to provide a suitable roadbed, grounds, and switch yard where the switching was required to be done, and that it also failed to provide suitable coupling links wherewith to do the coupling, and that it neglected to properly inspect the coupling links that were in use on its cars, and keep them in a safe and proper condition to be used.

On the trial in the circuit court the defendant in error, who was the plaintiff below, recovered a verdict for $4,000. The evidence showed that, as he was attempting to make a coupling on the occasion in question, the coupling link broke, and a large piece thereof was thrown against plaintiff's right leg, and broke it in two places.

It is assigned for error that the circuit court improperly gave an instruction, to the effect that in employing switchmen to couple and uncouple cars a railway company undertakes "to provide and keep a reasonably safe and suitable roadbed, grounds," etc. The chief objection urged against this instruction is that the evidence showed that the condition of the roadbed and grounds, had nothing whatever to do with the injury complained of, and that the instruction was misleading, because it assumed that the condition of the roadbed may have contributed to the accident. This objection is not tenable, for the following reasons: The defendant company did not request the court to charge the jury that there was no evidence tending to show that the condition of the track contributed to the injury. On the contrary, it assumed that there was some evidence of that character, by requesting the court to give the following instruction, which appears to have been given at its request:

"If you find that the spaces between the cross-ties had not been filled with earth, you will inquire whether that fact had anything to do with the accident. If it did not, if the accident is one that might as well have happened upon a track thoroughly ballasted as on the track in question, then you will dismiss the fact from your minds, in arriving at a conclusion."

A party will not be heard to complain of an error which was committed at his instance, or to criticise an instruction of a trial court because it took a view of the law or the testimony which the party himself entertained, as shown by his requests for instructions. Walton v. Railway Co., (8th Circuit,) 12 U. S. App. 511, 6 C. C. A. 223, 56 Fed. Rep. 1006, and citations. And where the evidence is such as to warrant a request for a peremptory instruction to find for the defendant on a given issue, that arises under the pleadings, a failure to ask for such an instruction will preclude the party from assigning as error that the court allowed such issue to be determined by the jury. Insurance Co. v. Unsell, 144 U. S. 439, 451, 12 Sup. Ct. Rep. 671. In view of these rules of law, it is manifest that the plaintiff in error is in no position to complain because the circuit court instructed the jury relative to the duty of the railway company in taking care of the tracks and grounds within its switch yard.

It is further assigned for error that the trial court refused to give the following instruction:

"A railroad employe is presumed to know of such dangers and risks as he has an opportunity to know of, and unless he informs himself of them he cannot recover for resulting injuries. It was therefore the duty of the plaintiff to inform himself of the condition of the track when he went to work, and the character of the work he had to do, and he cannot recover for injuries which he might have avoided, had he properly informed himself."

While the court refused the foregoing instruction, yet it charged the jury, in substance, as follows: That if the plaintiff knew that the track was in a bad condition, in the respects complained of by him, and yet went to work, or continued at work, with such knowledge, he could not recover because of the bad condition of the track; that if the plaintiff saw that the roadbed was unsafe he should have refused to work until it was made safe; and that if a switchman goes into the service of a railroad company at a place where it is apparent that the spaces between the cross-ties had not been filled up, and he is injured in consequence of such defect, he cannot recover.

We think that the directions actually given by the trial court sufficiently covered the case, and that the instruction above quoted was properly refused. It is true that the defect in the track and roadbed, within the switch yard, which was complained of, to wit, a want of filling between the ends of the ties, was an obvious defect, which a switchman could not fail to discover by walking over the track in the daylight, if he used his eyes, but the main controversy at the trial was whether the plaintiff had actually observed, or had had an opportunity to observe, the condition of the track, at the particular place where the accident took place, prior to its occurrence. He had been working as night switchman in the yard for five nights prior to the accident. The yard was said to be a mile and a half long and one-half a mile wide. There were seven tracks, besides the switch tracks connecting them, and the track on which the accident happened was one of the outer tracks. The plaintiff testified that he did not know the condition of the track where the accident happened, prior to its occurrence. Under these circumstances, we think the trial court went quite far enough, in instructing the jury that the plaintiff could not recover because of the alleged defect in the track, if he went to work, or continued at work, with knowledge of its condition, and in further instructing them, in substance, that he was bound to take notice of apparent defects. This left the jury at liberty to determine, and it was properly a question for them to determine, whether, under all of the circumstances, the plaintiff did have knowledge of the alleged defect in the track at the place where he was injured, and before he was injured. The instruction which was asked and refused seems to imply that, before taking service in the switch yard, it was the plaintiff's duty to examine all of the tracks in the yard where he might have occasion to work, to ascertain if he could walk along them in safety, and that if he failed to do so he could not recover by reason of any defects therein. We think that no such duty of inspection prior to taking service, or during his term of service, was devolved upon the plaintiff. He

was simply bound to notice those obvious defects in the tracks, or in other appliances, which he had an opportunity to notice in the discharge of his duties as a switchman, and he is only affected with knowledge of such obvious defects as he is shown to have had an opportunity to notice before the injury complained of was sustained. Railway Co. v. Leverett, 48 Ark. 333, 347, 3 S. W. Rep. 50; Hughes v. Railway Co., 27 Minn. 137, 6 N. W. Rep. 553; Railroad Co. v. Gildersleeve, 33 Mich. 133; Wood, Mast. & Serv. (2d Ed.) § 376.

