

1891

Employers Liability for Damages Suffered by Employee in the Performance of his Work

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Employer's Liability for Damages

Suffered by

Employee in the Performance of his Work.

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A T H E S I S

for

P O S T G R A D U A T E C O U R S E

in the

S C H O O L O F L A W .

--o--

Presented by

Kiichiro Kambe, LL.B.

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C o r n e l l U n i v e r s i t y ,

I t h a c a , N . Y .

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I n t r o d u c t i o n .

It seems to us that in ancient times the remedy for injuries was limited against the immediate or visible wrongdoers. Mr. Justice Holmes thinks that the remedy was in early times against the immediate cause of damage, even inanimate, the owner of which was therefore bound to surrender it (*noxae deditio*), though in later times he was allowed to redeem the offending property by a money payment. This is reversing the order of ideas which looks upon the surrender as having been a substitute for payment. (The Common Law, page 16). But the advanced state of human affairs found this inadequate, and the principle that a principal or employer is responsible for the acts of his agents or employees, either when expressly or impliedly authorized by him, was soon established. This rule is, in the words of Chief Justice Shaw of Mass., obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another. It is the great advantage of the common law that it is more

flexible or capable of being modified than the statute law. It does not, strictly speaking, give general propositions in definite terms, but decides each particular case according to the practical needs and justice of human affairs, and finding that the rule above stated is improper in some instances, it did not fail in its work, and modified it and exempted the employer's liability in case the person injured is also his employé. But once established principle is applied to new instances so far as cases present their likeness and it can not be changed wholly nor abolished by the judicial authority. On the other hand, our society develops from time to time, from day to day, and new businesses come up one after another, and an old principle of law does not give a proper remedy, or sometimes works a hardship or prevents the management of a new business. But the law, being a creature of necessity, adapted to the business and welfare of the community, it must be so modified or even changed by the legislature that it is able to give proper regulation.

The modern corporate business having grown so rapidly

in the last half century, and as the nature, its business being performed by its agents or officers, the relation of master and servant was a great subject of litigation. We intend in this short paper to state, as briefly and as plainly as possible, the principle, origin, and growth of the subject under consideration, and how it developed to its present condition.

The Relation of Employer and Employee.

In considering my subject, it may be necessary to devote a preliminary remark to the relation of employer and employee; in other words what constitute the relation of master and servant? or more shortly, who is a master and who is a servant? The common understanding of the words master and servant and the legal understanding are not the same; the latter is broader, and comprehends some cases in which the parties are master and servant only in a peculiar sense and for a certain purpose; perhaps only for a single purpose. To avoid this ambiguity the words employer and employee are used synonymously with master and servant in the legal sense.

The relation of employer and employee exists between two parties if one has the order and control of the work done by the other. An employer is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct the means also, or as it has been put, "retains the power of controlling the work"; and he who does work on those terms is in law an employee for whose acts, neglects, and defaults, to the extent to be specified, the

employer is liable.

Pollock on torts P.69; Sadler vs. Henlock (1885) 4 E.& B. 570,578; 24 L.J.Q.B. 138,141; Cooley on Torts,p.622,624; Laughner v. Pointer, 5 B.& C. 547.

But a contractor, sub-contractor, or other person exercising an independent employment, is not an employee within the meaning of the rule. He is not under the order or control of the person for whom he does it, and he may use his own discretion in things not specified beforehand, but he undertakes only to produce a given result.

Underhill's Law of Torts, (4th edition) p.53,54.

Thus a contractor employed by navigation commissioners in the course of executing the works, flooded the plaintiff's land, by improperly and without authority, introducing the water into a drain insufficiently made by himself. Here the contractor, and not the commissioners, was held liable.

Allen v. Howard,7 Q. B. 960.

Again where a company contracted with A. to construct a railway, and A. sub-contracted with B. to construct a bridge on it, and B. employed C. to erect a scaffold under a special contract between him and C., a passenger injured by the negligent construction of the scaffold could sue only

C., and not A., B., or the company; but such a case would be very restricted to apply, because the original employer retains his control, though not exercised practically, over the contractor, or personally interferes and makes himself a party to the act which occasions the damage, he will be liable. Knight v. Gex. 5 Exch. 721.

Above all, the legal criterion of the relation of an employer to an employee is the power of controlling the work. Thus a person who is habitually the servant of A. may become, for a certain time and for the purpose of certain work, the servant of B., even although the hand to pay him is still A's. This is a case of temporary transfer of service. Murray v. Currie, L. R. 6 C. P. 24.

Employer's liability to his employee.

Having seen in the preceeding statements who is an employer and who is an employee, we are going to enter into our proper field; i.e. Employer's liability for damages suffered by employee in the performance of his work. An employer's liability for damages to his employee may arise in

two ways,

I. From his own negligence.

II. From the negligence of another or co-employé.

We will consider hereafter, in order, what is the liability of an employer in these cases, and first, the negligent acts of the employer.

I. Negligence of Employer.

It is a general rule that an employer is bound to take reasonable precautions to insure the safety of his employees; to say more specifically, he owes to the employee to provide (a) safe place to work, (b) safe machinery, tools and appliances, (c) competent and skilful employees, if any, (d) reasonable rules and regulations, if co-employees are numerous, (e) and some other special act according to the circumstances. If he neglect these, the employer is, generally speaking, liable for an injury caused on account of it. We will consider more in detail of what the employer's negligence may consist.

(A). Safe place to work. The employer's negligence may consist in subjecting the employee to the dangers of

One of the defendants was manager of the mine, and it was worked under his personal superintendence, and the plaintiff was not aware of the state of the shaft.

unsafe buildings, or to other perils on his own premises. This rule was established by public policy and common justice. A man can not be understood as contracting to take upon himself risks which he neither knows nor suspects, nor has reason to anticipate.

Marshall v. Stewart, 33 Eng. L.& Eq. 1; Ashwix v. Stanwix, 30 L.J., Q.B. 183; Cooley on Torts, p.648.

