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EMPLOYERS' LIABILITY IN ENGLAND PRIOR
TO THE ACT OF 1880.

In essence, the problem of adjusting the relations which should prevail between the employer and the employed, so that they may share in a fair proportion the advantages and burdens of their association, is one which is economic, and courts, in dealing with the various situations growing out of the status, have, consciously or unconsciously, written into the law the ideas of social science entertained by the individuals composing them. Chiefly as a result of this, there is a hopeless conflict of decision and *dicta* in this field of the law, the importance of which may justify an examination of some of the cases showing the development of the subject of employers' liability in English jurisprudence.

This department of the law, although large in volume, is of comparatively recent origin. The first case in England was *Priestley v. Fowler*,¹ decided in 1837, in the Court of Exchequer. The declaration alleged that the defendant had directed the plaintiff, so being his servant, to take certain goods of the defendant's in a certain van of the defendant then used by him, and conducted by another of his servants. The plaintiff further averred the existence of a duty on the part of the master to use due and proper care

¹ 3 M. & W. 1 (1837).

that the van should be in a proper state of repair, that it should not be overloaded, and that the plaintiff should be safely carried thereby, but that in consequence of the neglect of all of these duties the van gave way and broke down, and the plaintiff was injured. After verdict for the plaintiff, a rule was taken to show cause why the judgment should not be arrested, on the ground that the defendant was not liable in law, under the circumstances stated in the declaration. The Court granted the rule, and the case has been cited as standing for the proposition that a servant cannot recover against his master for injuries caused by the negligence of a fellow-servant, this being due to the remarks of Lord Abinger, Chief Baron, the following being an excerpt therefrom: "If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents." As there was nothing in the case, however, aside from the averment that the van was conducted by another servant, to indicate that the accident was due to the negligence of one who was a co-employee of the plaintiff, what was said about the fellow-servant doctrine must be regarded as *dicta*.

After discussing this phase of the subject, Lord Abinger said: "But, in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself, and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master."

The tenor of such reasoning would seem to indicate that the Court, despite the statement of a generality that the master was bound to provide for the safety of the servant, was of the opinion that where the defect in the condition of the instrumentalities of the work could be discovered by the servant as well as by the master, there was no duty on the latter, either to take reasonable care to have the appliances in a safe condition, or to warn his employee of the defect. The Chief Baron, on concluding that the declaration did not charge that the defendant knew of the defects mentioned, did not consider how far it was the duty of the master to warn the servant of defects known not to the latter, but to the master.

The first English case in which it was determined that a servant cannot recover against his master for injuries sustained through the negligence of a fellow-servant, was *Hutchinson v. York, etc., Railway Co.*,² decided in 1850. In the course of his opinion, Baron Alderson said: "The servant, when he engages to run the risks of the service, including those arising from fellow-service, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care." This is not mere *dicta*; it is part of the reasoning on which the decision is based.

A Scotch author³ of prominence asserts that under the ruling in this case, breach of duty is involved only in the event of negligence in the employment of incompetent persons; that the master is not supposed to warrant the competency of the persons employed by him, and that to hold otherwise would be unjust if fault be the criterion of liability. It is, however, submitted that, notwithstanding the correctly quoted decision in a later case, *Tarrant v. Webb*,⁴ which he cites as "explaining" the case under discussion, the so-called explanation is in reality a departure, since in the

² 5 Exch. 341 (1850).

³ W. C. Spens, *The Law of Employers and Employed*, p. 76.

⁴ 86 E. C. L. R. 796 (1850).

Hutchinson case there was apparently a realization on the part of the Court that even competent persons may be guilty of negligence, and that the only risks the servant must be obligated to assume are those casual acts of negligence likely to be committed by competent persons, but not the carelessness of incompetents, even though the latter be employed by the master after exercise of due care on his part. In other words, the master may determine a servant's competency, whereas he cannot, by any foresight, prevent a competent man from being negligent.

In *Wigmore v. Jay*,⁵ it was proved that the husband of the plaintiff had been employed by the defendant as a bricklayer, and had been fatally injured by a fall from a scaffold, part of the material of which was unsound. The scaffold had been erected under the superintendence of the defendant's foreman, to whom the unsoundness of part of the lumber had been pointed out, but could not have been discovered by the deceased. The Court said that the person who erected the scaffold, or assisted in its erection, had not been proved incompetent, and was to be regarded as a fellow-servant with the deceased. The case is direct authority for the proposition that in so far as the erection of scaffolding was concerned, there was no duty on the master to use due care, either to see to its safe erection or to furnish safe materials for that purpose.

In *Williams v. Clough*,⁶ plaintiff, a servant of defendant, was injured by falling from a ladder which his master had ordered him to use. Objection was taken to the declaration on the ground that while it averred that the defendant knew that the ladder was unsafe, it had omitted to allege that the plaintiff did not know its condition, or could not have found out same. The Court held the declaration sufficient, giving as a reason, that it was not necessary that it should negative every possible state of facts which might afford a defense. Baron Bramwell, although not dissenting, was of the im-

⁵ 5 Exch. 353 (1850).

⁶ 3 H. & N. 257 (1858).

pression that the master could not be held to liability simply because he knew that the machinery was unsafe, if the servant had the same means of knowledge as the master.

This case did not recognize any duty on the part of the master, either to furnish safe machinery or to take care to do so. It went only to the extent of placing on the master, when he personally directed the work, an obligation to inform his servants of defects with which he was familiar, and of which the servant had not the means of knowledge. There is a wide difference between the thought expressed by Chief Baron Pollock's opinion and that of Baron Bramwell. The first-named recognized a duty on the master to warn the employee of defects known to the former; and an allegation of his omission to do so as a sufficient averment of breach, casting on the defendant the burden of refuting liability by proof on his part of the knowledge or means of knowledge of the servant. Baron Bramwell, on the other hand, recognizes the obligation to warn as present only in cases where the servant could not discover the defect, and regards an allegation of inability to make such discovery as an essential ingredient of the plaintiff's declaration.

