

**THE**  
**TEXAS COURT REPORTER**

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**CASES ARGUED AND ADJUDGED**

**IN**

**THE SUPREME COURT, COURT OF CRIMINAL APPEALS,  
AND THE COURTS OF CIVIL APPEALS**

**OF**

**THE STATE OF TEXAS**

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**OCTOBER 20, 1904—FEBRUARY 9, 1905.**

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P. Dever." The petition further alleges in substance that R. M. Vaughan and F. P. Works claim to be owners of, or to have some interest in, the tract sought to be purchased, and that they claimed under the incomplete grant before mentioned.

We are of the opinion that, where there is a dispute as between the State and another party as to the title to a tract of land, the Commissioner can not be compelled to make a sale. It is hardly within the scope of his functions or duties to pass upon titles in such cases, and we should be reluctant to hold that the Legislature intended to impose such duty upon him in the absence of language in the statute showing clearly that intent. It is known that at the date of the original act which appropriated these lands to the school fund there were many large bodies of land lying in the State held by persons who asserted title thereto, and whose titles had never been adjudicated and were not conceded. It is unreasonable to suppose that the Legislature intended to put such lands upon the market for sale, and thus to turn loose upon the courts a flood of litigation as between the purchasers and the adverse claimants. On the contrary, we think that the purpose of the Legislature with reference to them is shown by the eighth section of the act. That section in part is as follows: "When any of the lands described in this act, or any of the other public lands of the State held or owned by any fund, or any land in which this State or any such funds have an interest are held, occupied, or claimed by any person or association or corporation adversely to the State or to such fund, it shall be the duty of the Attorney General to institute suit therefor," etc. From this we think it is to be inferred that the policy of the Legislature in reference to lands which were claimed by third parties was first to establish its title before putting them upon the market for sale, and that it was not intended that they should be sold until the controversy between the State and the claimants had been adjudicated.

The present Constitution contains this provision: " \* \* \* All genuine land certificates heretofore or hereafter issued shall be located, surveyed, or patented only upon vacant and unappropriated public domain, and not upon any land titled or equitably owned under color of title from the sovereignty of the State evidence of the appropriation of which is on the county records or in the General Land Office, or when the appropriation is evidenced by the occupation of the owner or of some person holding for him." Constitution, Art. 14, Sec. 2. This provision does not pro-

hibit the Legislature from providing for the sale of such lands, but it very clearly evinces the policy of the State not to encourage litigation by permitting the acquisition from the State of lands which appear upon the official records, or by actual occupancy to be claimed adversely to it. It should not lightly be assumed that the Legislature intended to depart from that policy.

Our conclusion is that section 6 of the act under construction applied only to such lands as appeared upon the maps and records of the General Land Office not to be claimed by other parties, and to such as had been adjudged to the State, if ever so claimed.

For these reasons, the motion is overruled.

(Civil Appeals, Fifth District. Oct. 26, 1904.)

BONN v. GALVESTON, H. & S. A. R. R. Co.

Personal Injuries—Master and Servant—Negligence—Failure to Furnish Sufficient Men—Instructing Verdict—Withdrawal of Issue—Assumed Risk—Fellow Servant—Concurring Negligence.

1. The issue of negligence, dependent on evidence, should not be taken from the jury, except in cases where there is no material conflict, and where there is no room for different minds to draw different inferences from it.

2. It is not the province of the trial judge or an appellate court in determining whether a case should be withdrawn from the jury, to determine on which side the truth lies when there is a conflict between the testimony of the plaintiff and defendant, nor to say that the testimony of the one outweighs the other, and breaks down the theory sought to be maintained by the facts which plaintiff's testimony tends to establish.

3. It is the duty of the court to instruct a verdict, though there is slight testimony, if its probative force is so weak that it only raises a mere surmise or suspicion of the existence of the fact sought to be established—such testimony in legal contemplation falling short of being any evidence; and it is the duty of the court to determine whether the testimony has more than that degree of probative force.

4. It is the duty of the master to exercise ordinary care to employ a staff of servants sufficiently large to perform the work with reasonable safety to themselves. He is bound to see that the number of servants engaged upon the work in hand remains sufficient to insure the reasonable safety of each of them; and the principle affects him with liability not only where he allows the force of employes, considered as a whole, to fall below the proper aggregate, but also where he fails to assign an adequate number of men to each particular piece of work which may be undertaken from time to time.