Thus in Mellors v. Shaw (30 L.J., Q.B. 333) the defendants were owners of a coal mine, and the plaintiff was employed by them as a collier in the mine, and in the course of his employment it was necessary for him to descend and ascend through a shaft constructed by them. By the defendants' negligence, the shaft was constructed unsafely, and was by reason of not being sufficiently lined or cased, in an unsafe condition. By reason of this, and also by reason of no sufficient or proper apparatus having been provided by the defendants to protect their miners from the unsafe state of the shaft, a stone fell from the side of the shaft on to the plaintiff's head, and he was dangerously wounded. On this state of facts the defendants were held liable.

So, where an employer ordered an employee to take a bag of corn up a ladder which the employer knew, and the employee did not know to be unsafe, and the ladder broke and the employee was injured, the employer was held liable.

Williams v. Clough, 3 H.& N. 258; Underhill's Law of Torts, p. 66-67; Wheeler v. Mason Manf. Co., 135 Mass. 294; Pantzar v. Tilly Foster Min. Co., 99 N.Y. 368.

In the case of Wheeler v. Mason Manf. Co. the Mass. court through Allen, J., said: "We are of opinion that the duty resting upon the master is not merely one of reasonable care and diligence to give a proper notice, but that he is responsible in case the servant suffers through a want of receiving a proper notice of the risks to which he is exposed. The servant does not assume, and is not to bear the risk of unknown and undiscovered perils; but he is held to take those risks which are known or which, by the exercise of ordinary care, he ought to know, to be incident to the nature of the business in the place where and in the manner in which it is carried on."

The same view was, substantially, taken in the New

York court above cited. It says: "The rule that the servant takes the risk of the service presupposes that the master has performed the duties of caution, care and vigilance which the law cast upon him. It is those risks alone which can not be obviated by the adoption of reasonable measures of precaution by the master, that the servant assumes."

But when the employee knew, or ought to know in the circumstances, the danger, he can not, generally speaking, recover for an injury suffered; but this refers not only to the safety of place, but to all the other cases, and we will notice this subject in a subsequent part, that is, when we treat of the contributory negligence of the employee.

Application and Modification of the rule.

1. This rule has been applied against railroad companies in the case of injuries to their employees in consequence of the road-bed being out of repair. The employer is bound to make reasonable efforts to keep it in repair.

Snow v. Hoasatonie R.R.Co. 8 Allen 441; Elmer v. Locke, 135 Mass. 575.

In the case of *Elmer v. Locke* it was decided that a breakman in the employment of a railroad corporation may maintain an action against the corporation for personal injuries occasioned, while in the exercise of due care, by the fall of a trestle-work supporting a portion of a spur track, which was intended for use for an indefinite period of time if the fall is caused partly by the defective construction of the trestle work, and partly by the negligence of the fellow-servant of the plaintiff.

2. But a railroad company is not responsible to one of its employees for an injury occasioned by a latent defect in one of its bridges, where the company employed competent persons to supervise and inspect the bridge, by whom the defect was not discovered.

Warner v. Erie R.R.Co. 39 N.Y. 468; *Ladd v. New Bedford &c., R.R.Co.* 119 Mass. 412; *Cooper v. Hamilton Manf. Co.* 14 Allen, 193.

In the case of *Warner v. Erie R.R.Co.*, Bacon, J., delivering the opinion of the court, said: "The true principle applicable here is that, when the defendant has erected a structure to be used in its ordinary and accustomed bus-

iness, without fault as to plan, mode of construction and character of materials so that it was originally sufficient for all the purposes for which it is used, employs skillful and trustworthy agents to supervise, examine and test it, and that duty is performed with frequency, and with such tests as custom and experience have sanctioned and prescribed, it has exercised such care and skill as the law exacts of an employer in reference to his employee, and that no liability can attach to a party for a defect in such structure by which an employee has sustained an injury, unless there has been actual notice or knowledge that defects existed which, unless promptly remedied, would be liable to produce serious or fatal consequences."

The Mass. Courts decided just by the same view.

3. The employer is not bound to use the newest or safest appliances, but reasonably safe ones.

Hull v. Hall, 78 Me. 114; Probst v. Delamater, 100 N.Y. 266; Hickey v. Taaffe, 105 N.Y. 26.

(B). Safe machinery, tools and appliances.

The employer may also be negligent in not exercising

ordinary care to provide suitable and safe machinery, tools or appliances.

Readhead v. Midland Ry. Co., 2 Q.B. 412, L.R. 4 Q.B. 379.

The modifications.

1. But he is not guarantor of the safety of machinery and is responsible only where he has failed to employ reasonable care and skill in its selection.

Ladd v. New Bedford R.R.Co. 119 Mass. 412; Painton v. Nor. Cent. &c. Co. 83 N.Y. 7

If, therefore, an injury results to the employees, from a failure to exercise reasonable care and prudence in this regard, the employer may be and ought to be held responsible.

Keegan v. Western R.R.Co. 8 N.Y. 175; Hackett v. Middlesex Manf. Co. 101 Mass. 101; Laning v. N.Y.Cent. R.R.Co. 49 N.Y. 521; Ill.Cent. R.R. v. Welch, 52 Ill. p. 183.

2. The employer is not bound to adopt the newest and safest appliances, but reasonably safe ones, or to change its machinery in order to apply every new improvement in appliances. or supposed improvement
Wonder v. B.& O.R.R.Co. 32 Md. 411; Hull v. Hall, 78 Me. 114; Probst v. Delanater, 100 N.Y. 236
Hickey v. Taaffe, 105 N.Y. 26.

3. He must make reasonable efforts to keep his machinery in repair; this duty is like that to furnish originally safe machinery and can not escape by delegation.

(Solomon R.R.Co. v. Jones, 30 Kas. 601; Richmond &c. Co. v. Moore, 78 Va. 93; Fuller v. Jewett, 80 N.Y. 46.)

In the case of Solomon Ry Co. v. Jones, Brewer, J., delivering the opinion of the court, said: " It will not be doubted that the duty of the company is not only in the first instance to make reasonable efforts to supply machinery, tools &c., safe and sufficient, but also to make like efforts to keep such machinery &c. in good condition, and to this end must make all reasonable and necessary inspections and examinations", and cited many authorities.

