Did the court err in refusing to instruct the jury at the close of the evidence to return a verdict for the defendants? The solution of this question involves the application of the law to the facts of the case. There is no room for controversy over the material facts upon which the case must turn. They are very fully set out in the statement of the case. There was abundant evidence to warrant the jury in finding that the trestle was constructed without a due regard for the safety of those who were to work upon it. It was not braced between the trestle legs; the stringers laid on top were not spiked to the caps of the bents; the ties and track laid on the stringers were not spiked to the stringers; there were no chucks on the stringers on either side of the caps; nor any bolts driven into them on either side of the caps. The evidence shows that the doing of one or more of these things was necessary to render the structure reasonably safe and secure. The only means used to hold it together was a rope tied by hand around the stringers and the caps at each trestle-bent. It is not claimed that the plaintiff was guilty of contributory negligence, or that he constructed or assisted in constructing the bents or trestles. He was employed by Murdock to work on the dump,—that is, to dump cars, shovel dirt, and tamp the track; but Murdock could assign him to do any other work, and did require him to assist in raising trestle-bents when his services were necessary, and he was on the trestle by Murdock's order, assisting in raising a trestle-bent, when, without any fault or negligence on his part, the trestle upon which he was at work, by reason of its imperfect construction, fell and injured him.

Are the plaintiffs in error chargeable with this faulty construction of the trestle, and liable to the defendant in error for the injury he sustained by reason thereof? If this trestle had been erected under the immediate personal supervision and direction of the plaintiffs in error, it is clear they would be liable. But, instead of supervising and directing the work in person, they delegated this power and duty to Murdock; and it is said Murdock and the plaintiff are fellow-servants, and that the rule which precludes a servant from recovering from his master for an injury received through the negligence of a fellow-servant is applicable to this case. The proper construction of this trestle was a work that required more mechanical skill, judgment, and experience than is commonly possessed by the ordinary laborer, and the plaintiffs in error recognized this fact. They appointed a foreman to superintend, direct, and control the work. Murdock was intrusted with full control of the construction work on the section of the railroad embracing this trestle. He had authority to direct all the men on that section—between 30 and 40 in number—when to work, where to work, and how to work, and it was their duty to obey his orders. He superintended and supervised all the work on the section, and hired and discharged workmen, at his discretion. In these respects he was invested with all the power and authority his principals possessed. He did not ordinarily do manual labor; his chief duty was to personally supervise the work, including the building of the trestle, and to give directions how all parts of the same should

be done. He went back and forth between the places where the different crews were at work on the section, directing and instructing, and occasionally assisting, each of them in the work they were doing. Johnson, who framed the bents and put up the trestle, worked in obedience to his orders, as well as the other men. As the plaintiffs assumed through Murdock the superintendence and control of the construction of the trestle, they were bound to exercise ordinary care to make it reasonably safe and secure for those called to do work upon it. In the discharge of this duty Murdock occupied the place of the plaintiffs in error, and any failure on his part to exercise ordinary care in the discharge of this duty is imputable to them.

Whether the trestle was one of those structures the building of which the master might have committed to ordinary fellow-laborers, without any instructions or superintending care, by simply providing them with adequate materials and tools to do the work, need not be discussed. The plaintiffs in error did not attempt to build the trestle in any such way. They did not leave the mode and manner of its construction to the discretion or judgment of the laborers doing the work, but they constituted Murdock their representative, and imposed on him the duty, and conferred on him the authority, to supervise, direct, and control its construction, and required the laborers to obey his orders and directions in the premises. Under these circumstances, Murdock did not sustain the relation of a fellow-servant to the defendant in error in respect to this work. He stood in the shoes of his employers, and was their representative, and they are responsible for the results of his negligence in the work so committed to his direction, supervision, and control. This is the doctrine of the supreme court of the United States, (*Railway Co.* v. *Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Railroad Co.* v. *Herbert*, 16 U. S. 642, 6 Sup. Ct. Rep. 590,) and is the rule laid down in this circuit, (*Borgman* v. *Railway Co.*, 41 Fed. Rep. 667,) and by the courts of last resort in many of the states, and is appropriately denominated the "American Rule," (Shear. & R. Neg., 4th Ed., §§ 226–228.) This court unanimously approved and applied the rule in the case of *Railroad Co.* v. *Wilson*, 48 Fed. Rep. 57, (decided at the present term.) The reasons in support of the rule are forcibly and convincingly stated in the authorities we have cited, and need not be repeated here. In our judgment, the rule is right in principle, and is supported by the weight of authority. There was abundant evidence to warrant the jury in finding that Murdock did not exercise ordinary skill and care in supervising and directing the construction of the trestle, and that by reason of this negligence on his part the trestle was so defectively and imperfectly constructed that it fell and injured the defendant in error. This disposes of the first, second, and third assignments of error.

According to the view we have taken of the case, the court below properly modified the third request to charge, and properly refused the thirteenth and fourteenth requests. The fourth, fifth, and sixth assignments of error are therefore untenable. In the seventh assignment complaint is made of the action of the court in leaving the jury to determine

whether Murdock and Lindvall were fellow-servants, but as that issue was, in our opinion, rightly determined by the jury, and submitted to them under proper directions, the seventh assignment of error is untenable. The judgment of the court below is affirmed.

HALLETT, J., dissents.

WOODS *et al.* v. LINDVALL.

(Circuit Court of Appeals, Eighth Circuit. October Term, 1891.)

BILL OF EXCEPTIONS—TIME OF FILING.

In those districts where the custom prevails of entering judgment immediately upon the rendition of the verdict a bill of exceptions may be allowed and filed at the term in which the motion for a new trial is determined, although such action is taken at a term subsequent to the entry of judgment, and there is no order extending the time for allowing and filing the bill.

In Error to the Circuit Court of the United States for the District of Minnesota.

This is a motion to strike the bill of exceptions from the record for the alleged reason that it was not filed in time to become a part of the record. The case appears to have been tried at the January term, 1891, of the circuit court for the third division of the district of Minnesota. 44 Fed. Rep. 855. The verdict was returned on February 11, 1891, and on the same day judgment was entered on the verdict according to the usual practice in that district. On the following day, pursuant to section 987, Rev. St. U. S., plaintiffs in error asked and obtained a stay of execution for 42 days, to enable them to file a petition for a new trial. During the January term, and within the 42 days, such petition for a new trial was filed, but the January term adjourned *sine die* before the motion was heard or determined. At the succeeding June term, 1891, the petition for a new trial was argued and overruled, and at the same term, to-wit, July 30, 1891, a bill of exceptions was signed, sealed, and filed. The defendant in error duly objected to the allowance of the bill because the trial term had expired. It further appears that no order was entered at the January term, 1891, expressly extending the time for filing the bill to the June term, 1891, nor was any consent given that it might be so filed.

John M. Shaw and *W. R. Cray*, for plaintiffs in error.

John W. Arctander, for defendant in error.

Before CALDWELL, HALLET, and THAYER, JJ.

THAYER, J., (*after stating the facts as above.*) We are all agreed that the motion to strike out the bill of exceptions should be overruled. It is true that in several cases cited by counsel for defendant in error, to-wit, *Walton* v. *U. S.*, 9 Wheat. 651; *Ex parte Bradstreet*, 4 Pet. 102,