5. Whether the master has in any partic-

ular instance fulfilled his obligation to employ a sufficient number of servants is primarily a question of fact to be determined by the jury.

6. If injury to the servant is caused by the joint result of the negligence of the master and fault of a fellow-servant, the master is liable.

7. If the master knows, or would have known by the exercise of ordinary care to ascertain the facts, that the instrumentalities provided for his servants were unsafe, and the servant, without contributory fault, suffers injury thereby, the master is liable. Within this rule the men furnished for the work are considered as instrumentalities.

8. A servant does not assume the risks arising from the failure of the master to do his duty, unless he knows the failure and the attendant risk, or, in the ordinary discharge of his duty, must necessarily have acquired that knowledge.

Appeal from the Forty-fifth District Court of Bexar County; J. L. Camp, Judge.

Perry J. Lewis and H. C. Carter, for appellant; Baker, Botts, Parker & Garwood, for appellee.

Action by Phillip Bonn against the Galveston, Harrisburg and San Antonio Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

NEILL, ASSOCIATE JUSTICE.—Appellant sued appellee to recover damages for personal injuries alleged to have been inflicted by the latter's negligence. He alleged in substance in his petition that, while in the employ of the defendant, he and five or six other men were negligently ordered by appellee's foreman to take up and carry a heavy steel or iron rail across a ditch or trench, which made the carrying of the rail unusually burdensome and dangerous; that appellee negligently failed to furnish a sufficient number of hands to carry the rail with reasonable safety—only three men, including plaintiff, being furnished to carry one end of the rail, when at least double that number was necessary, while twelve or fourteen were necessary to carry it with ordinary safety; that plaintiff was wholly inexperienced in doing such work, and did not know the number of men necessary to carry the rail, yet that defendant's foreman, knowing the insufficiency of the number of hands assigned to such labor, stood by and directed how the work should be done, and that plaintiff, in obedience to said orders, which it was his duty to obey, in his effort to carry the rail, with the insufficient number of hands furnished, sustained serious and permanent physical injuries, for which he claimed damages in the sum of \$25,000.

The defendant, after interposing general and special exceptions to the petition, pleaded not

guilty, contributory negligence, assumed risk, and negligence of a fellow servant.

The case was tried before a jury, and, after the evidence was introduced by both parties, the court peremptorily instructed a verdict in favor of the defendant. And, from a judgment entered upon the verdict returned in obedience to such instruction, this appeal is prosecuted.

The assignment of error, upon the consideration of which this appeal must necessarily be determined, is that "the court erred in charging the jury peremptorily to find for the defendant, because the evidence raises issues of fact, and the jury should be permitted to pass upon the question as to whether or not the defendant was liable."

It is well settled that a question of negligence, dependent on evidence, should not be taken from the jury except in cases where there is no material conflict and where there is no room for different minds to draw different inferences from it. The question is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, and unless the conclusion follows as a matter of law that no recovery can be had upon any view that can be properly taken of the facts which the evidence tends to establish. *Choate v. Railway*, 90 Texas, 82, 36 S. W. Rep., 247, 37 S. W. Rep., 319; *Lee v. Railway*, 89 Texas, 583, 36 S. W. Rep., 63; *Railway v. Gasscamp*, 69 Texas, 347, 7 S. W. Rep., 227; *Railway v. Medlenka*, 43 S. W. Rep., 1028; *Traction Co. v. Bryant*, 6 Texas Court Reporter, 247, 70 S. W. Rep., 1016; *Railway v. Eckles*, 1 Texas Court Reporter, 669, 60 S. W. Rep., 831; *Railway v. Quay*, 3 Texas Court Reporter, 914, 66 S. W. Rep., 219; *Railway v. Carlin*, 60 Law. Rep. Ann., 463; *Jenkins v. Railway*, 56 Atl. Rep., 966.