In Fuller v. Jewett (80 N.Y. 46) it was decided that where an engineer upon a railroad locomotive was killed by an explosion of a boiler which had been for some time out of repair, and had been frequently reported and sent to the repair shop for repairs, that defendant who was operating the road was not excused from liability by the facts that there was no negligence on his part in the employment of a

superintendent of repairs, or in omitting to make proper regulations, that the master mechanic having charge gave proper instruction for the thorough examination and repair of the engine, and that the negligence causing the accident was that of the mechanics directed to make the repairs.

(C). Competent and skillful employees, if any.

The employer's negligence may also ^{consist} in employing employees who are wanting in the requisite care, skill or prudence for the business entrusted to them.

(Alabama, &c. R.R.Co. v. Waller, 48 Ala. 459; Mich.Cent.P.R. v. Dolan, 82 Mich. 510; U.S.&c.R.R.Co. v. Wilder, 116 Ill. 100)

Alderson, B., in Hutchinson v. Ry. Co., (5 Exch.343) says: "The servant when he engages to run the risks of the service, including those arising from the negligence of fellow servants, has a right to understand that the master has taken reasonable care to protect from such risks, by associating him only with persons of ordinary skill and care." Gray, J., in Gilman v. Eastern R.R.Co., (18 Allen 438) says "A railroad corporation is bound to provide proper road, machinery and equipment, and proper servants. It must do

this through appropriate officers. If acting through appropriate officers it knowingly and negligently employs a incompetent servants, it is liable for an injury occasioned to a fellow servant by their incompetency"

(Lanning v. N.Y. Cent. R.R. Co. 49 N.Y. 521.)

Application and modification of the rule.

1. Degree of care to select employees. Generally speaking, the employer is only required to exercise ordinary care and prudence when he hires any employé, but this is rather to be considered according to each particular case. It is not enough that such care as is ordinary is used if that is not reasonable under all circumstances.

(Mobile &c. R.R. Co. v. Thomas, 42 Ala. 672, 715; Ala. &c. R.R. Co. v. Waller, 48 Ala. 459; Wabash Ry. Co. v. Mc.Daniels, 107 U.S. 454.)

2. The employer does not warrant or guarantee the fitness or competency of his employé's.

(C.C. & J.C. &c. Co. v. Troesh, 68 Ill. 545, 48 Me. 291.)

This is settled rule from quite early as Pristly case.

3. It is not enough that the employer selects one or

more agents of approved skill and fitness, and confers upon them the power of hiring. These are the duties to be performed by the employer himself and any person who was put to perform those stands just in the same position with the employer. If any injury arise from negligence of such agent, the employer is liable as his own negligence. (Lanning v. N.Y. Cent. & C. R.R. Co. 49 N.Y. 521; Malone v. Hathaway 64 N.Y. 5-9.)

4. If the employer continue incompetent persons in his employ after their unfitness become known, or when, by the exercise of ordinary care, it would have known, he is liable, though he had exercised due care and diligence when he selected them. The duty continues during the employment. In *Gilman v. Easter R.R. Co.*, it was said "such a continuance in employment is as much a breach of duty and a ground of liability as the original employment of an incompetent servant."

(Lanning v. N.Y. Cent. R.R. Co., cited above; *Gilman v. Easter, R.R. Co.*, 13 Allen 433.)

5. If an employee, originally fit, is retained after

the employer, with reasonable care, know he has become unfit, the employer is liable. Because it will be the duty of the employer to dismiss from his service any employee, who from habits of intemperance or habitual carelessness or recklessness or otherwise, becomes incompetent, at the risk of being liable for the consequences of such servant's negligence to fellow servants, if he does not do so.

(C.C.& I.C. &cCo. v. Troesh, 68 Ill. 549; Lanning v. N.Y. Cent. R.R.Co., 49 N.Y. 521.)

But as to the duty of the employer to exercise such reasonable care and diligence in ascertaining what the man is, after employed, there is a hard question in practice. In Chapman v. Erie R.R.Co. (55 N.Y. 579) it was decided that good character and proper qualifications once possessed may be presumed to continue, and the employer may rely upon that presumption until notice of a change or knowledge of such facts as would be deemed equivalent to notice, or such at least as would put a reasonable man upon his guard. This was an action by the administratrix of an engineer to recover for injuries to the latter in a collision, due to

the negligence of a telegraph operator, whose duty in the defendants' employ was that of train dispatcher. The subject was reviewed. The lower court charged the jury that "But, if after a competent and proper person is employed for such a duty, if his habits become such that it is unsafe to trust him any longer in that capacity, the company are bound to use, through their proper officers, such reasonable care and diligence in ascertaining what the man is, after he is employed, as they would be in his original employment." Reversing this judgement, the court, through Church, Ch. J., said: "To this there was an exception. We think this rule of diligence is too broad and can not be sustained. The general rule is, that notice or knowledge of incompetency is necessary to charge the principal with the duty of acting.

6. Some cases hold that the employer is liable whether he know the unfitness or not, if the employer did not. (*McDermot v. Hannibal &c. Co.* 87 Mo. 285;)

7. But a single negligent act of an employee is not enough to show him incompetent. (*Balt. &c. Co. v. Neal* 65 Md. 488.)

(D). Reasonable rules and regulations, if co-employees are numerous. It is the employer's duty to prescribe sufficient rules for the conduct of the business.

(Regan v. St. Louis &c Co., 6 S.W.Rep. 371, Mo.; Sheehan v. New York &c Co. 91 N.Y. 332; Abel v. Pres. &c, Del. &c. Co. 103 N.Y. 581.)

Qualifications of the rule.

1. But he need not adopt the safest system.

(Hannibal, &c. Co. v. Kanaley, 17 Pac.Rep. 324, Kans.)

In Hannibal and St.J.R.Co., v. Kanaley, Mr. Justice Valentine, speaking for the court, said: "The law does not require a railroad company to direct the movement of its trains by orders from the train dispatcher alone, nor does the law require it to adopt any particular form of orders, or any particular system for communicating them..... The law only requires that the means adopted shall be brought to the knowledge of its employees, and that they be reasonably well calculated to secure the safety of its employees, if obeyed."

(E). Other cases in which the employer is bound.

The employer's liabilities are not limited to those cases

already discussed, but he is liable for his negligence in many other cases.

