COVINGTON *v.* LITTLE FAY OIL COMPANY.

Opinion delivered February 4, 1929.

1. MASTER AND SERVANT—DUTY TO FURNISH SAFE PLACE.—A master is required to exercise only ordinary care to supply a safe working place for the use of his servants and to exercise reasonable diligence in informing himself that the working place is safe.
2. MASTER AND SERVANT—INSTRUCTION AS TO DUTY TO FURNISH SAFE PLACE.—In an action for injuries to an employee, it was not error to modify a requested instruction to find for plaintiff if a ladder furnished him contained a rung with bark on it, by adding the words, "that rendered it defective and dangerous."
3. NEGLIGENCE—PROXIMATE CAUSE.—Unless defendant's negligence is proved to be the proximate cause of the injury to the plaintiff, there can be no recovery therefor.
4. MASTER AND SERVANT—BURDEN OF PROOF.—In an action by an employee for personal injuries, the burden of proof was on the defendant to establish contributory negligence or assumption of risk, unless this was shown by the plaintiff's own evidence.
5. TRIAL—ABSTRACT INSTRUCTION.—It was not error to refuse an instruction that plaintiff was not required to inspect the ladder from which he fell, where no such issue was raised in the case, such instruction being abstract and misleading.
6. APPEAL AND ERROR—WHEN INSTRUCTIONS HARMLESS.—Giving of defendant's instructions, containing mostly matters covered by instructions given at plaintiff's instance, was not error, though the court might properly have refused them.
7. EVIDENCE—ADMISSIONS OF PLAINTIFF.—In an action against an employer for injuries to an employee, testimony of defendant's foreman that plaintiff told him that he fell from the ladder because his gloves were oily, causing his hand to slip, *held* competent.
8. EVIDENCE—COMPETENCY OF ADMISSIONS.—Any statements made by a party to a suit against his interest bearing on material facts are competent as original testimony.

Appeal from Ouachita Circuit Court, Second Division; *W. A. Speer,* Judge; affirmed.

STATEMENT BY THE COURT.

E. Covington sued the Little Fay Oil Company to recover damages for personal injuries received by him while working on one of its oil derricks. The defendant denied negligence on its part, and pleaded assumption of risk and contributory negligence on the part of the plaintiff.

According to the testimony of E. Covington, he was twenty-five years of age, and the injury complained of was received by him in May, 1927, while he was working on one of the defendant's oil derricks. He had been employed by the defendant seven or eight months to work on its oil derricks, and, in connection with other employees, was working under the direction of a foreman. They worked on the derricks of about seventeen wells. On the day he was injured, at about a quarter after four in the afternoon, E. J. Norton, his foreman, directed him to go up on the walking beam of a derrick and put the rod hook in the T on the walking beam. The walking beam was situated on the second girder of the derrick, about twenty-two feet high. The derrick itself was about 112 feet high, and it was ascended by the workmen on two ladders, which were in two sections. The bottom section of the ladder went to the top of the second girder, and was used by the plaintiff in climbing up on the derrick for the purpose of carrying out the instructions of his foreman. After he had finished his work, he walked around the side of the derrick to the ladder, and started down it. There was a piece of bark on one of the rungs of the ladder, where he had to put his hand in order to go down the ladder. When he caught the rung of the ladder, the bark slipped, and this caused him to fall and break his left leg and arm. The bark on the rung of the ladder was loose, and this caused it to slip off when he took hold of it. Plaintiff had worked on the derrick before, but did not know that the rung of the ladder had bark on it or that the bark was loose and likely to slip off.

It was the duty of the defendant to have ladders of solid wood with no bark on them.

