

1894

The Liability of Railway Companies to their Employees

William C. Bouck
Cornell Law School

Follow this and additional works at: http://scholarship.law.cornell.edu/historical_theses

 Part of the [Law Commons](#)

Recommended Citation

Bouck, William C., "The Liability of Railway Companies to their Employees" (1894). *Historical Theses and Dissertations Collection*. Paper 387.

This Thesis is brought to you for free and open access by the Historical Cornell Law School at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Historical Theses and Dissertations Collection by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

THESIS

THE LIABILITY OF RAILWAY COMPANIES TO THEIR EMPLOYEES.

BY

William C. Bouck.

-0-

Cornell University School of Law.

-0-

1894.

-0-

CONTENTS.

WHO ARE EMPLOYEES,-----	1
THE LIABILITY OF THE COMPANY FOR INJURIES TO THEIR EMPLOYEES,-----	4
WHO ARE CO-EMPLOYEES,-----	13
DUTIES OF THE RAILROAD COMPANY TO THEIR EMPLOYEES,-----	20
THE DUTY OF THE RAILWAY COMPANY AS TO THE EXERCISE OF CARE ON ITS PART IN THE ORIGINAL CONSTRUCTION, INSPECTION, AND MAIN- TENANCE IN THE REPAIR OF ITS LINES, ROLLING STOCK AND APPLIANCES,-----	23
THE DUTY OF THE COMPANY AS TO THE SELECTION AND RETENTION OF SERVANTS,-----	26
RULES AND REGULATIONS WHICH THE COMPANY ARE OBLIGED TO MAKE,-----	28
STATUTES AFFECTING THE CO-EMPLOYEE LIABILITY DOCTRINE,--	31

TABLE OF CASES .

Hill v. Morey, 28 Vt.,178.-----	1
Everhart v, E.& I.R.R.Co., 78 Ind.,292.-----	2
Priestly v. Fowler, 3 M.& W.,1,-----	4
Murray v. S.C.R.R.Co., 1 McMullen, 325,-----	4
Farrell v. B.& W.R.R.Co., 4 Met.,49,-----	5
Haynes v. T.& G.R.R.Co., 3 Cold. 222,-----	7
Collin v. L.& N.R.R.Co., 21 Durvall, 114, -----	8
Chamberlain v. M.& M.R.R.Co., 7 Wis.,425.-----	8
Mosely v. Chamberlain, 18 Wis.,73,-----	10
Z.M.& R.R.Co., v. Stevens,,20 Ohio St, 415,-----	15
Z.S. & M.R.R.Co. v. Collins, 2 Durvall 114,-----	17
Z.S.& M.R.R.Co., v. Robinson, 4 Bush 507,-----	18
Z.& N.R.R. v. Tavally, 36 O.S.R., 221,-----	16
Ladd v. N.B.R.R.Co, 119 Mass., 412,-----	19
Patterson v. P.& C.R.R.Co., 76 Pa.St.,318-----	21
Golleib v. N.Y.L.E.& W.R.R. Co., 29 Hun, 637,-----	25
Decker v. H.& B.T.M.R.Co., 82 Pa.St.,119,-----	26
Rose v. B.& H.R.R.Co., 58 N.Y.217,-----	28
O.& M.R.R.Co., v.Collins, 73 Ind., 261,-----	20
C.M.& St.P.R.R.Co., v. Ross, 112 U.S.377,-----	32

INTRODUCTION.

The subject of this thesis from a practical point of view has grown to great importance during the last century. This has been brought about by the introduction of the steam railroad, which took the place of that ancient mode of conveyance the stage coach, into this country.

Before that time the various doctrines which were laid down to regulate the liability of Masters and Servants were of very little importance and their use was very seldom invoked. Now all is changed. Instead of the slow and practically safe stage coaches, we have the whole country intersected with the steam railway on which accidents happen every hour.

Although some of the Roman roads, like the Appian Way, were a near approach to the modern railway, yet they differed in many important particulars. They were simply granite stones fitted tightly together upon which low wagons were pushed along.

The first idea of having tracks for the wheels to run

upon was not brought into practice until the year 1676. This although not a modern railway was still a step towards it. It was not until the year 1825, that steam was in any way used for the purposes of propelling the cars. In this year the Liverpool and Manchester Railroad was built which although slow and cumbersome, was still a great success. Upon this basis the railway has developed until today it is one of the greatest wonders of the age.

