SUPREME COURT DECISIONS.

[Filed at Sacramento, March 19, 1891.]

Appeal from the Superior Court of Lassen County—Phil. W. Keyser, Judge.

For appellants, A. L. Hart and S. Solon Holl.

For respondents, J. D. Goodwin, D. W. Jenks and W. N. Goodwin.

IN BANK.

ELEANOR MURDOCK, Administratrix, Respondent, vs. C. W. CLARKE ET AL., Appellants, } No. 13,977.

February 4, 1875, Adam Murdock borrowed from the defendant Clarke $8,500, and executed to him his promissory note therefor "with interest thereon at the rate of one and one-fourth per cent. per month from said 4th day of February, 1875, interest payable semi-annually, and if not so paid to be added to the principal and bear a like rate of interest;" and at the same time conveyed to him certain real property consisting of the "Big Valley Ranch" and the "Beaver Creek Ranch" "for the purpose of securing the payment of said promissory note according to the terms thereof." March 22, 1875, Clarke conveyed to his co-defendant Cox an equal one-half of the interest in said note and security, and on the same day Murdock borrowed from Clarke and Cox the further sum of $5,000, for which he gave them his promissory note for that amount "with interest at the rate of one and a half per cent. per month from date until paid." At that time it was agreed between Murdock and the defendants that the defendants "should have and hold the possession and control" of the said real estate, together with certain personal property "until the said promissory notes, with interest thereon, together with such further amounts or sums as should be advanced and paid out by said Clarke and Cox for said Murdock, should be fully paid to them." April 10, 1875, a bill of sale of said personal property was executed by Murdock to Clarke and Cox "in pursuance of said agreement, and as further security for the payment of said several amounts." The defendants took possession of the ranches aforesaid on the 22d day of March, 1875, and after the execution of the bill of sale therefor they also took possession of certain of the personal property therein described. After the execution of said bill of sale the defendants at the request of Murdock advanced and paid to and for his use and benefit other sums of money, for some of which he gave them his note "with interest at the rate of one and one-half per cent. per month," and for a portion of which "no note or instrument in writing has ever been given." Murdock died intestate December 7, 1875, and thereafter his administratrix (the respondent herein) brought this action against the defendants for an accounting of the money received by them; and in the prayer to her complaint asked "that such sum as may be necessary for that purpose be appropriated to the payment of the said sums of money borrowed of the said defendants by the said Adam Murdock, with the interest thereon; and that said applications of said money to such payment be made as of the date at which the said money was received by the defendants."

The case came on for trial April 30, 1888, and in its decision, rendered February 18, 1889, the court settled the account of the defendants from the time they took possession of said property down to May 1, 1888. In its findings of fact the court found "that since they have been in the possession of said property, as aforesaid, the total expense of defendants in the necessary and proper management and care of said property, properly chargeable to said estate, has been $34,358 57, and their receipts from the products of said ranches, the sales of cattle and leases of hay land, have amounted to $48,160 45." The court also found that the defendants had, in addition to realizing the foregoing amounts from said property, made use of the property so held by them for their own benefit, and that "the value of the use and occupation of the said ranches on the part of the defendants for their own stock since the 1st day of November, 1877, up to the present time, is $1,000 per annum, and that the defendants are properly chargeable therewith." It also found "that no part of any money received by the defendants from the sale of stock or other products of the ranch, or from the leasing of hay land, has been applied to the payment of the debts due to them by the estate of Adam Murdock;" and, in conclusion, "that upon a full accounting the plaintiff was indebted to the defendants on the 1st day of May, 1888, in the sum of $29,752 59 no credit for compounding of interest being allowed defendants." From these findings the court found as its conclusion of law that the plaintiff was entitled to a reconveyance of the property "upon the payment to said Cox and Clarke of the said sum of $29,752 59, with simple interest on the notes held by them against said estate since the 1st day of May, 1888, and such further sum as may have been expended by them for the benefit of said estate since said date, less such sum as they may have received from said estate by the sale of cattle and other products, and the leasing of hay land, and less a rental of $1,000 per annum since said date for the use of said ranches for their own stock;" and directed a decree to be entered accordingly. Prior to the entry of the decree a supplemental account, rendered under the foregoing directions, from May 1, 1888, was settled by the court, and in its decree, after settling said account, the court found that there was a total of $31,926 37 due and owing from the plaintiff to the defendants, and directed and decreed that "upon the payment by plaintiff to the defendants of the said sum of $31,926 37, within thirty days after the entry of this decree, the defendants shall convey to the estate of Adam Murdock, deceased," all the said property then remaining in their hands. This decree was entered July 3, 1889, and thereafter the defendants appealed to this court "from the part of the judgment and decree rendered in favor of said defendants against said plaintiff, and which adjudges that no credit for compounding of interest be allowed the defendants, and which adjudges that there was due from the plaintiff to the defendants at the date of filing said decree, $31,926 37 only."

