Employer's Liability Acts, as to Co-Employees

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EMPLOYER'S LIABILITY ACTS

AS TO

CO-EMPLOYEES.

A THESIS

PRESENTED FOR THE DEGREE OF BACHELOR OF LAWS.

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ELMIRA, N. Y.
EMPLOYER'S LIABILITY ACTS

AS TO

CO-EMPLOYEES.

CHAPTER I.

EARLY COMMON LAW RULE.

Section 1. In England.

2. In Scotland and Ireland.

3. In America.

Section 1. Common Law Rule in England. — The doctrine of Respondeat Superior, the most important and best known maxim of the law, has one important exception known as the fellow servant doctrine; which holds that an employer, being without fault himself, cannot be made responsible for the negligent act of one servant causing damage to a co-servant. This principle was decided by the courts for the first time in 1837, in the celebrated case of Priestly vs. Fowler, 3 M. & W., 1. In this case a servant sued for damages for an injury caused by the breaking down of a negligently overloaded van. It is easily seen that this is really not a case of "fellow servant" at all, but it is said that it has changed the current of decision and settled it in a new line in a more radical and determined manner than any case ever decided. In 1850
the doctrine was again laid down and finally established. After this the master was not liable to any servant for an injury arising from the fault of a fellow servant, whether such fellow servant be in a position of authority or not. The construction of the term fellow servant is given the widest possible range (Report of House of Commons, committee on employers liability, Parliamentary papers, 1887. 285).

There are three notable exceptions to this rule; in which cases the master will be liable:

1. - Omission to provide suitable materials and facilities for the work.

2. - Engaging incompetent workmen through whose fault the damage occurs.

3. - His (Master's) personal negligence.

Section 2. - In Scotland and Ireland. - The two first cases in Scotland were decided against this principle, and still held to the doctrine of "Respondeat Superior". These two decisions were overruled by the House of Lords on appeal, and though the Scotch have tried to be independent in the matter their efforts have not been successful and the decision of the House of Lords is now the recognized rule in Scottish courts. The Irish courts have followed the rule of Priestly vs. Fowler from the first and
still hold it to be the law.

Section 3.- In America. - The first American case on this topic is Murray vs. S. C. R. R. Co., 1 McM., 385. It seems a horse was running obliquely toward the track. The engineer thought the best and quickest way to get rid of the difficulty was to reach the point the horse was approaching before the horse would be able to arrive there; for this purpose he allowed the engine full headway, but the point was reached simultaneously and the result was that the animal in the flesh derailed his iron brother. The plaintiff, a fireman on the engine, sues for his injury. He obtained a verdict on the lower court of $1500 but the court of errors, assuming that the engine was, as found, negligent, nevertheless held the company not liable; the ground of the decision being that the plaintiff knew that he was to work in concert with others to produce a single result, namely the running of the train. He knew the risks and assumed them, this much was admitted by the nine judges. The final point then is, does the company guarantee the plaintiff against the negligence of his co-workers? It was held it does not so guarantee by six judges, three dissenting. The court states that this is the first case to be decided on this point, that there must have been many similar accidents previously, but as no question has been raised, it seems that every one took it for granted that the master was not liable. It was stated by
those Anglo-maniacs who cannot forgive fate for decreeing that they should be born in Plebian America instead of Aristocratic England, that all of our good old law as well as our new theories come from England. Such statements are repudiated, at least in this one instance. In 1841 the case of Murray vs. S. C. Ry. Co., although arising four years after Priestly vs. Fowler, was argued and decided altogether independently of it, as it was cited by neither counsel or court; and further Priestly vs. Fowler was not in reality a true co-employee case but a case where the master failed to provide a safe van. The first true co-employee case in England was in 1850, so that the American courts had preceded the English by nine years.