With the development of the railway that vexed and troublesome question, as to whether and in what cases the Company is liable for injuries to their employees, has been raised.

WHO ARE EMPLOYEES.

The first question to be considered on this subject is who are employees.

The common and the legal understandings of the word employee is not the same. The latter is broader and comprehends not only the former but cases in which the parties are employer and employee only in a peculiar sense, and for certain purposes.

According to the common understanding an employee is one who engages in the service of another, for the purpose of doing some lawful labor for a consideration.

The case of Hill v. Morey, 28 Vt., 178, is a very good case to show the distinction between the two. There the plaintiff and defendant were engaged in repairing a line fence. While so engaged one Stuyveson, came along and without any request at all from the defendant began helping him. While so engaged he cut down trees which belonged to plaintiff. Thereupon plaintiff sued defendant for trespass and the court held that Stuyveson was an employee of the de-

fendant although his services were gratuitously and had not been asked for by the plaintiff.

Accordingly it has been held that when one person for the time being, places himself in the position of a subordinate to another in the business of the latter and by what he may do in that condition of subordination a third party is injured, such third party has a right to regard him as occupying the position of an employee.

The importance of determining whether a man is an employee or not can be seen from the case of *Everhart v. The Terre Haute & Indianapolis R.R.Co.*, 78 Ind., 292. Here one Everhart, at the request of the conductor of a freight train, climbed on a car for the purpose of putting on a brake. While on the car the engineer carelessly and willfully uncoupled the car and Everhart was thrown off and permanently injured. The point in question in this case was whether Everhart by getting on the car became a co-employee of the engineer or not-- If he did he could not recover. But it was held by C.J.Wordess, that he was a mere volunteer and could recover; but that if he had been a co-employee he

could not.

Having determined whether a person is an employee or not the next thing to be considered is the employer's liability to him in case of accident.

THE LIABILITY OF THE COMPANY FOR
INJURIES TO THEIR EMPLOYEES .

It is a general rule followed in both England and the United States that a servant who is injured by the negligence or misconduct of his fellow-servant can maintain no action against the company for such injury.

This rule was first laid down by Lord Abinger in the celebrated case of Priestly v. Fowler, 3 M & W., 1, and became settled law of England ever after.

In 1841, this principle was declared in South Carolina, without any reference to the English case, in the case of Murray v. S.C.R.R.Co., 1 McMullen, 385. Although no reference was made to the English case the doctrine was substantially the same.

The facts in the case were that one Murray was employed by the S.C.R.R.Co., as a second fireman, and put on a train manned by a competent engineer and fireman. While approaching a tunnel a horse was observed to be feeding on the track. The engineer's attention was drawn to this fact but he paid

no attention to it, until they were almost upon the animal. It being then too late to stop, the horse was run over, and the engine thrown from the track. At this moment Murray attempted to jump but his foot caught in the tender and was cut off.

It was admitted by both parties that the accident was caused wholly through the negligence of the engineer.

After receiving all the facts, C.J.Evans laid down the rule that an employer was not liable for injuries received by any employee through the negligence or misconduct of a co-employee.

One year after, in 1842, this doctrine was affirmed in *Fassell v. B.& W.R.R.Co.*, 4 Met., 49,. The opinion was written by C.J.Shaw, and is without doubt the most noted case on this point that has been decided in this country or in England. The facts were these: One Farrell was employed by the Railway Company as an engineer on a passenger train. The train was thrown off the track through the negligence of a switchman. By this act Farrell's hand was crushed and he brought an action against the Company for damages. The

learned Justice after discussing the different points fully concludes by saying; that, " He who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such service. They are perils which he is as likely to know, and against which he can as effectually guard, as the master.'

' Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy if he has any, against the actual wrongdoer." The loss must be deemed to be the result of pure accident, like those to which all men, in all employments, and at all times, are more or less exposed;' and like similar losses from accidental causes, it must rest where it first fell."

The policy and justice of this doctrine has been much questioned, and the rule itself has been rejected in the states.

As a rule of law it is undoubtedly an unjust one. For why should not an employee recover just as much and just as

readily if he is injured by a co-employee as he would if injured by the master himself? I cannot see any difference, and although England and forty-two states hold so. I will be inclined to side with Kentucky & Tennessee which have established or rather have never accepted the doctrine.