The points presented on behalf of the appellants are that the court should have computed interest upon the $8,500 note by compounding the same according to its terms, and that the same rate of computation should be continued until the entry of the decree.

1. The rules governing the application of indefinite payments made by a debtor to his creditor, to whom he owes different obligations, had their origin in the civil law; but in those countries where the common law prevails the rules of the civil law have been greatly modified, and in some respects entirely repudiated. Both systems concur in giving to the debtor the right to designate at the time of the payment the debt to which he wishes the payment applied. Both systems also hold that if the debtor shall not then designate the debt to which he wishes the payment applied, the creditor may make application of the payment, and that, if neither make such application, it shall be made by the court. The principles upon which the application is to be made by the creditor or by the court differ widely in the two systems. By the rules of the civil law, if the debtor at the time of payment makes no application thereof, it is the duty of the creditor to make application in accordance with the supposed intention of the debtor, and to that debt upon which the creditor would have applied it had he been the debtor; and that any application by the court must be made to that debt which the debtor at the time had the most interest to discharge, irrespective of its effects upon the creditor. (1 Domat's Civil Law, Book 4, Title 1, Sec. 4; 1 Evans' Pothier on Obl., p. 528; Civil Code of La., Arts. 2163 to 2166.)

This rule has been recognized in some of the States of this country, but in the courts of the United States and of the greater number of the individual States, it has been repudiated, and it may now be considered as the settled rule in this country wherever the Common Law prevails that when neither party to the transaction makes any application of the payment, and there are different debts due from the debtor to the creditor, the law will make the application in such a manner, in view of all the circumstances of the case, as is most in accordance with justice and equity, and will best protect and maintain the rights of both parties. (Field vs. Holland, 6 Cranch 8; Logan vs. Mason, 6 Watts & S. 9; Stone vs. Seymour, 15 Wend. 19; Smith vs. Lloyd, 11 Leigh, 511; Allen vs. Culver, 3 Denio, 284; Story's Eq. Jur. 459 b; 2 Greenleaf on Ev. Sec. 533.)

One of the elements underlying the rule for the protection of each party in his rights is that the burden shall be made as light upon the debtor as is consistent with giving to the creditor all that the debtor has bound himself to pay. If the creditor by any application that may be made for him can receive all for which the debtor is under an obligation to him, it is but equity that it should be applied in such a mode as will be least onerous to the debtor. On the other hand, when the interest of the debtor cannot be promoted by any particular application of the payment, or when it is a matter of indifference to him in which mode the application is made, the law raises a presumption that the payment was actually received in the way that was of most advantage to the creditor. If the application can be so made as to discharge all the obligations of the debtor without increasing his burden, it will be deemed indifferent to him upon which obligation the payment shall be applied. The principles of this rule find their application in cases where it is held that a payment is to be applied to interest, instead of principal; to an interest-bearing debt in preference to one bearing no interest; to the payment of legal interest instead of that which is usurious; to a debt that has matured rather than to one not yet due; to the payment of legal items in an account, rather than those which are illegal; and, on the other hand, for the purpose of protecting the rights of the creditor, a payment will be applied to the earlier items of an account in preference to later ones; to an unsecured debt, in preference to one for which he holds security; and, when he has more than one security, to that debt for which the security is the most precarious. No specific rule can be laid down that will embrace all the cases that may arise for its application, inasmuch as the infinite variety of human transactions cannot be included within the limits of a formulated rule; and, therefore, courts must be governed by principles, rather than by fixed rules. In this State an attempt has been made for the guidance of courts in this matter, but the rules there prescribed are insufficient for all occasions, and do not embrace even the conditions of the present case. Sec. 1479, C. C., provides: * * *.

"3. If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order; and, if there be more than one obligation of a particular class, to the extinction of all in that class, ratably:

"(1.) Of interest due at the time of the performance;

"(2.) Of principal due at that time;

"(3.) Of the obligation earliest in date of maturity;

"(4.) Of an obligation not secured by a lien or collateral undertaking;

"(5.) Of an obligation secured by a lien or collateral undertaking."

Neither of these subdivisions is directly applicable to the facts in this case. All of the obligations of Murdock are equally secured, and the moneys received by the defendants were at no time sufficient to extinguish all of the interest then due upon the principal obligations. The obligations also bear different rates of interest, and upon one of them the interest is to be compounded semi-annually, while the others bear only simple interest. Hence, instead of having the Civil Code as a guide, the court was compelled to take as its guide the equitable principles found in the above rule. Under these principles it was its duty to apply the payments that had been from time to time received by the defendants to those obligations which were most onerous to the plaintiff, so long as none of those obligations were impaired. Ordinarily this rule would require the payment to be applied in the extinguishment of the interest upon that obligation which bore the highest rate; but, inasmuch as in the present case the obligation which bore a lower rate of interest provided for compounding that interest, that became the most onerous, and, within the principles above stated, was the first to be extinguished, especially since thereby the defendants would suffer no loss, but receive all that Murdock had obligated himself to pay to them.

