

other; their separate services had an immediate common object—the moving of engines; neither worked under the orders or control of the other. Following that, in 112 U. S. 377, 5 Sup. Ct. Rep. 184, the famous *Ross Case*, the supreme court, by five to four judges, held that a conductor having charge of a train was so far localized in his work, and given such control over the train, that it was fair to hold him as a vice-principal, and not a co-employe with one on another train injured by his negligence; but they do not carry this exception to the old rule beyond the conductor; and while, of course, no man can know what may be the decision of the court in subsequent cases, I am reliably informed that the decision was intentionally and narrowly limited to the case of a conductor. In *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590, a case that went up from Dakota, the court held that one who had charge of the keeping of the cars and machinery in order was not a co-employe with one who was at work as a brakeman, on the ground that it was an independent duty of the railroad company to see that its machinery, its cars, were kept in order; and that that was not a common service with that of one who is employed in running trains. In 119 U. S. there are two cases,—one, *Steam-Ship Co. v. Carey*, p. 245, 7 Sup. Ct. Rep. 1360, and the other *Railway Co. v. McLaughlin*, p. 566, 7 Sup. Ct. Rep. 1366. Neither of those cases adds anything to the question, for they were each affirmed by a divided court, so no principle of law was settled. In one of them the negligence charged was of some agent of the company in failing to provide a suitable rope. That was the duty of one who had charge of the machinery of the company as contradistinguished from one who worked in using such implements; and yet, by only a divided court, the judgment below was affirmed. The other case went up from Iowa, and that was affirmed by a divided court; although in Iowa, by statute, they have abolished the rule in respect to co-employes, just as they have in Kansas. So the rule, as at present left by the supreme court,—and that, of course, guides me,—is that an engineer is a co-employe. It is a common service in a common object,—the moving of trains,—and, following the decisions of that court, I must sustain the demurrer to that complaint.

CANTER v. COLORADO UNITED MIN. Co.

(Circuit Court, D. Colorado. May 4, 1888.)

MASTER AND SERVANT—NEGLIGENCE OF MASTER—PLEADING.

The complaint in an action for damages for personal injuries set out the employment of plaintiff by defendant, and charged a breach of duty on the employer's part in failing to keep a certain ladder in proper repair, and that one of the rounds of said ladder broke and dropped plaintiff. The allegation of negligence was to the effect that "it was the duty of defendant to keep said ladder in good, safe, and secure condition, so that those in its employment might securely ascend and descend the shaft upon the same." *Held.* on de-

murrer, that the duty of the employer was stated too broadly, and that the complaint should be amended so as to confine that duty to the exercise of "reasonable care and diligence."¹

At Law. Action for damages for personal injuries. On demurrer to complaint.

T. M. Patterson, for plaintiff.

R. S. Morrison, for defendant.

BREWER, J. In this case there is a demurrer to the complaint. The cause of action is one for personal injuries. There is really no difference between counsel on both sides and the court as to the rule of law applicable to cases of this kind. The complaint charges a breach of duty on the part of the defendant in failing to keep a ladder in good condition, one of the rounds of which broke, and dropped the plaintiff, causing the accident. It is not the absolute duty of an employer to see that the instruments and machinery he provides are safe. The limit of his duty is reasonable care and precaution in that respect. I think that, taking the complaint as a whole, it may be an open question whether any more than a breach of such duty is charged, and yet, in the clause stating the duty separately, it is stated broader than the law imposes. The particular clause reads thus:

"That it was the duty of said defendant company to keep the said ladder in good, safe, and secure condition, so that those in its employment might ascend and descend the shaft upon the same, secure from harm by reason of the breaking of or injury to the same."

That, construed strictly, is an affirmation that it was an absolute duty, and a breach of that duty necessarily would cause liability, and in cases of this kind, where the form of the complaint is challenged in the first instance,—cases in which we all know that the sympathies of the jury naturally go out to the injured person,—I do not know but what it is fair and right that the language of the complaint should be made technically accurate in describing the duty resting upon the defendant. So, although there is general language in the subsequent part of the complaint that the defendant negligently and carelessly did so and so, I think, as this is challenged in the first instance, it would be no more than fair to sustain the demurrer, and at the same time permit an amendment by interlineation in this clause, so that it shall read that it was the duty of said company to use reasonable care and diligence to keep the said ladder, etc.; or putting at the close of the sentence, "So far as the same could be accomplished by the exercise of reasonable care and diligence," so that, when the complaint is read to the jury, and commented on, it may appear that the limit of its duty is the exercise of reasonable care and prudence.

¹A master's liability for injuries to his servant for defective arrangements is not that of an insurer or of a guarantor. The question is one of reasonable care and diligence. *Batterson v. Railway Co.*, (Mich.) 13 N. W. Rep. 503, 18 N. W. Rep. 534; *Richards v. Rough*, (Mich.) 18 N. W. Rep. 785; *Railroad Co. v. Wagner*, (Kan.) 7 Pac. Rep. 204; *Pierce v. Mills*, (Ga.) 4 S. E. Rep. 381; *Manufacturing Co. v. McCormick*, (Pa.) 12 Atl. Rep. 273; *Bowen v. Railway Co.*, (Mo.) 8 S. W. Rep. 230.

COWAN v. UNION PAC. RY. CO.

(Circuit Court, D. Colorado. May 12, 1888)

MASTER AND SERVANT—NEGLIGENCE OF MASTER—FAILURE TO FENCE RAILROAD TRACK.

Neither common nor statute law in Colorado require that a railroad company shall fence its track to prevent cattle from straying upon it. Hence, the company is not liable for the death of one of its engineers caused by a collision with cattle on the track.

At Law. Action for damages. On demurrer to complaint.

Browne & Putnam, for plaintiff.

Teller & Orahod, for defendant.

BREWER, J. In Cowan against the Union Pacific Railway Company is a demurrer to the complaint. The cause of action is, briefly, that the plaintiff's intestate was an engineer on the defendant's road, and while running a train, stray cattle jumped on the track, whereby the engine was thrown therefrom and he killed. Neither common nor statute law in Colorado requires that a railroad company fence its track to prevent cattle straying upon it, and where there is no obligation there is no liability. Counsel for plaintiff, in his brief, admits there is no authority sustaining this complaint, but insists that somebody must blaze the way, and we ought to. It is sufficient reply to that that it is the duty of the law-making power—the legislature—to blaze the way. The duty of the court is simply to walk *super antiquas vias*. Many a case I decide one way when I should decide differently if I had authority to make as well as construe the law. In the absence of any legislative action establishing a new rule, the only true way and rule for the court is to say *ita lex scripta est*. The demurrer to the complaint will be sustained. This is one of those cases whose pleading, I think, in the nature of things, cannot be changed so as to make a cause of action.

HOLLAND v. BROWN *et al.*

(District Court, D. Oregon. May 22, 1888.)

1. DEATH BY WRONGFUL ACT—ACTION BY ADMINISTRATOR—DAMAGES.

The damages given to an administrator for the death of his intestate by the statute of Oregon (Comp. 1887, § 371) are, when recovered, assets of the estate. They do not include anything but what is consequent on the death, and therefore no allowance can be made for the expenses of the illness attendant on the injury which caused the death, or of the burial of the deceased.

2. SAME.

These damages are in the nature of a compensation paid by the wrong-doer to creditors and next of kin of the deceased for the loss of life in which they have a pecuniary interest, and incidentally the liability to pay them is calculated to secure from carriers and corporations more consideration for the lives of passengers and employes committed to their care.