The Company is liable for the negligent acts of its employees to third persons who are not connected with them so upon what principles of justice is the reason of the rule that a class of persons who occupy an inferior position as servants of the road, and who are injured by the negligent acts of those occupying a parallel position, should not have the right to recover against the Company for damages sustained. I can see none.

Tennessee in the case of *Haynes v. E. Tenn. & Ga. R.R.Co.* 3 Coldwell, 222, repudiates this doctrine entirely on the ground that there is no sound reasoning at all in the cases of *Murray v. S.C.R.R.Co.*, and *Farrell v. B. & W.R.R.Co.*

Chief Justice Slacefford delivered the opinion of the Court. After going over and discussing all the points in the case fully he says, " The high character and bearing of

many of the jurists, who have enunciated this principle would have an influence with this Court in the determination of this question; but upon an examination of the authorities cited, we are unable to see upon what principle a rule that seems to us not founded in justice, nor common right should be upheld or maintained."

Kentucky also refused to recognize this doctrine in the case of *Collin v. The Tenn. & Nashville R.R.Co.*, In this case she allowed a common laborer to recover damages which had been caused by the negligence of an engineer. But by a careful study of the case she cannot be said to have entirely repudiated but only to have limited the rule. She seems to agree with the other states that an employee cannot recover for injury brought about by the negligence of a co-employee with this limitation. She holds that if the injury is brought about by the gross negligence of a co-employee the company is liable.

The law on this point in Wisconsin seems to have been in great confusion up to 1873. In 1858, the case of *Chamberlain v. The M.& M.R.R.Co.*, 7 Wis., 425 arose. In this case the

plaintiff an express agent on the road was hired to fill for one trip the place of a brakeman who was sick. While engaged in this work he was thrown from the car and had his leg crushed. The accident happened through the negligence of the engineer. Although the question at point did not come squarely up, it was decided by Justice Cole in a very well written opinion that had he been a co-employee of the engineer he would not have been allowed to recover. The case was then appealed on this point and the prior decision reversed.

Justice Paine in giving the opinion for reversing it says, "It is conceded that the Company is bound to conduct the force it sets in motion with proper care and skill so upon what principle can it be maintained that they may, through their engineer so negligently manage the engine as to mangle the brakeman and all their other servants on the train and yet be entirely irresponsible?"

This decision seemingly put the law on this question at rest but not for long, for three years after in 1861, another case arose which resulted in the overruling of Chamberlain v. M. & M.R.R.Co., and the substitution of the general rule de-

clared in Murray v. S.C.R.R.Co., and Farrell v. B.& W.R.R.Co.

This was the case of Mosely v. Chamberlain, 18 Wis., 731.

The opinion in this case was written by Chief Justice Dixon who overrules Chamberlain v. M. & M.R.R.Co, apparently without any reasons. The only argument which he gives is that all the rest of the states have gone the other way so he thinks Wisconsin should to.

This decision was so openly unjust and such a feeling among the different members of the bench that the legislature passed a statute which declared this decision should not apply to the employees of railways. Thus the law in Wisconsin was put at rest.

Which rule is right the one laid down in Mass. or the one in Tenn. will probably never be known; but were I to decide I should most assuredly side with Tennessee.

It is said by most courts that when a person contracts to do services on a railroad he takes into account all the dangers and perils which are incident to the employment, but I claim that this can only be intended to mean such dangers and perils as necessarily attend the business when conducted

with ordinary care and prudence. He certainly cannot be presumed to contract with reference to injuries inflicted on him by negligence.

The Railway Company in setting a force in motion is bound to see that it is employed with proper care and skill.

Other states have decided with Massachusetts but on an entirely different ground--- that of public policy. It is said that employees would be more vigilant to prevent injuries from the negligence of each other, if they knew that they could not recover damages, against the Company, than they would with the opposite belief.

But this notion, it seems to me, is based upon a false estimate of the motives which govern human action. In fact the argument on public policy I think is just the other way. By just so much as the liability of the employer for the negligence of his servant is reduced, by just so much are the motives diminished which induce him to employ servants of the greatest skill and vigilance. And if from this relaxation, negligence servants are employed, the public at large, as well as the other employees, run the hazard of the

accidents arising from it.

