THE

AMERICAN LAW REGISTER.

JUNE, 1858.

MASTER AND SERVANT—NEGLIGENCE—LIABILITY OF THE MASTER TO HIS SERVANT ON ACCOUNT OF INJURIES OCCASIONED BY THE NEGLIGENCE OF A FELLOW SERVANT.

The rule of law in regard to the liability of the master to his servant for injuries caused by the negligence of a fellow servant, is generally laid down as follows: "Where several persons are employed as workmen in the same general service, and one of them is injured through the carelessness of another, the common master of all is not responsible."

The leading case is *Priestly* vs. *Fowler*, 3 Mees. & Welsb. 1. This was an action on the case by a servant against his master for damages for injuries caused by the breaking down of a van. The declaration stated that the plaintiff was a servant of the defendant, in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant in a certain van of the defendant, then used by him, and conducted by another of his servants, in carrying goods for hire, upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding and being carried and conveyed by the said van, with the said goods; and it became the defendant's duty to use proper care that the van

should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby: nevertheless, that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried; in consequence of the neglect of which duties, the van gave way and broke down, and the plaintiff was thrown to the ground and his thigh fractured:—*Held*, on motion in arrest of judgment, that the action was not maintainable. Lord Abinger, C. B., delivered the opinion of the court, of which the following are the points.

1. There being no charge in the declaration that the master knew any of the defects mentioned, the court is not called upon to decide how far such knowledge on his part, of a defect unknown to the servant, would make him liable. * * * * 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.

2. The mere relation of master and servant can never 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. * * * 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 danger 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 his master.

It will be seen from the above that *Priestly* vs. *Fowler*, does not necessarily contain the doctrine enunciated at the commencement of this article. In fact, that case might have been decided on the ground that the servant had contributed to the accident by his own negligence, and stood therefore on precisely the same footing that a stranger would have done in the same circumstances. And the whole of the latter part of Lord Abinger's opinion, for which we refer to the report, seems to show that the learned judge himself took this view of the principles governing the case.

But in the subsequent cases of *Hutchinson* vs. *The Railway Co.*, 5 Exch. 341, and *Wigmore* vs. *Jay*, ib. 354, the same court went further, and decided in the case of a servant injured through the

negligence of his fellow servants, his own negligence not having contributed to the accident, that his master was not liable. In these cases, for the first time in English law, appears the doctrine that the contract of hiring as between master and servant, includes an agreement on the part of the servant to incur the ordinary hazards connected with his service, among which are to be reckoned the risk of injury from the negligence of his fellow servants.

From these cases, qualified, however, to some extent in the course of a long train of decisions, has sprung the rule which heads this article. This rule has been sustained in the following cases: *Skip* vs. *The Eastern counties Railway*, 24 Eng. Law & Eq. 396; *Farwell* vs. *Bost. & Worces. R. R. Co.*, 4 Met. 49; *Murray* vs. *The South C. R. R. Co.*, 1 M'Mullan, 385; *Brown* vs. *Maxwell*, 6 Hill, N. Y. 592; *Coon* vs. *S. & U. R. R. Co.*, 6 Barb. 231; S. C., 1 Selden, 492; *Hays* vs. *Western R. R. Co.*, 3 Cush. 390; S. C. 1 Am. Rail Ca. 564; *Sherman* vs. *Roch. & Syr. R. R. Co.*, 15 Barb. 574; *M'Millan* vs. *R. R. Co.*, 20 Barb. 449; *Horner* vs. *The Ill. Cent. R. R. Co.*, 15 Ill. R. 550; *Ryan* vs. *Cumberland Valley R. R. Co.*, 23 Penn. St. R. (11 Harris,) 384; *King* vs. *Boston & Wor. R. R. Co.*, 9 Cush. 112; *Mad. & Ind. R. R. Co.*, vs. *Bacon*, 6 Porter Ind. R. 205; *Albro* vs. *The Agawam Canal Co.*, 6 Cush. 75; *M'Daniel* vs. *Emanuel*, 2 Richardson, 455; *Couch* vs. *Steel*, 24 Eng. Law & Eq. 77; *Wiggett* vs. *Fox*, 36 Eng. Law & Eq. 486; *Tarrant* vs. *Webb*, 37 Eng. Law & Eq. 281; *Shields* vs. *Yonge*, 15 Geo. 349; *Walker* vs. *Bolling*, 22 Ala. 294; *Cooke* vs. *Parham*, 24 Ala. 21; *Bassett* vs. *Nor. & Nash. R. R. Co.* Sup. Ct. Connecticut, 19 Law Rep. 551; *Hubgh* vs. *N. O. & C. R. R. Co.*, 6 Louisiana Ann. R. 495.

