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Master and Servant-"Simple Tool" Rule

MASTER AND SERVANT—"SIMPLE TOOL" RULE—ASSUMPTION OF RISK—Plaintiff sued under the Federal Employer's Liability Act to recover damages for the loss of an eye, caused by defendant's alleged negligence. Plaintiff, 56 years old, was employed as defendant's section hand, and had worked 18 months prior to the injury. One of his duties was to remove old ties and replace them with new ones. For this purpose, plaintiff was supplied with picks, claw bars, and crowbars. At the time of the accident, one E was working with plaintiff and using a crowbar, plaintiff using a pick. Plaintiff stood outside the rail where he could stick the pick in the end of the tie and, by pulling on the pick handle, aid in removing the tie. He missed the place in the tie at which he aimed and struck the ball of the rail with the point of the pick. When the point of the pick hit the rail, a chip from the point was dislodged, flew up and hit him in the eye, blinding it. Plaintiff knew, at the time of the accident, that the point of the pick was dull, that the handle was crooked, and that the head of the pick was loose in the handle. Three other section hands testified, as did plaintiff, that they had at various times made complaints to the foreman of these defects in the tools, and that the foreman had said that new tools had been ordered and would arrive soon. Plaintiff was very vague and indefinite as to when these conversations with the foreman had taken place.

Verdict for the plaintiff, and defendant appeals from an order overruling a motion for a new trial. *Held*: Judgment reversed. The evidence clearly showed that plaintiff had assumed the risk. *Pennsylvania Ry. Co. v. Martin*, Appellate Court of Indiana, March 14, 1930, 170 N. E. 554.

A pick is a "simple tool," and the master owes no duty to the servant to inspect and know the condition of such tool; if the servant actually knows the defects in such tool, or if the defects are palpable so that he should know of them, and he uses or continues to use such tool, he assumes the risk of such use. *Jenney Electric Light, etc., Co. v. Murphy*, 115 Ind. 566; *Meador v. Lake Shore, etc., Co.* 138 Ind. 290; *American Carbon Co. v. Jackson*, 24 Ind. 390; *Vandalia Ry. Co. v. Adams*, 43 Ind. App. 664; *Beard v. Goulding*, 55 Ind. App. 398; *Standard Oil Co. v. Helmick*, 148 Ind. 457; *Crum v. North Vernon Pump Co.*, 34 Ind. App. 253; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107; *Cleveland, C., C. & St. L. Ry Co. v. Beale*, 42 Ind. App. 588; *Guedelhoder v. Ernsting*, 23 Ind. App. 188.

The reason for the rule is that, in the case of simple, ordinary tools which are known by the servant to be defective and which require no special care or skill in their operation, the master can hardly be said to have superior knowledge of the dangerous qualities of the tool; in such case, an injury occurring from the use of such tool is not the proximate result of the master's negligence, but is the result of the assumption of risk by the servant. *Meador v. Lake Shore, etc., Ry. Co., supra.*

This rule applies unless the master expressly or impliedly promises to remedy the defect. But the mere fact that the servant complains to the master of the defect is not enough to raise such a promise on the part of the master; the promise of the master must be such as induces the servant to continue in the master's employ. *Indianapolis & St. Louis Ry. Co. v. Watson*, 114 Ind. 27; *Hath v. May*, 10 N. E. (Mass.) 807; *Pennsy. Ry. Co. v. Lynch*, 90 Ill. 333; *Louisville & N. Ry. Co. v. Kemper*, 147 Ind. 561.

The rules announced in the principal case are undoubtedly the weight of Indiana authority, and under the view which the court took of the facts (which seems reasonable) the case is rightly decided. R. C. H.