It is suggested in *Farrell v. B. & W.R.R. Co.*, that an employee when he sees that negligent persons are employed, may leave the service. Suppose that this suggestion was carried out. Those employees who are careful, vigilant, and attentive to their business finding that their are others employed who are negligent or reckless, would leave the service, in obedience to the advice of the Supreme Court of Mass.

Where would the welfare of the public be then? All the skillful and careful servants gone the public would be left to the mercy of a handful of careless and negligent persons.

WHO ARE CO-EMPLOYEES.

Who are co-employees and who are not is probably one of the most difficult questions that the American Courts have ever had to deal with.

On account of this difficulty there are hardly two states in the whole union that have exactly the same rule.

The rule which is given by most text-writers is that a co-employee is one who serves the same employer; deriving their authority and compensation from the same source, and engaged in the same business, although it be in different grades and departments thereof, are fellow or co-servants, each taking the risk of the other's negligence.

But this definition is too broad and sweeping, and by a careful reading of the cases I doubt if you could find a single state which does not have a great many exceptions to it.

For example it has been held in Ohio that where a servant was engaged in repairing a track, and was injured through the carelessness of a fireman that the rule did not apply.

Still with a few exceptions it can be laid down as the

general rule in all the states except Mass., New York, Ohio, Indiana, Kentucky, and Tennessee.

The law in N.Y., on this point seems to be the best, most clear and certain of all the states.

The Courts of other states seem to have laid down very arbitrary rules and regulations while the Courts of N.Y., have been more lenient and equitable to the employee. This can be seen by a study of the later decisions.

The rule by which the Courts are guided when determining who are co-employees is this: Any employee of the corporation engaged in providing to other employees, a place to work, machinery, tools and appliances to work with, co-employees, and rules and regulations of employment is a vice-principal and the Corporation is liable in damages to all employees who are injured, through his negligence. All other employees who are not employed in providing any of these things are co-employees.

This, I think, can safely be said to be the rule as the cases will show. Thus a brakeman can recover damages for injuries received through the negligence of a track repairer,

as the track repairer is providing a place to work. A fireman could recover for injuries received through the negligence of a Mechanic in the car shops, who had been negligent in fixing a brake; as the mechanic was engaged in furnishing machinery, tools, and appliances for the fireman to work with. A brakeman could recover for injuries received through the negligence of a train dispatcher, who had the authority and did make rules for the running of trains. An engineer could also recover for injuries received through the negligence of a superintendant whose duty it was to make rules and regulations.

The Ohio Courts in determining this question seem to go upon the question of subordination or the rank and grade test as it is most commonly called. This rule was first declared in the Little Miami R.R.Co. v. Stevens, He, Stevens an engineer was injured in a collision, on the Little Miami R. R. The collision was due to the negligence and carelessness of the conductor of the train. The Court allowed the engineer to recover, saying, that he and the conductor were in subordinate positions and so were not co-employees, but

were rather in the position of employce and vice-principal. After discussing all the points fuully they decided that where an employer places one person in his employ under the directions of another, also in his employ, such employer is liable for injuries to the person of him placed in the subordinate situation.

This case was followed in The Lake Shore & Michigan Southern R.R.Co. v. Tavalley, 36 O.S.R.,221. There Tavalley a car repairer was ordered by one Fox, a foreman to go under a freight car for the purpose of repairing it. While under the freight car an engine switched a heavy coal car on the track which came in collision with the car Tavalley was under. The sudden moving of the car severely injured him. The Court held that the company was liable, Justice White, in giving the opinion said that Tavalley could recover as he was a subordinate and under the directions of Fox whose duty it was to take all all precautions to guard against such accidents. According in other cases they held that a conductor is not a co-employce of a brakeman. Nor a master mechanic of a common laborer in a car-shop.