In *Tarrant v. Webb*,⁷ the plaintiff, a servant of the defendant, was working on a scaffold erected by one M, employed for that purpose by the defendant, and was injured as a result of defective construction of the scaffold. The Court regarded the injury as due to negligence of a fellow-servant, and proceeded: "The master may be responsible where he is personally guilty of negligence; but certainly not where he *does his best* to get competent persons. He is not bound to warrant their competency." This represents a limitation in the master's favor of the duty laid down in *Hutchinson v. York, etc., Railway Co.* (*supra*), where "reasonable care to protect him from such risks" (those of fellow-service) was defined as "associating him only with persons of ordinary skill and care."

There was brought to the attention of the Court of Ex-

⁷86 E. C. L. R. 796 (1856).

chequer Chamber in 1857, the case of *Roberts v. Smith and Another*,⁸ presenting the question of the liability of the master for injuries caused the servant by reason of defective materials used in the construction of a scaffold upon which he was working. The evidence showed that one of the defendants, on being told that some of the logs had been broken, nevertheless ordered the carpenter to go ahead with the building of the scaffold. The Court, speaking through Justice Willes, in granting to plaintiff a rule for a new trial, said: "It must be understood that this rule is granted upon the ground that there appears to have been evidence of the *personal interference* and *negligence* of the master." The decision, therefore, did not go so far as to fasten on the master a liability for due care with regard to furnishing safe materials under all circumstances, but only in the case of his personal interference with the operations of his workmen, leaving him free to place at their disposal any grade of supplies in the event of his acting through others.

The Scotch Judges were from the first inclined to take into account the superior facilities of the employer, and hence to hold him to a higher standard of duty than was exacted of the servant. In *Sword v. Cameron*,⁹ plaintiff was a workman in the service of defendants, proprietors of a quarry. It was the practice to call "fire" as a signal to the workmen to move away when blasts were to be set off. It very frequently occurred at the quarry that stones, exploded from a shot, flew over the heads of retreating workmen, and in the present case, the plaintiff had been struck by one of these missiles and severely injured, as a result of which he brought an action for reparation. The Sheriff found that the plaintiff had been for some time a workman in the quarry and therefore knew the mode of operation; that there was time allowed to have enabled him, with ordinary diligence, to reach a place of safety. The Lord Ordinary, in overruling the Sheriff's interlocutor, remarked that

⁸ 2 H. & N. 213 (1857).

⁹ 1 Dunlop (Sess. Cases) 493 (1839).

the defendants did not deny that if the injury was produced by negligence of their workmen acting for them, they were liable, and that he differed with the Sheriff in that he took the position that merely because the workman knew the practice, it did not follow that "he was bound to adapt himself accordingly," otherwise knowledge of danger would be a defence for criminal rashness on the part of masters. The principle underlying his determination, he expressed thus: "The master of a work is not entitled to conduct it in such a way as that his people suffer unnecessarily in limb or life." On appeal, the Lord Ordinary's view was adopted, the Court treating the practice in vogue at the quarry as dangerous and due to the negligence of the workmen in charge, for whom the defendants were responsible.

It will be observed that the Scotch tribunals assigned to him who employed others in his business operations, the task of providing a safe system of work, designed to protect them from physical injuries, and that any lack of care on the part of one servant towards a co-worker was, for the purpose of determining the money reparation, to be treated as that of the master. In taking this view, the Court refused to apply to the situation any different rule than that prevailing in other divisions of the law with regard to the liability of the principal for the negligent acts of the servant done in the course of the former's business. Furthermore, they dismissed as untenable the defense of *volenti non fit injuria*.

The opposite attitude was taken by the English Court of Queen's Bench in *Seymour v. Maddox*,¹⁰ in which it ridiculed the idea of placing on the master an obligation to take care to provide a safe place of work for the employee. The declaration was to the effect that the plaintiff, an opera singer, had been employed by the defendant, who was possessed of a theatre, having underneath the stage, a floor, along which it was necessary to pass. The floor, it appeared, had a hole in it, and plaintiff charged negligence in not having the floor sufficiently lighted and the hole fenced, as a

¹⁰ 16 A. & E. (N. S.) 326 (1851).

result of which she sustained injury. Lord Chief Justice Campbell said that the duty laid did not arise from the particular facts stated nor from the general relation of master and servant. Mr. Justice Erle put his judgment on the ground that the declaration showed no contract respecting the lighting and fencing, and apparently concluded that the plaintiff had been aware of the defects and had assumed the risk of injury therefrom. Mr. Justice Coleridge went a step further, saying: "But the servant is not bound to enter the particular service; if he does, he must take things as he finds them."

Although the basis of the decision seems to be that the plaintiff knew of the condition of the floor, and assumed all risk attendant on its use, there can be no mistaking the disinclination of the Court to regard the parties as other than having entered, on an equal footing, into a contractual relation on which alone the rights and liabilities of each depended. There was no express stipulation that the floor should be lighted, and the hole fenced, and the Court was of opinion that the facts were not such that an implied contract to do these things should have been interpreted therefrom, but it could have as easily and reasonably concluded that there was such an implied contract. In other words, it is submitted that the "implied contract" theory is a ridiculously weak hook on which to hang the economic concepts of the individuals comprising the courts; their theories being applied under the guise of carrying out the intention of the parties immediately affected, when, in fact, the parties never gave any forethought to the situation, and hence could intend nothing with reference to it. It is not urged that there may not be times when, from a contract, there may be implied certain reasonable and logical sequences, but in a case like the one discussed, the terms implied depend on the individual views of the members of the court as to the best economic principles to import into the law, and the problem, it is submitted, should be solved without the aid of an unconvincing fiction.

