WOODS, Circuit Judge. John Erickson, the defendant in error, recovered judgment against the Dells Lumber Company, plaintiff in error, for personal injuries sustained in the employment of that company while operating a matcher in the company's planing mill at Eau Claire, Wis.,—his foot having been caught and crushed between pulleys under that end of the machine near which he was required to be when operating it. The gist of the declaration is that the negligence of the company which caused the injury consisted in omitting to equip the matcher with a spring to hold the boards being matched against the guides, and in omitting to cover or guard the pulleys; that by reason of the absence of the spring the plaintiff was compelled to press with all his strength against the boards to keep them moving in a straight line under the knives; that, while so engaged, a board broke under his hand, causing him to fall and his foot to be caught between the revolving pulleys. When the evidence was all in, the plaintiff in error moved the court to direct a verdict in its favor, but the motion was denied. Whether that ruling was right is the chief question in the case, and its determination depends upon the inquiry whether the defendant in error should be regarded as having assumed the risk of injury from the unguarded pulleys. That the omission to cover the pulleys, or in some mode to guard the operator of the machine against danger from them, was a breach of the company's duty to provide its employé a safe place in which to work is too clear for controversy; but it is contended that Erickson had become aware of the danger, and that by continuing in the service he assumed the risk. The accident occurred on Tuesday, and it appears that, on the Saturday next preceding, Erickson complained to John Bonk, whom he supposed to be the superintendent of the mill, about the condition of the matcher, and declared his purpose to quit work unless a spring was supplied and the pulleys covered, whereupon Bonk requested him not to quit, and promised that the spring should be supplied and the pulleys guarded. The promise, it is insisted, was not binding upon the company, and was unavailing to Erickson as an excuse for continuing to work under conditions of known danger, because Charles Charlesson, the foreman in the mill, was the one who had charge of the machinery, and determined what repairs and alterations should be made, while Bonk, instead of being the superintendent, was only a fellow servant of other employés, and possessed of no authority to promise that repairs or additions to the machinery of the mill should be made. Erickson testified that he believed Bonk to be the superintendent, and other witnesses asserted a like understanding. It is undisputed that Bonk had authority and was accustomed to hire and discharge the workmen employed in the planing mill. He hired Erickson and fixed his wages, as he did the wages of others, and there are other circumstances in evidence which tended to show that he exercised and had the authority of a superintendent. It was therefore a question for the jury, if the point were controlling, whether he was exceeding his powers when persuading Erickson to continue in a service for which, if he quit, another must have been employed. We are of opinion, however, that the important inquiry was not so much what authority did Bonk really possess, as what

Erickson supposed him to have. If the danger to be avoided had been a newly-developed one, of which the company was without notice, as in the case cited of Railway Co. v. Benford (Tex. Sup.) 15 S. W. 561, where the injury was caused by the going out of an electric light, or in Holmes v. Clarke, 6 Hurl. & N. 359, where the fence about dangerous machinery had broken after the injured servant had taken employment, the rule contended for would not be unreasonable,—that the servant continuing to work in the face of the new danger should be deemed to assume the risk, regardless of any promise of a fellow servant, or of any unauthorized person, to remove the source of danger. In such a case there would be lacking an essential element of liability on the part of the master,—notice of the existence of the condition of danger, or such lapse of time as would be equivalent to notice. See Railroad Co. v. Kenley (Tenn. Sup.) 21 S. W. 326. In this case there is no question of notice. The ground of the master's liability existed from the beginning, and the sole question is whether the servant, who otherwise would be indisputably entitled to indemnity, must be declared to have consented to take upon himself the consequences of the master's known delinquency. There is no reason for imputing to him an intention to do so. Believing, as he reasonably might, that Bonk had all the authority which he assumed to have, his remaining in the dangerous service was an act of the same quality as if his belief had been well founded. His excuse for incurring the risk of further work upon the machine, viewed with reference to his own conduct, is no less meritorious than if the promise to put a guard about the pulleys had come from Charlesson, or some other of unquestioned authority to make it. The dictates of ordinary prudence, of course, are not to be disregarded, and no promise, by whomsoever made, can justify the incurring of imminent and obvious risks; but while the possibility of injury from the exposed pulleys here in question was obvious, and the company's responsibility for failing to provide a suitable guard clear, the danger was not imminent, and under ordinary circumstances was easily avoided, if the operator was watchful. A like hurt, or serious injury of any kind, had never been received before by any one engaged in operating the machine; and it was therefore not a grossly reckless, or even plainly imprudent, act on the part of Erickson to resume work upon the machine on Tuesday, though he found the pulleys yet unguarded, and no spring provided to keep the boards against the guides. To say the least, the question whether he should be deemed to have assumed the risk involved, or to have been lacking in due care for his own safety, was properly left to the determination of the jury. It was manifestly a question for the jury whether the defendant in error was guilty of contributory negligence by reason of the manner in which he held the particular board which he was feeding to the machine when the accident occurred. It follows, too, from what has been said, that the court did not err in refusing to instruct that unless Bonk was in charge of the planing mill "so as to represent the defendant," the complaint made to him was a complaint to a fellow servant merely, and not binding on the master. The exceptions reserved to the introduction of evidence present no question of importance. The judgment of the circuit court is affirmed.

