MAMMOTH VEIN COAL COMPANY *v.* LOOPER.

Opinion delivered July 13, 1908.

1. MASTER AND SERVANT—SAFE PLACE TO WORK.—It is the duty of the master to exercise care in furnishing a reasonably safe place in which the servant is required to work, and in discovering defects and repairing them; and this care must be tested by the business in which the servant is engaged and the circumstances surrounding it. (Page 219.)

2. SAME—NEGLIGENCE—BURDEN OF PROOF.—The burden is on a servant suing the master for failure to exercise due care in furnishing a safe place to work to show negligence on the master's part, and this negligence cannot be inferred merely from the occurrence of the injury. (Page 219.)

3. SAME—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.—Where a miner was engaged in digging coal in a room in a mine and was directed to remove a prop at the entry in order to permit a car to enter the room, and was injured by reason of a rock falling from the roof when the prop was removed, the jury were authorized to find that the master was negligent in failing to keep the roof in safe condition. (Page 220.)

Appeal from Sebastian Circuit Court, Greenwood District; *Daniel Hon,* Judge; affirmed.

Read & McDonough, for appellant.

1. The court should have given a peremptory instruction in favor of appellant. The burden of proving negligence on the part of appellant was on the appellee. 79 Ark. 440. The hap-

pening of the accident does not warrant the finding of negligence. 101 S. W. 738. The falling of the rock is of itself no evidence of the master's negligence. 82 Pac. 387.

2. Appellee is shown to be an experienced miner. He voluntarily undertook to put his room in a condition that a car could be taken out. He assumed the risk. Not only so, but under the facts in evidence he is also barred of recovery by his own contributory negligence. 58 Ark. 177; 77 Ark. 367; 104 S. W. 174; 77 Ark. 290; 79 Ark. 439; 125 Ill. App. 622; 153 Fed. 358; 90 Pac. 433; 152 Fed. 417; 66 Atl. 576; 102 S. W. 740; 65 Atl. 1075. It is the duty of the servant to inform himself of the situation and of the risks incident to the work he is going to perform; and where the danger is obvious, or where he has same or equal means of knowing the danger as the master, he assumes the risk. 100 S. W. 83; 67 Atl. 148; 57 S. E. 1041. He assumes the risk of dangers which he might have discovered by ordinary examination. 67 Atl. 177; *Id.* 343.

Jesse A. Harp, for appellee.

HILL, C. J. Looper was a coal miner, working in the mine of the appellant company, and was injured by a rock falling from the roof in an entry. He brought suit against the company and recovered judgment, and the company has appealed.

The principal question argued is the sufficiency of the evidence to sustain the verdict. The coal company introduced no testimony, and the case was tried on the evidence introduced by the plaintiff, which showed this state of facts: Looper was engaged in digging coal in a room on the second east entry, and, owing to a prop sustaining the roof being placed in the entry where the mine track turned into his room, the mine cars were unable to get into his room to carry out his coal. On the morning of the accident he made repeated demands for cars, and one was taken into his room by lifting it off the track; and when it was loaded, and he desired to send it out, it could not be taken out on account of this prop. He made demand for the prop to be removed, and the mine foreman sent word to him to do it himself. He then went under the rock supported by the prop in order to change its location, but before he had done anything the rock fell upon him, and injured him.

The evidence shows that it is the duty of a mine owner to keep the entries in safe condition, and it is the duty of the miner to care for his room, as he is constantly changing its roof and face in doing his work. The rock supported by the prop which fell, while not in the direct path of the miners in using the entry as a passage way of the mine, was in the entry, and the proper care of the whole entry was the duty of the master.

Looper testified that he did not know that the rock was dangerous, that he had never noticed it, and had made no test of it to ascertain whether it was loose. He had not got ready to examine it nor begun his work when it fell. He described it as it appeared after it had fallen as follows: "The rock seemed to be a water-slip rock; water run over the rock; could see kind of settlings on it; yellowish settlings; something like copperas; showed that the water had been running over it for sometime."

The other witness, who was a driver in the mine, and had carried the car into Looper's room, testified that he had not noticed the condition of the rock before it fell, but he described it as he saw it after it had fallen as a flat rock and a "water-slip" rock.

What was said in *St. Louis & S. F. Rd. Co.* v. *Wells,* 82 Ark. 372, applies here. "The only question is whether the evidence showed a defect which the defendant could, by proper inspection, have discovered, for under no other circumstances could it be held responsible for the injury which resulted. Negligence of the company can not be inferred merely from the occurrence of the accident. That must be proved, and the burden of establishing it is on the party who alleges it;" citing authorities.

In *St. Louis, I. M. & S. Ry. Co.* v. *Andrews,* 79 Ark. 437, it was said: "It is the duty of the master to exercise care in furnishing a reasonably safe place in which the servant is required to work, and to exercise ordinary care in discovering defects and in repairing them. The burden is upon the injured servant to show negligence on the part of the master in this regard before recovery can be had for the injury. Nor can negligence be inferred merely from the occurrence of the injury."

In performing the duty of inspection, the master must use ordinary care and prudence to see that the working place is safe;

and this care and prudence must be tested by the business in which he is engaged and the circumstances surrounding it and commensurate to its requirements. *Ultima Thule, Ark. & Miss. Ry. Co.* v. *Calhoun,* 83 Ark. 318.

Applying these settled principles to the facts at bar, it can not be said that the jury was unauthorized to find a lack of care commensurate to the duty required of the company to provide a safe roof for the entry. All parts of the entry were a passage way for the miners; it mattered not that they did not usually pass under this rock. It was over their passage way; and Looper was sent there, not to repair a dangerous place, but merely to change the location of the prop in order that the car might pass into his room. This being in the entry way, he had a right to assume that the master had exercised care in keeping the roof in a safe condition, and his going under it without a knowledge of its dangerous condition was no more an assumption of the risk than if he had passed under it going into his room to dig coal.

The condition of the rock—a "water-slip" rock, as described by the witnesses—was sufficient to justify the jury in believing that, had the company made proper inspections of the place, in order to perform their duty of seeing that the roof was safe, the dangerous condition of this rock would have been discovered before Looper was sent under it to make the change in the location of the prop. The question of fact here is not unlike that in *St. Louis & S. F. Rd. Co.* v. *Wells,* 82 Ark. 372; *Ultima Thule, Ark. & Miss. Ry. Co.* v. *Calhoun,* 83 Ark. 318; *Kansas City Southern Ry. Co.* v. *Henrie, post,* p. 443.

The instructions, which may be found in the footnote*, were in accord with the principles herein quoted and referred to, and fairly presented the case to the jury. The evidence was sufficient to sustain the verdict, and the judgment is affirmed.

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*The court on its own motion gave the following instructions:

"1. The presumption is that the mine owner, the defendant here, has done its duty by furnishing a safe place for its employee, the plaintiff; and if the place furnished for the plaintiff's employment was not safe and was defective, there is a further presumption that defendant had no notice of the defect, and was not negligently ignorant of it, and it devolves upon the plaintiff to show that the mine in which the alleged injury occurred was not safe, and the defendant had knowledge