A clearer statement and elucidation of the principle which should govern a trial judge in determining whether a case should be withdrawn upon the consideration of the jury, can perhaps, nowhere be found than is set out in note e, page 80, to section 49 in fifteenth edition of *Greenleaf on Evidence*. There it is said that "the most difficult cases have arisen, however, when the question has been whether the case should be withdrawn by the judge from the consideration of the jury after the plaintiff has put in his whole case. In other words, when the question is whether, supposing all the facts the plaintiff proves are true, they show negligence; or, in still another form, whether there is any evidence of negligence to go to the jury. On this point, the language of Brett, judge, in *Bridges v. Railway*, L. R., 7 H. L., 213, is again a clear expression of the true rule: 'It

is the duty of the judge to determine whether there is evidence fit to be left to the jury on each of the propositions which it is necessary that the plaintiff should establish. This, being a duty cast exclusively on the judge, is a question to be decided according to some proposition or rule of law. What is that proposition or rule of law which the judge is bound to apply to the evidence in order to determine this question of law? It can not be merely, is there evidence? That has no meaning without a farther definition defining when it is to be considered, in point of law, that there is evidence. Without a proposition or rule which can be enunciated or predicated, there is no rule of law. A rule of law can always be predicated in terms. The proposition seems to me to be this: Are there facts in evidence which, if unanswered, would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain? It may be said that this is so indefinite as to amount to no rule; that it leaves the judge, after all, to say whether, in his individual opinion, the facts in evidence would prove the proposition, but I can not think so. It is surely possible to admit that reasonable and fair men might come to a conclusion which oneself would not arrive at. And judges may be able reasonably to say frequently that, although they would not, upon the facts, have come to the same conclusion to which the jury has come, yet they or he can not say but that fair and reasonable men might agree with the conclusion of the jury; or, in other words, that, although they would not have arrived at the same conclusion, it is not contrary to reason to have arrived at it.

“The judge must, therefore, before directing the jury in the terms set forth above, first determine the following questions: Are there facts in evidence upon which, if unanswered, men of ordinary fairness and reason might fairly say that the plaintiff had been injured by some act of commission or omission by the defendants or their servants? Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that any such act of commission or omission was such a person of reasonable skill and care, under the same circumstances, would have done, or omitted to do? Are there any facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that the plaintiff had not, in a manner contributing to the accident, done anything or omitted to do anything which a person of ordinary care and skill, under the same circumstances, would not have done or would have done?

“If the judge, not deciding the final issues according to his own individual view, but determining according to the propositions last laid down, holds that there is no evidence fit to be left to the jury on some one of the cardinal questions before stated, he must direct the jury, as matter of law, that there is no case in favor of the plaintiff, or he must nonsuit the plaintiff. If he holds that there is evidence on each of the cardinal questions, he must leave the case to the jury, according to the direction in point of law before laid down in this opinion. When the judge has so directed the jury as to the law, he has finished all which it is legal for him exclusively to determine in the case.”

What is above quoted from *Bridges v. Railway* is not in conflict, but is in perfect harmony with what is said by the Supreme Court in *Joske v. Irvine*, 91 Texas, 582. In the latter case, the Supreme Court quotes the rule that, “to authorize the court to take the question from the jury, the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it.” And, quoting from *Mynning v. Railway*, 64 Mich., 93, thus states the rule: “If the circumstances are such that reasonable minds might draw different conclusions respecting the plaintiff’s fault, he is entitled to go to the jury upon the facts. The judge takes the case from the jury only when it is susceptible of but one just opinion.” In fact, the Supreme Court in *Joske v. Irvine* only illustrates the rule quoted in its opinion when it says that, “from a careful examination of the cases it appears: (1) that it is the duty of the court to instruct a verdict, though there is slight testimony, if its probative force is so weak that it only raises a mere surmise or suspicion of the existence of the fact sought to be established—such testimony in legal contemplation falling short of being ‘any evidence’; and (2) that it is the duty of the court to determine whether the testimony has more than that degree of probative force.” Of course where the “probative force of testimony is so weak that it only raises a mere surmise or suspicion of the existence of a fact necessary to be established” to make out plaintiff’s case, and “falls short of being ‘any evidence,’” the law must presume that a jury can not “reasonably infer the existence of the alleged facts,” and “that there is no room for ordinary minds to differ as to the conclusion to be drawn from it,” for no conclusion of a fact necessary to be proven can be drawn in the absence of ‘any evidence’ to support it. It is in cases where testimony is of that character that the trial court holds “that there is no evi-

dence fit to be left to the jury \* \* \* ” and “must direct the jury as a matter of law that there is no case in favor of plaintiff.”

