

ANDERSON V. WINSTON AND OTHERS.

Circuit Court, D. Minnesota.

June Term, 1887.

1. MASTER AND SERVANT—LIABILITY OF MASTER—SERVANT'S KNOWLEDGE OF DANGER—ORDERS OF FOREMAN.

Plaintiff, one of a gang of workmen employed by contractors, while excavating a tunnel, Was injured by an earth slide produced by a crack in the soil from blasting, and sued his employers for damages. *Held*, denying his motion for a new trial, that, as the danger was apparent to plaintiff personally, he could not recover, though the foreman of the gang, also knowing the danger, ordered plaintiff to work, without notifying him thereof.

2. SAME—FELLOW-SERVANT—FOREMAN OF GANG.

The foreman of a gang of laborers, employed by a contractor, is a fellow-servant of one of the gang.
At Law.

Henry Johns and H. S. Williams, for plaintiff.

Kitchel, Cohen & Shaw, for defendants.

NELSON, J. In this case fit motion for a new trial is made by plaintiff. Defendants were contractors excavating a tunnel through a hill in the northern part of the city of St. Paul, in this district. It was a face cut. One side of the hill was a little higher than the other, where the excavation was made. It appeared from the testimony that the contractor worked night and day gangs. The plaintiff was an employe in the night gang, under a foreman, and brings this suit to recover damages from a personal injury suffered, as charged from the negligence of the defendants. This cut was through a hill which was about 30 feet in height. It was worked by having a platform raised some 15 feet, so that the men could work upon the platform, and also under it, in making the excavation. The sides of the cut were sloped, and the evidence shows the usual slope was given to them. In this face cut, when the day gang went off, the night gang came on, and it was while the night gang were at work that the injury occurred. Blasts had been made on account of the character of the soil. A crack; was formed, shortly after a blast, in the afternoon of the day before the accident, and some time during the morning there was a slide of earth, and plaintiff was injured. It is claimed that the foreman of the gang saw the crack, and did not inform the men of the fact that it was a dangerous place, and plaintiff was ordered to go to work there. The evidence of all the parties, with the exception of one who testified in regard to the character of the excavation, goes directly to the point that the foreman saw the crack, and that they also saw it. Anderson testifies that he did not see it, but it is obvious that, if there was any danger, it was as apparent to Anderson as to any one else. There is another reason why the plaintiff cannot recover in this case, and that is, the foreman, if he was at fault, was a co-servant with Anderson. An effort is made by the plaintiff to bring this case within the decision of the United States supreme court in *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184.

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No such case is presented.

The motion for a new trial is denied.