1. The employer may be guilty of actionable negligence in exposing persons to perils in his service which, though open to observation, they, by reason of their inexperience or youth, do not fully understand and appreciate, and in consequence of which they are injured. Such cases occur most frequently in the employment of infants. This rule puts on the employer a duty to exercise more than ordinary care when he employs infants or inexperienced men; and it is no doubt necessary to protect them. In *Bartons Hill Coal Co. v. McGuire* (8 Macq. H.L. 300,311), Lord Chelmsford, in speaking of an injury to a young girl from exposure to machinery in the building where she was employed, says: "It might well be considered that, by employing such a helpless and ignorant child, the master contracted to keep her out of harm's way in assigning to her any work to be performed. The supreme Court of Massachusetts has very properly said for their protection:-"The notice of which the defendants were bound to give the plaintiff of the nature

of the risks incident to the service which he undertook, must be such as to enable a person of his youth and inexperience in the business intelligently to appreciate the nature of the danger attending its performance. The question, indeed, on this branch of the case is not ^{of} due care on the part of the plaintiff, but whether the cause of the injury of which, by reason of his incapacity to understand and appreciate its dangerous character, or the neglect of the defendants to take due precautions to effectually inform him thereof, the defendants were bound to indemnify him against the consequences. But in determining this question it is proper and necessary to take into consideration not only the plaintiff's youth and inexperience, but also the nature of the service which he was to perform, and the degree to which his attention, while at work, would need to be devoted to its performance. The obligation of the defendants would not necessarily be discharged by merely informing the boy that the employment itself, or a particular place or machine in the building or room in which he was set to work, was dangerous. Mere representation in

advance that the service generally, or a particular thing connected with it, was dangerous, might give him no adequate notice or understanding of the kind and degree of the danger which would necessarily attend the actual performance of his work."

(Gray, J., in *Coombs v. New Bedford Cordage Co.* 702 Mass. 572
Cooley's on Torts, pp. 652-654 and note; *Sullivan v. India Manf. Co.*, 113 Mass. 396; *Jones v. Florence Min. Co.*, 66 Wis. 268, 25 Am.L.Req.(n.s.) 591.)

2. The employer may also be negligent in commanding the employee to go into exceptionally dangerous places, or to subject himself to risks which, though he may be aware of the danger, are not such as he had reason to expect, or to consider as being within the employment. In this case the infancy of an employee is also of great importance.

(*Malone v. Hawley*, 46 Cal. 409; *Ry. Co. v. Fort*, 17 Wall. 553; *Chicago & Ry. Co. v. Bayfield* 37 Mich. 205; *Lalor v. Chicago & R.R.Co.*, 52 Ill. 401, S.C. 4 Am.Rep. 616.)

In case of *Lalor v. Chicago & Ry. Co.*, the declaration averred an employment of the plaintiff's intestate as a common laborer in the business of loading and unloading cars, and for no other purpose; and that while he was en-

gaged in loading a freight car with iron, the deceased was ordered by the superintendent or foreman of the company employed to manage, direct and superintend the business of the company about the depot, to couple and connect a freight car with other cars, contrary to the special engagement of the deceased, &c., in doing which he was crushed to death. This was held to set out a good cause for action. "The company was constructively present, by and through his officer, and must be charged accordingly. It was, then, by the direct command of the company that the deceased was exposed to this peril, and one out of the line of the business he had contracted to perform. He was killed by the negligence of the driver in charge of the locomotive while thus exposed. The law would be lamentably deficient did it furnish no remedy in such a case". But this is a very hard question in practice; some cases hold that if the employe know the danger to be incurred, mere fear of discharge for disobedience will not, excuse him.

Russel v. Tillotson, 140 Mass. 201, and another case holds that if a mature and experienced employe consents to do work out-side of that he engaged to do, he can not re-

cover. (Cole v. Chicago, &c. Co., 37 N.W.Rep. 34, (Wis.)

3. It is also negligence for which the employer may be held responsible, if knowing of any peril which is known to the employee also, he fails to remove it in accordance with assurances made by him to the employee that he will do so.

(Patterson v. Wallace, 1 Macq. H.L. 748; Laning v. N.Y. Cent.R.R.Co., 49 N.Y. 521; Patterson v. Pittsburgh, &c. R.R.Co., 76 Pa. st. 389; Cooley on Torts, P. 661.)

sub-
Modifications of the rule(3)

(1). If the defect or danger is not such that an ordinary prudent employee would continue at the work after promise, the employer is not liable.

(Dis. of Col. v. McElligolt, 117 U.S. 621.)

(2). If in the particular case the business of the master is entrusted to another, his assurance must be taken as that of the master himself.

(Wayne &c. R.R.Co. v. Gildersleeve, 33 Mich. 133; Nelson v. Winona &c. Co., 33 N.W.Rep. 908(Minn.); Ind. &c. Co. v. Watson, 14 N.E.Rep. 721(Ind.)

(3). It is sufficient if the promise is made not to

plaintiff individually but to his gang of workmen in his presence.

(Atkinson &c. Co. v. Sadler, 16 Pac. 46 (Kan.))

4. If an employee is injured by the negligence of a servant and that of the master conjoined, he may recover of the master for the injury, for the master is at least one of the joint wrong-doers in such a case.

(Grand Trunk Ry. Co. v. Cummings, 106 U.S. 700; Pittsburgh &c. Co. v. Henderson, 37 Ohio, St. 549; Cone v. Del. &c. Co. 81 N.Y. 206; Ellis v. N.Y. &c. Co., 95 N.Y. 546; Strington v. Stewart; 100 N.Y. 516; Booth v. Boston &c. Co. 73 N.Y. 88; Elmér v. Locke, 135 Mass. 575.)

(F). Exception to the rule,--Contributory negligence of employee. Where the employer is sued by his employee for an injury which it is claimed has been occasioned by his negligence, it is very properly and justly held that the plaintiff can not recover if his own negligence contributed with that of the defendant in producing the injury.

(Cooley's on Torts P. 667; Burns v. Boston &c. R.R.Co., 701 Mass. 50; Cooper v. Buttler, 103 Penn. St. 412; Lyon v. Detroit &c. R.R.Co., 31 Mich. 429.)

