the *Yarmouth case* receives later further attention from the House of Lords on an appeal from the Court of Appeal, and its reasoning is sustained by the "law lords" in the case of *Smith v. Baker,* A. C. (1891), p. 325.

Sec. 62. The rule in Smith v. Baker.

This is the most important case in English law on the doctrine of assumed risk, and its facts and the rulings made upon them require careful consideration. The plaintiff had been employed by the defendants, who were railway contractors, for some months prior to the day on which he received his injuries. The duties assigned him when he first entered their employment was to fill carts with stones which were lifted by a steam crane in order to be put in the wagons; he was next engaged in slinging stones on to the crane, and, about two months before the accident, he was set to work with hammer and drill with two other servants of the respondents, he holding the drill while they used the hammer. On the day of the accident he was sent, with two others, to drill a hole in the rock in a cutting through which a railway track was to be laid. While they were thus employed, stones were being lifted from the cutting, which was seventeen or eighteen feet deep; the crane was resting on the top of the cutting, near

the edge. When slinging a stone, a chain was put around it and a hook hitched into one of the links; to this chain the chain from the crane was fastened; when the stones were clear of the bank the arm of the crane was jibbed in one direction or another, according to the position of the wagon into which the stone had to be put; if it was jibbed in one direction it passed over the place where the plaintiff was at work. It would appear that this method of work had existed from the commencement of plaintiff's employment at this work. Whilst he was working the drill a stone in the crane, on being lifted, fell upon him and caused serious injuries. No warning was given that the stone was to be jibbed in that direction. Plaintiff stated in his evidence that the men were "jibbing" over his head; that whenever he saw them he got out of the way, but at the time the stone fell upon him he was working the drill and so did not see the stone above. One of his fellow workmen had in plaintiff's hearing previously complained to the "ganger" or foreman of the work of the danger of slinging stones over their heads, and plaintiff himself had told the crane driver that it was not safe. On cross-examination the plaintiff stated that he was a "navvy" or railway laborer, and accustomed to this particular work for six or seven years; he had been long enough at it to know that the labor was dangerous; he had been at the same class of work in the same cutting when they were jibbing overhead every day, and had been doing that steadily for four or five months. Sometimes he could see the stones being craned up above him, and when he saw them he got out of the way. At the close of plaintiff's case, defendant's counsel submitted that the case must be non-suited on plaintiff's own admission as to his knowledge of the risk. (Citing *Thomas v.*

Quartermaine, 18 Q. B. D. 685.) The court refused to non-suit. The only witness called for the defendants was the superintendent of the work, under whose order plaintiff was employed on the day of the accident. He stated that they had put a sling chain on to the stone in the ordinary way, and no explanation was made or suggestion given as to what was the cause of the disaster. He said that the rule of the works was that all the employees should look out for themselves; that it was part of plaintiff's employment to look out; the men ought to have stopped work while the stone was being jibbed around, and that he told the men to get out of the way. The special questions sent to the jury in the case and their answers were these: "Q. 1. Was the machinery for lifting the stone from the cutting, taken as a whole, reasonably fit for the purpose for which it was applied? A. No. Q. 2. Was the omission to supply special means of warning when the stones were being jibbed a defect in the ways, works, machinery and plant? A. Yes. Q. 3. If so, were the employers, or some person engaged by them, to look after the condition of the works, etc., guilty of negligence in not remedying that defect? A. Yes. Q. 4. Was the plaintiff guilty of contributory negligence? A. No. Q. 5. Did the plaintiff voluntarily undertake a risky employment with the knowledge of its risk? A. No. Q. 6. Amount of damages, if any? A. One hundred pounds." Application was made on behalf of defendants to have judgment entered for them, notwithstanding the findings of the jury, on the ground *that the case should not have been allowed to go to them, plaintiff having admitted that he knew of the risk and voluntarily incurred it.* The trial judge having refused to set aside the verdict, the case went upon appeal, the notice of appeal

simply specifying as error that the judgment was bad in law on the ground that the plaintiff knew of the risk and had voluntarily assumed it. The Court of Queen's Bench dismissed the appeal, but allowed an appeal to the Court of Appeal, which reversed the judgment of the court below, mainly, or, perhaps, exclusively, on the ground that there was no evidence of negligence on the part of the defendant, although Chief Justice COLERIDGE expressed an opinion that the judgment of the County Court judge ought to be set aside on another ground, also, namely, that the plaintiff had engaged to perform a dangerous operation and took the risk of the operation he was called upon to perform. From the Court of Appeal the case came before the House of Lords. Questions of fact are not heard before the House of Lords, nor any law point not originally raised in the County Court itself. The question on which the Court of Appeal had reversed the case was disposed of in the House of Lords on the ground that no such point had been taken at the trial, and the question whether there was or was not absence of negligence by the defendant was not before the court.

In the leading opinion, that of Lord HALSBURY, he states the question involved in the case, as follows:

"The objection raised and the only objection raised to the plaintiff's right to recover was that he had voluntarily undertaken the risk. That is the question and the only question which any of the courts, except the County Court itself, had jurisdiction to deal with. Now, the facts on which that question depends are given by the plaintiff himself in his evidence. Speaking of the operations of slinging the stones over the heads of the workmen he said himself that it was not safe and that whenever he had sufficient warning or saw it

he got out of the way. The ganger told the workmen employed to get out of the way of the stones which were being slung. Plaintiff said he had been long enough at the work to know that it was dangerous, and another fellow workman, in his hearing, complained that it was dangerous practice.

"My Lords, giving full effect to these admissions on which the whole case for the defendants depends, it appears to me that the utmost they have proved is that in the course of the work it did occasionally happen that stones were slung in this fashion over workmen's heads; that plaintiff knew this and believed it to be dangerous, and whenever he could he got out of the way. The question of law that seems to be in debate is whether upon the facts, and on an occasion when the very form of his employment prevented him from looking out for himself, he consented to undergo this particular risk and so disentitled himself to recover when a stone was negligently slung over his head or negligently permitted to fall on him and do him injury. I am of the opinion that the application of the maxim '*volenti non fit injuria*' is not warranted by these facts. . . . It *appears to me that the proposition upon which the defendants must rely must be a far wider one than is involved in the maxim. I think they must go to the extent of saying that whenever a person knows there is a risk of injury to himself he debars himself from any right of complaint if an injury should happen to him in doing anything which involves that risk.* For this purpose and in order to test this proposition we have nothing to do with the relation of employer and employee. The maxim in its application to the law is not so limited. Where it applies it applies equally to a stranger as to any one else, and if applicable to the extent that is now insisted on no

person ever ought to have been awarded damages for being run over in the London streets, for no one (at all events some years ago, before the admirable police regulations of later years), could have crossed London streets without knowing that there was a risk of being run over."

" It is, of course, impossible to maintain a proposition so wide as is involved in the example just given, and in both *Thomas v. Quartermaine,* 18 Q. B. D. 685, and *Yarmouth v. France,* 19 Q. B. D. 647, it has been taken for granted that mere knowledge of the risk does not necessarily involve consent to the risk."

Lord WATSON, in his opinion, says, page 354; " The only question which we are called upon to decide, and I am inclined to think the only substantial question in the case, is whether, upon the evidence, the jury were warranted in finding, as they did, that the plaintiff did not ' voluntarily undertake a risky employment with a knowledge of its risks.' Whether the plaintiff appreciated the full extent of the risk to which he was exposed or not it is certain that he was aware of its existence and apprehensive of its consequences to himself, so that the point to be determined practically resolved itself into the question whether he voluntarily undertook the risk. If upon that point there are considerations pro and contra requiring to be weighed and balanced, the verdict of the jury cannot be lightly set aside. Defendant's case is that the evidence is all one way; that the plaintiff's continuing in their employment after he had become aware and had complained of the danger, of itself affords proof absolute and conclusive of his having accepted the risk of a stone falling in the course of its transit from the quarry to the loading bank. . . . *When, as is commonly the case,*

his (the workman's) acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence and appreciated or had the means of appreciating its danger. But assuming that he did so I am unable to accede to the suggestion that the mere fact of his continuing at his work with such knowledge and appreciation will in every case necessarily imply his acceptance. Whether it will have this effect or not depends, in my opinion, to a considerable extent upon the nature of the risk and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case."

Lord HERSCHELL, in his opinion on the case, at page 361, says: "In the present case it must be taken on the finding of the jury that the danger was at least enhanced and the catastrophe caused by the negligence of the defendants, and the question for your Lordship's consideration is whether, under such circumstances, the fact of the plaintiff having continued to perform the duties of his service, precludes his recovery in respect to this breach of duty because the acts or defaults which constituted it were done '*volenti.*'"

"There may be cases in which a workman would be precluded from recovering even though the risk which led to the disaster resulted from the employer's negligence. If, for example, the inevitable consequences of the employed discharging his duty would obviously be to occasion personal injury, it may be that if, with this knowledge, he continued to perform his work and thus sustain the foreseen injury he cannot maintain an action to recover damages in respect of it. Suppose, to take an illustration, that owing to a defect in the machinery at which he was employed, the workman could

not perform the required operation without certain loss of a limb. It may be that if he, notwithstanding this, performed the operation he could not recover damages in respect to such a loss, but that is not the sort of case with which we have to deal here. It was a mere question of risk which might never eventuate in disaster. The plaintiff evidently did not contemplate injury as inevitable, nor even, I should judge, as probable. *Where, then, a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service, with knowledge of the risk, preclude the employed, if he suffer from such negligence, from recovering in respect of his employer's breach of duty?* I cannot assent to the proposition that the maxim '*volenti non fit injuria*" applies to such a case, and that an employer can invoke its aid to protect him from liability for his wrong . . . It is suggested in the course of the argument that the employed might on account of special risk in his employment receive higher wages, and that it would be unjust that in such a case he should seek to make the employer liable for the result of the accident. I think that this might be so if the employed agreed, in consideration of special remuneration or otherwise, to work under conditions in which the care which the employer ought to bestow by providing proper machinery or otherwise to secure the safety of the employed, was wanting and to take the risk of their absence he would no doubt be held to his contract, and this is whether such contract were made at the inception of the service or during its continuance."

The decision of the House of Lords, on this extremely important case, was concurred in by all the judges

except Lord BRAMWELL, and the point upon which they all agreed, as expressed in the head note, is this: "When a workman, engaged in an employment not in itself dangerous, is exposed to a danger arising from an operation in another department, over which he has no control, the danger being created or enhanced by the negligence of the employer . . . the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to show that he has undertaken the risk so as to make the maxim '*volenti non fit injuria*' applicable in case of injury. The question whether he has so undertaken the risk is one of fact and not of law, and this is so both at common law and in cases arising under the Employers' Liability Act of 1880."

Sec. 63. The change intended by the statute.