WRIGHT v. SOUTHERN RY. CO. et al.

(Circuit Court, W. D. North Carolina. April 30, 1897.)

1. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANTS.
A railroad employé, who starts upon a trip on a hand car on his own business or pleasure, assumes the risk of injury from a fast mail train, which he knows to be due, and cannot recover against the company for injury received while attempting, pursuant to an order of the foreman, to get the hand car off the track in the immediate presence of the approaching train.

2. SAME—CITY ORDINANCES REGULATING SPEED OF TRAINS.
City ordinances limiting the speed of railway trains are not for the protection of railway employés, but merely for that of persons crossing its tracks on the streets and highways.

3. SAME—FELLOW SERVANTS.
The conductor and engineer of a railway train which collides with a hand car are fellow servants of an employé riding upon the car so that he cannot recover for an injury resulting from their negligence.

4. SAME—STATE STATUTES—RETROACTIVE EFFECT.
State statutes modifying the common-law doctrines recognized by the federal courts in regard to fellow servants will not be construed to have a retroactive effect in the absence of express provision to that effect.

5. PRACTICE—NOLLE PROSEQUI.
Leave to enter a nolle prosequi as to certain defendants will not be granted after the court has rendered an opinion granting a motion to direct a verdict for defendants, though such verdict has not yet been formally rendered.

B. F. Long and L. S. Overmon, for plaintiff.
Charles Price, G. F. Bason, and L. C. Caldwell, for defendants.

DICK, District Judge. (A civil action to recover damages for the death of plaintiff's intestate by reason of the negligence of the defendant companies.) At the close of the plaintiff's case, the counsel of defendants declined to introduce evidence in defense, and made a motion to the court for an instruction to the jury to render a verdict for the defendants on the issues of fact submitted to them. This motion is, in substance, a demurrer to the evidence, and admits the truth of the matters of fact shown by the testimony. As there is no conflict in the evidence of plaintiff, the question of negligence on the part of defendants is a matter of law to be determined by the court.

The arguments of counsel were elaborate and forcible. Many authorities were cited, and diversities and conflicts of decisions were pointed out and commented upon. The diversities of many of these decisions resulted from the peculiar facts in each particular case. Notwithstanding the confusion in cases involving the liability of railroad companies to employés for injuries caused by the negligence of other employés, there are some principles well setled by numerous decisions of the state and federal courts. A person who enters into the service of a railway company impliedly assumes the risks and hazards usually incident to such employment, including liability to injury caused by the negligence of a fellow servant; and that he will exercise ordinary care to protect himself from obvious danger and injury while engaged in his employment. A railway company, as employer, impliedly engages with an employé that the place in which

he is to work and the tools and machinery which are furnished him shall be reasonably proper and safe, and be kept in such condition during the time of employment, and that he shall be associated with suitable, competent, and sufficient fellow servants. A failure to properly discharge these obligations and duties renders the company liable for any injury resulting therefrom to an employé who may be injured without any contributory negligence on his part. This is a positive obligation on the company, and must be fully performed. If the company intrusts the performance of these special duties to an employé, who fails, by negligence or otherwise, to discharge them properly, he is a representative of the company, and not a fellow servant of another employé who may sustain consequent injury. When a railway company has once complied with its positive and implied obligations to its employés, and then exercises due care and diligence in such matters, it is not responsible for subsequent defects unless it has had actual or constructive knowledge of such defects, and reasonable opportunity to supply the proper remedy. Constructive knowledge will be implied if defects are obvious to ordinary inspection, or have existed for an unreasonable time. There are separate and distinctive departments in railway service in which employés are engaged in different lines of employment, but in this case it is not necessary to consider questions of law as to the relations of employés engaged in these separate and distinct departments, as all the parties connected with the occurrence causing the injury were engaged in the department for the safe, prompt, and successful operation of the business of the railway company in the transportation of freights and passengers.