The relation of master and servant exists, according to 123 U. S., 523, wherever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done but how it shall be done. This case holds that a master is liable to third persons injured by the negligent act of his servant in the course of his employment, although the master did not authorize or know of the servant's negligent act, or even if he disapproved or forbade it. This rule cannot rest on agency, as "Qui facit per alium facit per se" is incompatible with the idea
of anything against the wish of the principle. As this rule makes a master liable when he did not authorize or approve but even forbade the act, it is based neither on justice nor equity, but has its foundation in public policy and social utility. When one for his own benefit puts in action a mechanism either inanimate or human or both and through some flaw it injures a third person, the master should be liable to him. If a passenger is injured, clearly the master is liable for the carrying of him was for the master's benefit; but I think it was also for the passenger's benefit, otherwise he would not have paid for the privilege of being carried. The employees position is the same as the passenger's as to the benefits derived, the difference being the greater benefit to the servant than to the passenger. Thus far their positions are similar but there remains one vital distinction. The passenger depends for his safety entirely on the provisions made by the master for his safe carriage, and cannot avoid the result of any negligence, being unable to see it; but the servant, as one of the employees, can see the acts of his co-workers and be cautious accordingly; he may also admonish them to be more careful, and if they are not he may leave the employment. The leading case on this point is known as Farwell's Case 4 Met. 49, decided in 1842. An engineer was injured by the negligence of a switchman, a careful and trustworthy man, who left a switch open.
It was held that the engineer could not recover, being a fellow servant. It was stated by Chief J. Shaw, that the fountain head, prolific of just decisions which seem to grow stronger as the world grows older and wiser, that the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself. The eminent judge held it to be best for the traveling public that those who are component parts of that wonderful combination, the modern railroad, should be as careful as possible. Such care would be more likely to be used by the employees if each depended for his safety on the care of the others, thus making them overseers of each other's acts. The required care could not be obtained if large damages were allowed for injuries to each other, it is self evident that such a state of affairs would tend to make the employees careless. This case has never been overruled in England and but by one state (Tenn.) in America. The English Employers Liability Act recognizes it and only enacts exceptions to the doctrine there laid down. That the rule in Farwell's case is oftentimes very severe and seemingly unjust is obvious, especially where the plaintiff is in a wholly different department from the one whose negligence caused the injury. This is recognized in 25 Fed. Rep., 837, decided in 1886. A fireman was killed by the negligence of the engineer of another train. The judge held them fellow servants, following Farwell's
case; but stated that though the principle in Farwells case may
not be unquestionably correct, still fifty years of universal
application, coupled with the eminent authority declaring it, makes
the rule binding on the judiciary. And any change, if necessary,
must come from the legislature.
CHAPTER II.

PRESENT ENGLISH LAW.

EMPLOYERS LIABILITY ACT 1880 (42 & 43 Vict.).

The rule in England was that the master was never liable for
the negligence of a fit and competent servant, whatever his grade
might be. This manifest hardship on the servants led to the
Employers Liability Act of 1880. The necessity of such an act
in America is not as keenly felt, as the rule of a master's
liability is somewhat different in the two countries. In America
he cannot delegate his authority and with it his liability. As
the English Employers Liability Act (43 & 44 Vict.) is the founda-
tion of all later legislation on the subject, and has to a certain
extent influenced judicial tribunals, it may not be amiss to state
the principle features of the "Act" and show how they are construed.
It states that the master may not raise the special defense of
co-employment, but that the action will lie as if the injured
party was not a servant of the defendant, where the injury was
due to any:

1. Defect in the condition of the,-

(a) Ways.

(b) Works.

(c) Machinery.

(d) Plant connected with or used in the business of the
defendant.

2. Negligence of a superintendent while acting as such.

3. Negligence of one whose direction must be followed.

4. Act or omission of one following,—
   (a) A rule or by-law of employer.
   (b) Instructions of another having delegated authority.

5. Negligence of employee having charge or control of any,—
   (a) Signal.
   (b) Points.
   (c) Locomotive.
   (d) Train.

The Employers Liability Bill of 1888 amended the "Act of 1880" by inserting "or arrangement" after "Condition" in 1; and "buildings or premises" after plant in 1 (d).

The defect must have arisen from, or not been discovered or remedied, owing to the neglect of the employer or someone entrusted by him to see that the "Ways, works etc." were in proper condition.

Construction of the Act.

The provision of the "Act", "as if he had not been a workman" is construed to mean, as if he had been one of the public, who is on the master's premises with his invitation on business. The first provision which gives the workman a right of action is a "Defect
in the condition of the way". The leading case on this point is found in 10 Q.B. Div. 5. A workman was employed to take by means of a two wheeled car, "white hot" balls of iron to a steam hammer. While the deceased was running rapidly, drawing the car after him, it struck a piece of fire brick which was placed negligently on the "way", the car stopped, the deceased fell and the ball through its momentum, rolling forward, fell on to him causing severe injuries from which he died. His executors brought an action under the "Act", but the court held, that the defect was not in the "way", nor in the "condition of the way", but in a negligently placed obstruction. One of the judges drew the following analogies. If a drunken man staggered along the road would that be a defect in the road? And if he were lying down dead drunk would that be any more of a defect? A broken board in the floor of a dark passage would be a defect in the way, but a pail left there would be an obstruction.