Qualifications to the exception. When the employee had knowledge of danger. As to this case, there are some conflicting authorities. English rule is that, where a servant is injured by an instrument which he is himself using in the course of his employment, and of the nature of which he is as much aware as his master, he can not recover against the master, notwithstanding that such instrument was not the safest for effecting the object in view.

(Griffiths v. London & St. K's Dock Co., L.R., 12 Q.B.D. 498; Dyer v. Leach, 26 L.J., EX. 221; Senior v. Ward, 1 E. & E. 385; Asop v. Yates, 2 H.&N. 738; Griffiths v. Gidlow, 3 H.& N. 648.)

In case of Porter v. Hannibal &c. R.R.Co., (60 Mo. 160) an instruction that a rail road company would not be liable notwithstanding the unsafe condition of the track if plaintiff, a servant, knew, or could, by ordinary diligence, have known, the state of the track, was refused and held that it was not the business of the servant to ascertain whether the machinery and structure of the road are defective, but it is the duty of the company to keep

them in a safe condition, and it is responsible for a failure to do so. But on the other hand, it was held that if the servant has full knowledge and makes no report or objection, he takes the risk.

(Kroy v. Chicago &c. R.R.Co., 32 Io. 357; McGlynn v. Brodie, 31 Cal. 376.)

Mass. court decided more precisely on this point in Snow v. Hoosatic Rv. Co.(8 Allen 450); the court said through Bigelow, C. J.:"It may be suggested that the plaintiff ought not to recover because he continued in the performance of his duties after he was aware of the existence of the defect in the road. There may be cases where a servant would be wanting in due care by incurring the risk of injury in the use of defective or imperfect machinery or apparatus, after he knew it might cause him bodily harm. But we do not think this case is one of that class. His continuance in the employment did not necessarily and inevitably expose him to danger."

II. Negligence of Co-employee.

(A). General rule. It was a general rule in England previous to the first of January, 1831, and in most of the United States, that an employer is not liable to his employee for damages resulting from the negligence of his co-employee in the course of their common employment, unless the employee causing the injury was incompetent to discharge his duty, or the employee injured was not at the time acting in his employer's employment.

Origin and principles of the rule. This is an exception to the general liability of an employer for his employee's act. Formerly there was no distinction between a case where the person committing the injury is a third party, and the case where he is a co-employee. This distinction was made first in the well known case of *Pristly v. Fowler* decided 1837 in the English court of Exchequer.

In this case the plaintiff was engaged by the defendant as a butcher. The defendant sent another employee who drove the delivery wagon, to accompany and

deliver some goods to the plaintiff; and by negligence of the driver said plaintiff was thrown to the ground and injured. Therefore he brought the suit and obtained a verdict against his employer for damages. An appeal was then taken which resulted in the reversal of the judgment.

Lord Abinger~~s~~, delivering the opinion of the court, said: "The mere relation of master and servant never can imply an obligation on the part of the master to take more care of the servant than he may be reasonably expected to do of himself. He is, no doubt, bound to provide for the safety of the 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 sees 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 all, he is just as likely to be acquainted with the probability and the extent of it as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as

whether the van was sufficient, the master, and probably better, whether it was over-loaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master to protect him against the misconduct of others who serve him; and which diligence and caution, while they protect the master, are a much better security against any injury which the servant may sustain by the negligence of others engaged under the same master than any recourse against his master for damages could possibly afford."

This case is, it seems to me, founded on two principles though not expressed precisely and plainly; 1st., the master does not warrant to the servant the competency of his co-employees and the sufficiency of the carriage in which he sends him out; in other words, he takes the risk impliedly in the contract because he consented to the service, knowing such risk, or he has to know it in the exercise of ordinary care; 2nd., to allow such action is an encouragement to the servant to omit that diligence and

caution which he owes; that is against the public policy. Above all, it will be remembered that this case is a germ of the rule.

In the United States, the first case on the point is *Murray v. S.C.R.R.Co.*, decided in the supreme court of South Col., Feb., 1841,(1 McMullan's law 385; 36 Am. Dec.). In that case the plaintiff was engaged by the defendants on their rail road. The injuries out of which this action arose were received by the plaintiff, while engaged in the discharge of his duties as fireman, by reason of the engine on which he was employed being thrown from the track, in consequence of the negligence and carelessness of the engineer, who had charge of the engine, and who refused and neglected to lessen the speed or to stop the engine, after his attention had been called to the obstacles on the track which occasioned the accident. Verdict was given for plaintiff and defendants moved for a new trial.

Judge Evans, delivering the opinion of the court, said: "There is no question that in general, the princi-

pal is liable for the acts of the agent, performed in the execution of his agency, or in and about the business of his principal. Thus, the owners of a rail road would be liable to passengers for injuries sustained by the negligence of any of its servants, because it is implied in the undertaking to carry, not only the road and cars are good, but that the servants employed are competent and will perform their duty. So, also, if one employ an agent to execute any work whereby any injury may result to a stranger, the law requires it to be done with care, and if a stranger sustains any injury, his principal is liable. (O'Connell v. Strong, Dud. 265.) But the plaintiff is neither a passenger nor a stranger, if he can recover, it must be in his hermaphrodite character as a passenger-fireman." Thus the court recognized the doctrine of agency that the employer is liable for damages caused by the act of his employee who is acting in good faith within the scope of his authority for the furtherance of his employer's interest, but at the same time limited its application to third persons or passengers in case of common carrier. The court

further says: "It was said in the argument that if the engineer had been the owner of the road he would have been liable. Of this I apprehend there would have been no doubt, but then his liability would have arisen, not from his being the owner, but because the injury arose from his own act. It by no means follows as a consequence that because he is liable those who employ him are liable also..