Another error assigned is the refusal of the circuit court to charge that the plaintiff and the car inspectors employed by the defendant company were fellow servants, and that the plaintiff could not recover if his injuries were occasioned by the negligence of the car inspectors, in failing to properly inspect the coupling link which occasioned the injury. The authorities cited in support of this assignment are as follows: Mackin v. Railroad Co., 135 Mass. 201; Keith v. Northampton Co., 140 Mass. 175, 180, 3 N. E. Rep. 28; Byrnes v. Railroad Co., 113 N. Y. 251, 21 N. E. Rep. 50; Railroad Co. v. Hughes, 119 Pa. St. 301, 314, 13 Atl. Rep. 286; Wonder v. Railroad Co., 32 Md. 411, 418; Railroad Co. v. Webb, 12 Ohio St. 475; Railway Co. v. Gaines, 46 Ark. 555, 568; Smith v. Potter, 46 Mich. 258, 9 N. W. Rep. 273; Smoot v. Railway Co., 67 Ala. 13. It is not to be denied that most of these authorities fully support the doctrine contended for; but on the other hand, in the case of Railroad Co. v. Herbert, 116 U. S. 642, 652, 6 Sup. Ct. Rep. 590, it was held that as an obligation rests on the master to furnish suitable machinery, and to keep the same in repair, he is responsible for the negligence of those persons in his service on whom he has devolved the duty of inspecting machinery and appliances, and seeing that they are kept in a proper condition for use. The same doctrine is maintained by some of the state courts. Fay v. Railway Co., 30 Minn. 231, 15 N. W. Rep. 241; Condon v. Railway Co., 78 Mo. 567; Brann v. Railroad Co., 53 Iowa, 595, 6 N. W. Rep. 5; Railway Co. v. Dwyer, 36 Kan. 58, 12 Pac. Rep. 352; Railroad Co. v. Jackson, 55 Ill. 492; Long v. Railroad Co., 65 Mo. 225. It was also foreshadowed, if not distinctly announced, in the leading case of Hough v. Railroad Co., 100 U. S. 213, and has been adopted by some of the circuit courts. King v. Railroad Co., 14 Fed. Rep. 277; Carpenter v. Railroad Co., 39 Fed. Rep. 315. With respect to the question under consideration, it is only necessary to further remark that we deem it our duty to follow the federal adjudications, (Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. Rep. 914;) and, holding that view, it must be ruled that the trial court committed no error in refusing to charge as above explained.

Two other errors have been assigned, which we have examined, and found untenable. They are not of sufficient importance to deserve special notice.

As no material error is disclosed by the record, the judgment of the circuit court must be affirmed.

## HERMAN et al. v. CAMPBELL.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1893.)

No. 241.

TRIAL—INSTRUCTIONS—TAKING CASE FROM JURY.

In a suit for personal injuries suffered by plaintiff while in the service of defendant, the injury having been caused by the fall of a scaffolding on which plaintiff was working, the trial court charged the jury that the scaffold fell because one of the brackets had been insufficiently fastened owing to the negligence of a fellow servant of plaintiff, for which defendant was not responsible. *Held*, that the subsequent submission of the case to the jury (who rendered a verdict for plaintiff) was reversible error, and ground for a new trial. District of Columbia v. McElligott, 6 Sup. Ct. Rep. 884, 117 U. S. 621, 630, followed.

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

At Law. Action by Malcolm Campbell against Gustavus Herman, Christian Becklinger, and Julius F. Herman, copartners as Herman, Becklinger & Herman, for personal injuries suffered by plaintiff while in the service of defendants. Verdict and judgment were given for plaintiff. Defendants bring error. Reversed.

R. R. Briggs, for plaintiffs in error.

John Jenswold, Jr., for defendant in error.

Before SANBORN, Circuit Judge, and SHIRAS and THAYER, District Judges.

SHIRAS, District Judge. From the record in this cause it appears that the plaintiffs in error were the owners of a sawmill and furniture factory in the process of erection at New Duluth, Minn.; that the defendant in error entered into their employ, and was engaged in sheathing the building; that to enable the men engaged in sheathing and shingling the building to do the work a scaffold was erected on the south side, the same being built under the direction of one Chaloner, a carpenter of experience, who personally made the brackets used in the construction of the scaffold; that the next day after the scaffold was built the defendant in error went with others upon the same, and while engaged in work one of the brackets gave way, whereby the defendant in error was thrown to the ground, and received the injuries for which he seeks compensation in this action; that the fall of the scaffold was due to the fact that one of the brackets upon which it rested had been fastened to the bent supporting it with two eight-penny nails, whereas there should have been used five or more nails of larger size.

At the close of the evidence in the case the defendants below moved the court to instruct the jury to return a verdict for the defendants, which the court refused to do. The verdict of the jury was in favor of the plaintiff below, and, judgment having been rendered thereon, the defendants below bring the case before this court, assigning as error the overruling the motion for