Section "3" of the New York Employers' Liability Act is intended to *substitute* for the present rigid rule in force under the common law in that State (sec. 53), the flexible rule which prevails under the English common law as defined in the decisions which have just been considered. The section has, however, thus far failed to accomplish this effect. (See sec. 64, *infra.*)

Under this section of the New York law, an employee is conclusively presumed by entering upon or continuing in his course of employment, to have assented to and accepted all the necessary risks of his employment. The statute defines a necessary risk as one inherent in the nature of the business which remains 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 employee." This definition is

declaratory of existing law. (See sec. 51; *Booth v. B. & A. Ry. Co.*, 73 N. Y. 38; *Pantzar v. Tilly Foster Mining Co.*, 99 N. Y. 366; *McGovern v. Cent. Vermont Ry. Co.*, 123 N. Y. 287; *Benzing v. Steinway*, 101 N. Y. 552.)

The section, however, provides that the employee shall *not* be presumed to have assented to any risks *other* than the necessary risks by reason of his entering upon or continuing in the service with knowledge of such risks. This, of course, is a modification of the existing New York rule as to so-called "obvious risks" (see section 49), when those obvious risks exist by reason of the negligence of the employer. (See *Crown v. Orr*, 140 N. Y. 450; *Kennedy v. Manhattan Ry. Co.*, 145 N. Y. 95; *McQuigan v. D., L. & W. Ry. Co.*, 122 N. Y. 618.)

The statute having, in this section, first provided, as has been just seen, that no *conclusive* presumption of assumed risk shall arise from the mere fact of continuance, then provides that, "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 has 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." As has been seen (see sec. 52), the rule of law prevailing in New York at common law has been that where the employee continues at work after knowledge of the danger of personal injury from the defect created by

his employer's negligence, he is presumed by such continuance to have assented to the existence or continuance of the risk, and is not entitled to recover. The master, under the decisions cited in section 49, owes no duty of care (*Knisley v. Pratt*, 148 N. Y. 372) to such a servant, and has been entitled to a non-suit in an action brought by a servant when such knowledge, not merely of the defect, but *of the danger* therefrom, has been shown, and when, with that knowledge the employee has continued at work. In other words, by this statute, the assent by the employee to the existence or continuance of the risk of injury does not *necessarily,* and as a matter of law, follow from the mere fact that he keep at work. The statute then provides that 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.

The effect of this section is this: There is no inference to be implied by law (even where the workman knows of and appreciates the danger) from the fact of his continuance in the employment, that the question of assumption of unnecessary risk is one of fact for the jury; that the consent to run such risk must be proved by the defendant who wishes to rely on the maxim "*volenti non fit injuria,*" the reason being that the workman does not impliedly take the risk of his employer's negligence. The fact of continuance in employment, while it remains an important element in the case, is no longer necessarily controlling in the determination of whether the employee voluntarily undertook the risk

of injury from his master's negligence. It must be considered by the jury with such other circumstances as may be shown. It may be (as was intimated by Lord HERSCHELL in *Smith v. Baker*) that a situation may arise so full of peril that no reasonable man would be willing to endure it. In such a case it might well be that an employee who continued under such serious perils would be guilty of such negligence as to disentitle him to recovery. In such a case a verdict in his favor would, of course, be properly set aside by the court. It may be that the facts and circumstances disclosed and the nature of the defect are such as to lead irresistibly to the conclusion that the plaintiff did voluntarily assume the risk of injury and for this reason is not entitled to a verdict. (*Church v. Appelby*, 58 L. J. Q. B. 144, 5 T. L. R. 88.) The question of the assumption of an unnecessary risk of a given employment is a question of fact, and, ordinarily, the mere fact of continuance in employment is an element and only an element in the determination of that question by the jury.

Sec. 64. Section 3 as construed by the New York courts.

The third section of the Liability Act involves three propositions.

(1) It declares that the employee assumes *as a matter of law,* the necessary risks inherent in the business. This is the well settled common law rule. If an accident, therefore, occurs from a *business risk* not existing through any negligence of the employer but inherent in the very nature of the work itself and essential to its usual performance, plaintiff has no right of action and his complaint may be dismissed for failure of proof as a matter of law. (*Vaughn v. Glens Falls Cement Co.*, 105 App. Div. 136, 93 Supp. 979.) But this state-

ment is apparently in conflict with *McBride v. N. Y. Tunnel Co.,* 113 App. Div. 821, 92 Supp. 282, where the court says: "It is argued further that the explosion caused by Martin's act, that is, a premature explosion, was inherent in the nature of the business in which McBride was engaged, and that, therefore, the complaint should have been dismissed. This, however, under the provisions of the Employers' Liability Act, was a question for the jury.

(2) The question whether the plaintiff assumed the risk of injury occasioned by an *unnecessary* risk, that is, by a risk not inherent in the nature of the business itself, but existing through the carelessness of his employer or by the employer's failure to comply with statutes intended for the servant's safety is one of fact for the jury.

As the Appellate Division, First Department, has said in *Kiernan v. Eidlitz,* 109 App. Div. 726, 96 N. Y. Supp. 387: "It is quite apparent, on careful reading of the act, that the doctrine of the assumption of obvious risk has not been eliminated in an action by an employee against his employer, even if the negligence alleged be the failure to obey the strict provisions of the law as to furnishing of safeguards against injury by the employee. If that omission is obvious, the assumption of the risk is not assumed as matter of law, entitling the employer to a direction by the court, but the question whether the employee understood and assumed the risk of such injury shall be one of fact, and, of course, if one of fact, to be submitted to the jury, in other words, the doctrine of the assumption of obvious risks is still preserved, but the tribunal to pass upon the questions whether they were assumed with knowledge and understanding is

changed from the court to the jury. If the absence of the guard rail was the cause of the accident, the physical fact of its absence was as obvious to the employee, as to the master or his superintendent. But the statute says whether the employee understood and assumed the risk caused by the failure to erect and keep the guard rail there must be submitted to the jury. This interpretation of the statute has the authority of the following cases: *Vaughn v. Glens Falls Cement Co.*, 105 A. D. 136, 93 Supp. 979; *Di Stefeno v. Peekskill Lighting & R. Co.*, 107 A. D. 294, 95 Supp. 179; *Wynkoop v. Ludlow Valve Mfg. Co.*, 112 A. D. 729, 98 Supp. 1076; *Reilly v. Troy Brick Co.*, 184 N. Y. 399, 77 N. E. 385."

As the court says in *Vaughn v. Glens Falls Cement Co.*, 105 App. Div. 136, 93 Supp. 979: "By that section it is substantially provided that it may no longer be assumed *as a matter of law*, namely, conclusively be presumed, that an employee has assumed all risks that are obvious and fully appreciated by him. Such an assumption goes only to those that are in such section defined as 'necessary risks.' . . . In this case the risk was plain and obvious to the plaintiff, but it was one not necessarily existing. It resulted from a negligent omission on the defendant's part. The plaintiff's deliberate performance of the work, therefore, cannot be considered as a matter of law, to be an assumption of such risk, or as contributory negligence on his part." (See, also, *Baker v. Empire Wire Works*, 102 A. D. 125 ~~105~~, 92 Supp. 355; *Cadigan v. Glens Falls Gas & Electric Lighting Co.*, 112 A. D. 751, 98 Supp. 954; *Di Stefeno v. Peekskill Lighting Co.*, 107 A. D. 293, 95 Supp. 179; *Freemont v. Boston & Maine Railroad Co.*, 111 A. D. 831, 98 Supp. 179; *Reilly v. Troy Brick*

Works, 184 N. Y. 399; *Wynkoop v. Ludlow Valve Mfg. Co.*, 112 A. D. 729, 98 Supp. 1070.)

The intimation in *Faith v. N. Y. Central Ry. Co.*, 109 A. D. 222, that "cases might arise where the evidence conclusively establishes assumption of risk as a matter of law" is contrary to the meaning of this section of the act if applied to risks other than necessary risks inherent in the very nature of the business and not created by negligence of the defendant. The question of whether the plaintiff was guilty of contributory negligence under the same circumstances, that is, simply by staying at work with knowledge of the danger is also for the jury. (See cases above cited.)

(3) *The question of whether the plaintiff was or was not guilty of contributory negligence is not necessarily one for the jury, except in cases where the only contributory negligence shown is simply the continuance at employment with knowledge of the risk or danger created by the employer's negligence.* (*Chisholm v. Manhattan Ry. Co.*, 116 A. D. 320, 101 Supp. 622.) Section 3 does not affect the usual rule regarding contributory negligence, that is, the plaintiff must show the absence of contributory negligence on his part. The only modification made by the section on the general rule as to contributory negligence is that such inferences regarding contributory negligence as might be drawn solely from the fact of the continuance in employment at the same place in the presence of a known danger be passed upon as a question of fact for the jury. With this exception created by this section the complaint may still be dismissed in a proper case for the failure of plaintiff or his personal representative to show the absence of contributory negligence. In *Wilson v. New York Mills*, 107 A. D. 99, 94 Sup. 1090, there

was " a total absence of tangible facts by which the jury might determine how the accident happened to plaintiff's intestate." The man was hurt while greasing wheels. His clothing was caught in the wheels. The court reversed the verdict for failure to prove the absence of contributory negligence. The court quotes section 3 so far as it declares that the question whether the employee understood and assumed the risk or was guilty of contributory negligence by his continuance at work with knowledge of the risk should be a question of fact for the jury, and says: " The effect of this provision is not to relieve the plaintiff from showing freedom from contributory negligence, nor does it require the submission to the jury of this question where there is an utter absence of proof tending to establish the exercise of care by the person injured. Submission to the jury implies controverted facts or circumstances from which contrary inferences may fairly be drawn. The isolated fact that an employee was killed in the course of his employment does not of itself permit a jury to find that the employee was free from fault contributing to his death. The plaintiff must show affirmatively his freedom from negligence and if he utterly fails in this essential part of his case, the duty of the court to nonsuit still remains in spite of the Employers' Liability Act, for the reason that there is no fact to be submitted to the jury."

In *Kinney v. Rutland Railroad Co.*, 114 A. D. 286, 99 Supp. 800, where the complaint has been dismissed, the court in reversing the nonsuit said: " The proper notice was served under chapter 600 of the Laws of 1902, so that this nonsuit cannot stand upon the ground that plaintiff with knowledge of defendant's fault has by his contract assumed the risk. It can only stand upon one of

two grounds. First, that as a matter of law defendant has not been guilty of contributory negligence, and second, that *as matter of law plaintiff has been guilty of negligence which contributed to produce his injury.*" (See, also, *Bauer v. Empire State Dairy Co.*, 100 Sup. 663.)

Sec. 65. Setting aside verdicts under Section 3.