The findings show that from the time the defendants took possession of the property they were in the annual receipt of an income therefrom far in excess of their expenditures for its care and preservation, and that from that date until the time of the accounting they had in their hands moneys belonging to the plaintiff, which, added to the amount of annual benefit which they derived from the property, and for which the court found they were indebted to the plaintiff, greatly exceeded the interest accruing upon the $8,500 note. It would be contrary to all principles of equity and justice for them to retain this money in their hands and at the same time insist that the interest upon the $8,500 note which they held against Murdock should accumulate by being compounded according to its terms. It was their duty to apply these moneys, as fast as they were received, to keeping down the interest upon the obligations for which they held the property as security, and upon that obligation which was most onerous to Murdock, and upon which the court must presume he would have intended the application, as being most beneficial to him. In applying money that had been received by the defendants, first to the discharge of the interest upon the obligation which provided for its compounding, and whatever surplus there might be to the reduction of the interest upon the other obligation, the court acted in accordance with the principles of the above rule, making the burden upon the plaintiff the least onerous consistent with the obligations that had been made by Murdock, and at the same time giving to the defendants all the money that they could have received had Murdock paid them from time to time the semi-annual interest as it fell due, with the moneys which they held in their hands for him.

This application of the money in the hands of the defendants to the discharge of the interest upon the $8,500 note, instead of being "a modification of the contract entered into between the parties," as is stated in appellants' points, is in reality an exact compliance with the contract. In this mode the interest on the note that was "payable semi-annually" was discharged in exact accordance with the terms of the note. The defendants received all that Murdock had agreed to pay them, and at the very time that such payment was to be made, and at the same time the burden of the different obligations was made lighter upon the plaintiff than it would have been had the other course been followed.

The findings do not show the tabulation or stating of the account between the parties, but merely give the amount of the receipts and disbursements for each year and the result of the accounting, "without making any allowance for compound interest." This result is consistent with the rule we have above stated. Inasmuch as the evidence upon which the findings were made is not before us, and the findings themselves do not show the several dates at which the money was received by the defendants, or present any facts inconsistent with reaching this result, upon the principles herein laid down, we must assume that it is correct. We do not understand that the appellants contest the accuracy of the computation upon this principle. They contend that the account should have been stated by allowing compound interest.

2. The settlement of the account by the court as of May 1, 1888, was an adjudication by it of the amount then due from the plaintiff to the defendants, and was in the nature of a verdict or finding for that amount. A finding by the court in an action upon a promissory note embraces the whole amount due for principal and interest thereon at the date of the finding, and bears interest therefrom as a whole at the legal rate, and not according to the rate of interest stipulated in the note. (Alpers vs. Schammel, 75 Cal. 590; Mill Co. vs. Machine Works, 82 Cal. 184.) Section 1035, C. C. P., prescribes that: "The clerk must include in the judgment entered up by him, any interest on the verdict or decision of the court, from the time it was rendered or made." Under this rule the defendants had no reason to complain of the mode of computation adopted by the court in its conclusion of law.

In the present case, the account having been originally settled as of May 1, 1888, but the decision of the court not having been made until February 18, 1889, and the defendants having in the meantime made expenditures and received income from the property, a supplemental account was required. When the court came to settle that supplemental account it found "that since the trial of said cause, on the 1st day of May, 1888, and up to said 19th day of June, 1889, the said defendants have expended on behalf of said estate the sum of $6,360 25, and have received as proceeds of said property the sum of $4,186 47, leaving due to the defendants for expenditure over and above receipts, in addition to the said sum of $29,752 59, the sum of $2,173 78, making a total of $31,926 37 now due and owing from the plaintiff to the defendants."

We cannot say from this statement in the decree that a proper computation of the amount to which the defendants were entitled was not properly made by the court, inasmuch as it is not shown at what dates the moneys were respectively received or expended by the defendants.

We find no error in that portion of the judgment from which the defendants have appealed, and it is, therefore, affirmed. HARRISON, J.

We concur:
DEHAVEN, J.,
SHARPSTEIN, J.,
PATERSON, J.,
GAROUTTE, J.

[Filed at Sacramento, March 19, 1891.]

Appeal from Superior Court of Placer County—B. F. Myres, Judge.

For appellants, D. M. Delmas and Robert J. Devlin.

For respondent, Hale & Craig.

IN BANK.

KATE CONGRAVE ET AL, Plaintiffs and Appellants, vs. SOUTHERN PACIFIC R. R. Co., Defendant and Respondent. } No. 13,395

This action was brought by the widow and infant son of James W. Congrave, deceased, to recover damages for the death of the latter, who was killed by an accident on a railroad train of the defendant. A demurrer to the complaint was sustained by the court below; and, plaintiffs declining to amend, judgment went for defendant. From this judgment plaintiffs appeal.