..... A passenger desires to be transported from one place to another; the carrier undertakes to do this and is liable if he fail. It is wholly immaterial by whose default the injury resulted. Passenger has a right to look to him with whom the contract was made. With the plaintiff the defendants contracted to pay him for his services. Is it incident to their contract that the company should guarantee him against the negligence of his co-servants?" The court adopted the principle that the employer does not guarantee to his employee the competency of his co-employee but it is sufficient for him to exercise ordinary care and prudence. And on the other hand it establishes the doctrine that an employee takes upon

himself the risk, ordinary or even extraordinary. It does not recognize any distinction even when one of the employees who caused the injury had command over the injured. Thus the court says: "The engineer no more represents the company than the plaintiff..... They are not liable to the company for the conduct of each other, nor is the company liable to one for the misconduct of another." But O'Neill, J., dissenting to the majority, said that, "If it arose out of any of the old-fashioned modes of conveyance, could there be a doubt that they would be liable, if the injury resulted from negligence?..... Is there any distinction in law as to effect which the employment of the plaintiff is to have, in the different kinds of service in which he may engage? I think there is none.....I admit here, once for all, that the plaintiff, like any other servant, took, as consequence of his contract, the usual and ordinary risks of his employment. What is meant by this? No more than that he could not claim for an injury, against which the ordinary prudence of his employers, their agents, or himself, could provide. Whenever neg-

ligence is made out as the cause of injury, it does not result from the ordinary risks of employment."

He further says: "When they hire another to engage in a service, where neither his own care nor prudence can shield him from injury, which may arise from the act of another of their servants, having the control of him, the question of their liability depends upon the care used by such superior agent." This case was decided only from the point of contract and the view of public policy was not examined. If this rule is applied extremely, the employe takes upon himself all the risks relative to the employment and may have no remedy against his employer at all. But the rule was not firmly established until an elaborate examination of a well known case, *Farwell v. Boston &c. R.R. Co.* (4 Metc. 49). Though this case comes up some time after those two precedings, it is considered a leading case, being examined so completely.

This action was to recover the damage, the plaintiff, an engineer in the employ of the defendant, being injured through the negligence of a switch tender. The plaintiff

obtained a verdict against the company and an appeal was taken.

Chief Justice Shaw, delivering the opinion of the court, says that, "It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise the servant shall answer for his own behavior.(1. Blackstone Com. 481; M'Manus v. Cricket, 1 East, 108.) This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master that the latter shall be answerable civiliter." Thus he recognized the principle of agency, but limited it to the relation only of strangers. He says:

"this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity. The maxim *respondeat superior* is adopted in that case from general considerations of policy and security."

And he further says "But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of the employment, where all such risks and perils as the employer and servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated."

"The general rule resulting from considerations as well of justice as of policy is that he who engages in the employment of another for performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from

the carelessness and negligence of those who are in the same employment." Thus he founded, in the first step, the principle on the ground of contract. At this point it is just the same as the South Car. case. (Murray v. South C. R.R.Co., 1 McMullan, 385.) But he considered it also from another point, that is of public policy and said, it seems to me, the more weight on it than on the contract view, to decide the question, because he thought the implied promise was drawn from the original view. He says: "If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given

circumstances." And he compared the employeer's position to the common carrier's and inn-keeper's so far as that he gets a compensation for the service and takes the risks accordingly. He observes: "Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by negligence of each¹other."

According to this view, it seems to me that the employee takes all the risks of the employment except of the act of God or of a public enemy. And to apply this principle extremely, the employee is put on dangerous situation! Fearing this, Chief Justice Shaw added in his conclusion

that: "We would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle..... We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant." Thus the principle stated in the beginning of this part was established firmly. But notwithstanding the caution of the learned judge the courts which followed the rule were so perplexed in practical application, because the rule is rather arbitrary and tends to be so flexible, and finding a prejudice to the employees in many instances, the courts endeavored to modify the rule, and in England and in some states statutes were enacted to modify it.

(B). Modification of the rule. To limit the general rule it is frequently questioned, what is meant by the phrase "common employment"; in other words, who are the co-employees or fellow servants within the meaning of the rule; or it may be more clear to say, what is the distinction between co-employees and vice-principal? This notion was observed as early as in the South Car. case.

(Murray v. S.C.R.R.Co., cited ante). In that case the minority of the court, through Justice O'Neall, said, "The defendants employ the plaintiff to act under the command of another of their servants. In such a case, the servant in command is in the place of the employers. When they hire another to engage in a service, where neither his own care nor prudence can shield him from injury which may arise from the act of another of their agents, having control of him, the question of their liability depends upon the care used by such superior agent." And the courts of some states followed, subsequently, this view. But there are different lines of decisions on this point.

The first of these is that the persons who are employed in one and the same business under the same employers and derive their compensation from the same source, are co-employees. This was adopted in Mass., Ill., Minn., and England &c., and being quite broad, it works a hardship, especially in cases of corporation. Hence in England and some states, a statute was enacted which abrogated the exemption of the employer's liability.

Second principle is that the persons who are employed in the same business under the common employer, are not co-employees with those who have the general control of the work and employees. The U.S. courts and many of the state courts followed, but some of the state courts limited it to the case where they have also power to employ and discharge.

Another line is that the persons are vice-principals while they engage in the performance of employer's duties, without regard to grade, or rank, or common object of service with a co-employee. According to this view, the test is whether an act or business is a duty to be performed personally by the employer. The N.Y. courts are following this principle at present. This is, it seems to me, most reasonable, but we will examine all.

(a). Judicial,--

1. The Mass. rule. The leading case on the subject was decided in the Mass. court, hence it may be proper order to state first its rule. Chief Justice Shaw explained in the Farwell case, "When the object to be accomplished is one and the same, when the employers are the

same, and the several persons employed derive their authority and compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be to be in the same or different departments. In a blacksmith's shop, the persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a rope walk several may be at work on the same piece of cordage, at the same time, at many hundreds feet distant from each other and beyond the reach of sight or voice, and yet acting together.

"Beside, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection

with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but as one whose rights are regulated by contract, express or implied."

So it has been said that "We must not over-refine, but look at the common object, and not at the common immediate object." Thus all persons engaged under the same employer for the purpose of the same business, however different in detail those purposes may be, are co-employees in a common employment within the meaning of the rule.

This doctrine is recognized even now in Mass. (Rogers v. Ludlow Manuf. Co., 144 Mass. 198.) But in this case it was decided that if the master employs a servant to work on a machine which is so far out of repair as to be dangerous and which has remained in that condition for a long time, he is not relieved from responsibility to the servant

for an injury sustained while working on the machine, merely by proof that he has entrusted to competent servants the duty of making ordinary repairs of the machine, and the keeping of it in order from day to day and has supplied them with suitable means for that purpose, if it appear that the servant only inspected the machine for the purpose of keeping it in order so that it would do good work, without regard to its condition as a dangerous machine.