It has been seen by the preceding section that ordinarily the question of assumption of risk by continuance of employment in the presence of an unnecessary risk is one of fact for the jury. The section further provides, however, that a verdict so rendered shall be subject to the usual powers of the court in a proper case to set aside a verdict rendered contrary to the evidence. One of the most important questions rising under section 3 relates to the use by the court of the power to set aside a verdict where the evidence shows a continuance in employment with knowledge of the defect or negligence, where the verdict has been for plaintiff. In a number of cases in which this question has arisen the facts have been such that at common law the complaint would have been dismissed. Under the common law doctrine, where an employee remains at work in the presence of a known danger, even existing through the negligence of his employer, he is to be held to have assumed that risk as a matter of law. (See sections 52 and 53, *supra.*) This question being now, under the act, one of fact for the jury, and the jury having found a verdict contrary to the conclusion which the court would have reached as a matter of law under the common law doctrine, what disposition shall the court make of the motion to set aside the verdict? This has been passed upon in a number of cases and the practical result

of section 3 thus far has been to make the submission of of the question of assumption of risk to the jury a matter of form rather than of substance in cases where, at common law the complaint would have been dismissed or a verdict directed for defendant. The courts have thus far uniformly set aside verdicts as contrary to the weight of evidence in cases where the same verdicts would at common law have resulted in a directed verdict for defendant or a dismissal of the complaint. (*Vaughn v. Glens Falls Insurance Co.*, 105 A. D. 136, 93 Sup. 979; *Baker v. Empire Wire Co.*, 102 A. D. 125, 92 Sup. 355; *Wynkoop v. Ludlow Valve Mfg. Co.*, 112 A. D. 729, 98 Supp. 1076; *Roche v. India Rubber, etc., Co.*, 100 Sup. 1009.)

An examination of these cases will show that the Appellate Courts have in them held where plaintiff's knowledge and understanding of the danger of an unnecessary risk created by negligence has been shown, that the only conclusion to be drawn by the jury *as a matter of fact* from the continuance in employment, must be the same conclusion that had previously been drawn by the courts *as a matter or law*, and any verdict by the jury which differs from that conclusion previously drawn by the court is contrary to the weight of evidence. Knowledge of a risk under these decisions is held to be equivalent to assumption of risk and *must* be so found by the jury. This construction takes away all meaning of the word "assumed" in that portion of the section which says that the question whether the plaintiff knew and *assumed* the risk was one for the jury. The Court of Appeals has not yet been called upon to decide what, if any, actual change section 3 of the act has made in the existing law. At present the purpose of the act as contained in this section and as shown in section 64 preceding, has for the most part failed.

Sec. 66. Effect of Section 3 on common law actions.

That portion of section 3 which defines necessary risks and which provides that "the fact that the employee continued in the service after the discovery of a defect existing by negligence shall not be construed as a matter of law as an assent to the existence or continuance of the risk or as negligence contributing to such injury," does not in terms state that this section applies only to actions brought under the Liability Act, and the phrase used in section 3, "in all cases arising *after this act takes effect,*" has been construed in the Appellate Division, First Department, to make this section apply to all master and servant cases brought, both under the act and at common law. In *Ward v. Manhattan Railway Company,* 95 App. Div. 437, 88 N. Y. Sup. 758, the action was a common law action solely. On appeal from a verdict by the defendant, the court says: "The errors already pointed out require a new trial, but in awarding the same we deem it proper to make some further observations. The court, submitting the case to the jury, instructed them upon the law concerning the assumption of risks by an employee as the law existed prior to the enactment of the Employers' Liability Act (so called). No new liability is created by that act for the failure of an employer to make proper rules and regulations for the safety of his employees. The action is therefore based upon the common law. It has been decided that sections 1 and 2 of the Employers' Liability Act apply only to causes of actions arising thereunder. But it has not been decided that none of the provisions of the act apply to causes of actions for negligence in general, regardless whether they arise under the statute or at common law. Section 3 of the act is manifestly of general application

to all actions by servants against master for negligence upon causes of action arising thereafter. It prescribes a new rule with reference to the assumption of risks more favorable to the employee than the rule that previously obtained, and we are of opinion that it is applicable to this case." (See, also, *Smith v. Manhattan Ry. Co.,* 98 Sup. 1, to the same effect.)

The Third Department of the Appellate Division disagrees with this construction of the statute. In *O'Neil v. Karr,* 110 App. Div. 571, 97 Sup. 148, the court construes the act as an entirety, and construing section 3 in connection with section 2, it reaches the conclusion that section 3 is not of general applicability, but only to causes of action brought under the act. " It is true that section 3 has in it some general expression which might at first seem to make it applicable to all actions, whether at common law or under this act, but no single section of the act can be separated from the rest and alone construed. This act must be read as a whole. In section 2 it is provided 'No action for recovery or 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. This provision of the statute does not require notice to be given in an action for injury or death under *the first section of the act,* but *under the act itself, which includes all the sections,* and the conclusion would seem to me to be irresistible that by force of this clause, one who would seek the benefits of this act must give the notice required by the act. Whether the recovery is sought for an increased liability under section 1 or 3, the action is in either case brought *under the act,* and by the terms of section 2 quoted the notice therein specified

is required to be served. That this construction is a true one would seem to be indicated by the provision in section 3 itself, which provides that an employee or his legal representatives shall not be entitled "*under this act*" to any right of compensation or remedy against the employer where such employer knew of the defect or negligence and failed to give notice thereof unless the employer or his superintendent had equal knowledge thereof prior to the injuries to the employee. If this act were inseparable this provision should read that an employee or his legal representative shall not be entitled *under this section* to any right of compensation, etc. The reading of the section itself indicates that the act is not separable but entire and was so regarded by the Legislature when the act was passed and its benefits are given to those who comply with its condition of notice given."

The Appellate Division, First Department, has more recently reconsidered its decision in the *Ward case,* 88 Sup. 758, in *Curran v. Manhattan Railway Co.,* 103 Supp. 351, and has said: "Further consideration has led us to conclude that in order to entitle an employee to the benefits of the provisions of the Employers' Liability Act, he must bring his action under that act and conform to its terms therein contained. (*Chisholm v. Manhattan Railway Co.,* 116 A. D. 320.) And that in an action for common law negligence he is not entitled to the benefits of its provisions, but must be governed by the rules of the common law."

The question of whether section 3 of the act applies to common law actions must, therefore, be answered in the negative. The Court of Appeals has not as yet been called upon to decide the point.

Sec. 67. Notice of defect to employer; statutes compared.

An employee to be entitled to take advantage of the liberal provisions of the Liability Act must notify his employer of the defect which caused his injury whenever he himself knows of the defect a reasonable time prior to the occurrence of the accident. If he cannot give the notice to the employer himself he must give it to some person superior to himself in the employer's service intrusted with some general superintendence. The only excuse for the failure to give such notice where the employee himself is aware of the defect or danger, is where the employer or some person superior to the employee intrusted in some general superintendence, knew of the defect so that such a notice was unnecessary and would serve no useful purpose. This provision is similar to the provisions of the other liability acts. The English statute provides (subd. 3 of sec. 2) that workmen shall not be entitled under this act to any right of compensation or remedy against the employer . . . 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 person already knew of such defect or negligence.*

The Alabama law substantially follows the wording of the English statute. The portion underlined in the English statute is omitted in the Massachusetts and Colorado law. The Indiana law contains no requirement for such a notice of defect. Under the English and Alabama law it would appear that to excuse the giving of the notice of defect, two things must concur: First, the employer or some superior person must know of the defect; second, the employee must know prior to

the accident that the employer or superior person had such knowledge of the defect that notice to them of it is unnecessary.[17] The New York statute does away with the necessity of this second element of proof, and the failure to give notice is excused if the employee can show, upon trial, that the employer or superior person in fact knew of the defect at any time prior to the accident. In *Keating v. Coon,* 102 App. Div. 112, 92 Supp. 474, plaintiff, a sixteen-year-old boy, was hurt in a defective machine known as a carder. One of the main issues in the case was whether the plaintiff had notified defendant's superintendent of the defect in the machine within a reasonable time. It appeared by evidence given on trial that the boy had known for some two weeks before the accident of the defect in the machine but had not informed defendant's superintendent of the defect. The trial judge charged the jury that it was the boy's duty to give the superintendent this information within a reasonable time and further charged as a matter of law that "if the boy knew of the defect, understood the danger and knew that this machine was out of repair and ought to be fixed, the fact that he allowed two weeks to expire without giving such information to the superintendent, the waiting so long a period was an unreasonable period of time for him to wait, within that time before the injury occurred he should have given the superintendent notice that the machine was out of order." On appeal this was held to be error. The charge, as a matter of law, that the omission for two weeks to give the notice barred the recovery as there was evidence that the superintendent had had knowledge of some of the defects in the machine before the accident,

17. *Seaboard Mfg. Co. v. Woodson,* 94 Ala. 143.

and the court says: "If Haythorne (the superintendent) knew the rollers were out of gear and the plaintiff was aware he possessed that knowledge, then it was not incumbent upon the lad to inform the superintendent of the defect."

Sec. 68. Servant's duty to complain.

At common law, irrespective of the Liability Act, it has been held that it is the duty of an employee who knows of the existence of a defect in the materials or instrumentalities of his work, or of the incompetence of a fellow employee, or any other danger to which he is unnecessarily exposed in his work, to complain of the same and to notify the employer so that he may have an opportunity to correct the deficiency. This applies, of course, only in those cases in which the employer himself is not aware of the defect. See cases collected in the foot-note.[18]

Sec. 69. The burden of proof as to the notice of defect.

There has been no change made by the statute as to the burden of proof by this requirement concerning the notice of defect. The provision of the statute is not intended to create a condition which plaintiff must show has been complied with before he can maintain an action, but simply to give the employer a new ground of defense, the burden of showing which rests upon defendant. (*Connolly v. Waltham,* 156 Mass.

18. *Watts v. Boston Towboat Co.*, 161 Mass. 378; *Keenan v. Edison Electric Co.*, 159 Mass. 379; *Hatt v. May*, 144 Mass. 186; *N. Y., L. E., etc., Ry. Co. v. Lyons*, 119 Penn. St. 324; *Davis v. Detroit, etc., Ry. Co.*, 20 Mich. 105; *Williams v. St. Louis, etc., Ry. Co.*, 119 Mo. 316.

368; *Thomas v. Bellamy,* 126 Ala. 253; *Broslin v. Kansas City, etc., Ry. Co.,* 114 Ala. 398. There is nothing which requires plaintiff either to prove the giving of such notice or to make allegations concerning it in his complaint. (*Connolly v. Waltham,* 156 Mass. 368.)

CHAPTER VI.

PLEADING AND PRACTICE.

Sec. 70. No general change in pleading made by the act.

There can be no question but what the Employers' Liability Act does not change the ordinary rules of pleading in negligence cases now in force in New York, and while there are many cases under the Liability Act in other States relative to the form of the action, these decisions are, for the most part, of local value only, brought under the common law system of pleading, and have no bearing upon actions under the New York Code.

Sec. 71. The complaint under the Liability Act.