A few years afterwards, there came before the House of

Lords on appeal from the Scotch courts, *Paterson v. Wallace*,¹¹ whose decision serves to emphasize the divergent views of the Scotch and English courts respecting the nature and extent of the master's obligation to provide for the safety of his servant. It appeared that plaintiff's husband had been employed by the defendants in working in a mine, on the roof of which a large stone had been left in so dangerous a position that it fell on the workman and killed him. The owners had not personally interfered in the work, but this fact did not relieve them from liability. Lord Cranworth, in a much-quoted opinion, said: "When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of the workman. This is the law of England no less than the law of Scotland. It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure when in fact the master knows, or ought to know, that it is not so. And if from any negligence in this respect damage arises, the master is responsible." He further held that if the defendants' manager failed in his duty in directing the stone to be removed, this would be negligence for which the defendants would be responsible, and it would afford no defense that the workman continued at his employment after the orders for the removal of the stone had been ultimately given.

There is here established, without any reference to the law of contract, a duty on the employer not only to take reasonable means to provide a safe place to work, but to keep it safe. The duty is one which is absolute, hence the negligence of another entrusted with its fulfilment is regarded as that of the employer. The rule formulated by Lord Cranworth is based, apparently, not on any judicially-manufactured contract for parties who neither expressly nor impliedly intended to regulate this incident of their relations by contract; but on the theory that in dealing with a relation of so vital an economic importance as that of master and ser-

¹¹ 1 Macq. (H. L. Sc.) 748 (1854).

vant, the law is justified in saying that it is reasonable that when a man wishes to have work performed, the doing of which involves danger, perhaps, at all events, and most certainly if the place of work or the instrumentalities therein used are not in a safe condition, there is imposed on him, who has the control of the work and of the instrumentalities, the duty of taking precautions looking to the safety of the employed. The master's duty was similarly defined in the later Scotch case of *Bryden v. Stewart*.¹²

The English Court of Exchequer, however, refused in *Dynen v. Leach*¹³ to be guided by what had been expressed by Lord Cranworth. The facts showed that deceased had been employed by defendant, a sugar refiner, to hoist sugar molds to higher floors by means of machinery. The usual mode was to place them in a sort of net bag, which prevented any accident; but, defendant, after using this method, substituted, from motives of economy, a kind of clip which laid hold of the rim of the mold. While the mold was being raised, the clip slipped, and the mold fell and killed the workman, for whose death recovery in damages was sought. Chief Baron Pollock, during the argument, remarked that what was said in *Paterson v. Wallace* (*supra*) about the master's duty was mere *obiter dictum* as regarded the law of England, and in delivering his opinion, held that there was no contract and no general duty thrown by law upon the master to the effect stated in the declaration. To quote: "If the work is more than ordinarily dangerous, the servant should know it, and decline to continue in it." Of stronger import are the words of Baron Bramwell: "It may be inhuman to carry on his works as to expose his workmen to peril of their lives, but it does not create a right of action for an injury which it may occasion when, as in this case, the workman has known all the facts and is as well acquainted as the master with the nature of the machinery and voluntarily uses it." He further said that in this the case differed

¹² 2 Macq. (H. L. Sc.) 30 (1855).

¹³ 26 L. J. Exch. 221 (1857).

from *Paterson v. Wallace* (*supra*), where the workman had nothing to do with the stone, the fall of which caused his death.

The only obligation imposed on the master by this case was to warn the servant of the danger of the machinery in use, unless the servant, in the course of his duties, would have opportunity of acquainting himself with the nature of the machinery, in which event there would be no further duty to warn, and the servant would be confronted with the alternative of leaving the employment or of continuing it subject to every risk.

In *Couch v. Steel*,¹⁴ the declaration averred that plaintiff's health was injured as a result of defendant's so negligently fitting out a vessel that it was unseaworthy. In disposing of this count, Lord Chief Justice Campbell observed that it disclosed no contract or legal duty of which there had been a breach, the subject of action. "For aught that appears on this count," he declared, "the defendant may have been perfectly ignorant of the defects in the vessel, whilst plaintiff may have examined the vessel before he engaged himself, and have known her state well."

Here there had been no express contract on the part of the master to take precautions looking to the seaworthiness of the ship; and the Court, in thorough concord with the economic trend of judicial precedent, did not see the advisability of discovering in the vast legal storeroom of "implied contracts," any duty on the part of the owner of a ship to have her inspected before putting her into commission. It is not clear what meaning the term "legal duty," as used by the Chief Justice, was intended to convey, but it may be assumed that he referred to an obligation imposed by statute, as distinguished from one having its inception in contract.

There had not as yet arisen in the English law any case requiring a determination of the master's liability for injuries sustained by a servant through the negligence of a

¹⁴ 3 E. & B. 402 (1854).

fellow-servant not employed by the master in person. In *dicta* contained in *Ormond v. Holland*,¹⁵ there was an intimation that the master would not be liable under such circumstances. The plaintiff, an employee of defendants, was injured in the use of a defective ladder. The evidence showed that the ladder had been inspected by a gatekeeper appointed for that purpose by a general foreman who had been selected by defendants, but there was a conflict in the testimony as to whether the injury was due to some unaccountable accident or to negligence on the part of the gatekeeper. As the jury were directed to find a verdict for the defendants, they did not resolve this conflict, so that the opinions of a majority of the members of the court, based apparently on the assumption of the gatekeeper's negligence, must be regarded, to a great extent, as very strong *dicta* rather than as clear authority. The reasoning of Lord Chief Justice Campbell was, in part, as follows: "There was no evidence of *personal* negligence; the builders used *due and reasonable* care to have competent servants." Justice Wightman stated that there was no evidence that the gatekeeper was incompetent, or even if he was, that there was any negligence in the defendants personally, while Justice Crompton concurred with an observation that evidence of personal negligence of any kind was lacking. Justice Erle said: "On these facts the defendants have shown that they took due care. The question of law therefore is, whether the master warrants the soundness of the materials. And he does not."