The law in Kentucky on this point favors the employee more than the law of any other state with the single exception of Tennessee which has never adopted the rule of Co-employee non-liability at all. The first time that a case of this kind ever came up was in 1865, in *The Louisville & Nashville R.R.Co., v. Collins*, Here a common laborer was ordered by an engineer to get under an engine for the purpose of fixing it. While so engaged the engine moved forward and cut his leg off. It was proved on the trial that the engineer was grossly negligent in not blocking the wheels of the engine before setting the laborer at work. The Court held that the Company was liable. Judge Robinson in delivering the opinion of the Court said, "In running its cars the Company is required to observe at least, ordinary care, vigilance and skill so far as strangers are concerned," 'Had the appellee been a stranger, the appellant would, therefore, have been certainly liable on this action and we cannot admit that the appellants relation as an employee should exempt the Company from that general liability,' Common laborers in their employment having nothing to do with the cars or the running of

them, they, like the Companies mere wood choppers, are comparative strangers to the engineer, , and his running operations, and should be entitled to all the security of strangers. They know nothing of the skill or care of the engineer nor have they any control over him. They are not therefore in the essential sense of contradistinctive classification. In the same service with him. ' ' The only consistent or maintainable principle of the corporations responsibility is that of agency.' ' It is, therefore, responsible for the negligence of its engineers, as its controlling agent in the management of its locomotives and running cars, and that responsibility is graduated by the classes of persons injured by the engineers' neglect or want of skill-- as to strangers, ordinary negligence is sufficient-- as to subordinate employees, associated with the engineer in running the cars, the negligence must be gross-- but as to employees in a different department of service, ordinary negligence may be sufficient."

This case was followed in Z.& N.R.R. v. Robinson, 4 Bush, 507. Here a brakeman was run over by an engine. It was

proven that the engineer was grossly negligent, and the Court held that the Company was liable.

The rule therefore in Kentucky as laid down by these cases depends upon the degree of negligence and that only. If the injury is caused by an employee in a different department, the company is liable if there has been ordinary negligence. And as to subordinate employees in the same general service the negligence must be gross.

DUTIES OF THE RAILROAD COMPANY TO THEIR EMPLOYEES.

Railway Companies must use reasonable care in furnishing a safe place to work. They must use reasonable care in selecting machinery, tools, and appliances to work with. They must use reasonable care in selecting co-employees to see whether they are competent and skillful. And he must make reasonable rules and regulations for their safety. And they must use care in the original construction and subsequent maintainance in repair of its lines.

These are the rules laid down by all text book writers as the duties which a railroad owes to its employees. But these requirements can be waived by the employee and will be if he knowing the defects as well as his employers, still proceeds with his work without protest. It is the duty of an employee who knows of any defect in these requirements to notify his employer at once. If he knows of these defects and still goes on and works, saying nothing about them he is estopped from setting up the negligence of the company. This was decided in the Massachusetts case of Ladd v. New

Bedford R.R.Co. There Ladd was a road master and was injured by a train, on which he was riding being thrown over an embankment. The cars on the train had no check chains and that he knew that it was dangerous for a train to run without them. Upon this evidence the Court held that it was the duty of Ladd to notify the Company of their absence and as he did not he was estopped from recovering damages by his own negligence.

The question then arises what must the employee do upon discovering some defect to hold the company liable. This has been answered in a great number of cases. He must leave the company or notify the company or its agent of such defects. If after having given such notice, the Company promises to make necessary repairs, and requests the employee to remain in their service, the Company is liable for all damages which may arise through such defects before they are repaired. This was decided in Patterson v. Pittsburg & Connellsville R.R.Co. There Patterson was a conductor of a freight train. It was his duty to switch certain coal cars off on a switch, for the purpose of unloading the coal on a

platform. The switch was very dangerous on account of the shortness of the curve, and the improper construction of the frog. The plaintiff knew of these defects and notified the Company. The company promised to remedy them and requested plaintiff to remain in their employ while such repairs were being made. The plaintiff did remain and was injured by having a car run off the switch upon which he was riding. The Court held that the Company were liable.

THE DUTY OF THE RAILWAY COMPANY AS TO THE EXERCISE OF CARE ON ITS PART IN THE ORIGINAL CONSTRUCTION, INSPECTION, AND MAINTAINANCE IN REPAIR OF ITS LINES, ROLLING STOCK AND APPLIANCES.

The company does not guarantee to their employees that their lines, appliances, and machinery are in a safe condition. They only, guarantee that they will exercise due care in building and keeping in repair such lines and machinery.

They are not bound to supply the best appliances on the market, but they must supply such appliances as are reasonable safe and suitable, or such as any prudent person would supply in similar circumstances.