Allegations of a cause of action under the common law and under the Employers' Liability Act are the same except that under the act there must be an allegation with respect to the service of the notice provided for therein. (*Monigan v. Erie Ry. Co.*, 99 App. Div. 603, 91 Supp. 657; *Severson v. Hill-Warner-Fitch Co.*, 101 Supp. 808. See, also, to the same effect, *Harris v. Baltimore Machine & Elevator Works*, 112 App. Div. 389, 98 Supp. 440, affirmed, 188 N. Y. 141.)

It has been held in *Harris v. Baltimore Machine and Elevator Works*, 98 Supp. 440, that where the action is for the negligence of a superintendent, it is not necessary to make any special allegation either of the occurrence of the accident through the negligence of the superintendent or that he was acting as such at that time. The complaint in this action was criticised both on trial and on appeal as not alleging a cause of action

under the act. The decision of the Appellate Division sustaining the pleading has been affirmed in the Court of Appeals, 188 N. Y. 141. The Appellate Division, 2d Dept., says of the complaint: "It alleges that the plaintiff, being in the employ of defendant, was directed by it to enter an elevator which it had constructed and had under its control, and use the same. That it was negligently constructed in that the cable by which it was suspended was negligently fastened to the top of the car, and that by reason thereof and of defendant's negligence in directing the plaintiff to use the car, the said cable became unfastened and the car fell. In the last paragraph it alleges service of the notice required by the statute. The complaint is well drawn, it is barren of allegations of evidence and other unnecessary allegations. It is said that the complaint should have in strictness alleged that the plaintiff was directed by the superintendent to use the car and that such superintendent did the other negligent acts, in order to be deemed under the statute. The learned trial judge shared this view, but ruled, nevertheless, that the complaint could be eked out as sufficient. The pleader was entirely right in alleging that the negligence was that of the defendant. To have alleged that the negligence was that of the superintendent would have been unscientific and not in due form. The negligence to be recovered for under the statute is that of the defendant and not of the superintendent or any agent or employee, the very same as under the common law. The statute merely changes the common law rule by making the negligence of the superintendent that of the master in the cases where at common law it would be that of a fellow servant. The complaint should be for the negligence of the defendant in every case now as always, and evidence

that the superintendent did the negligent act makes out the allegation of the complaint. For a complaint to allege in any case that the defendant by his agent or servant did thus and so would not be scientific form. The proper form is that the defendant did it, and whether he did it personally or by an agent matters not; in either case he did it. Which way he did it is a matter of evidence, not of pleading." (See, however, *Bear Creek Mill Co. v. Parker,* 134 Ala. 293.)[1]

As has been shown before in section 42, in order to entitle the plaintiff to relief under the Liability Act, due notice of claim, stating the time, place and cause of the injury must have been served within the statutory period upon the defendant and such fact must appear by the complaint. It has been held that an allegation that notice of the time, place and cause of the injury was "duly" given to the defendant is sufficient. (See *Steffe v. Old Colony Ry. Co.,* 156 Mass. 262; *Cairncross v. Pewaukee,* 78 Wis. 66; *Todd v. Union Casualty Co.,* 70 App. Div. 52.)

It is suggested, however, that better practice would require a fuller statement. (*Reining v. Buffalo,* 102

1. In *Bear Creek Mill Co. v. Parker,* 134 Ala. 293, the declaration alleged that the injury to plaintiff was caused by the negligence of a certain named person in the service or employment of defendant corporation as "loader or boss of the trainmen," to whose order plaintiff was bound to conform and did conform, and that said injuries resulted from plaintiff having so conformed to the orders and directions of such person, and were caused by reason that plaintiff attempted to make the coupling of cars as directed by such section loader, etc. It was held on demurrer to be bad pleading in that the declaration did not state that this loader or boss was entrusted with any superintendence as such as *contra* distinguished from the ordinary servant or employee, to do certain designated work (*Danzler v. De Bardeleben Coal Co.,* 101 Ala. 309), nor was it averred that the direction was one negligently given.

N. Y. 308; *Holroyd v. Town of Indian Lake,* 75 App. Div. 197.) There is yet much uncertainty among the decisions as to whether in statutory actions an allegation that a statutory condition precedent had been "duly" complied with, is an allegation of a conclusion of law and not issuable, or an allegation of fact. (Abbott's Trial Brief on Pleading, sec. 255, and cases cited.) Moreover, an action under this act is obviously not covered by section 533 of the Code, which provides that in pleading the performance of a condition precedent in *a contract* it is not necessary to state the facts constituting performance, but that the party may state generally that he duly performed all conditions on his part. It was undoubtedly the rule of common law, except in cases covered by this section of the Code, that the plaintiff must particularly plead each condition precedent and compliance therewith, and the only relief from pleading, as was required at common law, the doing of acts claimed to be performance of the conditions, is found in the Code. (See *Les Successurs D'Arles v. Freedman,* 53 Supr. 518; *Hatch v. Peet,* 23 Barb. 575; *Hamerschlag v. Electrical Co.,* 16 App. Div. 185; *Gerb v. Metropolitan Collecting Co.,* 30 Misc. 314, 63 Supp. 513.)

The better practice would, therefore, be to allege facts showing the time and manner of service of the notice and the contents of the notice itself, at least sufficiently to show that the notice stated the time, place and cause of the injury.

In other respects the ordinary rules of pleading in negligence cases apply to a complaint drawn under the statute. In *Redhead v. Dunbar & Sullivan Dredging Co.,* 101 Supp. 301, there are statements from which the inference might be drawn that the absence of contrib-

utory negligence has to be pleaded as though it were a condition precedent the performance of which has to be alleged. It is elementary, of course, that the absence of contributory negligence does not have to be pleaded in a common law action for negligence although the majority of such complaints contain such allegations. The Liability Act does not change the rule, and the doctrine in the case referred to is not an authority for such a change in the requirements of the pleading. (See *Severson v. Hill-Warner-Fitch Co.,* 101 Supp. 808.)

When one seeks to maintain an action under a statute it is a sound and well settled rule of pleading that he must state specially every fact requisite to enable the court to judge whether he has a cause of action arising under the statute. (*Bartlett v. Cozier,* 17 Johns. 438; *Austin v. Goodrich,* 49 N. Y. 266.)

"It is immaterial whether a condition be imposed in a statute giving a right of action or be provided by contract or exist by some force or principle of common or statute law. The complaint must, by the settled rules of pleading, state every fact essential to the cause of action to give the court jurisdiction to entertain the particular proceeding." (*Reining v. City of Buffalo,* 102 N. Y. 308.)

An allegation would be sufficient which followed in substance the statute and stated that notice of the time, place and cause of injury was given to the employer within 120 days after the occurrence of the accident, and that a written notice, signed by the person injured, was served by delivering the same at his residence (or place of business), or, in the alternative, by post by letter addressed to him at ———, being his last known place of residence (or place of business). (See *Rochester Ry. Co. v. Robbins,* 133 N. Y. 242.)

When the notice is not given within 120 days, by reason of "physical or mental incapacity," the complaint should state, as a fact, that plaintiff by reason of such incapacity had been unable to give the notice, and that the same was given within ten days after the removal of the incapacity. In an action by an executor or an administrator, the better practice would be to allege the date of appointment and the date on which the notice was given by the executor or administrator, in case no notice has been given by the deceased in his life time.

It is, of course, unnecessary, in a complaint, based upon such a general statute as the Liability Act, to recite the provisions of the act, or even to make any express allusion to the statute itself. As the Court of Appeals says in *Harris v. Baltimore Machine & Elevator Co.,* 188 N. Y. 141: "It is not necessary, in order to plead a cause of action under the Employers' Liability Act, that its precise language should be made use of, provided that it appear plainly from what is alleged that the cause of action was within the provisions of the act and that its requirements of the giving of a notice to the defendant has been complied with." (See, also, *same case,* 112 App. Div. 389, 98 Supp. 440; *Severson v. Hill-Warner-Fitch Co.,* 101 Supp. 808.) While the statute must be pleaded, that is, the complaint must state facts bringing the cause within its provisions, it need not describe or recite it as the court takes judicial notice of such an enactment. (*Riley v. McNulty,* 100 Supp. 985; *Edwards v. Law,* 63 App. Div. 451, 71 Supp. 1097; *Swinnerton v. Columbia Ins. Co.,* 37 N. Y. 174; *O'Brien v. Fitzgerald,* 29 Supp. 975; *McHarg v. Eastman,* 7 Robert, 137; *Shaw v. Tobias,* 3 N. Y. 188; *Brown v. Harmon,* 21 Barb. 508; *Carris v. Ingalls,* 12

Wend. 70; *Bayard v. Smith,* 17 Wend. 88; *Goslit v. Cowrey,* 8 Supr. Ct. 132; *O'Brien v. Kurscheedt,* 61 St. Rep. 470, 29 N. Y. Supp. 973.)

Sec. 72. Pleading several counts.

In several States in which employers' liability acts are in force, it is the practice to set forth in the declaration separate counts, each alleging the breach of one or more of the provisions of the act when the action is founded upon more than one of the subdivisions creating liability, and it has been held that to join several breaches of the act as one count is bad pleading.

This form of pleading is very cumbersome and tends rather to confusion of issues than to clearness or precision. It is not required under the New York Code of Civil Procedure, and the statement of causes of injury in separate counts is not good practice in New York, whether the action is brought at common law or under the Employers' Liability Act. A cause of action for personal injuries occasioned by negligence is a single cause of action and very general allegations of negligence have been held sufficient pleading. (See *Pizzi v. Ried,* 72 App. Div. 162; *Leeds v. N. Y. Telephone Co.,* 64 App. Div. 484, 72 Supp. 250; *Agnew v. Brooklyn City Ry. Co.,* 20 Abb. N. C. 235, and cases cited in the note; *Clare v. N. Y., etc., R. Co.,* 172 Mass. 211; *Oldfield v. N. Y., N. H. & H. Ry. Co.,* 14 N. Y. 310; *Laughran v. Brewer,* 113 Ala. 509.) A cause of action for carelessness or negligence, by means of which injury and death ensue, may and should be stated in one count in the complaint. (*Dickens v. N. Y. C. R. R. Co.,* 13 How. 228; *Smith v. Rathbun,* 22 Hun, 150.) The Code of Civil Procedure (sec. 481) requires that the complaint should set forth plainly and concisely the facts

constituting each cause of action without unnecessary repetition, and while separate counts have been allowed in cases in which the precise nature of the cause of action itself is doubtful and plaintiff is uncertain as to the form in which he will be able to introduce his proof (see *Blank v. Hartshorn,* 37 Hun, 101; *Talcott v. Van Vechten,* 25 Hun, 565; *Barr v. Shaw,* 10 Hun, 580; *Velie v. Newark Ins. Co.,* 12 Abb. N. C. 309), separate statements of the same cause of action or separate counts is ordinarily held bad pleading. The action for personal injury received by negligence being a single cause of action, all the allegations of negligence may be properly alleged together in one statement. Moreover, it is to be observed, that while in Massachusetts or Alabama a declaration which does not separately state the counts upon the common law, superintendence, defects in ways, etc., is demurrable, in New York no such ground for demurrer exists, the only remedy for defendant where causes of action are not separately stated is by motion to separately state and number. (See *Gunn v. Fellows,* 41 Hun, 257; *Townsend v. Cohn,* 7 Civ. Pro. 57; *Bass v. Comstock,* 38 N. Y. 21.)