This last expression indicates that there was in the mind of Justice Erle an idea that a duty of some sort respecting the furnishing of supplies was imposed on the master, but that it would be discharged by selecting a foreman to appoint some one to inspect them before they should be used. The majority of the Judges did not, however, consider the existence of any such duty. Their decision to the effect that there was no personal negligence on the part of the employer went to the extent of holding that there was on him no duty

¹⁵ 1 E. B. & E. 102 (1858).

to attend in person to the retention of co-workers with whom the employee would be associated, and the *obiter dictum*, so forcible as to have almost the weight of decision, determined that neither would he be responsible for the manner in which those co-servants were hired by the one entrusted with the task. Such an enunciation may mean that there was no duty at all on the master—liability would only arise where he would show a desire to meddle with the details of his business; or, as the words of the Chief Justice indicate, there was a duty, but the requirement of “reasonable care” would be fulfilled by the appointment of a foreman equally competent as the master to select servants who would be associated *inter se*.

In the same year the House of Lords in *Bartonshill Coal Co. v. Reid*,¹⁶ on appeal from the Scotch courts, decided that the fellow-servant doctrine prevailed in Scotland as in England. Lord Cranworth reviewed the Scotch law in an attempt to show that the Scotch cases were not opposed to the doctrine, but, it is submitted, analysis of the authorities will create considerable doubt as to the accuracy of his conclusion in this respect. The facts showed that the husband of the plaintiff was killed through the negligence of one S, engineman of a cage in which the deceased was riding from defendant’s mine, both he and S. having been employees of defendant. In the Court of Session, Lord Deas admitted that in some cases there might exist the risk of common employment, but that in this case it was the duty of the master to convey the miners up and down the pit, and “if he delegated that duty to another as his representative, he became equally liable for the fault and negligence of that representative as for his own.” And Lord Ivory observed: “It will not do to say there was due precaution used in the selection of the principal man.”

It will be clearly seen from the above expressions of the Scotch Judges that the Court refused to consider as an exercise of reasonable care the appointment of one to whom

¹⁶ 3 Macq. (H. L. Sc.) 266 (1858).

was entrusted the actual carrying out of the work, and it followed that, the duty being absolute, the master was liable for its negligent performance, whether by himself or by another. Lord Cranworth, on the other hand, was of the opinion that the engineman, in drawing the workman from the mine, was not fulfilling a duty owed by the master to the servant, but that the work was part of the common employment in which he and the latter were engaged. The case is important as showing the convergence of the Scotch and English ideas in this expanse of the law.

The next English case of importance involving a further consideration of the extent of the employer's obligations was *Griffiths v. Gidlow*.¹⁷ The plaintiff's case was founded on the neglect of the defendant, his employer, to furnish proper apparatus for the work. The evidence showed that the master was at the workings of his mine several times each day. Baron Watson, after stating that "the master's duty, *when he personally interferes*, is to provide that tackle and apparatus supplied by him is proper and secure, and that he is liable for want of due care in this respect," held, that the evidence proved a compliance with the requirement by the master, and that the injury to the plaintiff was due to improper use on the part of the latter's fellow-workmen of proper apparatus, and that, consequently, recovery was barred. He cited as authority for his definition of the master's duty, *Paterson v. Wallace*, (*supra*); but it is submitted that the case quoted went further than as interpreted by the learned Baron, since it contained nothing, expressly or by implication, to show that the duty was limited to cases where the master personally interfered. To the same effect as Baron Watson's opinion was the *dictum* of Chief Justice Lefroy in *Potts v. Plunkett*,¹⁸ where he said that "there was no averment of any knowledge on the part of the defendant, that the flag which caused the injury to the plaintiff

¹⁷ 3 H. & N. 648 (1858).

¹⁸ 9 Ir. C. L. R. 290 (1859).

was of such a nature or quality as exposed any one who stood upon it to danger.”

The following year, the Irish Court of Exchequer, in *Vaughan v. Cork, etc., Railroad Co.*,¹⁹ indicated a tendency to extend the responsibility of the master. The plaintiff, while carrying stone along a passageway, was injured by an overhanging wall falling on him. The declaration averred that the defendants negligently kept the wall and that they did not use reasonable precautions in order to prevent accident. Chief Baron Pigot, after pointing out that there would be no liability if the wall was dangerous when deceased entered the employment and was known by him to be in such condition, imposed on the employer the obligation to use all reasonable care to protect his workmen from dangers unknown to them, and which he knows, or must be presumed to know. On construing the summons as meaning that the wall became ruinous by defendants' negligence after plaintiff engaged in the service, the wall being in actual possession, and under the control and dominion of the defendants, he concluded that they “could hardly be treated otherwise than as directly and personally cognizant of the altered condition of the wall,” and bound to repair it or to acquaint the workman with the change entailing increased risk.

The Chief Baron did not admit any duty on the master to take care to provide a safe place to work; his only obligation was in the alternative—to keep the premises in the same condition as they were when the service began, or to acquaint the servant with any change increasing risk of injury. The English authorities had fastened on the master no obligation, not even to warn of dangers, unless he knew of them, and he was not required to obtain such knowledge; but, this decision made him responsible for the protection of his employees from dangers unknown to them, and of which a knowledge on his part would be presumed. This seems rea-

¹⁹ 12 Ir. C. L. 297 (1860).

sonable in view of the master's superior facilities for observing defects in his plant.

