

stances the failure of the court in this respect would not be regarded in an appellate court as error, even if some of such instructions ought to have been given. *Anthony v. Railroad Co.*, 132 U. S. 172, 10 Sup. Ct. Rep. 53; *Insurance Co. v. Smith*, 124 U. S. 405-426, 8 Sup. Ct. Rep. 534; *Moulor v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. Rep. 466. I candidly concede that the instructions were presented in apt time, in due form, and with very intelligible directness, and they were considered by the court during the argument with a view to the charge to be given to the jury; but I insist that, if I failed to respond to any one or more of the instructions which the counsel deemed as material and essential points in their case, they should have called my attention to the omission, and specially asked specific instructions. "It is too late, certainly after verdict, to raise the objection that the judge did not charge upon a particular aspect of the case." *Boon v. Murphy*, 108 N. C. 187, 12 S. E. Rep. 1032; *Posey v. Patton*, 109 N. C. 455, 14 S. E. Rep. 64.

After careful consideration of all the instructions requested, I am of opinion (1) that defendant is entitled to have included in a bill of exceptions its objections made during the progress of the trial, and duly noted, as to the rulings of the court in reference to the witnesses who were summoned, sworn, and tendered by defendant to plaintiff, and who, with leave of the court, were cross-examined by plaintiff, and were afterwards contradicted by other witnesses of the plaintiff; (2) that defendant is not entitled to have included in a bill of exceptions the parol evidence on the trial, as it was not reduced to writing at the time under the direction of the court, and there was no agreement of the parties about the matter; (3) that defendant is not entitled to have included in a bill of exceptions a general or special objection that the court failed to respond to any or all of its series of instructions, as at the close of the charge the attention of the court was not called to any omission as to any one or more of said series, and specific instructions requested.

I have, in open court, caused an order to be entered of record, allowing the defendant further time during the continuance of this term, which expires on the first Monday of April next, to prepare and tender such other bill of exceptions as will be approved by the court, as above indicated.

STOCKMEYER v. REED.

(Circuit Court, D. Indiana. April 17, 1893.)

No. 8,791.

FELLOW SERVANTS—VICE PRINCIPAL—LIABILITY OF EMPLOYER.

If an employe is injured by reason of the negligence of the foreman or superintendent in charge of the work, he can only recover against the employer when the foreman or superintendent was negligent in performing duties which the law imposes on the master personally, and cannot recover if the foreman or superintendent was merely negligent in the performance of such work as properly pertains to a servant; as, for instance, in pounding and prying upon a rock in a stone quarry.

At Law. Action by Lentwick Stockmeyer against David Reed for damages for personal injuries sustained by the plaintiff while in the defendant's employment. Heard on demurrer to the complaint. Sustained.

Keith & Taylor, for plaintiff.

Dunn & Alexander, for defendant.

BAKER, District Judge. The sole question in this case is raised by the defendant's demurrer, which alleges that the complaint does not state facts sufficient to constitute a cause of action. The material facts alleged in the complaint are that the defendant on and before, as well as after, May 6, 1892, was the owner of and actively operating a certain stone quarry and stone sawmill at and near Reed's station, in Lawrence county, Ind., for the purpose of quarrying, turning, cutting, sawing, and shipping limestone, and in the operation of said quarry and mill employed a large number of men. That defendant is likewise the owner of large quarries and mills in Monroe county, Ind. That he is a resident of Chicago, Ill., and is seldom present at his quarries and mills in Lawrence and Monroe counties, and intrusts the control and management of the same to one Robert Reed, and divers other superintendents and foremen. That at the date of the grievances, May 6, 1892, the defendant had in charge of the quarries at Reed's station, as superintendent and foreman, one Joseph Drehoble, and that Drehoble, in the absence of Robert Reed, was in full charge of the quarries, the works, men, employes, and machinery; and on the 6th day of May, 1892, Robert Reed was absent from the quarries and works at Reed's station, and was in Monroe county, and so absented himself, leaving Drehoble in full control and management of the quarries, their employes, machinery and business. That at and prior to said date plaintiff was employed by defendant, and was engaged as a quarryman or scabbler in the quarries and yards of the defendant at Reed's station. That at said date Drehoble attempted to turn, and cause to be turned, a certain block of stone in said quarry. That, after the stone has been duly channeled, it is the customary and usual and only safe rule of quarrying to drill the same at the base of the cut on the outside before attempting to turn the stone; but in violation of this rule, which is the only safe one, the defendant, by his superintendent and foreman, negligently and carelessly attempted to turn and throw over said stone without so drilling, and, in so attempting, Drehoble had actual charge and management of the quarry and its employes. That Drehoble discovered that there were one or more dry seams running through the stone, thereby rendering it liable to break and come apart when moved or handled; and, notwithstanding the fact that Drehoble had full knowledge of the dangerous and unsafe condition of the stone, he directed and ordered the plaintiff, who was scabbling at another part of the quarry, to work at and immediately below the outside base of the rock so sought to be turned, and to clean away dirt and rubbish from the same, that the stone might be so turned or thrown over.