In Scotland in 23 Scottish L. R., 108, the rule seems otherwise. The plaintiff, a brakeman on defendants train, by order of the engineer, stepped down onto the foot-board of the engine. As he did so a bar of iron projecting from a pile of pig iron at the side of the track, struck his foot and injured him severely. The court held that as the iron was piled negligently close to the track it created a defect in it and the master would be liable for
damages accruing by an injury therefrom. This case has been criticised and is not considered a very strong authority.

In Pegram vs. Dixon, 55 L. J. Q.B. 447., the plaintiff, a workman, was ascending a ladder through an elevator "well" in a new building, when a board was thrown down without warning, breaking his collar bone. This "way" had been previously used to throw down rubbish. Held, no defect in the way but merely a negligent act of a fellow servant. Thus it may be seen that the Judiciary holds to a very strict construction of the term 'way' as set forth by the Legislative branch.

The line of demarkation seems to be that when the employer has used due care and provided a safe way, the fact that some fellow servant renders it dangerous does not make the master liable. It seems to me an interesting question might arise, as to when a simple obstruction remaining undisturbed would become a defect. It also seems to me that a brick removed from the "way" would be no more of a defect than an extra brick placed on the way; still the former is declared a defect and the latter not. The cause of its absence or presence, the circumstance and effect of the accident may all be the same, and if one is a defect so also should be the other.

Next in order is the defect in the "Works". The leading case is found in 17 Q. B. Div., 189. The plaintiff was injured by the
falling of a wall which was to be the side of a house when completed. The rule was laid down, that as the term "ways" means ways used in the business and not partly made ways not used, therefore the term "works" must have the same construction. To be used in the business, the "work s" of course must be completed. Obviously if the employer is a builder a different rule would apply (building is held to include taking down of houses).

The rule as to defect in "machinery" is found in 16 Q. B. Div., 52. A machine is defective if not in a proper condition to perform the work or purpose for which it is used. A better case on this point is in 22 Scottish L. R. 698. An alarm of fire in a factory was given. The plaintiff in shutting the fire proof door smashed his fingers, and sued the owner for his injury. The defense set up was that the plaintiff would not have been injured had he shut the door carefully. The court held, that although the door had been, and could be shut without injury if done carefully, still the door was made to be used "in case of fire" and should be suitable for that purpose. In such a case men must act in a hurried manner.

Plant includes all apparatus used by a business man for carrying on his business (not his stock in trade); all chattels, fixed or movable, alive or dead, which he keeps for permanent employment in his business, (19 Q. B. Div., 658). The injury complained of
must have been caused "by the defect" in the natural and ordinary sequence of events. (33 W. R. 216).

Subsection 2 of section I gives the injured employee an action where the negligence is of a Superintendence in the exercise of his authority as such. The leading case on "Superintendence" is in 14 B. D. 585. One B was foreman of a gang of men loading a ship. He stood by the hatchway and warned the men below when the bales were to descend; by failing to give such warning a bale fell on the plaintiff, who sues therefore. Held, (by Shultz J.) that B was not entrusted solely or principally with superintendence, but was a co-laborer working with his hands all day. This settled the case as to subsection 2 of section I. It was further agreed that subsection 3 of section I applied; "by negligence of one whose orders must be obeyed". Hawkins and Smith J.J., state as follows "conceding that these orders must have been obeyed", still they fail to see where B gave an order; therefore, if he never gave an order, the plaintiff could not have bound to his injury by it. It seems to me that this is rather a falacious reasoning. If B had said move to the right, and the plaintiff was injured, clearly the master would have been liable; if he (B) says nothing at all it is equivalent to ordering the plaintiff to stand where he was. The duty was placed on B to tell the men below where to stand and a failure to tell them was a much greater fault than a
wrong order; the latter would be merely an error of judgement while the former is negligence pure and simple. It is strange indeed when a court will excuse the negligence the statute aims at and punish as negligent a wrong order. The negligent act complained of must have been one of superintendence. In the case in 10 Q. B. Div., 356, the plaintiff was injured by the negligent failure of his superintendent to check the movement of a crane by a guy rope, of which the superintendent had charge. The court held that although the man in charge of the guy rope had superintending powers, still as the act which caused the injury was done in his capacity as a fellow workman, the master would not be liable. In Scotland no distinction is drawn between the negligence of a superintendent and negligent superintendence.