It has been held in Alabama that where the action is brought to recover for negligence of a superintendent, the name of the person who it is claimed was exercising superintendence should be alleged if known to the plaintiff, and if the name is not known that fact should be alleged and must be proved on trial. (See *Woodward Iron Co. v. Herndon,* 114 Ala. 191; *Ala. G. S. Ry. Co. v. Davis,* 119 Ala. 572.)

There can be no question but what such an allegation is not proper in the complaint under the New York Code. (*Harris v. Baltimore Machine & Elevator Co.,* 112 App. Div. 389, 98 Supp. 440.) Matters of evidence

are not properly to be pleaded in a complaint, and the name of the person claimed to have been a superintendent clearly falls within this rule as being a mere matter of evidence, even though under special circumstances it might be required in a bill of particulars. In Massachusetts the name of the superintendent is not required to appear in the declaration. (*Woodbury v. Post,* 158 Mass. 140.)

As has just been noticed in a previous section (see sec. 62), the complaint need contain no allegation that notice of the existence of the defect from which the injury arose was given to the employer within a reasonable time prior to the accident, and no reference to the notice of defect provided for in section "3" of the act is necessary in the pleading.

Sec. 73. Joinder of common law and statutory liability.

When a complaint is drawn which is broad enough in its terms to include both statutory and common law liability, and the notice under section 2 is properly alleged, if the plaintiff fails to prove the statutory liability but the complaint is broad enough in its allegations to justify a common law recovery, the court may properly regard the provision as to the notice as surplusage and permit a recovery at common law. (*Holme v. Empire Hardware Co.,* 102 App. Div. 505, 92 Supp. 914; *Kleps v. Bristol Mfg. Co.,* 107 App. Div. 488, 95 Supp. 337; *Schradin v. N. Y. C. & H. R. Ry. Co.,* —— Misc. ——, N. Y. Law Journal, Feb. 14, 1907.) The case of *Holme v. Empire Hardware Co., supra,* was an action for death by negligence and the notice, though alleged, was served too late to comply with the terms of the statute. The court construed the action as a common law action, and says:

"The complaint having alleged a cause of common action under section 1902 of the Code of Civil Procedure, it is entirely immaterial whether or not the notice required by the Employers' Liability Act was given and the allegation of the service of such a notice was surplusage and could not affect a cause of action properly pleaded irrespective of that act. If the facts alleged in the complaint gave the plaintiff a cause of action under either section 1902 of the Code of Civil Procedure or under the Employers' Liability Act, the plaintiff was entitled to present her proof and if the proof sustained the cause of action she was entitled to have the question submitted to the jury."

The decision on this point in this action would seem a matter of the elementary law of pleading. There are, however, cases in which, on hasty reading, an apparently different ruling is laid down. (*Curran v. Manhattan Ry. Co.,* 103 Supp. 351; *Davis v. Broadalbin Knitting Co.,* 90 App. Div. 567, 86 Supp. 127, affirmed, 185 N. Y. 613, and *Chisholm v. Manhattan Ry. Co.,* 101 Supp. 622.) A careful examination of the *Davis case,* however, would show that in it the complaint was not broad enough to permit a common law recovery, and that the failure to prove a cause of action under the act left no alternative on which the case could proceed at common law. The statement in *Chisholm v. Manhattan Ry. Co., supra,* that "an employee cannot bring his action under the act and without amendment recover upon a common law cause of action" is *dicta* only. It is, of course, true, as these two cases should be understood as declaring, that the plaintiff who has based his claim *solely* under the Liability Act, that is, who has alleged acts of negligence which do not at com-

mon law entitle him to a recovery, cannot obtain a judgment except under the act.

It is undoubtedly good pleading to join in the same complaint a cause of action at common law with one under the statute. They need not be separately stated (*Acardo v. N. Y. Contracting & Trucking Co.*, 116 App. Div. 793, 102 Supp. 7; *Hammerstrowm v. N. Y. Contracting Co.*, 52 Misc. 634, 102 Supp. 835; *Harris v. Baltimore Machine, etc., Co.*, 112 App. Div. 389, 98 Supp. 440), as the cause of action for negligence is a single cause of action which has been extended by the act and the courts have held that the act does not create a new right of action. (*Mulligan v. Erie Railway Co.*, 99 A. D. 499; *Kleps v. Bristol Mfg. Co.*, 107 App. Div. 488; *Holme v. Empire Hardware Co.*, 102 App. Div. 504; *Monigan v. Erie Railroad Co.*, 99 App. Div. 603.)

Sec. 74. Pleading by defendant.

Under the New York Code the statute of limitations is not a defense unless pleaded in the answer, and this rule applies to the limitation contained in section "2" of the act requiring the action to be commenced within a year. (See Code of Civil Procedure, sec. 413; *Eno v. Diefendorf*, 102 N. Y. 720; *Green v. Hauser*, 31 St. Rep. 17; *Plimpton v. Bigelow*, 3 Civ. Proc. 182.) The requirements of the statute as to notice of the time, place and cause of injury do not fall within this rule, and no special reference to plaintiff's failure to furnish such notice is necessary in the answer to enable defendant to take advantage of the absence of the notice or the fact that it was not served within the statutory time. (*Johnson v. Roach*, 83 App. Div. 357, 82 Supp. 203; *Gmaehle v. Rosenberg*, 80 App. Div. 541, 80 Supp. 705, *supra.*) The rule in this regard is similar to the rule in

cases where plaintiff has failed to allege the notice required by statute to be given preliminary to the commencement of an action against a municipal corporation. It is well settled in such cases that the objection that the plaintiff has failed to give the notice may be raised at any stage of the trial, although such failure is not alleged in the answer. (See *Krall v. The City of New York,* 44 App. Div. 259, 60 Supp. 661; also sec. 41, *supra.*)

Sec. 75. Election of remedy.

An important question is whether the plaintiff in an action brought on both common law and statutory grounds, can be compelled to elect on trial as between two causes of action. There have been decisions in Massachusetts which intimate that where a plaintiff joins in the same declaration, separate counts, one or more upon the common law and others upon the Liability Act, the trial court may in its discretion compel the plaintiff to elect upon which of these counts he will go to the jury. The rule is not a settled one, in that State, however, and it is still an open question whether the plaintiff can be compelled to elect before the close of the evidence or whether in every case of this class the trial court can or ought to compel plaintiff to elect. (*Claire v. N. Y. & N. E. Railroad Co.,* 172 Mass. 211.)

The rule in New York as to requiring election is apparently contrary to that of Massachusetts. In *Mulligan v. Erie Railroad Co.,* 99 App. Div. 499, this question was raised directly under the Liability Act. Plaintiff had commenced a common law suit and after defendant had answered, he served an amended complaint, also alleging a common law cause of action solely. Later on he obtained an order to show cause

why he should not be allowed to amend and serve a complaint with additional allegations required by the Liability Act. It was held at Special Term that as plaintiff by his amended complaint had declared upon his common law remedy, he was bound to pursue that remedy; that he had elected to stand upon his common law right and could not be permitted to set up his right under the statute. On appeal this was held error. The court says: "The policy of the law is to permit litigants to dispose of the whole controversy between them in a single action. . . . The doctrine of an election of remedies applies only to cases where there is by law or by contract a choice between two remedies which proceed on opposite and irreconcilable claims of right; in such a case a party having a resort to one remedy is bound by his first election, and hence barred from the prosecution of the other. (*Matter of Garver,* 176 N. Y. 386, 392.) But here there is no choice of remedies; section 1 of chapter 600 of the Laws of 1902 specifically provides that the injured person 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 not engaged in his work. This clearly indicates an intention on the part of the Legislature not to change the common law remedy, but as the title of the act declares, to extend and regulate the liability of employers to make compensation for personal injuries suffered by employees. It did not give a new remedy for acts of negligence resulting in personal injuries, it merely extended the liability of employers for negligence of their superintendents, giving an action in some cases where it could not have existed at common law. . . . In Massachusetts under the Employers' Liability Act of that State, in essential

particulars the same as our own, the exact practice followed by the plaintiff in the present action is distinctly approved. (*Clare v. N. Y. & N. E. Railroad,* 172 Mass. 211, 212.) We are clearly of the opinion that as the plaintiff would not be compelled to elect between the two counts if he had stated them originally, it is improper to deny him the right of amending his pleadings, so as to bring him under the provisions of the Liability Act." (See, also, *Monigan v. Erie Ry. Co.,* 99 App. Div. 603; *Kleps v. Bristol Mfg. Co.,* 107 App. Div. 488.)

The only case definitely holding that the trial court has a discretion in ordering plaintiff to elect between the counts at common law and those upon the statute is *Brady v. Ludlow Mfg. Co.,* 154 Mass. 468. There are cases, however, in which an election having been ordered by the trial court at the close of the evidence the ruling was held on appeal to have been harmless to plaintiff, even if the court had no power to make the direction, but these cases do not decide that any such discretionary powers exist in the trial court.[2]

In Massachusetts the amount of recovery under the Employers' Liability Act is limited to $4,000, while there is no limit upon the amount of recovery at common law. This difference between the common law and the Liability Act, in the amount of recovery permitted, does not exist in New York. One of the reasons for compelling election in Massachusetts is in order that it may be known upon which ground the jury brings its verdict, and if an excessive verdict be rendered under the Liability Act it may be corrected. Another reason is to prevent, if possible, the confusion which the multi-

2. *Murray v. Knight,* 156 Mass. 518; *May v. Whittier Machine Co.,* 154 Mass. 29; *McLean v. Fiske Wharf & Warehouse Co.,* 158 Mass. 472; *Conroy v. Clinton,* 158 Mass. 318.

plicity of counts create. The court says, in *Brady v. Ludlow Mfg. Co.,* 154 Mass. 468: "In some cases the jury may be able to deal with different counts founded upon the same facts presenting different issues and involving different liabilities in damages at the same time without great difficulty, and it may be just to both parties to submit them to the jury together. In other cases the presiding judge may see that such a mode of trial would be likely to lead to confusion, and to prevent the jury from reaching a correct result. Much must be left to the discretion of the presiding judge in determining what is conducive to an orderly trial and an intelligent verdict." It has been held that the trial court should not require an election in cases in which the declaration sets forth causes of action solely under the common law or solely under the Liability Act, but only in those cases in which common law counts are joined with counts under the act. (See *Beauregard v. Webb G. & S. Co.,* 160 Mass. 201.)