The complaint avers that said Congrave, deceased, was a brakeman in defendant's employ upon a train which left the town of Truckee on March 19, 1888, and started westward, destined for Sacramento City. It is averred, in general terms, that the deceased, as such brakeman, was "placed by said defendant under the control and direction and subject to the orders of the conductor of said train;" but it is not averred that the accident which resulted in the death was caused, in whole or in part, by any order or direction given by said conductor to deceased, or that any order or direction whatever was so given. On the other hand it appears affirmatively that the accident was not caused by any order or direction given by the conductor to said deceased. The complaint proceeds to state in detail the circumstances, facts and causes which produced the accident by which the deceased was killed; and they are briefly as follows: The train, proceeding westward, had to pass a certain station called Tamarack. "According to the rules and regulations, time-tables and schedules, made by said defendant to govern and regulate the movements of its trains upon its aforesaid roads, and the times of the arrivals and departures of said trains from stations, and for the *instruction and guidance* of its conductors," said train ought to have left Tamarack at the hour of 55 minutes past 12 o'clock, noon, of said day, and not earlier; and it was "the duty of said conductor" not to have allowed the train to start before said time. But the conductor "in disregard of the aforesaid rules, regulations, time-tables and schedules of said defendant," "negligently and recklessly ordered, caused and permitted said train to leave said Tamarack station in its westward-bound course a long time before the expiration of the proper and schedule time as aforesaid," viz: at 43 minutes past 12 o'clock. "By reason of said negligence, recklessness and breach of duty of said conductor, and the departure of said train from said Tamarack station before its proper and schedule time, as aforesaid," the train collided with another train, and by said collision the deceased was killed. It is stated by way of recital that he was killed "while at his post obeying the orders and directions of said conductor, and performing his duties as such brakeman;" but there is no averment that any particular order was given, or that any such order contributed in the slightest degree to the accident or to the death. The demurrer contained the general ground of want of facts, and also special grounds—one being that the complaint was uncertain, etc., because "it does not appear therefrom what were the duties, or any of them, required of or to be performed by James W. Congrave, mentioned in said complaint as brakeman on the train mentioned therein."

We think that the demurrer was properly sustained and that the judgment should be affirmed.

It is entirely clear on the face of the complaint that the deceased and the conductor were co-employes of defendant. It is also clear that the death was caused by the negligence and breach of duty of the conductor in starting the train before schedule time; no other cause of the accident is intimated in the complaint. There is no averment that the defendant was negligent in the selection of the conductor. And the general rule (whatever exceptions there may be to it) is well settled in England and the United States, and particularly in this State, that a master is not liable to his servant for damages sustained by the negligent act of a fellow-servant, unless the master was negligent in the selection of the servant at fault. It is hardly necessary to cite authorities on this point, as we do not understand counsel for appellant to contend against the general rule as above stated. The earliest cases upon the subject in this country in which the principle was applied to railroad companies and their employes, are Murray vs. R. R. Co., decided by the Supreme Court of South Carolina in 1841 (1 McMulan 385), and Farwell vs. Boston and W. R. R. Co., decided in 1842 by the Supreme Court of Massachusetts, Chief Justice Shaw delivering the opinion. (4 Met. 59.) These leading cases were generally followed in the United States. Very few cases can be found which deny the general rule. They were also followed in England. (Hutchinson vs. York N. & B. R. Co., 5 Exch. R. 343; Wigmore vs. Jay, 5 Exch. R. 354; Bartonshill vs. Reid, 3d Macqueen H. L. Cases, 266.) We need not allude further to authorities in other jurisdictions, as this court has frequently approved the rule. In Yeomans vs. Contra Costa S. N. Co. (44 Cal. 71), the point was directly involved, and the court, among other things, say: "The defendants excepted to these instructions, and contend that the case is within the reason of the rule that an employer is not responsible to his employe for injuries resulting from the negligence, carelessless or unskillfulness of a fellow employe engaged in the same general business. The rule itself *cannot be questioned*. It has been settled by a uniform series of both English and American decisions. The question comes upon the application of the principle to the present case." (In that case it was held that plaintiff, who was an express agent, was a passenger, and not an employe of defendant.) In Hogan vs. Central P. R. R. Co. (49 Cal. 128), the court say: "In Yeomans vs. Contra Costa S. N. Co. we announced the rule of law on this subject, and referred to many of the authorities by which it is sustained. The cases are very numerous, many of them being cited by defendant, and they are to the effect that the master is not liable for injuries suffered by a servant through the negligence of a fellow servant, unless the master was negligent in the selection of the servant in fault. The early cases in Wisconsin, Indiana and Ohio, relied on by plaintiff as sustaining his view of the law, have since been overruled or disapproved." Other cases to the same point are Collier vs. Steinhart (51 Cal. 116), McLean vs. Blue Tent G. M. Co. (51 Cal. 256), McDonald vs. Hazelhue (53 Cal. 35), Brown vs. C. P. R. R. Co. (72 Cal. 523), Fagundes vs. C. P. R. R. Co. (79 Cal. 97).