The Scotch courts, fettered as they were by the decision in *Bartonshill Coal Co. v. Reid* (*supra*), continued to look out for the interests of the servant and to hold the master to no small degree of responsibility. In *M'Aulay v. Brownlie*,²⁰ the defendant was engaged in erecting a building, and plaintiff was employed as a laborer in carrying stones along a scaffold on the third story of same. Some planks were removed by the foreman, and on the plaintiff and others pointing out the resultant danger, he not only failed to have the defects remedied but ordered plaintiffs to assist in carrying some stones along the scaffold, in the doing of which the injury complained of was sustained. Plaintiff alleged that the defendant had delegated to the foreman the duty of furnishing gangways and scaffoldings and power of giving such orders as he thought proper. The Sheriff substitute found that the injury was due, not to plaintiff's own fault, but to the carelessness of the master or persons in his employment for whom he was responsible, in that the gangway had not been constructed or kept clear with a due consideration to the safety of the laborers. In the Court of Session, Lord President McNeill distinguished the case from that of the *Bartonshill Coal Co.* (*supra*) in that here the master was bound to provide proper machinery. He then went on to say that the responsibility for a foreman might depend on whether the person so placed in charge was a man of known skill and character in regard to the matters over which he was placed in superintendence, but was of the impression that here the foreman was not competent. Lord Curriehill observed that there was a duty on the master to prove the foreman competent. The view of these Judges seemed to be that the master, although charged with due care in furnishing safe machinery, might have fulfilled the duty by the appointment of a competent foreman. Lord Deas, on the contrary, considered the foreman as the "*alter*

²⁰ 22 Dunlop (Sess. Cases) 975 (1860).

ego" of the master, delegated to act for him in his absence, and that "when a master so delegates his powers and duties in matters affecting life and limb, he must be responsible for the acts and omissions of his representative equally as for his own." This theory failed, however, to find lodgment in Scotch or English jurisprudence.

A slight increase in the master's responsibility was made in *Mellors v. Shaw*.²¹ The declaration averred that the shaft of a mine was, by the negligence of the defendants, constructed in a defective and improper manner, and was in an unsafe condition, which defendants knew. Counsel for the defendants urged the necessity of actual personal interference on the master's part, so as to lay a trap for the servant in the particular matter from which he received the injury. Justice Crompton refused to adopt this proposition and considered it negligence for which the master was liable, if he knew that the machinery or tackle used by the persons employed by him was improper or unsafe, and notwithstanding that knowledge sanctioned its use, although there might be a doubt as to his liability where the servant was aware of the defective state.

This decision was to the same purport as that reached by the Irish Court of Exchequer in *Vaughan v. Cork, etc., Railroad Co.* (*supra*). It imposed on the master no duty either to have the machinery safe originally or to keep it so by repair—the extent of the obligation was to bring home to the employee notice of any change in the condition of which the master should be informed. This represents a slight change in the law, as it may be confidently asserted that prior to this time there was on the master no duty, either to see to the safety of the materials or to warn the servant of their defects, unless he personally interfered in the work.

A case of more interest and importance was *Searles v. Lindsay*.²² The plaintiff, a third engineer on board a steam vessel owned by defendants, while employed with others,

²¹ 101 E. C. L. R. 437 (1861).

²² 11 C. B. (N. S.) 428 (1861).

under orders of the chief engineer, in turning a winch, was injured, as a result of one of the handles coming off through the chief engineer's negligence in not keeping it free of defects. Justice Byles considered the measure of duty on the master's part to be to take due and proper care that his machinery was sufficient and his workmen reasonably competent. Justice Williams stated that there was no evidence that the chief engineer was not competent, thus treating him as a fellow-workman of the plaintiff. On reasoning that seems less strained, Justice Keating relieved the master by assuming that the winch required repairing, and pointing out that defendants had on board their vessel a competent chief engineer whose duty it was to see it done, and who did so, though too late. He took the view that there was on the employer no obligation to keep the instrumentalities in proper condition—whatever duty existed was discharged when a competent man had been appointed to see to their safety. As there was here no evidence that the machinery was not safe when furnished, his remarks can have only the force of *dicta* as applied to the duty of preparation.

In marked contrast to the above attitude of the English Judges is the consistent tendency on the part of the Scotch law to hold the master to a line of duty in keeping with his greater facilities for taking precautions to prevent injuries to his servants. In *Weems v. Mathieson*,²³ the death of decedent was caused by the fall of a cylinder under which he was working, due to his employer's lack of precautions to secure the safety of his workmen. On appeal to the House of Lords, Lord Chancellor Westbury said that it would be necessary to show that the defect in the machinery was known, or might by the exercise of due skill and attention have been known, to the employer of the deceased Lord Wensleydale, in placing on the employer a duty of superintendence, evidently thought that he was limiting the obligations of the master. To use his words: "All that the master is bound to do is to provide machinery fit and proper for the

²³ 4 Macq. (H. L. Sc.) 215 (1861).

work, and to take care to have it superintended by himself or his workmen in a fit and proper manner." Lord Westbury did not indicate whether his requirement of "due skill and care" would be met by the master's appointment of one competent to judge of the sufficiency of the machinery, but it is doubtful if he would have considered this a compliance with the duty. Lord Wensleydale's language involved holding the master not merely to providing superintendence, but to responsibility for the manner of its exercise, thus going beyond the limits set by the English authorities.

Through the whole course of the English decisions, and to a lesser degree in this branch of Scotch jurisprudence, the object of the courts seemed to be to refer to contract, not only the formation of the relation of master and servant, together with the incidents which might be said to attach thereto *ex necessitate*, but to assume that all considerations of risk and liability for injuries sustained by the servant were traceable to the implied terms of the voluntary contractual relation. There were some Judges, notably those in the Scotch courts, who apparently saw that underlying the facts of the particular case before them was a vital economic problem not to be solved, but only to be complicated, by such superficial treatment.