In New York the weight of authority seems to hold that the trial court is justified in compelling plaintiff to elect only in those cases where the complaint sets forth two or more causes of action which are incompatible and inconsistent in their facts.[3] There is no inconsistency between a claim of negligence founded upon the common law and one founded upon the Liability Act, and a complaint which is founded upon both the

3. *Follett v. Brooklyn El. Ry. Co.,* 91 Hun, 296; *Velie v. Newark City Ins. Co.,* 12 Abb. N. C. 309; *Blank v. Hartshorn,* 37 Hun, 101; *Longprey v. Yates,* 31 Hun, 432; *Murray v. Ins. Co.,* 96 N. Y. 614; *American Dock & Improvement Co. v. Staley,* 40 Super. 539; *Walters v. Continental Ins. Co.,* 5 Hun, 343; *Durant v. Gardner,* 10 Abb. 445; *Bruce v. Burr,* 67 N. Y. 237; *Southworth v. Bennett,* 58 N. Y. 659; *Mills v. Parkhurst,* 126 N. Y. 89.

common law and statute sets forth not two causes of action, but one.

The policy pursued by the New York courts on the question of election of remedy is well expressed in *Follett v. Brooklyn El. Ry. Co.*, 91 Hun, 296, 36 Supp. 200. Defendant had moved that plaintiff be compelled to elect whether to try the case as for a continuing trespass or for a nuisance, and his motion having been denied, this exception was urged upon appeal as a ground for reversal. The court says: "The motion was properly denied. Under our present system parties are allowed to plead the real facts. What benefit will result from that liberality if upon trial the party may not prove the facts as pleaded? A party has an absolute right to plead and prove the facts upon which his rights depend, to prove them all and to prove them as they took place. The determination of the rights that flowed from these facts is the duty of the court which cannot properly be transferred to the party. The only motive conceivable for urging such a motion is a hope that a party might make an unwise election to the detriment of his rights. To compel a party to take a position involving such a peril would be an abuse of discretion which would be speedily corrected by the appellate court."

Sec. 76. Effect of judgments.

The policy of law has always been that the whole question of liability for personal injury should be tried in one action and settled once for all. The employer should not be harassed by separate actions for the same injury, nor should the employee be compelled to bring several actions and try his case by piecemeal. (*Beauregard v. Webb Granite Co.*, 160 Mass. 201.) While the Court of Appeals has recently held that separate actions

may be brought where the same act of negligence has occasioned injury both to person and to property, one action being maintainable for the injury to the person and another for the injury to property (see *Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40), there is no change made by the Liability Act which will permit the injured plaintiff to bring one action against the employer for personal injuries based upon common law, and then, if defeated, permit him to bring another alleging one or more provisions of the act. A judgment rendered in such an action is conclusive upon the entire right of recovery and is a bar to the maintenance of any other action for the same cause.[4]

It has been held in Massachusetts that the statute has created not one but two causes of action, and that in a case where the injured person has in his lifetime sued and recovered for injuries, his administrator may, nevertheless, subsequently sue and recover for the death of the intestate. The Massachusetts courts hold that the causes of action for injuries and for death are separate and distinct, and a judgment obtained by an injured person in his lifetime is not a bar to an action for the death brought by the person's representatives. (*Clare v. N. Y., etc., R. Co.*, 172 Mass. 211.) This decision is contrary to decisions of the New York Court of Appeals in the construction placed upon the action for death provided for in the Code (see Code Civ. Proc., sec. 1903-1909), and the Massachusetts cases will probably not be followed on this point in New York. There is, more-

4. *Sheldon v. Carpenter*, 4 N. Y. 579; *O'Brien v. Lloyd*, 43 N. Y. 248; *Walthams v. Hope*, 77 N. Y. 420; *Rockwell v. Brown*, 36 N. Y. 207; *Bassett v. Conn. River R. Co.*, 150 Mass. 178; *Foye v. Patch*, 132 Mass. 105; *Bradley v. Bingham*, 149 Mass. 141; *Sullivan v. Baxter*, 150 Mass. 261.

over, a decided difference between the wording of the New York statute and the Massachusetts statute upon the rights of action created by the respective acts, and recovery by the injured person in his lifetime will probably be held, in New York, to be a bar to a recovery by his administrator for his death. Without plain expression of the legislative intent to create two causes of action, one for the injured person and another for his personal representative in case of death, the courts will consider that but one cause of action was intended.[5]

5. *Littlewood v. Mayor, etc.*, 89 N. Y. 24; *McGahey v. Nassau El. Co.*, 51 App. Div. 281; *Matter of Meekin*, 164 N. Y. 152; *Debil v. N. Y. & E. Ry. Co.*, 25 Barb. 182; *contra Schlisting v. Witgram*, 25 Hun, 626.

CHAPTER VII.

ACTIONS BY RAILWAY EMPLOYEES.

Sec. 77. Special provisions relating to railway employees.

The New York Employers' Liability Act contains no special reference to railroad employees as a class and confers on them no additional benefits other than the benefits generally conferred upon all employees. In this respect it differs from the acts of Massachusetts, Alabama, Indiana, Colorado and England. (See Appendix.) By chapter 687 of the Laws of 1906, the text of which is contained in the Appendix, legal rights have been conferred on railroad employees, which are, in many particulars, closely similar to the rights conferred by liability acts in England and in the other States above mentioned. This act, which is an amendment to the Railroad Law, provides in substance that an employee of a railroad corporation or of a receiver of such corporation shall have not only his present common law rights and remedies either for injury or for death occasioned by the negligence of the corporation or of the receiver or his representative, but shall have in addition thereto the following further rights: (1) The fellow servant doctrine (depriving him at common law of legal redress) shall not apply to such injured or killed employee, where the injury resulted from the negligence of a fellow servant, provided that fellow servant was one in the employ or the railroad or in the service of a receiver "entrusted by such corporation or receiver with the authority of superintendence, control or com-

mand of other persons in the employ of such corporation or receiver or with the authority to direct or control any other employee in the performance of the duty of such employee." The difference between the language quoted and the language of the Liability Act which makes the employer responsible for the negligence of a person "entrusted with and exercising superintendence, *whose sole or principal duty is that of superintendence,*" is apparent. The responsibility of a railroad or its receiver to the injured employee or his personal representatives under this amendment to the railroad law is fairly capable of a much broader construction than the more general provisions of the Liability Act itself. The responsibility of the railroad corporation or its receiver is apparently made to depend upon whether the person charged with negligence had *any* authority over employees. If he was entrusted with "the authority to direct or control *any other employees*" or is entrusted with "the authority of superintendence, control or command of other persons in the employment of such corporation or receiver, the liability of the corporation would apparently be created, even if that negligent person be one whose powers of superintendence is only incidental or occasional and even if his "principal duty" is something else than superintendence. In this construction of the Railroad Act it is, so far as the responsibility for an act of superintendence is concerned, much broader and more beneficial to railroad employees than the Liability Act itself.

(2) This act further creates a responsibility in the railroad or its receiver where the injury results from the negligence of a person or persons who have as a part of their duty for the time being, physical control or

direction of the movement of a signal, switch, locomotive engine, car, train or telegraph office. The act says that such persons are to be held to be vice principals of the corporation or receiver and are not fellow servants of the injured or deceased employee.

This provision of the act is substantially similar to provisions of liability acts of other States. (See Appendix: Massachusetts Act, subdivision 3 of section 71; Alabama Act, subdivision 5 of section 1749; the Indiana Act, subdivision 3, section 7083; the Colorado Act, subdivision 3 of section 1, English Act, subdivision 5 of section 1.)

(3) This act further provides that if an employee is engaged in the service of a railroad company or its receiver and is injured by any defect in the condition of the ways, works, machinery, plant, tools, or implements or of any car, locomotive or attachment thereto belonging, owned or operated or being run and operated by such corporation or receiver, if the defect was one which could have been discovered through reasonable care or tests or inspection, if the same had been made by the corporation or receiver, the corporation is deemed to have had knowledge of such defect before and at the time such injury was sustained and the fact of such defect, if proved on the trial, shall be of *prima facie* evidence of negligence on the part of the corporation or receiver. In other words, the employee, on proving the existence of a defect in the condition of the ways, works, machinery, plant, tools, implements or of any car, train, locomotive or attachment thereto, whether belonging to or operated by a railroad corporation or a receiver makes out a *prima facie* case of negligence on the part of the corporation, when it is shown that the defect

could have been discovered by reasonable and proper care, test or inspection.

Sec. 78. Constitutionality of railroad act.

There can be no substantial question as to the constitutionality of this act. It has been tested at trial term *Schradin v. N. Y. C. & H. R. R. Co.*, — Misc. —, N. Y. Law Journal, Feby. 14, 1907, and its constitutionality affirmed. Similar acts have been declared constitutional by the United States Supreme Court. (See *Minnesota Iron Co. v. Kline*, 199 U. S. 593; *Tullis v. Lake Erie, etc., R. Co.*, 175 U. S. 348; *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205; *Minneapolis, etc., Ry. Co. v. Emmons*, 149 U. S. 364.)

Sec. 79. "Car," "train," etc., as defined.

In Massachusetts the word "train" is defined in the statute itself, and means one or more cars which are in motion, whether attached to the engine or not. It has been held in *Devine v. Boston, etc., Ry. Co.*, 159 Mass. 348, before the enactment of the statutory definition, that two cars attached together, which had been "kicked" off from the locomotive, constituted a train within the meaning of the act, although the cars were not attached to the locomotive at the time the accident occurred. (See *Caron v. Boston & Maine, etc., Ry. Co.*, 164 Mass. 523.)

A "train" has been defined in Massachusetts as a locomotive with one or more cars connected together and run upon a railroad. (*Dacey v. Old Colony Railroad Co.*, 153 Mass. 112; *Shea v. N. Y., N. H. & H. Railroad Co.*, 173 Mass. 177.)

In Massachusetts it has been held that an electric street car is not a "locomotive engine" or "train" under

the act. (*Fallon v. W. E. St. Ry. Co.*, 171 Mass. 249.); It should be observed that the Massachusetts Act creates no liability for the negligence of a person in charge of a "car" or "telegraph office," both of which are included in the New York law. Under the Massachusetts law the responsibility of the railroad for a "car" must depend upon whether it is part of a "train" within the meaning of the act. The word "car" as used in the New York act probably does not include street cars of the ordinary kind used in street railway operation.

The word "car" has been held in Alabama to include a hand car as well as the ordinary type of cars. (*Kansas Rd. Co. v. Crocker*, 95 Ala. 412; *Richmond, etc., Rd. Co. v. Hammond*, 93 Ala. 181.)

The Massachusetts act provides, subdivision 3 of sec. 71, for a liability where the negligence is that 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 words "upon a railroad" have been omitted from the New York statute. The presence of these words "upon a railroad" enabled the Old Colony Railroad, in *Perry v. Old Colony Railroad*, 164 Mass. 296, to escape liability for an accident occurring while the locomotive engine was on the rails of a railroad round-house for repairs. The court held that the locomotive was not then upon the railroad within the meaning of the act.

Careful comparison should be made between the wording of the New York Railroad Employees' Act and other Employers' Act in testing the applicability of cases brought for injured railroad employees, as the New York act is in many respects much more liberal in its provisions.