We will now, in view of the test just enunciated, examine the testimony, and, in the light of the law which we will state applicable to it, consider the question presented by the assignment above quoted. In doing so it will be unnecessary, if not improper, to consider such testimony of the defendant as contradicts or is in conflict with the plaintiff's, or is antagonistic to the facts sought to be established by his evidence; for it is certainly not the province of a trial judge or an appellate court, in determining whether a case should be withdrawn from the jury, to determine on which side the truth lies when there is a conflict between the testimony of the plaintiff and defendant, nor to say that the testimony of the one outweighs the other, and breaks down the theory sought to be maintained by the facts which plaintiff's testimony tends to establish.

The undisputed testimony shows that in July, 1901, the plaintiff was in the employ of the defendant and at work for it at its new depot in San Antonio. He testified: “When I went to work at the new depot, my duties were unloading gravel from the cars. While I was working at the new depot where I was injured, we carried a rail over the ditch. At the time I was hurt Hawkes was the foreman. Hawkes told me to do something. He picked out the men he wanted to have them carry the rail over the ditch. The rail was about thirty feet long. I do not know whether it was iron or steel. Mr. Hawkes at the time he told the men to take this rail was right there by the people. Hawkes directed the men to pick up the rail. Hawkes told me to go over the ditch and take that rail and carry it over the ditch, and went with us up there. At the end of the rail where I had hold, three men had ahold of it with me. I can't say how many men had hold of the other end of the rail. I did not notice that. They were Mexicans who had hold of the other end of the rail. \* \* \* When we were crossing the ditch I stepped off and stepped into the ditch with one foot, and the other one on top of the bank. One of them kinder let go or let loose a little, and I got the weight on me almost altogether. I stepped into the ditch with one foot and the other one on top. I got the weight on me just as I stepped into the ditch with one foot. The foreman told me to lift the rail and carry it. The foreman told me to cross the ditch. The rail was about twenty feet from the ditch when I picked it up. The foreman was on the other side of the ditch when I got the weight of the rail so heavily upon me. It hurt very

bad, right on the right side here (indicating groins and abdomen), gave me very bad pain at the time. \* \* \* I never worked any more since then.”

The witness being asked what experience he had had in carrying iron rails prior to the time he was injured, answered: “I don't know that I had ever carried any before.” This question and answer then follows: Q. “Had never carried any before?” A. “No, sir.”

On cross-examination he testified: “When I was working at the new depot I was all right. It (referring to a rupture he had received long prior to that time) had gotten well. When I came home I was in terrible pain, just like a dozen knives sticking into me. I showed it to my wife and saw it was ruptured. My wife looked at it, and we saw it was ruptured. It came out on both sides. \* \* \* When I take this truss off, it comes down—both sides come down. Before I carried that rail my condition was all right, I was strong. Since then I have suffered pain in my heart and then around in my back, and often I lay down it comes all over and through me, and I must roll around and halloa for pains just like an animal. I can't hardly stand it at nights. Sometimes this keeps up a whole day. It has been continuous ever since I was hurt. I have very little capacity to work. I have very little strength now. I am 56 years old. I was born in 1847, 3d day of May.”

On cross-examination he testified: “I do not know that these rails were not the big, heavy steel rails that go into the main track. I don't know that these rails were old rails that they used in spur tracks and that they weighed less than 500 pounds. I can't tell about that. I don't know how many rails were moved. I helped to move two. \* \* \* These rails, when I took hold of them, were twenty feet from the ditch. The ditch was about two feet deep and three feet wide. The banks of the ditch were straight down. They were cut straight down and about three feet wide. Three of the men took hold of the rail on my side, I don't know how many on the other side. I didn't pay much attention to the other side. \* \* \* When I picked that rail up and started across the ditch one of the men kinder let loose of the rail; one foot in the ditch and one foot on the top, and I got this heavy rail on me. I think one of these men let loose of the rail a little, and I got the heavy side on me—the heavy weight. I can't tell which one it was. It was one of the men at the same end with me. \* \* \* We carried the rail end foremost across the ditch, not lengthwise. I was on the front end. I don't know how many men were on the hind end. There were no men