It may be said that no one grasped more fully the true nature of the problem than did Justice Byles, as is shown by his reasoning in *Clarke v. Holmes*,²⁴ a case which came before the English Court of Exchequer Chamber on appeal from the Court of Exchequer. Defendant was the owner of some machinery which he had fenced in compliance with a statute, and it was in this state when plaintiff entered his employ. The fencing having become broken by accident, the plaintiff complained and was promised by the superintendent and by the defendant that it would be remedied. The machinery remained unfenced and plaintiff was injured. In allowing recovery, Chief Justice Cockburn formulated a rule to the effect that the danger contemplated on entering into

²⁴ 7 H. & N. 937 (1862).

the contract should not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect it would be kept. Justice Crompton delivered an opinion of like tenor, while Justice Wightman and Justice Willes concurred in the judgment, but not in the reasons supporting it.

In reaching the same conclusion as his associates, Justice Byles said: "I think the master liable on the broader ground, to wit, that the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition." After pointing out that *Priestley v. Fowler* (*supra*) should not be applied to a case such as the one at bar, he continued: "The master again is a volunteer, the workman ordinarily has no choice. To hold the master responsible to the workman for no absence of care, however flagrant, seems in the highest degree both unjust and inconvenient. The master is neither on the one hand at liberty to neglect all care, nor, on the other, is he to insure safety, but he is to use due and reasonable care." He disapproved of those cases in which the master's personal misconduct or personal knowledge was made the test of responsibility, and advocated the liability of the master for the negligence of his manager or agent. He urged that if a master's personal knowledge of defects in his machinery were necessary to his liability, the more a master neglected his business, the less would he be liable. His conclusions are not free from criticism, but his idea that the question raised could be settled without the aid of a fiction, deserves commendation.

The above *dictum* seems to have been, for the first time, the deciding factor in a case, in *Grizzle v. Frost*.²⁵ Plaintiff, a young girl under sixteen years of age, was employed about dangerous machinery of the defendants. She sustained injuries by reason, as she alleged, of the foreman not having given proper instructions. In charging the jury, Chief Justice Cockburn said that if the owners of dangerous machin-

²⁵ 3 F. & F. 622 (1863).

ery, by their foreman, should employ a young person about it inexperienced in its use, either without proper directions as to its use or with directions which were improper and likely to lead to danger of which the young person was not aware and of which they were aware, they would be liable; as it would be their duty to take reasonable care to avert such danger, and they would be responsible for any injury ensuing from the use of such machinery. It will be observed that the "*alter ego*" theory of the master's liability was here adopted—the duty of instruction imposed on the employers was one which was absolute.

The theory of Justice Byles was limited, against his dissent, in *Gallagher v. Piper*.²⁶ Plaintiff was employed by defendants in erecting a scaffold. Being short of boards, application was made to the foreman, who in turn applied to the general foreman or manager, who refused to furnish them, saying that plaintiff must get on as best he could. Plaintiff placed his foot on a log, from the rounded surface of which he slipped, and was injured. The jury found that the scaffold was unsafe to the knowledge of both foremen, but not to the knowledge of defendants, who personally never interfered with the works. In reversing the verdict in favor of the plaintiff, Chief Justice Erle held that the general manager did not stand in the place of the defendants, but was merely a fellow-servant with the plaintiff, and that there was no liability, as there had been no evidence of any default on the part of the defendants themselves, either as to the supply of sufficient materials or in the selection of a manager. Justice Willes concurred, but Justice Byles dissented on the ground that the manager was acting master.

The Chief Justice was of the impression that there was on the master a duty of some sort respecting the supply of sufficient materials for the work, but that once the materials were at the disposal of a foreman for distribution to the men, the duty was at an end. On this theory, it was unnecessary to go further and to hold, as he did, that in the distri-

²⁶16 C. B. (N. S.) 669 (1864).

bution of the materials, the foreman became a fellow-workman with the employees who were to use them. Justice Byles, while dissenting, yet intimated that the duty to furnish safe materials would be satisfied by giving the foreman authority to lay out money for that purpose. He, however, imposed on the defendants the burden of proving that they had supplied materials. Whatever his meaning, the words used are of plain import, and the curious but inevitable result of applying them would be that the master would escape liability through the suggestion of a Judge whose attitude was especially favorable to the servant, and the effect of his opinion in *Clarke v. Holmes (supra)*, where he strongly advocated the master's liability for the acts of his manager, would be negatived.

The theory of the master's non-liability excepting for personal negligence received support in *Brown v. Accrington, etc., Co.*²⁷ The defendants erected a building by contract, and employed a clerk of their works to superintend its erection. He directed a substitution to be made in the materials composing the foundations, and partly as a result of this, the plaintiff, an employee, was injured. The Court, speaking through Chief Baron Pollock, pointed out that there was no evidence of personal negligence on the part of the company, or any of its members, nor "on the part of any person acting as their servant, or under their orders, for which they were responsible, either by having given specific directions as to the mode in which the work should be done, or by having any reason to suppose that the person to whom they entrusted the duty of seeing that it was properly performed was not a person of ordinary competence." The decision regards the master liable for personal negligence only, except in the two instances named. It takes but a glance to see that the first of these exceptions is in reality but a species of personal interference, and that the occurrence of the second may be prevented by avoiding the selection of a known or supposed incompetent.

²⁷ 3 H. & C. 512 (1865).