It is true, however, that there has been some difference of opinion as to the meaning of the phrase "fellow servants;" and a few of the cases have recognized a distinction growing out of different grades of employment. There has also been recognized in a few instances what may be called the doctrine of "vice principalship;" that is, where one general employe is held to have been given the entire and unlimited control and management of the whole business of the principal, so that he stands in all respects in his principal's place, and all his negligent acts are deemed to be the direct acts of the principal. And upon these asserted principles we understand appellant to mainly rest this case. It is contended that as the conductor was superior in grade to the deceased brakeman, and had certain authority over him, and as the conductor, with respect to the running of the train, was the vice principal, therefore the general rule applicable to fellow servants does not apply. In support of this position the case of Chicago and M. R. R. Co. vs. Ross (112 U. S. Rep. 377) is cited.

The facts of the last-named case are not exactly like those in the case at bar. It may be assumed, however, that the opinion of the majority of the court in that case is favorable to the appellants' contention. That seems to be the view taken by the four dissenting Justices—Bradley, Matthews, Gray, and Blatchford; for, in expressing their dissent, they say: "We think that the conductor of the railroad train in this case was a fellow servant of the railroad company with the other employes on the train. We think that to hold otherwise would be to break down the long established rule with regard to the exemption from responsibility of employers for injuries to their servants by the negligence of their fellow servants." But it is to be observed that the majority of the court were not governed or restrained by any statutory provision. They were at entire liberty to consider the philosophy of the subject, and to follow the direction of their own judgments as to what should be the rule. The decision was not given in view of the statutory law of California upon the point, or of any similar law of any other State.

The Civil Code of California went into effect January 1, 1873, and under the head of "Obligations of the Employer," it provides as follows: "Section 1970. An employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer *in the same general business*, unless he has neglected to use ordinary care in the selection of the culpable employe." This section of the code not only re-states the rule first established by judicial decision, as to injury received through the negligence of a fellow-servant, but it clears away to a great extent the difficulties which may have existed as to the meaning of "fellow-servants." It declares them to be those employed "in the same general business." And if the employes on a train of cars, including the engineer, the conductor, the fireman, and the brakeman, are not persons employed in the same business, it would be difficult to imagine a set of men who could be considered as so employed. They are on the same train; their duties all appertain to the running of that train; each has his own work to do, and the joint work of all is necessary to the business; they are almost constantly in close relations and personal contact with each other; they have the fullest opportunities for knowing each other's qualifications as to carefulness and skill, and detecting any failure of duty; and to them applies peculiarly the reasoning upon which the general rule was originally founded.

This clause of the Code has received judicial construction. In McLean vs. Blue Point Gravel M. Co. (51 Cal. 255), plaintiff was employed to work in a hydraulic mine. One Kegan was "foreman of all work," with "authority to employ and discharge hands." Through the negligence of Kegan plaintiff was injured by a blast. Judgment in the trial court went for defendant, and on appeal plaintiff's counsel contended, as an exception to the general rule, "that the employer is liable for injury to a subordinate servant by the negligence of a superior." The court affirmed the judgment, and in its opinion, after quoting section 1970, said: "The injury to the plaintiff was caused by the negligence of Kegan, the foreman of defendant, who was a fellow servant with the plaintiff—'another person employed by the same employer in the same general business,' that is the business of working the mine of defendant—Kegan being in the blasting, and plaintiff in the hydraulic department of the 'general business.' * * The law of this State respecting this subject, as set forth in the Code referred to, recognizes no distinction growing out of grades of employment of the respective employes; nor does it give any effect to the circumstance that the fellow servant through whose negligence the injury came was the superior of the plaintiff in the general service in which they were in common engaged; and the alleged distinction in this respect insisted upon by the defendant's counsel, founded, as he claims, on the general principles of law, and the adjudged cases require no examination at our hands. (Collier vs. Steinhart, ante, p. 116.)" It is clear that in deciding this case the court determined that the code swept away the distinctions which appear in some of the "adjudged cases," on the subject of fellow servants. Collier vs. Steinhart, referred to in the opinion (51 Cal. 116), is still stronger to the point decided. Both of these cases were approved in McDonald vs. Hazeltine (53 Cal. 35), which was also a case where an employe was injured through the carelessness of a foreman. These cases were again followed and approved in Stevens vs. Doe (73 Cal. 26), where it was held that "the foreman of a mine and a miner employed to work under his directions are fellow servants; and the owner of the mine is not liable for injuries caused to the latter through the negligence of the foreman, unless he failed to use ordinary care in the selection of the foreman." The same doctrine was announced in Brown vs. C. P. R. R. Co. (72 Cal. 523), and Fagundes vs. C. P. R. R. Co. (79 Cal. 97).