24 Sc. L. R. 91. Subsection 3 of section I gives the injured employee an action when he was injured by following the negligent order of one who must be obeyed. It is immaterial what position in the employment the one giving the order holds; the only question being did he have the power to give such an order? (3 Times L.R. 779) (12 R (Sc.) 804) Subsection 4 of section I, allows the injured party to recover where the injury is caused by an act done in compliance with the rules or by-laws of the employer. Both parties are held to contemplate the effect of such rules except where, -
1. Employee has not equal means of knowledge. (3 Macqueen 266.)

2. Danger is immeasurably increased by absence of due care (27 L. J. Ex. 325).

Subsection 5 of section I, requires that the negligence must be of one who has charge or control of any signal, points, locomotive or train; and not merely of one who cares for or works about them. It was stated in 11 Q. B. D., at p. 22, that the negligence of one who cleaned, oiled and inspected point boxes, was not the negligence of one who had charge or control of them. Such an oiler has no more charge or control of the points, than a workman who "taps" wheels, to discover if they have the true ring which precludes a flaw, has charge or control of them.

Section II, has a clause preventing recovery if the plaintiff knew of the defect. This rule is general and is taken in connection with all the "Act". He has a reasonable time to communicate notice of the defect, unless the employer or some superintendent knows of it already. Knowledge of the danger will not bar a recovery if the master fails in some statutory duty thereto. (As fencing a dangerous fly-wheel, per Bramwell, B., in L. R. 7 Ex. 136.)

The damages under the "Act" would be the estimated earnings, during the three years preceding the injury, of a person in the
same grade, employment and district. This was not a measure of damages but merely a limit, and if the person made over time, such could also be allowed (53 L. T., 999).

The "Act" was meant only to make the employer liable in certain cases, provided nothing was proven to the contrary between the parties; therefore a contract to waive the "Act" was held valid (9 Q. B. Div., 357). As the "Act" applied to but a limited number of cases, construed strictly; and as nearly every contract of employment contained a "waiving clause", (due to the fact that workmen were plentiful and positions scarce) the benefits were not as far reaching as might be expected from the terms of the acts.
CHAPTER III.

AMERICAN STATUTES

FOLLOWING THE ENGLISH ACT.

The American statutes on this subject although founded on, and to a great extent copies of the English "Act", vary in the different states. Those states which have virtually reenacted the English Act, construe it in substantially the same manner. Most of our states have practically reenacted it. The study of it is of more importance than the act of any American state except the one in which the question at issue arises. When a conflict arises as to jurisdiction, the rule in (5 Fed. R. at page 75) will apply, which allows a state statute to be enforced in a national court when the citizenship of the parties, or the nature of the subject, will permit.

The dependent condition of the employee as related to his employer, clearly gives power to the latter to coerce the former into contracts waiving the benefits of the "Act". This being so, many of the American states except Georgia forbid such contracts. Carriers may not contract away their liability for negligence in the carriage of chattels. To allow them to contract away their liability for the safety of those in their employ, would be the placing of the value of a man's life and limb below the interest they might have in the chattel. Such waiving contracts are
forbidden in,-

Alabama - 91 Ala. 514., 92 Ala. 218.

Massachusetts - Public statutes Chapter 74 Art. III.

Indiana - Act of 1893 Chapter 130 Art. V.

Iowa - Code 1880 Art. 1307.

But not in Georgia 50 Geo. 465, 89 Geo. 318.

The Massachusetts statute is based on the English Act. It provides that a workman in the exercise of due care and diligence may recover if injured by reason of any defect in the condition of the Ways Works or Machinery connected with or used in the business of the employer; which arose from, or had not been discovered or remedied, owing to the negligence of the employer or of some one entrusted with the care of them.

Section II, provides for a recovery where the negligence is of one entrusted with exercising superintendence.

Section III, gives a right of action where the negligence is of one having charge or control of any signal, switch, locomotive or train.

Section IV, If an employer enters into a contract with another to have his work performed by the other, he will be liable for injuries to the employees of such a contractor due to any defect in the "ways, works" etc.