At the trial of *Feltham v. England*,²⁸ there was predicated a radical extension of the master's duty of care in furnishing a safe place to work, although, on appeal, it was not, in its fullest extent, concurred in by the Court of Queen's Bench, and received limited approval by intimation rather than by definite affirmance. Plaintiff, an employee of defendant, was at work on an engine suspended from a crane which was on a tramway. The tramway was supported by piers of fresh brickwork, which gave way, and plaintiff was thereby injured. Chief Justice Cockburn charged the jury that the defendant was an engineer and that it was for them to say whether if he had applied his skill and knowledge he might not have seen that the piers were of insufficient strength. "Although," he said, "it may be that the defendant had no actual knowledge of this, the question is whether he might not and ought not to have had personal knowledge."

In prior cases, the trend of judicial expression was overwhelmingly in favor of holding the master to no personal duty of seeing that a safe place of work was provided, and to consider him liable in damages only for careless performance of that to which he volunteered to give personal attention. But Chief Justice Cockburn was of the impression that there was on the master a personal duty to see that the place of work was in a safe condition, provided that he was capable of judging of its fitness. Justice Mellor, in granting a motion to enter a nonsuit,²⁹ seemed to be of the same persuasion, but concluded that the defendant was not shown to have been able to determine in person the sufficiency of the piers, and had fulfilled his obligation in the appointment of competent persons to erect them.

Such a doctrine appears manifestly unjust. It throws on the master who, probably through years of studied effort, succeeds in becoming familiar with a trade or business, other than the one in which he is engaged, a duty of seeing that all acts involving the application of such trade principles in

²⁸ 4 F. & F. 460 (1865).

²⁹ L. R. 2 Q. B. 33 (1866).

his establishment, are properly executed, but frees from this obligation the master who is not so qualified, and furthermore relieves him from responsibility for the careless acts of one more efficient to whom he has entrusted the work.

This brings us to *Wilson v. Merry*,³⁰ which, although decided on appeal from Scotland, was afterwards followed in England, and was greatly responsible for the passage of the Employers' Liability Act in 1880. The defendant was a mine owner, who, in order to open up an under seam of coal, had erected a scaffold in the pit, by means of which to drive the level in the seam. The platform interrupted the free current of air in the pit, interfering with the ventilation which previously had not been defective. There was an explosion of the accumulated fire-damp, and the plaintiff's son, a workman, was killed. There was a foreman to whom had been given the charge of sinking the pit and making underground arrangements, he being in turn subject to a general manager.

The Chancellor, Lord Cairns, after stating the law of fellow-service, proceeded to base his decision on "a broader ground," citing the fellow-servant doctrine only as an example. He declared that the master's duty, in the event of his not personally superintending the work, was to select proper and competent persons to do so, and to furnish them with adequate materials, and that the master had not in this case contracted or undertaken to execute in person the work connected with the business.

Of similar import was the observation of Lord Cranworth: "It certainly was not incumbent on them personally to fix the scaffold. They discharged their duty when they procured the services of a competent underground manager." He then proceeded on the fellow-service theory, and stated that whether the deceased began to work with or under the foreman before or after he had prepared the scaffold was a matter of no importance; they were fellow-servants from the time when he began to work.

³⁰ L. R. 1 H. L. Sc. 326 (1868).

Lord Cairns, instead of adopting the arbitrary excuse of common employment as the basis of decision, dealt with the situation in a manner, that if not sound economically, was at least dictated by legal reasoning. Instead of maintaining, as he might have done, that the master had a duty of care to furnish a safe place to work, but that the moment he appointed some competent person to see to it that such a place was provided, the appointee and the other workmen became fellow-servants, he cast on the employer the alternative of giving personal supervision to the work or of selecting competent persons to do so, and to furnish them with adequate materials. It will be observed that he did not designate the mode of such selection or of supplying materials, but it is fair to assume, from his opinion, that he meant to place these as absolute obligations on the master, and that the retention of competent fellow-workmen and the preparation of a safe place to work were included in the term "supervision," thus relieving the master of any liability for the manner of the performance of these duties by the superintendent.

Lord Cranworth's reasons do not commend themselves so strongly as those advanced by the Chancellor. He concurred in the opinion that the master's appointment of a competent underground manager was a discharge of his duty, and then went on to decide that the foreman and the deceased became fellow-servants. This latter conclusion was wholly superfluous, because, as the master's obligation had been considered discharged by the appointment of a competent manager, the status of the manager with reference to the workmen was immaterial.

Lord Chelmsford proceeded on the theory that if the defendant had provided a safe system of ventilation, but the defect was in the carrying out of the system by the manager on whom the duty was imposed, such negligence would be that of a fellow-servant, and hence the master would be relieved of liability. The judgment of Lord Colonsay was to the same purport, but, in delivering his opinion, he took occasion to specify as acts sufficient to fasten liability on the master, culpable negligence in the master in cases where he

himself should supervise, or, where he devolves it on others, the heedless selection of incompetent persons, or "the failure to provide or supply the means of providing proper machinery and materials."

These instances were given as examples, not as limitations. No close analysis is needed to appreciate the obvious result of literal application of such a doctrine—it would mean that all the master would have to do in order to insure his funds against depletion by recoveries for personal injuries to his servants would be to take care in selecting a competent superintendent and to deliver to him a quantity of materials from which to select those needed, or to furnish to him the wherewithal to purchase same.

A result more radical than the decision in the above case was effected in *Smith v. Howard*.³¹ The plaintiff was employed by defendant to work at a circular saw. The defendant's foreman engaged a boy to assist the plaintiff, who afterwards complained to the foreman that the assistant was unsatisfactory, and thereupon the foreman promised him some one more efficient. Plaintiff continued at his work, and sustained injuries on account of the boy's negligence. On appeal from a nonsuit, Chief Baron Kelly decided that the fact that plaintiff made a complaint, not to the defendant, but to the foreman, of the boy's lack of skill, showed that he recognized him as the person whose business it was to engage and discharge the person from whose incompetence the accident arose, and that the foreman, in attending to the matter, was a co-worker, so that it was only a case of one servant sustaining injury from the negligence of another.