It is contended, however, that the principal may give an employe such authority as will constitute him a "vice principal;" that in that instance such employe stands in the shoes of the principal, and the latter is liable for the employe's negligence by which another employe is injured; and that in the case at bar the conductor was such vice principal. The authorities mainly relied on for this contention are Beeson vs. Green Mountain (57 Cal. 20); Brown vs. Sennett (68 Cal. 225); Sanborn vs. Madera Flume Company (70 Cal. 261), and McCune vs. Southern Pacific Railroad Company (66 Cal. 302).

In the Beeson case the death of the deceased was caused by a defective pipe in a mine; and the only point decided was that a principal is liable for injury to an employe caused by defective machinery. The principle that it is the duty of an employer, himself, to provide safe materials and structures, has never been disputed. There is some language used in the opinion which, perhaps, goes further—for which reason, probably, three Justices dissented. But the case decides nothing more than as above stated.

In Sanborn vs. Madera Flume Company, the plaintiff was injured by defective machinery used in a saw-mill, and the court decided, according to the well-settled rule, that, "it is the duty of the owner of a saw-mill to furnish suitable and safe machinery for the use of his employes."

Brown vs. Sennett, and McCune vs. S. P. R. R. Co., seem to recognize to some extent the doctrine of vice principalship. In the former case it was held that "the foreman of a gang of men to whom a stevedore delegates the *entire management* of the work of unloading a vessel, with *full direction* to control and supervise it, is not a fellow-servant with his subordinate employes." The court says in its opinion that the "defendants *abdicated* the control and management of the entire work to the foreman, and gave him full discretion to control and supervise it." He employed the men, and the court holds that "the foreman was therefore in the performance of the 'job' in place of the master." The case is decided by a mere majority of the court; it makes no allusion to the language of the code, and is hard to reconcile with some former decisions—particularly with Collier vs. Steinhart, above mentioned (51 Cal. 116), and McLean vs. Blue Tent G. M. Co., *supra*. But assuming the case to be correctly decided, the facts were very different from those in the case at bar.

In McCune vs. Cal. S. R. R. Co., a department decision, the defendant was engaged in constructing a railroad. The plaintiff was injured by the negligence of one Fisher, who "was material agent and train dispatcher for defendant, and had charge of the moving of trains." The negligence consisted in his carelessly sending out a special train which collided with a handcar on which plaintiff and others were riding, and injured plaintiff. "A rule of the company declared that no extra engine, either with or without train, unless in company with a regular train, would pass over any portion of the road *except on an order from the material agent or train dispatcher*." The court say: "He represented the defendant; was a vice-principal; he employed and discharged men, and directed the movements of the trains. When he directed the extra train to go up the road, the company directed it." Assuming this case not to be in conflict with the numerous decisions above noticed, it is clear that it is not authority for appellant in the case at bar. The material man and train dispatcher seems to have had control of the entire business of constructing the railroad. He employed and discharged men, and moved all the trains at his own will, without any restraint. The defendant seems to have "abdicated" in favor of this general agent. But in the case at bar the conductor was merely an ordinary employe, who worked with other employes on a train, each having certain duties to perform. He had no power to "direct the movement of trains." He had no authority to direct the movement of the particular train on which he was employed, except in accordance with the regulations and schedules and time-tables by which the defendant directed the work to be done. He had no power to employ or discharge men. It cannot be said that when he started the train before the schedule time "the company directed it." He was not then acting *for* the defendant, but against its express orders. He did not therefore come within the doctrine of vice-principalship—assuming that there may be cases to which that doctrine would apply. Moreover, it was said, and we think it was clearly intended to be decided in Brown vs. C. P. R. R. Co. (72 Cal. 523) that the brakeman and conductor on a railroad train are fellow-servants, and in Fagundes vs. C. P. R. R. Co. (*supra*) it was held that a laborer, a track-worker and a conductor were all fellow-servants.

Our conclusion is that, on the facts of this case as presented in the complaint, the deceased and the conductor were persons "employed by the same employer in the same general business" within the meaning of Section 1970 of the Civil Code, and that, therefore, the defendant is not liable for the death of the one caused by the negligence of the other. Judgment affirmed. MCFARLAND, J.

We concur:
DE HAVEN, J.,
HARRISON, J.,
PATERSON, J.,
SHARPSTEIN, J.

[Filed at San Francisco March 24, 1891.]

Appeal from Superior Court, San Francisco, Department No. 1—Eugene R. Garber, Judge.

For appellant, E. D. Wheeler and Barclay Henley.

For respondent, H. E. Highton, H. C. McPike and J. A. Cooper.

DEPARTMENT TWO.

WHITE, Appellant, vs. WHITE, Respondent. } No. 14,293.

This is an appeal from an order made after final judgment, directing the appellant to pay to the respondent the sum of $7,500, for the purpose of paying certain of her attorneys for professional services rendered to her in the action.

The respondent moves to dismiss this appeal upon the ground, among others stated, "The order appealed from was made after final judgment, and no bill of exceptions to the making of said order was ever served, settled, allowed or filed."