in the middle of the rail. I didn't see anybody in the middle. \* \* \* I don't know how long I had been working there before I lifted the rail, but about three or four weeks. The work that I was doing there was sometime sent me down to the supply store to get tools for the work, and then to go back with the tools—light tools—and then I was at work with the gang that scraped with the shovel. I was working with the gang shoveling. We scraped the dirt out, and laid the track down. \* \* \* I have been at work for the Galveston, Harrisburg and San Antonio Railway for twenty years. When I first went to work I worked under Kelley, section foreman. I belonged to his section gang. I shoveled and kept clean (meaning track). I worked under him about two or three months. I didn't work for over a year with Mr. Kelley. I worked with his gang here in the yard. During the two or three months that I worked in that section gang here in the yard I did not lift any rails. The other fellows my partners, lifted the rails. \* \* \* I have worked for nobody except the railroad for the last fifteen or twenty years until I got hurt in 1901. \* \* \* Before that" (referring to the time he assisted in carrying the rail) "the men were finishing the tracks; were shoveling the dirt out. I don't know how many men were at that work. Mr. Hawkes did say, 'Boys, we want to lift these rails up and bring them across the ditch.' He said, 'Come boys, so much men I want, I want to bring the rails away. Bring the rails on the other side of the ditch,' and the men went and took hold of the rails. The men were right there when Hawkes told them to do that." Being asked to state exactly what Mr. Hawkes said, witness answered: "Mr. Hawkes ordered the men and said, 'Come up here and bring the rails away.' I don't know how many men came when he said that. I paid no attention about it. I didn't look to see. I don't know. The same men carried the second rail. I didn't help much to do it. I couldn't help much. I got bad, much pain. I helped a little bit, but couldn't do much. I couldn't do much because it hurt me too much. I was afraid to lift any more on the second rail because it hurt me too much."

Thos. Grady, a witness for plaintiff, testified: "I am familiar with the handling of iron rails—steel rails. I have done a great deal of it as foreman. I became familiar with the handling of rails mostly in construction work. \* \* \* There is very little handling of iron to be done in section work, unless it is an old roadbed, where the iron becomes old. When steel becomes ten or fifteen years old it requires changing. I am acquainted with the handling of iron rails and the number of men required

in handling them. I am acquainted with the class of rails that are in use and have been in use on the different railroads in Texas for the last thirty-five years, also for the Galveston, Harrisburg and San Antonio Railroad. I have worked for them. The lightest rail they have to the yard is fifty pounds. The heaviest rail is seventy-five pounds, I think, at the present time, I don't know whether they use an eighty-two to the yard or not. The standard length of rails is thirty feet. I believe sixty is the lightest they use at the present time on the Galveston, Harrisburg and San Antonio during the last twenty years. I believe fifty or fifty-six is the lightest they used. I believe fifty pounds is the lightest rail used for railroad purpose, fifty, fifty-six and sixty at the present time, fifty pounds any time during the last twenty years. Fifty pounds is the lightest rail made. If a rail is thirty feet long and fifty pounds to the yard, any class of man handling the rail, to work all day, and do it quick, in my opinion would take ten men. That would be five men at each end, it requires so many men, because frequently the man at the end of the rail makes a misstep, and jars the balance on the side of him, especially in going over an uneven surface it requires men experienced in this class of work; men accustomed to the work so they can keep step, walk with each other. The tendency if men were carrying a rail over a ditch in regard to the distribution of the weight is they can't all step together down in the ditch, and if they were to try, the chances are they would all fall in. The purpose of having at least five men at each end of a rail of that size and length is to move it with safety." Being asked to explain to the jury wherein it might become unsafe to have a fewer number of men, he answered: "The swinging of the rail has a great deal to do with it, and men not acquainted, who don't know their business, move at a regular step; it requires men accustomed to this to do the work properly, and, if a man at the end of a rail makes a misstep, he jars the man beside him. He steps shorter and throws the whole weight on the man adjoining him."