This case illustrates how far afield the fellow-servant doctrine had been carried in its work of freeing the master of responsibility for injuries occasioned by a servant. The opinion of the Chief Baron asserted that the master's duty of care to secure competent fellow-servants extended only to retaining a competent foreman, the risk of whose negli-

³¹ 22 L. T. (N. S.) 130 (1870).

gence in employing men with whom the workman would have to be associated would be assumed by the latter, because of the fact that the foreman in hiring these servants was engaged in a common employment with those who would be associated with them.

It is submitted, with the greatest of respect for the Court from which it proceeded, that such a theory closely approaches the absurd, and that the same result could have been reached on a more common-sense basis by regarding the master's duty of care in employing competent fellow-servants as discharged by his appointment of one equally qualified to judge of the capabilities of workmen.

An illustration of the extent to which the courts had gone in attributing almost every occurrence resulting in injury to the workman, either to the servant himself or to his fellow, in either case saving the master, is furnished in *Allen v. The New Gas Co.*³² Defendants had on their premises gates which were safe when open and wedged up, but likely to fall when closed. The attention of the manager had been called to their unsafe condition, and orders had been given, but not carried out, to remedy the defect. The plaintiff, an employee, in the performance of his duty, passed through the gates when open, but on his return one of them was closed, and shortly afterwards, while he was working near the gates, they fell and injured him. There was no evidence to show that the manager was incompetent.

In disposing of the case, Baron Huddleston stated that assuming the negligence to have been that of the manager, it would be regarded as a fellow-servant's. In the course of his opinion, he called attention to the lack of evidence indicating that the gates were defective in their original construction or that they had not been perfectly safe when put up. He said: "If they had fallen into a state of decay, and had been permitted to remain in that state, it could scarcely be said that that was the act of the defendants, but must have been that of the persons whom they must have em-

³²L. R. 1 Ex. Div. 251 (1876).

ployed, and there was no evidence that such persons were not proper and competent for the defendants to employ."

The idea apparently meant to be conveyed by such language was that there rested on the employer no duty of keeping his plant in good repair, provided that in the first instance he exercised due care in seeing to its fitness. If he cared to direct a manager or foreman to see to repairs, then in carrying out such instructions, the manager would be regarded as a fellow-servant with those for whose safeguarding the repairs were necessary. The effect of such a decision was to leave *in nubibus* the obligation of the master to have reasonably safe premises, because, once having furnished such premises, there rested on the master no further responsibility for deterioration, either by reason of use, or for such as was due to chemical changes brought about by exposure to the elements.

A result *contra* to this view was reached later in the same year in *Murphy v. Phillips*.³³ The plaintiff was injured while in defendant's employ, through the snapping of a chain used in the work. The evidence showed that a person accustomed to chains could, on looking at the chain, have observed these defects, and also that there were well-known methods adopted by "chain-testers" for examining and testing chains. Chief Baron Kelly was of the opinion that it was the duty of the defendant to have the chains duly examined and tested periodically. Of the same tenor were the concurring judgments of Barons Pollock and Cleasby, that of the latter being of especial interest in that he designated the manner of exercising reasonable care in fulfilling the obligation. "This might have been accomplished in two ways," said the learned Baron. "He might have appointed a fit and competent person expressly to superintend and see to the examining and testing of the chain, and had he done so he would have been himself exempt from all liability; or he might have examined the state of the chain himself."

In adjusting the duties and liabilities attaching to the

³³ 35 L. T. (N. S.) 477 (1876).

status of employer and employed, the assignment to the master of the duty of seeing to the repair of the machinery used by him in his operations, and of which he has the ownership, is reasonable, in view of the inability of the servant to discover, by such superficial inspection as he could make in the midst of his work, defects apparent only to the trained eye after adequate inspection. It would seem, then, that the position taken in the case discussed is preferable to that arrived at in the preceding case, especially since it cannot be urged that the alternative obligation placed on the master is difficult of fulfillment.

This was the last important case before the passage of the Employers' Liability Act³⁴ in 1880, after several years of deliberation and debate. Of the necessity for this statute, there could be no doubt, in view of the inadequate protection given by the common law to the workman. The extent of the employer's duties at this time may be stated to have been: (1) in case of personal interference with the work, to be careful of the safety of the workman; (2) to warn the servant of defects in the machinery and plant of which he knew, and of which the servant was ignorant and with which the latter could not, by the exercise of reasonable care, acquaint himself; (3) in the absence of personal attention, to take reasonable care to employ a competent man to provide a safe place to work and suitable appliances, the employer being allowed either to furnish to said appointee sufficient materials for these purposes or adequate means of providing same; (4) to take reasonable care to select one competent to retain careful servants with whom the employee would be associated.

Such a small measure of obligation resulted in throwing on the workman risks of danger to life and limb which he was unable to prevent, and, in view of his dependent situation, had to assume as incident to the employment. This effect had been brought about by the tendency of the courts, through a long series of cases, to consider the facts, not as presenting single instances of a broad economic situation,

³⁴ 43 & 44 Vict., C. 42.

but as disputes between employers and workmen which were to be settled on the theory that the parties had "impliedly contracted" concerning the subjects in dispute; the incidents implied from the contract relation were defined with the result that not only were these resolved for the most part in favor of the master, but the basis of decision was fictional.

It was with a view to bettering the workman's position in the law that the Employers' Liability Act was passed, and it is interesting to note that the jurisdiction in which it was adopted is to-day one of the most advanced in its methods of adjusting the relations of workmen and those for whom they labor, recognizing the status of employer and employed as presenting social and legal problems of vast importance.

James T. Carey.