We now come to consider some of those qualifications of the general rule, to which allusion has been made.

Where a person in the general employ of another, is injured through the negligence of other servants of the employer at a time when the injured person is not acting in the service of the employer, the employer is responsible. *Hutchinson* vs. *The York, Newcastle &c. Railway*, 6 Eng. Rail. Ca. 580, S. C. 5 Exch. 343. In such case the servant is substantially a stranger, and entitled to all the

privileges he would have had if he had not been a servant. And the case of *Gillenwater* vs. *The Mad. & Ind. R. R. Co.*, 5 Ind. R. 340, cited below, appears to have been decided partly upon this principle, that the plaintiff was a passenger in the cars of defendants at the time he was injured, and it made no differance to their liability that he was there by their directions, and paid no fare.

It makes no difference however to the master's liability that the servant injured was not engaged in a *common act of service* with those by whose negligence he is injured. *Hutchinson* vs. *Railway*, 6 Eng, Rail. Ca. 580, S. C. 5 Exch. 343; *Wiggett* vs. *Fox*, 36 Eng. Law & Eq. 486; *Gillshannon* vs. *Stony Brook R. R. Co.*, 10 Cush. 228; *Ryan* vs. *Cumb. Valley R. R. Co.*, 23 Penn. St. R. 11 Harris, 384. These last were cases of laborers riding upon a gravel train to the place of their employment, and injured by the negligence of those in charge of the train. But in Indiana a carpenter employed by a railway company to build one of their bridges, and who took passage in their cars by their directions, to go to a certain point, for the purpose of loading timber to be used in building the bridge, and who was injured in the course of the passage by the negligent conduct of the train, was held entitled to recover of the company on the ground that the plaintiff had no particular connection with the conduct of the business in which he was injured. *Gillenwater* vs. *The Mad. & Ind. R. R. Co.*, 5 Ind. R. 340. And, in the same State, where laborers upon a railway, were transported to and from their labor and meals upon the gravel trains of the company, which they were employed in loading and unloading, but had no agency in managing and in such transportation, by the gross negligence and unskilfulness of the engineer were injured, it was held that the company were liable, *Fitzpatrick* vs. *N. A. & S. R. R. Co.*, 7 Porter, Ind. 336. And in *Coon* vs. *The Syr. & Ut. R. R. Co.*, 6 Barb. 231, a distinction was attempted to be taken between servants of different grades and those of the same grade, and it was sought to make the master liable where the servant injured was to some extent under the control and direction of the one whose negligence occasioned the injury. But the court refused to make the

distinction, and their decision was affirmed on appeal, 1 Selden, 492. And see *Wiggett* vs. *Fox*, 34 Eng. Law & Eq. 486; *Albro* vs. *The Agawam Canal Co.*, 6 Cushing, 75. This distinction has however been sustained in Ohio. *Little Miami R. R. Co.*, vs. *Stevens*, 20 Ohio, R.; *C. C. & C. R. R. Co.* vs. *Keary*, 3 Ohio St. R. 202.

And it makes no difference in regard to the liability of the master that the person injured came into the service *voluntarily*, to assist the other servants of the employer in a particular juncture, and was killed by the negligence of some of the servants. *Degge* vs. *Mid. Railway*, Court of Exchequer, February 1857.