That plaintiff had no knowledge of the dangerous and unsafe condition of the stone and the work, and that Drehoble had full knowledge, and that, under said orders from him, plaintiff proceeded to work at the base of the rock; and while he was so at work, under defendant's orders, and without fault, Drehoble, superintendent and foreman as aforesaid, was carelessly and negligently pounding and prying on said rock above the plaintiff; and, as the result of such careless and negligent acts on the part of defendant and his superintendent and foreman, the rock, so seamed, as Drehoble well knew, parted and broke and slipped, and fell on the plaintiff, bruising and mangling him so as to require the amputation of his right leg.

The plaintiff contends that the foreman of the defendant represented him in the alleged wrongful acts resulting in his injury, in such sense that the negligence of the foreman was the negligence of the defendant. On the other hand, the contention of the defendant is that the foreman and the plaintiff were engaged at the time of the injury as fellow servants in performing the work of a common employer, and that the facts disclosed in the complaint bring the case within the principle that the employe assumes the risks incident to the service, and that among them are those arising from the negligence of a fellow servant. It is firmly established that the common master is not responsible to an employe for an injury caused by the negligence of a coemploye, in the absence of negligence, either in hiring or in retaining one who is careless or incompetent. *Hough v. Railroad Co.*, 100 U. S. 213; *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590; *Holden v. Railroad Co.*, 129 Mass. 268; *Flynn v. City of Salem*, 134 Mass. 351; *Crispin v. Babbitt*, 81 N. Y. 516; *Hussey v. Cogger*, 112 N. Y. 614, 20 N. E. Rep. 556; *Taylor v. Railroad Co.*, 121 Ind. 124, 22 N. E. Rep. 876; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. Rep. 303. It is equally well established that the fact that one employe is the superior of another makes no difference. The question is not one of rank. Whether, at the time the negligent act causing injury occurs, they are fellow servants, is not to be determined by an inquiry into their relative grade or authority. The rule extends to every case where the two, deriving their authority and compensation from the same source, are engaged in the same business, although in different departments. *McGee v. Cordage Co.*, 139 Mass. 445; *Clifford v. Railroad Co.*, 141 Mass. 564, 6 N. E. Rep. 751; *McCosker v. Railroad Co.*, 84 N. Y. 77; *Car Co. v. Parker*, 100 Ind. 181; *Justice v. Pennsylvania Co.*, *supra*. If Drehoble was acting in the capacity of a fellow servant at the time his negligence caused the plaintiff's injury, the action cannot be maintained, although he was the plaintiff's superior, and had the right to retain or discharge him. The defendant exercised no personal supervision over the work, but devolved its whole control and management upon superintendents and foremen, who were authorized to employ and discharge workmen, to regulate and direct the manner of the work, to provide the appliances and means necessary to its prosecution, and to determine the time and place of its performance. The superintendents or foremen were employed by the defendant as his servants, but were

delegated with the discharge of all those duties which, in the conduct of the work at the quarries, rested upon the defendant as master to perform in respect to the persons there employed.

So far, therefore, as the sufficiency of the complaint in this case is concerned, Drehoble may be regarded as standing in the place of the master to the persons employed in the quarries. It is not, however, every act of such superintendent or foreman for which the master is liable. Notwithstanding his supervisory power, such superintendent or foreman is still a servant, and, in respect to such acts and work as properly belong to a servant to do, he is, while performing them, discharging the duties of a servant, for whose carelessness and negligence the master is not responsible to a co-employee. *Taylor v. Railroad Co.*, 121 Ind. 124, 22 N. E. Rep. 876; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. Rep. 303; *Crispin v. Babbitt*, 81 N. Y. 516; *Hussey v. Cogger*, 112 N. Y. 614, 20 N. E. Rep. 556; *Holden v. Railroad Co.*, 129 Mass. 268; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326. It has been asserted that, in determining the responsibility of the master for the negligent acts of his servants, we must look solely at the position of such servant, and we must consider the duties devolved upon him, solely for the purpose of determining his position; and, if we find that he is the representative of the master, then the master must be held responsible for all his acts of negligence committed within the scope of the business intrusted to him, as well to coemployees as to strangers, whether the acts of negligence were such as pertained to the duties of the master or those of a servant. *Crispin v. Babbitt*, 81 N. Y. 516, dissenting opinion of Earl, J. In my opinion, however, there can be no middle ground. Either the master must be held responsible for all negligent acts of his superintendent or foreman within the scope of the business intrusted to him, or for those only which pertain to the duties of the master. Reason and the decided weight of authority support the doctrine that the employe, whatever his rank or authority may be, does not stand in the place of the master except in respect of the performance of those duties which, from motives of public policy, the law has imposed upon the master. There are duties incumbent on the master, with reference to the safety of his employes, whose performance the law devolves upon him personally; and whoever is authorized by him to perform them, without regard to his grade or authority, stands, while engaged in their performance, in the master's place, and his negligence in their performance is the negligence of the master. The supervision of the business, the employment of workmen, suitable in number and skill, the provision of suitable tools, machinery, and materials for the work, the providing and maintenance of reasonably safe and secure places for his employes in which to work, are some, but not all, of the duties devolved by the law on the master personally. The neglect of any of these duties, causing injury to employes or strangers, whether the negligent act be that of the master, or of a servant upon whom he has devolved these duties, gives a right of action against the master. But no reason is perceived why the servant, upon whom the master