The transcript on appeal herein purports to show that certain affidavits and testimony of witnesses were used upon the hearing of the motion, which resulted in the order appealed from, but there is no bill of exceptions in the record. In the case of Somers vs. Somers, (81 Cal. 608,) the members of this court were divided as to the proper practice to be pursued in authenticating the record on appeal from this class of orders, but since then the court has adopted Rule 32, which we think should be deemed as settling the practice, so far as relates to appeals taken since it went into effect; and this appeal having been taken since that date, the rule is decisive of the question arising on this motion. The rule is as follows:

"In all cases of appeal to this court from orders of inferior courts the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authorization is provided by law."

Appellant suggests a diminution of the record so as to have the transcript herein properly certified by the clerk of the court below; but it is manifest that such certificate could not supply the place of a bill of exceptions, which is required by the rule just quoted.

Appeal dismissed; remittitur stayed for thirty days. DE HAVEN, J.

We concur:
MCFARLAND, J.,
SHARPSTEIN, J.

Mrs. Shaw is said to have made $15,000 by her whistling the last season. Thousands of women who want $15,000 have to "whistle for it," and then they don't get it.—*Norristown Herald.*

"WHAT it costs" must be carefully considered by the great majority of people, in buying even necessities. Hood's Sarsaparilla combines positive economy with great medicinal power. It is the only medicine of which can truly be said "100 Doses One Dollar."

ONE ENJOYS

Both the method and results when Syrup of Figs is taken; it is pleasant and refreshing to the taste, and acts gently yet promptly on the Kidneys, Liver and Bowels, cleanses the system effectually, dispels colds, headaches and fevers and cures habitual constipation. Syrup of Figs is the only remedy of its kind ever produced, pleasing to the taste and acceptable to the stomach, prompt in its action and truly beneficial in its effects, prepared only from the most healthy and agreeable substances, its many excellent qualities commend it to all and have made it the most popular remedy known.

Syrup of Figs is for sale in 50c and $1 bottles by all leading druggists. Any reliable druggist who may not have it on hand will procure it promptly for any one who wishes to try it. Do not accept any substitute.

CALIFORNIA FIG SYRUP CO.
SAN FRANCISCO, CAL.
LOUISVILLE, KY. NEW YORK, N.Y.

Changed Daily for the Red House.

OWING TO THE BAD FAITH OF MANY OF THE MERCHANTS AGREEING SOMETIME AGO TO CLOSE THEIR BUSINESS AT 6 O'CLOCK P. M., AND HAVING BROKEN IN SOON AFTER, THEREFORE FROM THIS DATE OUR STORES WILL BE OPEN UNTIL 8 O'CLOCK FOR BUSINESS.

SPECIALS IN MILLINERY.

The most popular Shade Hat for this season is the Leghorn. The astonishingly low prices for these goods place them within the reach of all. Large wreaths of flowers are used for trimming, and also tips and ribbon. We have special values in Untrimmed Leghorns at............ ....50, 75 and 95 cents and up

We have made a special price on our Ladies' and Misses' Broad-brim Milan Braid Shade Hats, in black and colors, trimmed with long wreath..... ....65 cents

Ladies' Lace Toques, handsomely trimmed with flowers and ribbons..$3 50

Children's Sailor School Hats........15 cents

$10--Men's Suits--$10.

Our $10 Men's Suits, in medium and heavy weight, are the best we have ever offered for that price, desirable patterns, well made and perfect-fitting garments.

Men's Gray All-wool Cheviot Sack Suits, sizes 35 to 42........$10
Men's Mixed Brown All-wool Sack Cheviot Suits, sizes 35 to 42........$10
Men's Double and Twist Light Gray Cassimere Sack Suits........$10
Men's Dark Brown Hair-line Sack Suits........$10
Men's Extra-heavy Dark Gray All-wool Sack Suits........$10
Men's Steel-mixed Double and Twist Cassimere Sack Suits........$10
Men's Dark Brown Check Cassimere Cutaway Frock Suits........$10

EXTRA VALUES IN MEN'S PANTS.

Men's Half-wool Dark Satinet Pants........$1 45
Men's Gray Wool Cassimere Pants........2 00
Men's Heavy All-wool Cheviot Pants........2 50
Men's Black Wool Cheviot Pants........2 50
Men's Dark Fancy-striped Wool Cassimere Pants........3 00
Men's Dark Silk and Wool Cassimere Pants........3 50
Men's Medium-weight Fancy-striped Worsted Pants........4 00

NEW IN STOCK TO-DAY.

Three Cases of Boys' Clothing of Superior Value.

300 Boys' Fancy Check Cotton Cassimere Knee-pants Suits, ages 4 to 12 years........$1 00
150 Boys' Dark Brown Check Satinet Knee-pants Suits........1 25
200 Boys' Dark Mixed Knee-pants Suits........1 75
175 Boys' Dark Gray Check Moleskin Knee-pants Suits........2 00

C. H. GILMAN,
RED HOUSE, Sacramento, Cal.

THE GRAND OPENING

Now in progress. Most successful of the season.