It follows as a corollary from the above rule, that the master is responsible to his servants for his own negligence. He is bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information and belief. *Priestly* vs. *Fowler*, 3 M. &. W. 1. He is therefore liable for injuries caused by defective machinery, where the defect is known to him. *M'Millan* vs. *Saratoga & Wash. R. R. Co.*, 29 Barb. 449; *M'Gatrick* vs. *Wason*, 4 Ohio St. R. 566; *Keegan* vs. *Western R. R. Co.*, 4 Selden, 175. And the master is liable if he might have known the exposure of his servant, but for his own want of ordinary care, as in the case of a defective locomotive engine, which exploded and injured the servant through a defect of construction. *Noyes* vs. *Smith*, 28 Vt. R. 59. See also *Marshall* vs. *Stewart*, 33 Eng. Law & Eq. 1. And in *Roberts* vs. *Smith*, in the Exchequer Chamber, reported 29 Law Times 169, the servant, a plasterer, was injured by the fall of a scaffolding, which had been put up by other servants of his master. The accident was caused by the rottenness of the timber used, which was furnished by the master, and he was held liable. And in *Marshall* vs. *Stewart*, *supra*, the master was held liable for a defect in the shaft lining of a mine, by which his servant, a miner, was injured.

But there is no implied obligation on the part of a ship-owner towards a seaman who agrees to serve on board, that the ship is seaworthy, and in the absence of any express warranty to that effect, or of any knowledge of the defect, or of any personal blame on the

part of the ship-owner, the seaman cannot maintain an action by reason of the ship becoming leaky, and his being obliged to undergo extra labor. *Couch* vs. *Steel*, 24 Eng. L. & Eq. R. 77.

The master is bound to employ servants of ordinary skill and care, and he is responsible to other servants injured through his negligence in this respect. *Wiggett* vs. *Fox*, Eng. Law & Eq. 486; *Coon.* vs. *Syr. & Utica R. R. Co.*, 1 Selden, 492; S. C. 6 Barb. 231; *Keegan* vs. *Western R. R. Co.*, 4 Selden, 175. But if he use reasonable precautions and efforts to procure safe and skillful servants, but, without fault, happen to have one in his employ through whose incompetency damage occurs to a fellow servant, the master is not liable. *Tarrant* vs. *Webb*, 36 Eng. Law & Eq. 281. He is not bound to warrant their competency. Ib., per Jervis C. J. *Farwell* vs. *The Boston & Western R. R. Co.*, 4 Metc. 36; S. C. 1 Am. Rail Ca. 339. In *Roberts* vs. *Smith*, 29 Law Times, 169, it was held that where the master directs the conduct of a servant, he is liable for any injury resulting therefrom to the other servants. And great latitude must be given to the phrase "engaged in his employment" when the plea seeks to avoid the master's liability on the ground, that the servant injured was not so engaged at the time of the injury. Hence the master is responsible for defects in machinery although the person injured, a miner, had refused to work, and was at the time when he was injured being drawn up out of the mine in consequence of such refusal. *Marshall* vs. *Stewart*, 33 Eng. Law & Eq. 1. And Lord Cranworth, Ld. Ch., said that the master is bound to use due care and diligence towards his workmen, *eundo, morando et redeundo.* And Lord Brougham said, "the master who let them down is bound to bring them up, even if they come up for their own business and not for his; he is answerable for the state of his tackle."

But this responsibility of the master for his own negligence does not attach, if the negligence of the servant who was injured contributed to the accident which caused the injury. *Priestly* vs. *Fowler*, 3 M. & W. 1. For he might decline the service, *ib.*; *Skip* vs. *Eastern Counties Railway*, 24 Eng. Law & Eq. 396: *Brown* vs.