has devolved these duties, the performance of which the law has imposed upon him personally, may not also perform for the master service which belongs properly to a servant to do; nor is there any reason why the same rules of law should not apply to such employe as to any other, in respect to such work as properly belongs to a servant to do. In my opinion the true rule is that the master should be held responsible for every act of negligence of a servant, whatever his rank, who is charged with the performance of those duties devolved by the law on the master, where the negligent act of such servant has relation to the performance of the master's duties; and that such servant, when performing such work as properly pertains to a servant to do, is the fellow servant of all others engaged in the common service. As was said in the case of *Crispin v. Babbitt*, supra:

"The liability of the master does not depend upon the grade or rank of the employe whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow servant of the other operatives. * * * The liability of the master is thus made to depend upon the character of the act, in the performance of which the injury arises, without regard to the rank of the employe performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows: If the act is one which pertains only to the duty of an operative, the employe performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow servant for its improper performance."

In that case, while the plaintiff was engaged in lifting the flywheel of an engine off its center, the superintendent carelessly let on the steam and started the wheels, throwing the plaintiff onto the gearing wheels, and thus occasioned the injuries complained of.

While the allegations of the complaint are inartificial and confused, it seems to me that the proximate cause of the injury was the careless and negligent acts of the foreman which pertained to the duties of a servant, and not to those of a master. In ordering the plaintiff to work below the stone which was being quarried, the foreman was performing an act pertaining to the duties of a master; but no injury arose from the plaintiff's obedience to this order. Nor was the dry seam in the stone the proximate cause of the injury. The proximate cause of the injury was the careless and negligent acts of the foreman in pounding and prying on the stone in attempting to remove it from its bed. The quarrying of the stone, and its removal from its bed, pertained to the duties of a servant, and not to those of a master. The injury was the proximate result of the careless and negligent acts of the foreman which pertained to his duties as a servant, and not to the improper performance of those duties which pertained to the defendant as master. For these reasons the demurrer must be sustained, and it is so ordered.

MCDONALD v. PRESS PUB. CO.

(Circuit Court, S. D. New York. April 24, 1893.)

LIBEL—WHAT CONSTITUTES—NEWSPAPER PUBLICATION.

A complaint for libel set out the following publication: "Missing Millionaire McDonald Located. Cincinnati, O., Aug. 17. McDonald, southern Ohio manager of the Standard Oil Company until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, near Windsor, Canada." *Held* that, in view of the fact that many of our countrymen who expatriate themselves under such circumstances in Canada are frequently fugitives from justice, (a matter of common knowledge, which the court may judicially notice,) this publication is capable of a libelous interpretation, and, being properly pleaded, is good as against a demurrer.

At Law. Action by Alexander McDonald against the Press Publishing Company for libel. Demurrer to the complaint overruled.

Deming & Walradt, for plaintiff.

Platt & Bowers, for defendant.

WALLACE, Circuit Judge. This is a demurrer by the defendant to a complaint in an action for libel. The complaint shows that the defendant printed and published of and concerning the plaintiff, a citizen of the state of Ohio residing at the city of Cincinnati, the following alleged defamatory matter:

"Missing Millionaire McDonald Located.

"Cincinnati, O., Aug. 17. McDonald, southern Ohio manager of the Standard Oil Company until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, near Windsor, Canada."

The innuendo is stated as "meaning and intending to accuse the plaintiff of odious and disgraceful conduct, and to bring him into disrepute and disgrace, and meaning and intending that the plaintiff was obliged to secretly run away to Canada, and that he was there found living in luxury on his ill-gotten gains."

It is insisted by the demurrer that the complaint does not set forth a cause of action, because the publication is not libelous. The construction which is to be put by the court upon a publication which is alleged to be libelous is to be derived as well from the whole scope and apparent object of the publication as from the expressions used. It is not to be dissected and analyzed to see whether the several parts, standing alone, are innocuous, but is to be read as a whole, in order to ascertain what general impression it is calculated to convey to those who see it. *Spencer v. Southwick*, 11 Johns. 592; *Fidler v. Delavan*, 20 Wend. 57; *Cooper v. Greeley*, 1 Denio, 347; *Beardsley v. Tappan*, 1 Blatchf. 588. If, when thus read, the language is equivocal, and capable of being understood as conveying an injurious imputation, even though it is also capable of an innocent meaning, it is not for the court, but for a jury, to determine in what sense the language is used.

Applying these rules, the question here is whether a jury would be authorized to find that the publication, in any sense which can be legitimately put upon it, is calculated to injure the reputation