Following these rules the Courts of different states have held that the Company need not supply all of the latest inventions. That they are not liable because the road bed is intersected with ditches; because its switch frogs are not blocked; nor because its car platforms are of unequal heights.

But it is a railway duty to make frequent and thorough

inspections of its line and appliances. In order that a railway may be assured that its lines and appliances are in a safe condition they are bound to make such frequent and thorough inspections as can be done consistently with the conduct of its business.

It is impossible to lay down precise rules as to determine when a company has been negligent in making inspections and when it has not. Each case must be determined by its own facts. Under circumstances of more than ordinary peril, as in the case of violent storms, the Company must inspect its lines with more than ordinary care and promptness.

The Company is liable for all negligence in the original construction of its lines, and, although a competent contractor has been employed for that purpose.

The Courts of a great many states hold that when a railway Company receives cars for transportation from another line it must make a thorough inspection to see whether they are safe and in good repair. If they are not they should refuse to handle them until such defects have been repaired. But the same Courts hold that this rule only extends to obvious

defects, and not to latent. In Golleib v. N.Y.L.E.& W.R.R. Co., the Company was held liable to a brakeman who was injured while coupling defective cars which had been received from another line for transportaion. Earle J. said, " The defendant was under obligations to his employees to exercise reasonable care and diligence in furnishing them safe and suitable instruments, cars, and machinery for the discharge of their duty." The defect was an obvious one easily discovered by the most ordinary inspection, and it would seem to be the grossest negligence to put such cars into any train."

THE DUTY OF THE COMPANY AS TO
THE SELECTION AND RETENTION OF SERVANTS.

A railway Company must use due care in its selection and retention in its service of its employees. If it is in any way negligent, it will be liable for all damages which may arise. But in order to render the Company liable it must be shown that the negligence of the incompetent servant was the proximate cause of the accident, and that the officer who is charged with the duty of appointing and dismissing servants either knew or ought to have known of the servant's incompetency.

The Company will be liable if it keeps in its service an employee whose habits are known to be intemperate. This was decided in the case of Decker v. H. & B.T.R. & C. Co., 82 Pa. St., 119. In this case Decker was an engineer on a coal train. One Bowser was a conductor on another train. The cars were running in opposite directions, and the train dispatcher gave Bowser directions to let the coal train pass at a certain place. He was intoxicated and did not obey the

instructions. The trains came into collision and Decker was killed. It was proved on the trial that Bowser was habitually drunk, and that the Company knew of it. The Court thereupon directed a verdict for the plaintiff on the ground that the Company were liable for keeping an habitual drunkard in their employ.

The Company will also be liable for keeping in its employ a conductor who cannot be depended upon and who always disobeys orders.

AS TO THE RULES AND REGULATIONS
WHICH THE COMPANY ARE OBLIGED TO MAKE.

Every railroad is bound to establish and enforce such rules and regulations as are necessary for the safety of their servants. What these rules should be will depend on the circumstances in each case.

Among the most important ones are these. The Company should lay down rules regulating the speed of trains. Rules which determine the exact duty of each employee. If the road is a single track, rules should be laid down which will govern the passing of trains. There are a great many others which might be named, but these will suffice for examples.

At one time there was a great many disputes as to whether the Company would be liable for damages brought about by the breaking of these rules by a co-employee; but I think that by a careful reading of the cases at the present time that it is easily determined.

The case of *Rose v. B. & H.R.R.Co.*, 50 N.Y., 217, seems to settle the law in New York on this point. The case arose

in this way. Rose was a brakeman on a freight train. The Company had established a rule that its trains should not be started within ten minutes of each other. A conductor and co-employee of Rose violated this rule by sending out three trains from East Albany at four minutes intervals. The head train broke into and collided with the second. Rose was thrown from his car by the collision and killed.

Johnston J. in writing the opinion laid down the rule that the Company would not be liable for an injury brought about by the disobedience of the rules of the Company by a co-employee.

This rule has been generally followed in all the states. But on the other hand it has been held by good authority that a Railway Company is liable if it knowingly permits its employees to habitually disregard the rules. This was held in *O. & M.R.R. v. Collarn*, 73 Ind. 261. In this case a brakeman was injured by the carelessness handling of an engine by a fireman. On the trial it was proven that the engineer was, to the knowledge of the Company, in the habit of trusting the control of his engine to his fireman in disobedience to the

rules and regulations. The Court held that the Company was a party to the negligence and was liable. It was further held that the Company would undoubtedly be liable for the breaking of any of the rules unless it had used every precaution to guard against it.