Maxwell, 6 Hill, N. Y. 592.[1] Much less is the master liable if the servants own foolhardiness or imprudence caused the injury *Timmons* vs. *The Central Ohio R. R. Co.*, 6 Ohio St. R. 105.[2]

If, therefore, the servant knew the danger and did not communicate it to the master, he cannot recover. *M'Millan* vs. *Saratoga & Wash. R. R. Co.*, 20 Barb. 449; *Hubgh* vs. *N. O. & C. R. R. Co.*, 6 Louis. Am. R. 495. If the master inform the servant of the danger, and he chooses to continue in the service, it is at his own risk, the master is not liable. *Perry* vs. *Marsh*, 25 Ala. R. 659. But if the master knew of the defect, and direct the servant to continue the service in a prescribed manner, he is responsible for the consequences. Redfield on Railways, 387 n. 2.[3]

The rule as above given is that of the common law of England, and of most of the United States. It recommends itself by its justice and fairness, though no doubt hard cases will occasionally arise under it. It is founded upon an implied agreement on the part of the servant to incur the ordinary risks of his employment, one of which arises from the carelessness of his fellow servants and

[1] It has been held in some cases, Scudder *vs.* Woodbridge, 1 Ga. 195, that the rule that the master is not liable for an injury to one servant, inflicted by the want of care or skill in a fellow servant, does not apply to slaves, on account of their want of freedom in action and choice, in continuing the service, when it becomes perilous. And where the injury resulted from the habitual negligence of the engineer of a steamboat, whereby the slaves perished from the bursting of a boiler, the master of the boat is liable, and would be so in the case of freemen. Walker *vs.* Bolling, 22 Ala. 294; Cook *vs.* Parham, 24 Ala. 21. The court here were equally divided upon the question, whether the general rule upon this subject applied to the case of a slave hired upon a steamboat.

[2] This has been held not to apply to the case of slaves, especially where the employer had stipulated not to employ them about the engines and cars, unless for necessary purposes of carrying them to places where their services were needed, and they were carried beyond that point, and killed in jumping from the cars. Duncan *vs.* The R. R. Co., 2 Richardson, 613.

[3] This dictum of the learned author of the treatise above cited, for which no authority has been found, is probably based upon the idea, that such a direction on the part of the master is an actual assumption of responsibility for the consequences. If this conjecture as to its foundation be correct, there will be no difference as to the master's liability whether the servant did or did not know of the defect.

on the part of the master, to use ordinary care and diligence to secure the safety of his servant in the course of his employment, both in the use of machinery and in the selection of his other servants. Further than this it does not go, and therefore any negligence or want of ordinary care on the part of the master in either of these respects will render him liable to a servant who has been injured in consequence of *such negligence of the master*, unless the servant injured knew or ought to have known of the defect or negligence on the part of his master, and by his own negligence in not disclosing the danger to the master, or by his own imprudence or foolhardiness in remaining in the service after the danger became known to him, has himself contributed to produce the injury of which he complains. But even in this latter case it has been said that if the master, after the defect has been disclosed to him, direct the servant to continue the service in a prescribed manner, he thereby assumes a liability for any injury arising from such defect, which may befall the servant while pursuing such directions. And the same exception would seem to apply in the case of an apprehended danger from the incompetency of fellow servants, duly disclosed to the master.

But the rule itself has been repudiated in Scotland, where no such agreement by a servant to incur the risk of carelessness of his fellow servants is implied by the contract of hiring, and in regard to the master's liability for an injury arising from the negligence of his servant, no distinction is admitted between the cases where the person injured is a fellow servant and where he is a stranger; so that wherever the master would be liable to a stranger he is held liable to his servant. *Dixon* vs. *Ranken*, Court of Sess., Jan. 3rd., 1852, reported 1 Am. Rail Ca. 569.

It is commonly said that the law of Scotland has been followed by the Supreme Court of Ohio. See *Little Miami R. R. Co.*, vs. *Stevens*, 20 Ohio, 415, and *C. C. & C. R. R. Co.*, vs. *Keary*, 3 Ohio St. R. 202. But an examination of these cases will show that the court did not go so far as to repudiate the rule of the common law. In both cases, however, they decided that as between servants of different grades the common master is responsible to the