Though it does not say they are not co-employees, the court afforded the same remedy in effect. It noticed the prejudice to exempt the employer from liability in such a case but only feared to say expressly against the well decided terms. It says therefore that, "It is a settled rule in this common wealth that all servants employed by the same master in the common service are fellow servants whatever may be their grade or rank." The many courts of Minn., Ill., Ind. adopted this doctrine. (14 Minn. 360, 72 Ill. 256, 28 Ind. 371.) Fraker v. St. Paul & Co., 19 N.W. 349.

2. The English doctrine. The English doctrine is the same with Mass. Lord Cranworth, in the renowned case

of *Bartonshell Coal Co. v. Reed* (3Macq. 295), defines as follows, "To constitute fellow laborers within the meaning of the doctrine which protects the master from responsibility for injuries sustained by one servant through the wrongful act or carelessness of another, it is not necessary that the servant causing and the servant sustaining the injury shall both be engaged in precisely the same or even similar acts. Thus, the driver and guard of a stage-coach, the steersman and rowers of a boat, the man who draws the red-hot iron from the forge and those who hammer it into shape, the engineer and switchman, the man who let the miners down into and who afterwards brings them up from the mine and the miners themselves, all these are fellow servants and co-laborers within the meaning of the doctrine in question." It has no regard for the rank or grade of the injured servant and the negligent servant who caused the injury. And in England it was, it seems to me, applied more strictly than it is in Mass., hence the statute of 1880 was enacted.

(*Morgan v. Vale of Neath R.Co.*, L.R. 1 Q.B. 149; *Allen v.*

New Gas Co., L.R., 1 Ex. D. 251; Tunney v. Mid.R.Co., L.R. 1 C.P. 291; Feltham v. England, L.R. 2 Q.B. 33.)

In Tunney case, the plaintiff was employed by a rail road company as a laborer, to assist in loading what is called "pick-up train", with materials left by plate layers and others upon the line. One of the terms of his engagement was that he should be carried by the train from Birmingham after his day's work was done, the train by which he was traveling came into collision with another train, through the negligence of the guard who had charge of it, and the plaintiff was injured. The plaintiff sued the company, but the court held, that, inasmuch as the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to the case out of the ordinary rule, which excepts a master from responsibility for an injury to a servant through the negligence of a fellow-servant, when both are acting in pursuance of a common employment. In Feltham case, the defendant was the maker of locomotive engines, and the plaintiff was in his employ. An engine was being hoisted, for

for the purpose of being carried away, by a traveling crane moving on a tramway resting on beams of wood, supported by piers of brick work. The piers had been recently repaired, and the brick work was fresh. The defendant retained the general control of the establishment, but was not present; his foreman or manager directed the crane to be moved, having, just before, ordered the plaintiff to get on the engine to clean it. The plaintiff having got on the engine, the piers gave way, the engine fell, and the plaintiff was injured. Here it was held that the fact that the servant who was guilty of negligence was a servant of superior authority, whose lawful directions the other was bound to obey, was immaterial; and that as there was no evidence of personal negligence on the part of the defendant, and nothing to show that he had employed unskillful or incompetent persons to build the piers, he was not liable to the plaintiff.

3. The Ohio rule. The Ohio courts modified somewhat the Mass. rule, and according to its ruling, when an employer placed one person in his employ under the direc-

tion of another, also in his employ, such employer is liable for injury to the person placed in the subordinate situation by the negligence of his superior. Thus when a rail road company places the engineer under their employ under the control of the conductor, who directs when the cars are to start, stop, &c., the company are liable to the engineer for an injury received, occasioned by the negligence of the conductor, whilst they are both engaged in their respective employments.

(Little Maimi R.R.Co., v. Stevens, 20 Ohio 216; Whaalan v. Mad. Riv. & L.E.R.R.Co., 8 Ohio St. 250; Cleveland &c.R.R. Co., v. Kearg, 3 O. St. 202.)

In Whaalan v. Mad. Riv. &c. R.R.Co., it was decided that where a servant is injured in his person through the carelessness of a fellow servant engaged in a common business and employment, and no relation of subordination or subjection existed between them, and the employer is himself guilty of no fault, such employer is not responsible for such injury.

In Cleveland &c. R.R.Co. v. Kearg, it was decided that he(employer) can not divest himself of this obligation

by committing its control to another, but he still remains liable, upon the maxim *respondeat superior*, for such injury as arise from the negligence or carelessness of his agent while engaged in the prosecution of a business.

Thus the Ohio courts recognized rank and grade of servant employed in one and the same business, and those who have control and superintendence over another stand in the place of the employer so far as his liability is concerned although do not say expressly they are not co-employees with others under their control.

4. The U. S. Courts rule. The U. S. Courts' rule is almost the equal with the Ohio rule but it does not recognize in effect the relation of fellow servant in case in which the Ohio courts do. Thus in *Chicago &c. R.R.Co. v. Ross*, it decided,-- a conductor of a rail road train, who has the right to command the movement of the train and to control the persons employed upon it, represents the company while performing those duties and does not bear the relation of fellow servant to the engineer and other employees of the corporation on the train.

(Chicago &c. R.R.Co. v. Ross, 112 U.S. 177; Boardman v. Omaha R.R.Co., 41 Fed.Rep. 667.)

In the former case, Mr. Justice Field, delivering the opinion of the court, said, "There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of a corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence."

5. The Texas rule. The Texas courts added a limitation to the U. S. courts rule and it decided that a superintending officer is not fellow servant with the men of whom he has power to employ and discharge them, but he is vice-principal.

(Galveston &c.R.R.Co. v. Smith (Tex.) 13 S.W. 562; Missouri Pac. R.Co. v. Williams, 12 S.W. 835.)

In Missouri Pac. R.Co. v. Williams, it was decided that a foreman in the repair department of the shops of a rail road company, with power to employ and discharge hands,

is not the fellow-servant of those under his control, but is the representative of the company. The only different point is that he has the power to employ and also discharge.