According to the evidence for the defendant, an inspection was made of the ladder soon after the plaintiff received his injuries, and there was no rung which appeared to have had any bark that had slipped off of it. One of the rungs of the ladder higher up did have some bark on the bottom side of it, but the bark fitted on tight, and none of it had fallen off. Besides this, the plaintiff could not have reached the rung of the ladder that had the bark on it in climbing to the place where he was working. None of the rungs of the ladder up to the place where the defendant climbed the ladder had any bark on them and none of them showed that any bark had become loose and slipped off of them. The plaintiff told the foreman, after the accident, that he had on gloves which had become greasy with oil, and that his greasy gloves caused his hand to slip and that this made him fall. He said his glove was so oily that he could not hold on to the rung of the ladder when he caught hold of it.

There was a verdict and judgment for the defendant. The plaintiff complains that the court erred in modifying instructions Nos. 1 and 2 asked by him, and in refusing to give instruction No. 5 requested by him.

Instructions Nos. 1 and 2 read as follows:

"1. You are instructed that it was the duty of the defendant company [to exercise ordinary care] to furnish plaintiff a reasonably safe ladder on which to ascend and descend the derrick, and to keep said ladder in a reasonably safe condition, and if you believe from a preponderance of the evidence in this case that the ladder which was furnished plaintiff to use in going up and down the derrick contained a rung which had bark on it, [that rendered it defective and dangerous] and that this condition was unknown to plaintiff [and was known to defendant, or could have been known by a reasonably careful inspection], and if you believe that plaintiff had crossed over from the walking beam in said derrick and

had got on to said ladder to go down, and you find that he was in discharge of his duty, and was exercising ordinary care for his own safety, and had not assumed the risk, and you believe from a preponderance of the evidence that he took hold of the rung of said ladder which had the bark on it, and that the bark broke loose from said rung and caused plaintiff's hold to be broken from said ladder and caused him to fall, and injured him as complained of in his complaint [and you find that this was the proximate cause of the injury], then you will find for the plaintiff.

"2. You are instructed that plaintiff assumed all the risks and hazards ordinarily incident to his employment, but you are further told that he does not assume the risk or danger which arises from negligence on the part of the defendant company, its agents or employees [unless he knows of such danger and appreciates the same]; and you are further told that it was the duty of the defendant company [to exercise ordinary care] to furnish a reasonably safe ladder for plaintiff to work on, and to make reasonable inspections from time to time, and to make necessary repairs, if needed, to keep said ladder in a reasonably safe condition; and if you believe from the evidence in this case that the defendant company was negligent in performing this duty, and that said negligence was the proximate cause of the injury, then you are instructed to find for the plaintiff [provided you further find that plaintiff was in the exercise of ordinary care for his own safety and had not assumed the risk]."

Instruction No. 5 reads as follows:

"You are instructed that the plaintiff assumed the risk of injury from dangers and defects which are so patent and obvious that he either knew, or, in the exercise of ordinary care, should have known, of their existence. But you are further told that the plaintiff was under no primary obligation to investigate for latent defects, or to test the fitness and safety of the place, fixtures or appliances provided him by the defendant company. Yet you are further instructed that the plaintiff had a right

to rely upon the obligation resting upon the defendant company to exercise reasonable care to see that they were fit and safe; and, although the circumstances may be such that the plaintiff is chargeable with knowledge of such defects as are patent and obvious, and of such defects as, in the exercise of ordinary care, he ought to have knowledge of, yet he is not to be deemed as having notice or assuming the risk of such defects and insufficiences as can be ascertained only by investigation and inspection for the purpose of ascertaining that there is no danger."

J. B. Milham, for appellant.

T. D. Wynne and *Chas. A. Miller,* for appellee.

HART, C. J., (after stating the facts). The modification complained of by the plaintiff in instruction No. 1 is shown by the brackets as the instruction is copied in our statement of facts. The first modification consists in the addition of the words in the brackets, "to exercise ordinary care," in defining the duty of the defendant to furnish plaintiff a reasonably safe ladder. There was no error in this. It is well settled that a master is only required to exercise ordinary care to supply a safe place for the use of his servants, and in the discharge of his duty is bound to exercise reasonable diligence in informing himself that the working place is safe. *St. L. S. W. Ry. Co.* v. *Gant,* 164 Ark. 621, 262 S. W. 654; *Western Coal & Mining Co.* v. *Burns,* 168 Ark. 976, 272 S. W. 357; and *St. Louis-San Francisco Ry. Co.* v. *Rogers,* 172 Ark. 508, 290 S. W. 74.