To constitute "ways or works", the appliances must be of a
permanent or quassi permanent character. Thus a temporary staging put up by masons is no part of the "ways or works" (160 Mass. 457). The American courts have followed the English construction, that the "ways or works" must be finished before a defect can be proved under the statute; unless the employer is a builder (160 Mass. 248 at page 252). It is held in Massachusetts in (159 Mass. at p 1) that where a contractor ordered one of his men to carry a bar of iron down a movable stair, which slipped and caused an injury to the workman, the contractor is not liable. But in 159 Mass. 287, where the injury was caused by a defective car of a third party used by the defendants to transport stone from their quarry, the defendant was held liable. The distinction is thus clearly drawn, that if the use is to be of a permanent character, if only for a day or an hour it is within the statute; but if it merely an incidental user it is not included. To be within the statute therefore, it seems it must be a permanent user of a finished product adapted to produce a given result.

The forwarding of cars, formerly devolved merely the duty of inspection (156 Mass. 13); but by the amendatory statute of 1893 Chapter 359, it is enacted that a car in use by or in the possession of a railroad company shall be deemed to be part of its "ways, works and machinery". Interesting cases arise where the defect is in the railroad of another company over which the
defendant's train is passing. Such a case is that in 156 Mass. 298. It was there laid down that it may not be necessary to render the 
master liable that he should own the road over which his train 
runs, but he must at least have some control over it. It must be 
used in his business by his authority, express or implied. The 
phrase, "connected with or used in the business of the employer", 
cannot be taken literally, but must be taken in connection with 
the terms "ways, works and machinery", and held to mean those used 
in his business, by his authority and subject to his control.

The term "machine" may be defined as a combination of moving 
mechanical parts, adapted to receive motion and apply it to the 
production of a mechanical result (Walker on Patent Law). The 
term machinery has a somewhat broader scope than machine, the court 
in each case must decide whether the facts and circumstances bring 
it within the meaning of the term.

A superintendent is one having the direction of employees acts, 
coupled with the power of hiring and dismissing workmen. His sole 
or principle duty must be that of superintendence, and the negli-
gence complained of must have been done in the capacity of superintend 
while acting as such. (160 Mass. 131, 155 Mass. 584) 
In 156 Mass 242, the plaintiff was injured by the negligence of the 
engineer of a stationary engine, who was also a superintendent. 
The court held, that as the act complained of was done in his
capacity as a workman and not through his authority as a superintendent, the plaintiff could have no recovery. The law recognizes the dual being of the superintendent for some purposes, and a common laborer for others. If the injury is caused by an obvious danger with which the plaintiff is, or ought to be, familiar, he has no recovery (150 Mass. 423, 157 Mass. 418).

In cases under the statute the evidence of the negligence is a very important matter, at times very complex and seemingly unjust, as for instance where a workman was injured by the caving of the sides of a ditch due to lack of shoring. Plaintiff attempted to show that it had been properly shored up immediately after the accident. The court stated that such evidence must be excluded, as a subsequent use of a particular safeguard is no more evidence of prior negligence, than a subsequent lack of caution would be evidence of former care and diligence. This looks remarkably like reasoning backwards but the above is unquestionably the old and well established rule.

When a person sues for injuries by a train, the negligence must have been of one having charge or control of the train, but it may have been only a temporary charge (156 Mass. 262). Upon a railroad means upon the road proper and moving or prepared to move (156 Mass. 13 at page 19, 164 Mass., 296 at page 301). The train itself may be one or more cars with or without a locomotive
(159 Mass. 348). Formerly a locomotive was required to be attached to bring it within the meaning of the term. (153 Mass. 112).

The Alabama statute is a virtual copy of the Massachusetts act and is construed in substantially the same manner. Very often cases arise where the plaintiff is a non-resident. The question then resolves itself into whether the statute is a part of the contract of employment. The contract of employment merely creates the relation of master and servant, the statute then acts on the incidents of such a relation. Therefore the liability under the statute does not arise from the contract of employment, but is an obligation based on a given set of circumstances within the state (97 Ala., 126).

