

employed by Scullen to guard against the accident which happened, and which he ought to have apprehended.

The question of contributory negligence was properly submitted to the jury, and we have no power or wish to disturb the finding. Indeed, we think it fairly supported by the evidence. Brown had done the work assigned to him. While sawing the roof he had no opportunity of knowing what had been done below; at least, he so testifies, and there is no evidence to the contrary. He did not know what braces or posts had been chopped, and had no reason to suppose that his cutting one of the several posts, as directed by Scullen, would cause the structure to fall. Scullen should have known of that danger, and provided against it. He was in a safe place himself, but he sent Brown to a point of great danger, in circumstances where a skillful and prudent man would have done otherwise. He says he told Brown to cut the post a little, and Brown says he cut it a little; just how much does not appear, or whether he cut it off. He testifies that he does not recollect about seeing the post come in two, for three or four inches were holding; that he struck three or four blows, and the shed caught him; that he does not know whether the post broke off or not, but that he knows he never chopped it in two, for there was too much wood for the three or four blows he gave it to cut it in two,—too much timber left. Nor does it appear with any certainty how much the other posts had been cut. Witness Charles Mahon, who came from the roof before Brown, says they were all chopped, more or less; that some had been chopped in halves, others about two-thirds, as near as he could remember. He also says the wind was blowing in the opposite direction, and they did not have men enough there to use the plank, as he says could be very easily seen, as the biggest part of the shed fell on the opposite side of what it was intended to fall. How it was expected, without rope or windlass or other means than those provided, and with five or six 8x10 dry oak posts but partly cut, to push the shed over in safety, it is difficult to perceive. Scullen stood but a few feet from Brown when he was doing the cutting, without giving any orders to stop. He was presumably directing and controlling the cutting from first to last, and the jury were clearly justified in finding that everything done by Brown was done under Scullen's authority and direction, in ignorance of the danger which Scullen ought to have recognized.

The judgment of the circuit court is affirmed, with costs.

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LOUISVILLE & N. R. CO v. STEWART.

(Circuit Court of Appeals, Seventh Circuit. May 2, 1893.)

No. 7.

**DECLARATIONS AS EVIDENCE—RES GESTAE.**

In an action against a railroad company for injuries alleged to have been caused by the defective condition of a locomotive engine, declarations as to the condition of the engine by engineers in charge of it, made

at various times from six hours to five months before the accident, are inadmissible in evidence against the company, not being part of the *res gestae*.

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

Action on the case by James H. Stewart against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Plaintiff obtained judgment. Defendant brings error. Reversed.

J. M. Hamill, for plaintiff in error.

George B. Leonard, for defendant in error.

Before GRESHAM, Circuit Judge, and BLODGETT and JENKINS, District Judges.

JENKINS, District Judge. The accident to the defendant in error, for which damages are here sought to be recovered, occurred while he was a brakeman in the service of the plaintiff in error, and either in the attempt to get upon a moving engine or in being thrown from the engine while standing upon the steps, the engine being in motion. It is charged that this resulted from the negligent and sudden starting of the engine, which was out of repair, and, by reason of the steam valves leaking steam, could not be properly controlled in starting or reversing her motion, and by running the engine violently backward over broken and defective rails. The negligence charged is threefold: First, operating a defective engine; second, negligence in the operation of the engine; third, a defective roadbed. At the trial the evidence was directed chiefly to the condition of the engine. Substantially all the testimony on the part of the defendant in error going to that fact consisted in declarations, admitted under objections, of several engineers having charge of the engine at different times. These declarations were made at various periods from six hours to five months prior to the accident. We are of opinion that this testimony was improper, and should have been excluded. The declarations were no part of the *res gestae*. They do not relate to anything occurring at the time of the accident and in connection therewith, but to alleged defects in the engine, and were made long before the accident. None of these engineers stood in the place of the railway company for the purpose of admitting its negligence. They had no authority to bind the company, except by such acts as were within the scope of the delegated authority, and in regard to a transaction then pending *et dum fervet opus*. *Packet Co. v. Clough*, 20 Wall. 540; *Railroad Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. Rep. 118; *Insurance Co. v. Smith*, 124 U. S. 405, 424, 8 Sup. Ct. Rep. 534.

The declaration of the engineer to the plaintiff upon the morning of the accident, and some six hours prior thereto, to the effect that the engine would soon go to the shop for repairs, was also improperly admitted. His duty involved the management and operation of the engine; not its repair. It was not within the scope of

his agency to give assurance to the defendant in error of the repair of the engine, so as to warrant the latter to continue in a service dangerous by reason of a defective engine, for such a period after the promise as it would be reasonable to allow for its performance.

The admission of the engineer's declaration to the defendant in error of the promise of the master mechanic to repair the engine was also erroneous upon the ground first stated.

Serious objections to the charge of the court to the jury were urged at the hearing. As, however, there must result a new trial, which may present the case in a different aspect, we do not deem it needful at this time to express an opinion upon the charge.

The judgment is reversed, and the cause remanded, with directions to award a new trial.

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WHAT CHEER COAL CO. v. JOHNSON.

(Circuit Court of Appeals, Eighth Circuit. June 26, 1893.)

No. 220.

**1. MASTER AND SERVANT—FELLOW SERVANTS—MINE FOREMAN AND LABORER.**

A "foreman" in a coal mine, whose duty it is to direct 10 or 12 men what work to do, and to prop the roofs of rooms with timber; to inspect them, and to see if they are safe; and to drill holes in the face of the rooms, charge them with powder, and fire them,—but who is subject to the orders of the pit boss and the superintendent, is the fellow servant of a laborer under his direction, who is injured in performance of his duty of shoveling and removing coal and dirt, and assisting the foreman in his work. *Railroad Co. v. Baugh*, 13 Sup. Ct. Rep. 914, followed.

**2. TRIAL—ERRONEOUS INSTRUCTIONS—PROVINCE OF JURY.**

When the trial court submits to the jury the question whether one who is in law a fellow servant of plaintiff, and whose negligence caused plaintiff's injury, is a vice principal, and the jury finds generally for plaintiff, the judgment should be reversed on writ of error, although the verdict might have been justified on other grounds if the instruction had not been given.

**3. OBJECTIONS TO INSTRUCTIONS—SUFFICIENCY.**

Where a trial judge, in a part of his charge, erroneously submits to the jury the question whether defendant's negligent agent is a vice principal, or a fellow servant with plaintiff, an exception is sufficient which is taken to that paragraph of the charge treating most extensively of this subject, "because said instruction does not properly state the rule whereby it is to be determined whether an employe is a coemploye or fellow servant, said instruction going much further, as to the liability of an employer for acts of coemployes, than the law justifies," in connection with a further exception,—that, at the time of the alleged injury, plaintiff was a coemploye with the man whose negligence caused the injury.

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

At Law. Action by Charles A. Johnson against the What Cheer Coal Company for negligence resulting in plaintiff's injury. Judgment was given for plaintiff. Defendant brings error. Reversed.