There are some differences of decision between the supreme court of this state and the supreme court of the United States as to the complex and unsatisfactory doctrines of fellow servants which have so frequently been subjects of discussion in the courts and in state legislatures. The counsel of plaintiff earnestly insisted that the contract of employment between the plaintiff's intestate and the defendant company was made and the service was rendered in this state, and that the construction of the terms of the contract and the legal implication arising from the employment should be in accordance with the laws of this state, where the cause of action arose. In Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, the court expressly decided that the question is not one of local law, to be settled by the decisions of the highest court of the state in which the cause of action arises; but is one of general law, to be determined by reference to all of the authorities, and a consideration of the principles underlying the relations of master and servant. In Finley v. Railroad Co., 59 Fed. 419, I attempted to distinguish the facts and principles involved in the case on trial from those presented in Railroad Co. v. Baugh, and follow the decision of the supreme court of this state in Mason v. Railroad Co., 111 N. C. 482, 16 S. E. 698. The circuit court of appeals overruled my views of the law of the case. Railroad Co. v. Finley, 12 C. C. A. 595, 63 Fed. 228. I now feel constrained to strictly observe the

positive decisions of United States appellate courts, clearly expressed in learned and elaborate opinions.

The facts in the case now before us on trial are few and simple, as there is no conflict, and only slight and immaterial diversity, in the testimony. The deceased, at the time the injury was sustained, was not engaged in the actual service of the company at the time and place of his usual employment; and his mode of transportation was controlled by himself and fellow servants under well-known circumstances of danger and hazard. He had gone to Salisbury, to receive payment of his wages, and was detained until about 9 o'clock at night. He was desirous of attending a social party at a place near the railway about five miles distant. Before he started on the hand car, he had made inquiry at the station, and knew that the fast mail train was due at Salisbury, and was behind the schedule time of arrival. In his daily business of repairing the track he was constantly exposed to the danger of passing trains, and well knew the hazard of entering upon the track with a hand car when a fast train was due and expected, and had the right of way. His conduct in going upon the hand car with full knowledge of the peril may well be held to have been a voluntary assumption of the risk of injury. When he saw the headlight of the rapidly approaching mail train, he stopped the hand car, and he and his fellow servants got off in safety, and the others escaped injury. His attempt to remove the hand car from the rails was the proximate cause of the disaster. This attempt was made in obedience to a hasty request or order of the section foreman to "save the hand car." In the face of such obvious and imminent danger he was under no obligation to obey the impulsive order of the foreman. He did not exercise reasonable care and caution to secure safety, and his hazardous attempt, under the circumstances, may well be held to be contributory negligence. Even if he thought that he was bound to obey the order, the act of the section foreman was the negligence of a suitable and competent fellow servant in the same line of employment under a common master. Kirk v. Railroad Co., 94 N. C. 625; Thom v. Pittard, 10 C. C. A. 352, 62 Fed. 232; Coulson v. Leonard, 77 Fed. 538; Railroad Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269.

It was insisted by counsel of plaintiff that the injury was caused by the negligence of the conductor and engineer of the mail train in not ringing the bell at crossings, and running at a greater rate of speed than was allowed by an ordinance of the city of Salisbury. The rule and regulation for ringing the bell at crossings are intended to give notice to persons passing along the highway, and enable them to avoid danger. The right of a railway train to pass over its track is paramount, but persons have a right to pass over crossings made for highways at suitable times and in proper manner, and, if any injury results to a careful and observant traveler by failure to ring the bell of a passing train, the company would be responsible in damages sustained. The ordinance of the city of Salisbury limiting the rate of speed of passing railway trains was intended to guard against danger and injury to citizens pass-