An employee having notice of a defect cannot recover for an injury therefrom unless such defect was known to the master and he had time to remedy it (11 S. R. 733). Until such notice the employee may presume there are no defects (17 S. R. 452). The plaintiff in his complaint, when alleging a defect, must also allege that it was not discovered or remedied owing to the negligence of the master, or some one by him authorized to care for it (85 Ala., 272). When he enters the employment the employee of course accepts all patent defects; it follows naturally that if he discovers a defect, in the course of his employment, he assumes it also, unless he gives notice, in which case he may wait a reasonable time for its correction (97 Ala., 359).
In the case reported in 17 S. R., at page 30 an engineer ran his engine with great force against a stop block, placed on the end of a trestle, tearing it up and toppling over. The fact that the stop block was very defective did not give the plaintiff a right of action, because no matter how good the stop block might have been made, it could not have withstood the shock. The defect in the "ways etc." must be an inherent part of them. In 97 Ala., at page 240 the plaintiff a switchman was about to alight from a moving train, to do which it was necessary to swing out from the side of the train before dropping to the ground. As the plaintiff swung out he struck a car which was placed on a switch within a foot of the main track. The court stated, that as the Alabama "Act" was a copy of the English "Act", the decisions of the English courts handed down shortly after its passage, have very great influence with the American courts. This influence, owing to the circumstances, was much greater than is ordinarily due the learning and ability of those courts. It seems to me that if the whole switch was within twelve inches of the main track, it would be a defect in the condition of such main track, as soon as cars were placed on the switch. Some part of any switch must necessarily be within twelve inches of the main track, not of itself a defect, but when cars are placed on that portion which is within a foot it should be held a defect therein. One car so
placed would have the same unenviable quality of sweeping unsuspecting trainmen from the side ladders, as would a whole train. In either case there would be the same point of contact, namely the first car within twelve inches of the main track. A track being so near a wall that a trainman was injured thereby was held a defect in the "ways" (14 S. R., 175). I think a car is as dangerous as a wall if placed too near the track.

If an employee is injured by a defect, while he is breaking a rule, in using such defective contrivance, he cannot recover (12 S. R. 273 - 294 - 714). A railroad company under the statute, as at common law, is bound to provide safe and reasonable machinery but is not obliged to have the "newest thing out", though it may be a safer appliance. But I think the two appliances might be compared before the jury to show if reasonable care had been used in providing safe machinery.

Superintendence is the power possessed by one over the men and appliances used in the work. It need not have been over the injured person, but if the negligence injures any servant the master is liable (97 Ala., 245), unless the plaintiff is guilty of contributory negligence. This latter can only be excused by wanton, careless or intentional negligence on defendant's part.

One having control of a stationary engine need not necessarily be
a superintendent, but is usually a fellow servant; because he receives not gives orders. (14 S. R. 10). The foreman of a section gang is held to be a superintendent in 13 S. R. 308. The section of the "Act" relating to those having charge or control, excludes any one having control in breach of a rule or regulation of the company (14 S. R. 209). A section foreman in charge of a hand car comes within the rule (11 S. R. 262).

The injury complained of must have been received while undertaking the particular service called for in his contract of employment, or while obeying the orders of a superior. If he is injured while engaged in some service by way of accommodation he cannot recover (85 Ala 203). The burden of proving negligence under the statute lies on the plaintiff (84 Ala. 133).

The early law of Georgia provided that when one engages to serve a master, he undertakes to run the risk of his employment, including that arising from the negligence of fellow servants (15 Geo., 534). This rule did not apply to hired slaves;

first, because they were chattels,

second, because they had no choice but to obey orders (1 Ga. 195).

In 1855 the following "Act" was passed in Georgia (Code, section 3036). If the person injured is himself an employee, the damage being caused by another employee; and if the plaintiff was without
fault he may recover. This was held not to apply to the receivers of a railroad holding possession of it for a court of chancery. The plaintiff cannot recover if he is at fault himself, even though acting under directions of a superior (55 Ga. 279). The same rule holds as to his using a defective contrivance, as such a user would be a fault (55 Ga. 133). The only excuse for an employee who goes beyond his own sphere and is injured, is necessity, of which the jury are to be judges (53 Ga. 630).

Section 3033 of the code provides that recovery can be had for,

first, Damage to persons, stock or other property caused by the running of trains or other machinery.

second, damage done by any person in the service of the company, unless reasonable care and diligence was used.

Section 3034 provides that no recovery can be had when the injury was caused by the negligence or with the consent of the plaintiff; if both are negligent then the damages shall be reduced in proportion to the plaintiff's fault.

Section 3036 (belonging after 3034, where it was in the old code), enacts that even if an employee is injured he may recover if he be without fault.

Section 2083 states that as railroad companies have many employees who cannot possibly control those who should exercise care and diligence in the running of trains, the company should be liable
to such employees for want of such care and diligence. Under this last clause the question arises, must the injury be caused by the "running of trains" alone? If 2083 is taken in connection with 3033, then it will be seen that 2083 refers to 3033 and includes part II as well as I of that section (ante page 26). (64 Ga., 509).

Construing the sections together the law seems to be that the company shall be liable for any injury caused by negligently running trains in their service or employment, or any other negligence except,

first, where the plaintiff's negligence alone caused the injury (whether or not he is an employee).

second, if partly at fault; the damages be given according to the degree of fault (not applying to employees).

third, if any fault is shown on the plaintiff's part (he being an employee).