STATUTES EFFECTING THE CO-EMPLOYEE LIABILITY DOCTRINE .

In eight states of the Union statutes have been passed which materially modify the rules of co-employee liability. These states are Georgia, Kansas, Montana, Iowa, Mississippi, Wyoming, and Rhode Island.

These statutes in general declare that the Company shall be liable to their employees for all negligence or mismanagement by their agents or other employees. That is that if an employee is injured through the negligence of a co-employee, the Company is still liable unless the injury was brought about through the carelessness of the person injured.

There is a great deal of difficulty as every lawyer will admit with the doctrine of fellow servant. For over forty years the Courts of this country have been perplexed with this troublesome question; and every decision rendered by the Courts, instead of settling it, has only produced new perplexities.

The whole trouble is caused by the attempt of the Courts to make a distinction between the different classes of ser-

vants, instead of considering them all in one light.

Unless the legislatures of the various states pass a statute settling this question at rest, the law of the subject will soon be in such a state as to be utterly valueless.

The reasons that have been given for exempting a Railway Company from liability for injury to one servant by the negligence of another servant are stated in the case of C.M.& St.P.R.R.Co., v. Ross, 112 U.S.377. Chief Justice Field delivered the opinion of the Court and said, " The general liability of a railway company for injuries caused by the negligence of its servants, to passengers and others not in its service is conceded.' 'It covers all injuries to which they do not contribute, but which injuries befall a servant in its employ a different principle prevails.' ' Having been engaged for the performance of specific services, he takes upon himself the ordinary risks incident therewith.' 'As a consequence, if he suffers by exposure to them, he cannot recover compensation from his employer.' ' The obvious reason for this exception is that he has, or in law, is supposed to have them in contemplation when he engages in the service,

and that his compensation is arranged accordingly.' ' He cannot, in reason, if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid."

" There is also another reason often assigned for this exemption that of a supposed public policy.' It is assumed that the exemption operates as a stimulate to diligence and caution on the part of the servant, for his own safety as well as that of his master."

" Much potency is ascribed to this assumed fact by reference to those cases where diligence and caution on the part of the servants constitutes the chief protection against accidents. But it may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willingly to subject themselves to dangers of life or limb because, of losing the one, or suffering in the other, damages could be recovered by their representatives or by themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant."

This opinion written by Justice Field is considered to be one of the best opinions ever written on this subject, and I think gives fully the reasons for the fellow servant doctrine'.

He disposes of the reason last assigned fully so but little more need be said upon it. To hold that the fact that no damages would be given would increase the servant's regard for his own safety is to contradict and go against all rules of human nature. It would be utterly foolish to suppose that a servant would be one degree less careful if he were allowed to recover damages which have been caused by another and most likely an utter stranger to him.

The other reason given by Justice Field, to wit, that the servant takes upon himself the ordinary risks incident to the service, needs a more careful consideration.

This may be a good doctrine but as applied by the Courts at the present time it is too arbitrary, and hard. Looking at this doctrine it will be asked what "are ordinary risks"? They are those risks which the Courts declare the servant assumes. Who are the servants who assume these Risks?

They are those servants whom the Court arbitrarily says assume these risks. This seems to be the logic of the Courts at the present time.

The Courts say that the servant has his compensation arranged according to the degree of danger. Is this so or not? It may be so in theory but is certainly not in actual practice. Where is there an employer who gives his servant a larger compensation when he directs him to perform a dangerous service. Where is the railroad Company who pays, those employees, who risk their lives and limbs daily, more than the employee, who occupy a safe position and assume no risks. It is just the opposite. It will be found by actual experience that those employees who occupy a safe position are paid double the amount paid to those who put their lives in danger every moment.

It seems to be a waste of time to discuss the doctrine of fellow servant if, indeed, there can be said to be any settled doctrine in the U.S.. The reasons upon which it is supposed to be founded are manifest absurdities and should be abolished. All servants of the same master should be upon

an equal footing, so far as their right to recover for the negligence of other servants is concerned. The Railroad Company should be liable in all cases or not at all.

FINIS.