Roger McCue, a witness for plaintiff, testified: "We get experience in handling rails by carrying them. There is no other way to get experience in carrying rails except by carrying them that I know of. There is no other way. A rail thirty feet long that weighs fifty pounds to the yard weighs 500 pounds, that has to be carried thirty or forty feet or steps, and there is a ditch over which it must be carried like two feet deep and three feet wide there should be at least eight men to carry it with safety; there should be four at each end, I think. It

is necessary to have that many men, because the springing of the rail is very dangerous if there is not enough men, and, in case a man was lower it would throw the weight on the other man, why it is difficult. It requires at least eight men to a thirty-foot rail. That is the least number I would use to a thirty-foot rail. The effect of crossing a ditch, if a man is experienced or is not experienced, if he does not hold up the weight as he goes down, it throws the weight on the other party. It takes experience to handle and carry these rails with safety. You are supposed to watch green men; you got to watch them to keep them from getting hurt. The way to get that experience is to handle rails."

The plaintiff's wife testified that after the accident her husband came home in an injured condition. That he was ruptured on both sides, and was suffering greatly. And Dr. Barker testified that plaintiff was suffering with double hernia, and that such an injury could be produced by violent muscular exertions, such as lifting and straining.

P. E. Kelley, a witness for the defendant, testified: "Of course it makes a difference about the lay of the ground about the number of men that ought to carry it. In carrying a rail on the ground, the fact that the ground is uneven, or ditches to cross, makes a difference in the number of men that you have on the rail; there ought to be more force, because a man is placed in a position sometimes he can't lift much. In shifting their position they naturally have to lift less than their share, and it falls on the other men, and there must be enough to support it, especially on a tall man it falls more than on a low man. It would require more men to carry a rail on rough ground. In carrying it on rough ground, it is divided into fifty pounds apiece, or twenty-five pounds, whatever you figure on to the man."

W. H. Hawkes, a witness for defendant, testified: "I ordered these rails moved. I took a little squad of men up there—about ten or twelve men out of the gang. I went right with them myself and showed them what to do. I told them to pick up these rails and carry them across the main track and lay them down on the other side of the main track, a distance of about thirty-five or forty steps. Those rails were fastened down with spikes; I am under the impression that Phillip Bonn and Meixner pulled the spikes; Phillip Bonn worked in the gang. \* \* \* The duty of the foreman in working men is to direct them; show the laborers and direct the work. The men's duty is to do the work that they are told to do. If men don't do their work they are discharged, of course. I was around there when that rail was

being carried. I wanted to get men enough for the purpose of handling the rails. I think I got about ten or a dozen. I don't remember for sure who they were. \* \* \* I don't know how many men had hold of the first rail. I don't know how many men had hold of either of the rails by count."

In our opinion the probative force of this testimony is not so weak that it only raises a mere surmise or suspicion of the fact sought to be established by plaintiff in order to make out his case. In other words, it does not, "in legal contemplation, fall short of being 'any evidence.'" But that it, even when taken in connection with defendant's testimony, which may be conceded as strongly tending to contradict it, presents issues upon which reasonable minds might draw different conclusions as to the existence of such facts as are essential to plaintiff's recovery.

We think this testimony can fairly be taken as evidence tending to prove: (1) that Hawkes, defendant's vice-principal and plaintiff's foreman, who had charge and supervision of moving the rails, was personally present, and, in directing the rail to be moved across a ditch, ordered plaintiff and two other hands to take up and carry one end of it; (2) that, in view of the fact that they had to carry it across a ditch, more than three men were necessary to carry that end with reasonable safety to the men engaged in such work; (3) that plaintiff was inexperienced in such labor, and did not know the number of men reasonably necessary to safely carry the rail; and (4) that, on account of the insufficient number of hands, in attempting to cross the ditch, the weight of the rail that fell upon plaintiff was so great as to inflict upon him serious and permanent physical injuries.

If, then, the proof of these facts would establish defendant's liability, the case should have been submitted to the jury, unless the evidence upon the defensive matters specially pleaded was of such a character as to leave no room for ordinary minds to differ as to the conclusion that at least one of the defensive matters plead was proven.