Sec. 80. Physical control or direction.

The New York act says that the railroad shall be responsible where the injury results from the negligence of a person or persons "having *as part of their duty for the time being,* physical control or direction of the employment of signal, switch, etc." The words italicized make it clear that temporary control is sufficient and that it is not necessary that the person charged with negligence should have a general or usual charge or control. This construction has also been given to the Massachusetts Act in *Steffe v. Old Colony R. Co.,* 156 Mass. 262. The question was whether one Thompson, a brakeman, was "in charge or control" of a train. The court says: "The statute obviously implies that some person is to be regarded as being in charge or control of a moving train, and makes the defendant responsible for the negligence of any person in its service who has such charge or control. It is not necessary that he should be a conductor or have any other particular office or position. The statute includes every person, and must be deemed to mean any person who has such charge or control for the time being."

As the court says in *Shea v. N. Y., N. H. & H. Ry. Co.,* 173 Mass. 177: "Ordinarily, one who is to determine whether the train is to move or remain stationary, and who is to give directions as to the moving or stopping of the train, may be said to be in charge or control of it."

Under the Indiana act, the wording of which is substantially different from the New York act, it has been held that the temporary use of a switch by a brakeman is not enough to warrant the conclusion that he was in *charge* of it, under the terms of the statute. (*Baltimore, etc., R. Co. v. Little,* 149 Ind. 167.)

The English statute has been construed as covering

only those negligent employees having *general* charge and not charge for a particular moment. (See *Gibbs v. Great Western Ry. Co.,* 12 Q. B. D. 208.) It is clear that the same conclusion could be fairly reached under the New York act. .The Master of Rolls, BRETT, in this case says: "I think that to be such a person (a person entrusted with the charge or control of points), he should be one who has general charge of the points and not one who merely has the charge of them at some particular moment."

The New York act is apparently made to include what the English decision excludes, as it says, "The railroad shall have the responsibility for the negligence of persons who have as a part of their duty *for the time being,* etc." The language just quoted is apparently taken from the Massachusetts act (Laws 1897, chap. 491, clause 3), which says that a person who 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. 81. Physical presence of the person in control unnecessary, if the control is in fact exercised.

In *Donahoe v. Old Colony R. Co.,* 153 Mass. 356, the court says that a conductor of a freight train may be found to be in charge or control of the train at the time of an injury even though temporarily away from the train, engaged upon a duty connected with the operation of the train in his charge, and the question of his control becomes one of fact for the jury.

Sec. 82. Negligence of persons exercising physical control or direction.

In *Dacey v. Old Colony Railroad Co.*, 153 Mass. 112, plaintiff's intestate, a brakeman, had been killed between a moving car which he was boarding and a stationary car which had been placed too near the track upon which the moving car was operated. The only evidence in the case to fix the liability of the defendant for the position in which this car had been left, was testimony which showed that during the preceding afternoon a conductor had directed the placing of cars upon this track. The court held that the question of whether the stationary car had been left there by the negligence of a person in charge of the train, was for the jury. The Massachusetts act does not cover liability for *unattached* cars. (See *Thyng v. Fitchburg R. Co.*, 156 Mass. 13. In this case the railroad company escaped liability for the death of a freight brakeman who was killed by the breaking of a coupling pin. Too short a coupling pin had been put between two freight cars while the train was being made up. The court held that the employees who made up the train were fellow servants of the deceased. The court says: "A conductor of a switch engine, which is drawing several cars under his direction, may be, for the time, in charge of a train consisting of the engine and cars. But there is nothing to show that this conductor of a switch engine was at any time negligent in his charge or management of such a train, or of the engine attached to it, or that his conduct in reference to such a train had any connection with the accident. . . . He never had charge or control of those cars *as a train*, but he was to determine what cars should be brought together to constitute the train and see that they were properly coupled and ready

to be taken away . . . 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." (See *Caron v. Boston, etc., R. Co.,* 164 Mass. 528.)

Under the New York statute a recovery would doubtless have been permitted as the negligence in question was of a person who had charge of cars which are covered by the New York law as above indicated.

Sec. 83. Presumption of negligence from existence of defect.

The act provides, as has been previously noted, that if an employee is injured in the service of a railroad company or its receiver, and is injured by any defect in the condition of the ways, works, machinery, plant, tools or implements, or of any car, locomotive or attachments thereto, belonging, owned or operated by such corporation or receiver, if the defect was one which could have been discovered through reasonable care or tests of inspection if the same had been made by the corporation or receiver, the corporation is deemed to have had knowledge of such defect before and at the time such injury was sustained, and the fact of such defect, if proved on trial, shall be *prima facie* negligence on the part of the receiver. It is questionable whether this clause, reasonably construed, makes any substantial change in the common law. A railroad is obliged to make proper inspection of its cars, machinery, etc., for the purpose of discovering defects in its machinery, brakes, etc. (*Bailey v. R. W. & O. Rd. Co.,* 139 N. Y. 302; *Seybolt v. N. Y., Lake Erie & Western Rd. Co.,* 95 N. Y. 562), whether owned or only operated by it; the duty to inspect foreign cars being well established. (*Eaton v. N. Y. C. & H. R. R. Co.,* 163 N. Y. 391.) It

is true of course that "where an employee is injured from defective machinery, the fact that he was so injured does not alone raise the presumption of negligence on the part of the company. The knowledge of the defect must be brought home to the master, or proof given that he was ignorant of the same through his own negligence or want of proper care." (*Bailey v. R. W. & O. Rd. Co.,* 139 N. Y. 302, citing *Wright v. N. Y. Central,* 25 N. Y. 560.) But where such a defect is shown, and that it could have been discovered by reasonable inspection, the defendant's negligence follows at common law, for he has been negligent either in failing to make the inspection, which would have unearthed the defect, or in having failed to repair the defect which such inspection disclosed. (*Eaton v. N. Y. Central & H. R. Rd. Co.,* 163 N. Y. 391.) It owes this duty as master and is responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. (*Goodrich v. N. Y. C. & H. R. R. Co.,* 116 N. Y. 398.)

The duty of inspection is one of the non-deligible duties of a railroad, so that the railroad cannot escape liability under the fellow servant doctrine for the failure of a fellow servant to properly inspect. (*Bailey v. R. W. & O. Ry. Co.,* 139 N. Y. 302; *Eaton v. N. Y. C. Ry. Co.,* 163 N. Y. 391; *Hawkins v. N. Y., L. E. & N. Ry. Co.,* 142 N. Y. 416.) This does not apply, of course, where the plaintiff himself was the person whose employment was to make inspection. (*Cregan v. Marston,* 126 N. Y. 568.)

Sec. 84. The Federal Employers' Liability Act.

The text of this act is contained in the appendix (see page 247). The act has been declared both constitutional

(*Spain v. St. Louis & S. F. Rd. Co.*, 151 Fed. 522; *Smead v. Central Georgia Rd. Co.*, 151 Fed. 608), and unconstitutional (*Brooks v. Southern Pacific Rd. Co.*, 148 Fed. 986; *Howard v. Illinois Central Railroad Co.*, 148 Fed. 917), and its constitutionality is now before the United States Supreme Court for final decision. A discussion of the constitutional question involved in the act would serve no useful purpose at this time.*

If sustained this act will prove to be one of the most drastic of American laws on the responsibility of railroads to their employees. The act is one on which actions may be maintained in State courts as well as in those of the United States, as the act does not provide that jurisdiction over cases involving the construction and application of the statute should be confined exclusively to the courts of the United States. The courts of the States are constantly called upon to hear and decide cases arising under the Federal constitution and laws, just as the courts of the United States are called upon to hear and decide cases arising under the laws of the States, when the adverse parties are citizens of different States. The duties of the courts are to apply the existing laws to the cases brought before them. If the law applicable to a given case is of Federal origin, the Legislature of a State cannot abrogate or change it, but the courts of the State may apply and enforce it, and hence the fact that a given subject, like interstate commerce, is beyond State legislative control does not *ipse facto* prevent courts of the State from exercising jurisdiction over cases which grow out of this com-

* (See, however, "The constitutionality of Federal legislation concerning employer and employee engaged in interstate and foreign commerce." by Carl D. Wisner, Michigan Law Review, June, 1907, Vol. 5, No. 8, page 639, for exhaustive consideration of the subject.)

merce. (Sutherland, Notes on the United States Constitution, 509-513; *Claflin v. Houseman,* 93 U. S. 136; *Murray v. Chicago & N. W. Rd. Co.,* 62 Fed. Rep. 24, at page 43; *McDonald v. Mallory,* 77 N. Y. 546.)

Sec. 85. The Federal Act and the fellow servant doctrine.

The act abolishes *in toto* the fellow servant doctrine so far as railway employees are concerned. It makes the common carrier liable to any of its employees injured by the negligence of any of its other employees of whatever rank or grade and irrespective of whether or not the negligent employee was exercising superintendence. There is no limitation whatever upon the railroad's liability for the negligent act of one fellow servant causing injury to another, except in so far as contributory negligence may be a defense. The defense of assumption of risk is presumably likewise removed. The act says that the common carrier "*shall be liable* to any of its employees *for all damages* which may result from the negligence of any of its officers, agents or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works." These italicized words cannot fairly be construed as creating a mere contingent liability to be defeated and destroyed by the continuance of the employee in the usual course of employment with the knowledge of the defect or danger. The statute apparently intends to create an absolute liability of a railroad corporation to pay damages for injuries occasioned by any defect or insufficiency existing by its negligence specified in the words of the first section of the act, subject only to such defenses as contributory negligence may afford under the second section. A construction which would

hold that the employee by continuing in employment, thereby assumes the risk of injury from any such defect or insufficiency due to the carrier's negligence, would destroy the obvious meaning of the words which declare that the carrier "shall be liable . . . for all damages," for defects and insufficiencies existing through its negligence as specified in the first section of the act.

Sec. 86. The Federal Act and contributory negligence.

On the subject of contributory negligence the second section of the act contains the following principles:

(1) Contributory negligence shall not be a bar in cases where the contributory negligence of the injured person is slight and that of the employer was gross in comparison.

(2) Where the contributory negligence of the injured is slight and that of the employer is gross in comparison, the damages which the injured employee recovers shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

(3) All questions of negligence and contributory negligence (assuming of course that evidence has been introduced sufficient as a matter of law to raise the issue of negligence) are to be submitted to the jury.

(4) Where the negligence of the injured party is gross in comparison with that of the employer, the common law rule is unaffected and contributory negligence is a bar. In such a case the power of the court to set aside the verdict rendered in plaintiff's favor is unimpaired. As all questions of negligence and contributory negligence are to be submitted to the jury under the requirements of the act, the court, however, has been deprived of any power to dismiss or direct a verdict

for defendant in cases where there is evidence sufficient in law to raise the question of negligence, even though it be apparent that the negligence of the injured party is gross in comparison with that of the employer. The comparison between the relative negligence of the parties is primarily for the jury, but the power in such a case, however, of the trial judge to set aside a verdict rendered in plaintiff's favor contrary to the evidence is not impaired, though the questions of negligence and contributory negligence must be submitted again to a new jury on a re-trial.