3. The New York rule. In New York there were three lines of decision, first of which is the so called common employment test. *Coon v. Syracuse & Utice R.R.Co.*, (1 Seld., 492) is the first case on the doctrine; it decided that a principal is not liable to one of his agents or servants, for injuries sustained through the negligence of another agent or servant, when both are engaged in the same general business. The plaintiff in this case was a trackman, following with his hand car in the evening, in the discharge of his duty, a passenger train, and while so engaged was run over by a train of cars of the defendants called a stake train, which was out of lights, and did not usually pass at that hour, and the plaintiff had no notice that it was expected. In *Sherman v. Rochester &c.R.R.Co.*, (17 N. Y. 153.) it was decided that a servant who sustains an injury from the negligence of a superior agent engaged in the same general business can maintain no action against

their common employer, although he was subject to the control of such superior agent and could not guard against his negligence or its consequences.

This principle is just the same as the Mass. and English rule, and finding that it works hardship in many instances, the second principle was soon recognized; that is the test of grade or rank. Thus in *Malone v. Hathaway*, 64 N.Y., 5 (1875) it was decided that it is only where the master withdraws from the management of the business, intrusting it to a middle man or superior servant; or where, as in the case of a corporation, the business is of such a nature that the general management and control thereof is necessarily committed to agents, that the master can be held liable to a subordinate for the negligent act of one thus acting in his stead. And this is equal to the Ohio rule, but it was considered by the courts that even this doctrine does not give adequate remedy in all cases, and the third and present doctrine was established.

It is that an employee, while engaged in the performance of the employer's duties, is a vice-principal, without

regard to grade or rank or common object of service with a co-employee. And since *Crispin v. Babitt* (31 N.Y. 516) 1880, the New York courts have recognized only the single test of this, discarding the other two. That case decided, (1) the liability of a master for an injury to an employe, occasioned by the negligence of another employee, does not depend on the grade or rank of the latter, but upon the character of the act, in the performance of which the injury arises. (2) If the act is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance; but if the act is one pertaining only to the duty of an operative, the employe performing it, whatever his rank or title, is a mere servant, and the master is not liable to a fellow servant for its improper performance.

(*Shehen v. N.Y. Cent. & C.R.R. Co.*, 91 N.Y.; *McCosker v. R.R. Co.* 84 N.Y., 77; *Slater v. Jewett*, 85 N.Y., 31; *Hussey v. Cogger*, 112 N.Y., 314; *Birnes v. R.R. Co.*, 113 N.Y., 251.)

There is one thing more to be noted, i.e. when a stranger invited by a servant to assist him in his work, or who volunteers to assist him in his work, is, while giving

such assistance, injured by the negligence of another servant of the same employer, what is liability of that employer towards him. In this case he is considered to be a servant *pro tempore* or in the same position as if he were a servant, and no action will lie against the employer.

Having of the free will (Though not under contract of service) he exposed himself to the ordinary risks of the work and made himself a partaker in them.

(Potter v. Faulker, (1861) Ex.Ch. 1 B.& S. 800; 31 L.J. Q.B. 30, Degg v. M.R.Co., 1 H.& M. 773; Pollock on Torts P.89; Underhill's Law of Torts, 4th. Eng. Ed. P.69.)

Such were the results arrived at by a number ^{of} authorities, both English and American, which it seems useless to cite in more detail.

(B). Statutory modifications. But the rule, though not wholly abrogated, was greatly limited in application in England and in some of the U.S. It may not be useless to summarise here the famous statute of 1880 in England. This act (43 & 44 Vict. c. 42) is on the face of it an experimental and empirical compromise between conflicting interests. It is temporary, being enacted only for seven

years and the next session of Parliament, but it being useful, Parliament in 1888 determined to continue the act.

The effect is that a "workman" within the meaning of the act,-- any (1) railway servant, (2) laborer, (3) servant in husbandry, (4) journeyman, (5) artificer, (6) handicraftsman, (7) miner, or (8) other person engaged in manual labor (not being a domestic or menial servant)-- is put as against his employer in approximately the same position as an outsider as regards the safe and fit condition of the material instruments, fixed or movable, of the employer's business, or may sue his employer as if the relation of master and servant did not subsist between them (sect. 1) for any personal injury caused by any of the reasons prescribed in sec. 1. subs. 1, sect. 2, subs. 1, sect. 1, subs. 2, 3, 4, 5 & sect. 2, subs. 2 . It provided also that the servant can not recover if he knew of the defect or negligence, and did not complain to the master or manager within a reasonable time, unless he knew that the master or manager was aware of it. (Sect. 2, subs. 3.) It regulated, moreover, amount of damages (Sect. 3, 5.), limit of time for commenc-

ing action (Sect. 4,7) and mode of trial (Sect. 6).

In the United States, Ga.,(1873), Kans. (1874), R.I. (1882), Miss. (1880), and Ia. (1880) issued statutes of similar nature. But I have no room to remark. French law does not recognize the exemption of employer's liability. (Cod.Civ.,Art. 1384, Sec.3). The Japanese new civil code, following the French principle, does not also recognize the distinction of employer's liability between liability for a servant and for a stranger. (Civ.Cod.,Art.373)

C o n c l u s i o n .

We, coming to the conclusion, will see that there are four steps on the subject under consideration which cover the present condition:-

First, there is the general rule of an employer's liability for his employees.

Secondly, the immunity of the employer where the person injured is also his servant.

Thirdly, the judicial modification of the immunity of the employer, that is , an exception or limitation to the

second.

Fourthly, the statutory modifications of the immunity of the employer.

In England, the tendency is rather against the employee's interest and almost all the litigation upon the Act has been caused either by its minute provisions as to notice of action, or by desperate attempts to evade those parts of its language which are plain enough to common sense. But in the United States it is fortunately, it seems to me, on the contrary; still there are so many different opinions as to the test of fellow servant within the meaning of the rule. Even a well settled principle of law works prejudices, in many instances, to apply practically, because law is a dead thing, and only effectual by the help of judicial officers. More especially, in an application of such unsettled or so flexible, though to say settled, doctrine, judges, lawyers, and every body must be careful in each case to be supported by justice and public general convenience.