It is the duty of the master to exercise ordinary care to employ a staff of servants sufficiently large to perform the work with reasonable safety to themselves. He is bound to see that the number of servants engaged upon the work in hand remains sufficient to insure the reasonable safety of each of them. This principle affects him with liability, not only where he allows the force of employes, considered as a whole, to fall below the proper aggregate, but also where he fails to assign an adequate number of men to each particular

piece of work which may be undertaken from time to time. 1 Labatt on Master and Servant, Sec. 204, and authorities cited in notes; Whitaker's Smith on Negligence (Webb's Edition), p. 156, and note e, p. 159; 3 Wood on Railways, Sec. 381; Railway v. Sherwood, 4 Texas Court Reporter, 716, 67 S. W. Rep., 776; Bonnet v. Railway, 89 Texas, 72; Traction Co. v. Rodriguez, 77 Texas, 420; Railway v. Langen (Ky.), 76 S. W. Rep., 32; Johnson v. Ashland Water Co., 71 Wis., 553, 37 N. W. Rep., 823, 5 Amer. St. Rep., 243; Jones v. Old Dominion Cotton Mills, 3 Amer. St. Rep., 92; Hill v. Big Creek Lumber Co. (La.), 32 So. Rep., 375; Albertz v. Bache, 10 N. Y. Supp., 639.

In Johnson v. Ashland Water Company, supra, it is said: "The courts have uniformly held that it is the duty which the employer owes his servants, when set to do any particular work, that he shall provide a sufficient number of men to do the work in a reasonably safe manner. This duty is placed on the same ground which requires the employer to furnish safe implements and appliances to do the work, and a reasonably safe place in which the work is to be done. Wood in his work on Railway Law (Vol. 3, p. 1487, Sec. 381) says: 'The term *appliances* of the business embraces not only machinery, premises, and all the instruments of every kind used in and about the business, but also the persons employed to operate them; and the master must furnish a sufficient number of persons competent to perform the labor safely; and when the failure to employ a sufficient number of hands to perform the particular service is the proximate cause of the injury, the master is liable, unless the servant may fairly be said to have assumed the risk incident thereto.' This is a reasonable and just rule, and has been approved by all the courts in which the question has been raised, except in cases where the employe knew at the time that there was a want of sufficient help and, notwithstanding such knowledge, entered into the employment."

The principle of law which imposes this duty upon the master has been asserted and applied in cases ranging from the navigation of an ocean steamer and the operation of a railway train to the lifting of a log or the turning of a stone.

Whether the master has in any particular instance fulfilled his obligation to employ a sufficient number of servants is primarily a question of fact to be determined by the jury. Labatt's Master and Servant, Sec. 205; Supple v. Agnew, 191 Ill., 439, 61 N. E. Rep., 392.

Thus it is seen from the authorities quoted

and cited that the proof of the facts which the testimony introduced upon the trial of this case tended to establish would establish the liability of the defendant for plaintiff's injury. It therefore remains only for us to determine whether the evidence upon the defensive matters specially plead is such as leaves no room for reasonable minds to differ as to the conclusion that at least one of the defensive matters plead was proven. These defenses, as has been seen from our statement of the case, were contributory negligence, assumed risk, and negligence of a fellow servant.

We may pass without discussion the first and third of these special defenses, for the burden of proving contributory negligence in this State rests always upon the defendant, and it is too clear for argument that the evidence does not show as a matter of law that plaintiff was guilty of such negligence. And, as we held in Railway v. Sherwood, supra, if the injury was caused by the joint result of the negligence of the defendant and fault of a fellow servant, plaintiff's right to recover would be maintained; for the original negligence of the master would still remain as the culpable and direct cause of the injury, and the intervening fault of a fellow servant, which might have contributed to it, could not be regarded. Citing Shearman and Redfield on Negligence, Sec. 188; Buswell on Personal Injuries, Secs. 103, 201; Supple v. Agnew, supra. If, then, in this case the evidence was sufficient to establish, as a matter of law, the negligence of a fellow servant, it could not be said that such negligence was so separable from the negligence of defendant as to make it the proximate cause of plaintiff's injury.

We are thus brought to a consideration of the question as to whether the evidence was such as authorized the court to conclude, as a matter of law, that plaintiff's injuries proximately ensued from a risk assumed by him. It must be borne in mind that the burden of proving this defense rested upon the defendant. Railway v. Harris, 4 Texas Court Reporter, 462, 95 Texas, 346. And, unless all the evidence upon the issue was such as to leave no room for reasonable minds to come to any other conclusion than that the injury was the direct and proximate result of a risk ordinarily incident to plaintiff's employment, the case upon this issue, as well as upon all others, should have been submitted to the jury.