Sec. 87. The Federal Act and the comparative negligence doctrine.

The second section of the Federal Employers' Liability Act is a declaration in statutory and modified form of the so-called "comparative negligence" rule. This rule is stated as follows in Illinois in *Rockford, etc., Ry. Co. v. Delaney,* 82 Ill. 198: "The rule of this court is that the relative degrees of negligence in cases of this kind is a matter of comparison, and that the plaintiff may recover although his intestate was guilty of contributory negligence, provided the negligence of the intestate was slight while that of the defendant was gross in comparison with each other." This rule formerly adopted at common law in Illinois, has since in more recent decisions been repudiated, without statutory intervention, by the courts, and the ordinary common law rule as to contributory negligence adopted. (*Lake Shore Ry. Co. v. Hessions,* 150 Ill. 586; *Lanark v. Dougherty,* 153 Ill. 165; *Chicago, etc., Rd. Co. v. Kelly,* 156 Ill. 17.) This rule was formerly in force in Kansas, Kentucky, Oregon and Tennessee, and remains in force in Georgia. (*Branham v. Central Ry. Co.,* 78 Ga. 35; *Savannah,*

etc., Ry. Co. v. Smith, 93 Ga. 742; *Ga. Ry. Co. v. Pittman,* 77 Ga. 325. See "Comparative Negligence," vol. 6 of Am. & Eng. Enc. of Law, 2nd Ed., page 360, for a full consideration of the comparative negligence rule.)

Under the Illinois comparative negligence rule stated above, the injured employee was entitled to recover not only for the damages he sustained from his employer's negligence, but also for those sustained through his own fault, provided his own negligence was slight in comparison with that of the defendant, as the Illinois doctrine made no provision for deducting from the total damages sustained, an amount equivalent to that occasioned by the negligence of the injured party himself. In Georgia, however, where an otherwise similar rule now prevails, the negligence of the plaintiff is to be taken in mitigation of damages where his negligence is small in comparison with that of the defendant and the damage recovered by him is to be diminished in proportion to his own contributory negligence. (*Georgia Ry. Co. v. Pittman,* 73 Ga. 325; *Branham v. Central Ry. Co.,* 78 Ga. 35; *Savannah, etc., Ry. Co. v. Smith,* 93 Ga. 742.) The rule as created by the Federal Employers' Liability Act bears a striking similarity to the comparative negligence rule as annunciated by the Georgia and older Illinois cases. Neither under the comparative negligence rule as laid down in these States nor under the federal act is an employee entitled to recover damages from his employer where his negligence is gross in comparison with that of the employer. In such a case it is the duty of the jury to render a verdict in favor of the defendant, and in case the jury fail to render such a verdict it still remains the duty and power of the judge to set aside the verdict and order a new trial.

NEW YORK EMPLOYERS' LIABILITY ACT.

(L. 1902, ch. 600.)

AN ACT to extend and regulate the liability of employers to make compensation for personal injuries suffered by employees.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 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 entrusted 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 entrusted 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 one hundred and twenty 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 injured or by some one in his behalf, but if from physical or mental incapacity it is impossible for the person injured to give notice within the time provided in said section, he may give the same within ten days after such incapacity is removed. In case of his death, without having given such notice, his executor or administrator may give such notice within 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 containing 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 others. 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 risk of personal injury therefrom, or as negligence contributing in 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 such 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 two 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 first, nineteen hundred and two.

NEW YORK RAILROAD LAW.

(Chap. 657 of the Laws of 1906.)*

AN ACT to amend the Railroad Law in relation to liability for injuries to employees.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter five hundred and sixty-five of the laws of eighteen hundred and ninety, entitled "An act in relation to railroads, constituting chapter thirty-nine of the general laws, and known as the railroad law," is hereby amended by adding thereto a new section, to be known as section forty-two-a, as follows:

Sec. 42-a. In all actions against a railroad corporation, foreign or domestic, doing business in this state, or against a receiver thereof, for personal injury to, or death resulting from personal injury of any person, while in the employment of such corporation or receiver, arising from the negligence of such corporation or receiver or of any of its or his officers or employees, every employee or his legal representatives, shall have the same rights and remedies for an injury, or for death, suffered by him, from the act or omission of such corporation or receiver or of its or his officers or employees, as are now allowed by law, and, in addition to the liability now existing by law, it shall be held in such actions that persons engaged in the service of any railroad corporation, foreign or domestic, doing business in this state, or in the service of a receiver thereof, who are entrusted by such corporation or receiver, with the

*Became a law May 29, 1906.

authority of superintendence, control or command of other persons in the employment of such corporation or receiver, or with the authority to direct or control any other employee in the performance of the duty of such employee, or who have, as a part of their duty, for the time being, physical control or direction of the movement of a signal, switch, locomotive engine, car, train or telegraph office, are vice-principals of such corporation or receiver, and are not fellow-servants of such injured or deceased employee. If an employee, engaged in the service of any such railroad corporation, or of a receiver thereof, shall receive any injury by reason of any defect in the condition of the ways, works, machinery, plant, tools or implements, or of any car, train, locomotive or attachment thereto belonging, owned or operated, or being run and operated by such corporation or receiver, when such defect could have been discovered by such corporation or receiver, by reasonable and proper care, tests or inspection, such corporation or receiver, shall be deemed to have had knowledge of such defect before and at the time such injury is sustained; and when the fact of such defect shall be proved upon the trial of any action in the courts of this state, brought by such employee or his legal representatives, against any such railroad corporation or receiver, on account of such injuries so received, the same shall be *prima facie* evidence of negligence on the part of such corporation or receiver. This section shall not affect actions or causes of action now existing; and no contract, receipt, rule or regulation, between an employee and a railroad corporation or receiver, shall exempt or limit the liability of such corporation or receiver from the provisions of this section.

Sec. 2. This act shall take effect immediately.

FEDERAL EMPLOYERS' LIABILITY ACT.

[PUBLIC—No. 219.]

AN ACT Relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

Sec. 2. That in all actions hereafter brought against any common carriers to recover damages for personal

injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury:

Sec. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: *Provided, however,* That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

Sec. 4. That no action shall be maintained under this act, unless commenced within one year from the time the cause of action accrued.

Sec. 5. That nothing in this act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the safety-appliance act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three.

Approved, June 11, 1906.

ENGLISH EMPLOYERS' LIABILITY ACT.

(43-44 Victoria, 1880, ch. 42.)

AN ACT to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service. (7th September, 1880.)

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:

SECTION 1. Where after the commencement of this act personal injury is caused to a workman:

(1) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or

(2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or

(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

(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

(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:

(1) Under subsection one of section one, 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 entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

(2) Under subsection four of section one, 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.

(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 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 maintainance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.

Sec. 5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or person 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 of persons 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. (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 be by law removed.

(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.

(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 nine of the sheriff's 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 to 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.

When 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 purpose of this act, unless the context otherwise requires:—

The expression, "person who has superintendence entrusted 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, 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.

ALABAMA EMPLOYERS' LIABILITY ACT.

(Act of February 12, 1885; Session Laws, 1885, p. 115; Civil Code, 1896; Alabama, ch. 43, secs. 1749-1751.)

SECTION 2590 (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 one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the master or employer, or of some person in the service of the master or employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant, were in proper condition.

Sec. 2591 (1751). *Personal representative 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 (1750). *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.

MASSACHUSETTS EMPLOYERS' LIABILITY ACT.

(L. 1887, ch. 270; Rev. L. 1902, ch. 106, secs. 71-79, with amendments to date.)

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:

SECTION 71. 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 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 employer, 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 one 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 three of this section, and whoever, as 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 an 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 a result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under the provisions of section seventy-one, 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 seventy-one for a personal injury to an employee, in which no damages for his death are awarded under the provisions of section seventy-two, shall not exceed four thousand dollars. The amount of damages which may be awarded in such action, if damages for his death are awarded under the provisions of section seventy-two, shall not exceed five thousand dollars 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 seventy-three, 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 seventy-three shall not be less than five hundred nor more than five thousand dollars.

Sec. 75. No action for the recovery of damages for injury or death under the provisions of sections seventy-one to seventy-four, 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 pro-

visions 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 twenty-two of chapter fifty-one shall apply to notices under the provisions of this section.[1]

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.

1. Chapter 51, L. 1902, sec. 22, referred to above, reads:

"Sec. 22. A defendant shall not avail himself in defence of any omission to state in such notice the time, place or cause of the injury or damage unless within five days after the receipt of the notice given within the time required by law, and by an authorized person, referring to the injuries sustained and claiming damages therefor, the person receiving such notice or some person in his behalf, notifies in writing the person injured, his executor or administrator or the person giving or serving such notice in his behalf, that his notice is insufficient and requests forthwith a written notice in compliance with the law. If the person authorized to give such notice, within five days after the receipt of such request gives a written notice complying with the law as to the time, place, and cause of an injury or damage, such notice shall have the effect of the original notice and shall be considered a part thereof."

Sec. 77. An employee or his legal representatives shall not be entitled, under the provisions of sections seventy-one to seventy-four, 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 seventy-one to seventy-four, inclusive, or to any relief society formed under the provisions of sections seventeen, eighteen and nineteen of chapter one hundred and twenty-five, may prove in mitigation of the damages recoverable by an employee under the provisions of said section, 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.

INDIANA EMPLOYERS' LIABILITY ACT.

(Acts 1893, ch. 130, p. 294; Burns R. S. of Ind., 1901; Annotated Statutes of 1894, ch. 81.)

SECTION 7083. *Liability for personal injuries.*—Every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by an 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 entrusted 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, co-employee 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, co-employee 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 repealed chapter 64, acts of 1895.

Sec. 7085. *Measure of Damages.*— The 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. *Laws of other states not a defense.*— In case any railroad corporation which owns or operates a line extending into or through the state of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured as provided in this act, in any other state where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or

statutes of the state where such person shall have been injured as a defense to the action brought in this state.

Sec. 7087. *Contracts of release void.*— 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.

COLORADO EMPLOYERS' LIABILITY ACT.

(Mills Supp. Ann. St. Colo., 1891-1896, secs. 1511a-1511c; Acts of 1893, ch. 77.)

SECTION 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 entrusted 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, entrusted with or 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 any 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. The amount of compensation recoverable under this act, in case of a personal injury resulting solely from the negligence of a co-employee, shall not exceed the sum of five thousand dollars. 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. Whenever an employee 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 entrusted by him with the duty of seeing that they were in proper condition.

Sec. 4. 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 entrusted to him some general superintendence.

Sec. 5. If the injury sustained by the employee is clearly the result of the negligence, carelessness or misconduct of a co-employee the co-employee 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 co-employee, 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 co-employee, the jury may assess damages both against the employer and employee.

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