MILLINERY---IMPORTED STOCK.

Latest Designs and Novelties in Spring Goods.

The New York Milliner,

S. T. MI HOOVER, 625 J Street.

Real Estate, Etc.

A RARE OPPORTUNITY

Good Agricultural Land for $10 to $20 per Acre.

The Pacific Improvement Company has recently purchased twelve thousand acres of land in the heart of Tehama County, for the purpose of promoting subdivision and settlement. This land embraces lands from first-class Sacramento Valley agricultural land, to land of fair average quality, and is offered at from $10 to $20 per acre, in subdivisions of 40, 80, 120, 160 and 320 acres.

The terms upon which these lands are offered are especially attractive. They will be sold in subdivisions, as above indicated, by the payment of interest only for three years, at which time the purchaser can begin the payment of principal by paying the first of five equal annual installments. Thus no part of the principal is to be paid for three years, and then the purchaser is to have five years in which to pay five equal annual installments, with interest at the rate of 7 per cent. per annum, making payments extending over a period of eight years. Intending purchasers are assured that this is an opportunity to purchase land of fair average quality at $10 per acre, and good agricultural land at $20 an acre, with other grades of land at prices to correspond between these figures.

The assertion is frequently made that good lands, suitable for general farming, and especially adapted for fruit-growing, cannot be had in California for less than from $60 to $100 an acre. An examination of the land subject of this advertisement will prove to home-seekers that this is an opportunity for the purchase of good agricultural land at $20 an acre, and for qualities grading down to fair agricultural land at $10 an acre, on terms of payment which should make the disposition of these lands to actual settlers a result easy of accomplishment.

The primary object of the purchase of this body of land was the breaking up of a large holding for the purpose of promoting its settlement in smaller quantities and its devotion to diligent husbandry.

For further particulars call upon, or address,
WM. H. MILLS,
Land Agent of the C. P. R. R., Fourth and Townsend sts., San Francisco, Cal. fe14-2m

H. S. CROCKER & CO.
208 and 210 J Street,
The Leading Stationers, Printers and Lithographers.
Agents for Caligraph Type Writer and Supplies.
MANUFACTURERS OF BLANK BOOKS.

CAUTION AGAINST FRAUD.

IN THE MATTER OF THE ESTATE OF THOMAS HARRIGAN, deceased, now pending in the Probate Court, no final account has ever been made nor no final settlement as yet. MARGRET HARRIGAN, Executrix and Administratrix.

Miscellaneous.

PROPOSALS
—FOR—
Purchase of Bonds
—OF—
East Riverside Irrigation District.

SEALED PROPOSALS FOR THE PURCHASE of the bonds of East Riverside Irrigation District, to the amount of one hundred and fifty thousand ($150,000), will be received by the Board of Directors of said district, at their office in East Riverside, San Bernardino County, State of California, till 1 o'clock P. M. of the 22d day of APRIL, 1891, at which time and place said board will open the proposals and award the purchase to the highest responsible bidder.

Said bonds are a portion of a series of bonds amounting in the aggregate to two hundred and fifty thousand ($250,000), issued by authority of and pursuant to the provisions of an Act of the Legislature of the State of California, entitled "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, and also by authority of and in accordance with the vote of the qualified electors of said irrigation district, at a special election held December 24, 1890.

Said bonds bear interest from the 1st day of January, 1891, at the rate of six (6) per cent. per annum, payable on the 1st day of January and July in each year.

The principal of each of said bonds is payable as follows, to wit: At the expiration of eleven years, five per cent. thereof; at the expiration of twelve years, six per cent.; at the expiration of thirteen years, seven per cent.; at the expiration of fourteen years, eight per cent.; at the expiration of fifteen years, nine per cent.; at the expiration of sixteen years, ten per cent.; at the expiration of seventeen years, eleven per cent.; at the expiration of eighteen years, thirteen per cent.; at the expiration of nineteen years, fifteen per cent.; at the expiration of twenty years, sixteen per cent. Coupons for the several payments of principal and interest are attached to each bond.

None of said bonds will be sold for less than ninety (90) per cent. of the face value thereof.

Said board reserves the right to reject any or all bids.

All bids should be addressed to East Riverside Irrigation District, San Bernardino County, California, and marked "Proposals for Purchase of Bonds."

By order of the Board of Directors of East Riverside Irrigation District.

East Riverside, San Bernardino County, California, March 17, 1891.
HENRY W. ROBINSON, President.
J. A. VAN ARSDALE, Secretary. mr26-20t

FRIEND & TERRY
Lumber Company.
MAIN YARD AND OFFICE 1310 SECond street. Branch Yard, corner Twelfth and J streets.

LAWN :-: MOWERS :-: REPAIRED.
Fourteen years experience.
Saw Filing and General Repairing.
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Opposite Hale Bros. Store. mr26-tf