This case is readily distinguished from that of Traction Company v. Rodriguez, so confidently relied upon by the defendant. That is a case where a laborer willingly undertook to lift a log that he had assisted in lifting

before, and with the weight of which it was presumed that he was as fully acquainted as his employer. The principle that, "So far as the movements of servants may depend upon their own volition, and are not in any way affected by the control of a superior, there can be no recovery on the theory that the number of servants was temporarily inadequate at the time and place where the injury was received, unless it be shown that such inadequacy was known, actually or constructively, to the master or his representative" (1 Labatt's Master and Servant, p. 437), seems directly applicable to that case. But in the case under consideration the evidence not only tends to show, but is undisputed, that the representative of the master in charge of the work was present, supervising and directing it, and it tends to show that plaintiff was an inexperienced hand at such labor, and did not know that the number of hands furnished by the defendant was insufficient to do the work with reasonable safety to the men engaged in it, and that, being ignorant of the danger incident thereto, he was ordered by defendant's foreman to take up and carry the rail across the ditch.

We have shown by the authorities that the duty of the master to provide a sufficient number of men to do the work in a reasonably safe manner rests upon the principle that he is required to exercise ordinary care to furnish his servants reasonably safe instrumentalities and appliances with which to do the work in hand. In other words, the men furnished are considered, under the authorities, simply as "instrumentalities" or "appliances" furnished by the master for doing his work. The duty of the master to use ordinary care and diligence to provide for his servants reasonably safe instrumentalities for doing their work is a personal one resting upon the master alone. And if the master knows, or would have known had he exercised ordinary care to ascertain the facts, that the instrumentalities provided for his servants were unsafe, and the servant, without contributory fault, suffers injury thereby, the master is liable therefor. *Railway v. Winton*, 4 Texas Court Reporter, 14, 66 S. W. Rep., 478. A servant does not assume the risks arising from the failure of the master to do his duty, unless he knows the failure and the attendant risks, or, in the ordinary discharge of his duty, must necessarily have acquired that knowledge. *Railway v. Hannig*, 91 Texas, 347, 43 S. W. Rep., 508. He has a right to presume, and act upon the presumption, that his master or vice-principal has and will continue to perform every duty incumbent

upon him; that there are no risks attending the business other than such as usually attend business of that general nature, and existed when he entered the service, or such as has been explained to him, or known by or perfectly obvious to him, that it is safe to obey orders, and that the appliances and instrumentalities furnished him by his master are reasonably good and adequate. *Railway v. Winton*, supra, and authorities cited.

When these well established principles are applied to the testimony in this case, we do not think that it can be said that the evidence upon the question of assumed risk is such as to leave no room for reasonable men to come to any other conclusion than that the injury received by plaintiff was the direct and proximate result of a risk assumed by him as one ordinarily incident to his employment. Therefore, we are of the opinion that the trial court erred in peremptorily instructing the jury to return a verdict in favor of the defendant.

We do not think that the court erred in refusing to allow the plaintiff to testify that had he failed to obey the orders of his foreman, when directed to assist in carrying the rail, he would have been discharged summarily. The mere fact that a servant exposed himself to an abnormal risk because he feared that if he did not do this he would lose his position, is not considered to be evidence of legal constraint.

The testimony sought to be elicited by plaintiff from witness McCue, "that a man could not acquire knowledge of the handling of iron rails, such as were under consideration in this case, by working on and around iron railroad shops and railroad yards," was simply a conclusion of the witness upon matters which a jury could draw conclusions from the facts and circumstances as well as the witness, and was not of such a nature as to admit of expert testimony.

For reason that the court erred in peremptorily instructing a verdict for the defendant, its judgment is reversed and the cause remanded.

(Civil Appeals, Fifth District. Nov. 5, 1904.)

EMERSON v. MISSOURI, K. & T. R. R. CO.

Appeal—Proof of Inability to Give Bond—  
Term Time—Session of Court.

1. Proof of inability to give an appeal bond when made before the court trying the case must be made while the court is actually in session.

2. Where the affidavit was in strict compliance with the statute and the order made