The fault of the plaintiff, to bar his recovery, must have had something to do with the injury. Where an engineer was injured by the caving in of dirt, the fact that he had a brother engineer on board, against the rules of the company, is no bar to his recovery (63 Ga., 181).

Section 3033 of the code states that the presumption in all cases is against the company. But in 61 Ga. 153 it is held that though the presumption is against the company every time and on every
issue, after the fact of the killing on the defendant's road if proven; still when it is shown either that the plaintiff by his own negligence caused the injury, or that the company was not negligent, the burden is shifted because either will relieve the company. In 30 Ga., at page 150 is found what seems to me the true rule in so called fellow servant cases. The doctrine of fellow servant is one of public policy to secure better service and safer transportation for both servants and passengers, by making each one look after and encourage the carefullness of the rest. Surely this reasoning can have no application to employees who have no connected influences over eachother. the rule is in the nature of a penalty, and to impose a penalty where there is no chance of exercising that care it was meant to enforce is sheer cruelty.

If a railway company permits another to run cars over its road, it is still liable for all accidents due to negligence, because the Legislature gave the franchise on the credit of the owner's capital that his privileges could not be abused (49 Ala., 355).

The Florida law need not be discussed at length as it is a copy of the law of Georgia and is therefore construed in the same manner, at least in so far as is not inconsistent with the general legislation in Florida on the subject (15 S. R. 882). The statute is found in chapter 3744 section 2346 (page 764) as follows, a fellow servant may recover, if injured through the negligence of a co-worker, provided he is without fault himself.

In Mississippi it is provided that an employee of a railroad
company shall have the same action for injury caused by any act
or omission of the corporation or its employees, as is allowed by
law to others not employees, where the injury results from the negle-
ligence of an employee engaged in another department of labor
( sec. 193 of Const. of 1890). The only question to arise under
this "Act" will be as to the distinction of departments. It has
been held under it that an engineer and telegraph operator are not
in the same department. So also as to a fireman on one train and
the engineer on another train of the same company.

The Missouri law on the subject is in a peculiar position
owing to the abstruseness of the statute itself, and the position
taken by the court in its construction. The statute (R. S. 1889
sec. 4425 ) enacts in substance, that whenever any person shall
die from an injury resulting from or occasioned by the negligence,
unskillfulness or criminal intent of any officer, agent, servant or
employee in the employ of a transportation company, the master
shall be liable; and whenever any passenger shall die from an
injury owing to any defect in the railroad, steamboat or etc., or
from the negligence, carelessness or criminal intent above declared
the master shall be liable.