The second modification "[that rendered it defective and dangerous]" was also proper. As we have already seen, the defendant would not be guilty of negligence unless he failed to exercise ordinary care to furnish his servant a safe working place, and this carried with it the duty to make proper inspection to satisfy himself as to whether or not the working place continued to be safe. The words contained within the brackets made plain the meaning of the instruction, and there was

no error in adding them. *Texas Pipe Line Co.* v. *Johnson,* 169 Ark. 235, 275 S. W. 329.

It is equally well settled that, unless the negligence of the defendant is proved to be the proximate cause of the injury to the plaintiff, there can be no recovery. *Meeks* v. *Graysonia N. & A. Rd. Co.,* 168 Ark. 966, 272 S. W. 360; and *Standard Pipe Line Co.* v. *Dillon,* 174 Ark. 708, 296 S. W. 52.

The court also correctly instructed the jury that the burden of proof was on the defendant to establish contributory negligence or assumption of risk, unless this was shown by the plaintiff's own evidence. *Sun Oil Co.* v. *Hodges,* 173 Ark. 729, 293 S. W. 9; *Central Coal & Coke Co.* v. *Lockhart,* 161 Ark. 97, 256 S. W. 37; and *Eureka Oil Co.* v. *Mooney,* 168 Ark. 479, 271 S. W. 321.

Counsel for the plaintiff also ask for a reversal of the judgment on the ground that the court refused to give instruction No 5 requested by him. This instruction is copied in our statement of facts, and need not be repeated here. The matters embraced in the first part of the instruction are covered by instructions Nos. 1 and 2, given as modified by the court, which are also copied in our statement of facts. The last part of instruction No. 5 was properly refused by the court. It was calculated to mislead the jury. There was no contention by the defendant that the plaintiff was required to inspect the ladder for the purpose of ascertaining that there was no danger in climbing it. It is well settled in this State that the court is not required to give abstract instructions or instructions which tend to confuse or mislead the jury because they are argumentative in form.

Counsel for the plaintiff also asks us to reverse the judgment because of the action of the court in giving several instructions for the defendant. We do not deem it necessary to set out these instructions or to review them at length. We have examined them carefully, and, for the most part, they contain matters which had already been submitted to the jury in the instructions given at

the request of the plaintiff. They cover practically the same ground, and differ only in the language used. The court might have refused them, because the matters contained in them were already covered by other instructions given, but there was no error in giving them.

Finally, it is insisted that the judgment should be reversed because the court allowed the foreman of the defendant to testify that the plaintiff had told him that the reason he fell was that his gloves were oily, and this caused his hand to slip when he grasped the rung of the ladder. The record shows that the workmen carried two pairs of gloves, because one of them would become oily in doing their work, and the dry pair then could be used by them in going up and down the ladder. There was no error in allowing the testimony complained of to go to the jury. The plaintiff had a right to speak for himself, and the jury might have found that he was bound by the declarations he made. It is well settled that any statements made by a party to a suit against his interest, bearing on material facts, are competent as original testimony. *Collins* v. *Mack,* 31 Ark. 684; *St. L. I. M. & S. R. Co.* v. *Dallas,* 93 Ark. 209, 124 S. W. 247; *Jefferson* v. *Souter,* 150 Ark. 55, 233 S. W. 805; and *McCormack-Reedy Lumber Co.* v. *Savage,* 169 Ark. 192, 273 S. W. 1028.

We find no prejudicial error in the record, and the judgment will therefore be affirmed.