Section 4426 gives a right of action to the representatives
of the deceased in a case where he himself could have recovered
if the injuries had not resulted in death.
In 36 Mo. at p 13 the court held that the statute meant what the natural import of the words seemed to imply; that is if anyone was killed through the above specified negligence, an action would lie against the company. This holding was reversed in (159 Mo., 285). In this latter case the judge held that the decision in the former case was not based on logical grounds. The interpretation thus given allowed the employee rights which he did not before possess (an action for injuries due to the negligence of a co-servant). It is not natural that the legislature would take away the employee's clear right of action for an injury due to defective machinery, and give him a new right of action against common usage and of questionable utility; namely, for injury due to the fault of a co-servant. There are further objections, section 4425 so construed, gives the widow $5,000.00 if her husband is killed outright by the negligence of a fellow servant; while the following section allows no such action in a case of injury merely. Thus $5,000.00 would be allowed to a widow if her husband was killed outright, but no recovery could be had if he lost his arms or legs, or both. As recovery at law is given as a compensation for the loss of the head of a family, such a rule would allow one damages for being negligently deprived of an income, but would give him nothing if the income were turned into a
source of expense. It seems that the eminent judge endeavored by taking the whole "Act" into consideration, to eliminate the distinction arising from a liberal construction of the term "any person" as used in the first clause, and to hold it as excluding fellow servants from its benefits. The "Act" was passed in 1855. The court in 1865 held that the term "any person", meant exactly what it said, and thus included fellow servants. This construction was not questioned by the courts until 1875, twenty years after its passage. In the meantime the Legislature knowing the first construction placed on its "Act" and not objecting, proves that the construction met with its approval. That this interpretation met with the approval of the People, Bar, Court and Legislature during the ten years following 1865, should of itself cause much hesitation before so peremptorily overruling it as to place the stigma of ignorance upon them. Section 2 and 3 can be distinguished on the ground that while the widow receives $5,000.00 for the negligent killing of her husband; the successor of the passenger has his $5,000.00 against the owner of the negligently defective contrivance. Section 2 is penal, ("shall forfeit or pay") while 3 is compensatory ("shall be liable to an action for damages"). It would seem from the great difference between the inherent nature of section 2 and 3 that they should not be construed together, so as to eliminate the clear meaning of either or part of either.
The prime reason for the latter construction seems to be that it coincides with the fellowservant doctrine of the common law, the theoretical benefit of which is that it tends to make each servant his "brother's keeper" in a certain sense. If one sees his coservant is generally negligent and liable to cause him injury, for which he will have no recovery, he will naturally report such negligence and have it eliminated. But is this not likely to make the master careless as to the quality or conduct of his servants. Let it be granted that the fellow servant doctrine is salutary. The rule is the same under the statute, except as to death. But there is a distinction which gives good reason for the statutory exception. The fact that one's wife will receive $5,000.00 for his death will not make him any the less careful to preserve his life. In the existing state of marital relations, it would probably tend to make him more careful, and not allow the successor of his connubial joys the added benefit of his statutory recovery. Hard cases are presumed under the statute, as where recovery is allowed for a man's death but not for an injury which leaves him a charge on his family. Such cases may be imagined under any law instituted by the human mind. To be absolutely equitable a law must have come from Omnipotence itself, which would be able to foresee all cases. "The common law, which has grown under the fostering care of our "great judges" does
not at all times cover all cases. How much more unlikely is the Legislature on its first passage of a single act to arrange it to cover all cases imaginable. The mere fact that a law does not apply equitably to all cases is no reason that it is not good law as to the cases it does cover. The Missouri courts seem to override a prime rule of construction laid down by Brett M. R. in (Gibbs vs. The Great Western Ry. Co., 12 Q. B. Div., 208 - 211), that if an "Act" is passed for the benefit of workmen it is the duty of the courts not to construe it strictly as against workmen.

In Iowa (Code Sec. 2002) every corporation is liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by the mismanagement of the engineer's or other employees of the corporation, and in consequence of the willful wrongs, whether of commission or omission of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railroad, on or about which they shall be employed, and no contract which restricts such liability shall be binding. Unlike the statute of Georgia, the judgment under the above may be obtained against a receiver and satisfied out of the property of the corporation (62 Iowa, 728). If the act be within the scope of his authority the company is
liable even though such act be willfully wrongful (64 Iowa 568).

As this statute is in derogation of the common law it is construed strictly. It is held to cover only those engaged in the running of the railway. It does not cover the case of one who wipes engines, keeps a turn table free from snow and operates it (65 Iowa 417), nor does it include employees in the machine shops of the company (46 Iowa 399), and car repairers are not within its purview (64 Iowa 644).

It seems therefore that the court holds the statute as meaning the hazardous work of the running of trains rather than the running of a railway.

In Indiana we find a virtual copy of the English Act, except that the knowledge of a co-worker's incompetency is held the same as knowledge of a defect and must be communicated to the master by the employee if he knew or ought to have known of such incompetency. If accidents happen without the state, the plaintiff being a resident of the state, on a railroad running through the state the master will be liable. All contracts of release by the employee, and rules or regulations of the master to the same effect are held invalid. (Indiana Statutes 1894, Sec. 7083 - 7087) In both Indiana and Iowa we find statutes prohibiting the black listing of discharged employees.

The Colorado statute is a virtual copy of the English Act.
We have seen that originally the master was liable for all acts of his servant (Respondeat Superior). This was found to be such a hardship on the master that he was released from all responsibility for the negligent acts of his servants as between each other (Fellow Servant doctrine).

When this rule was laid down, it had indubitably the good and salutary effect of making each co-employee's defenseless position a check on the carelessness of himself and his fellows. But the wonderful growth of corporations, and the specialization of labor, separating each one of a group from all contact or influence of those in another department, have made the members of each group as entirely independent of each other as if they were under different masters. They really are under different masters, for obviously the superintendent of a certain department has no influence over and is independent of every other division of the corporate business. Clearly a servant, in one group, acting as a component part thereof, can have no effect on or influence over a member of another; therefore as a reason for the fellow servant rule has ceased, the rule should follow the reason. Thus it seems the "different department doctrine" is and ought to be the correct solution of the question.