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RAILROADS: LIABILITY OF LESSOR FOR NEGLIGENCE OF LESSEE RESULTING IN INJURY TO LESSEE'S SERVANT.

In the recent case of *Axline v. Ry. Co.*, 138 Fed. 169, which arose under an Ohio statute providing that, where a railroad company leases its road, it shall be jointly liable with the lessee on all rights of action arising from the negligent operation or maintenance of the road, it was held that the statute applied only to actions arising from a breach of duty as a common carrier, and did not render the lessor liable for the negligent operation of the road by the lessee whereby its employee was injured.

This appears to be one of the first cases to arise under the statute in Ohio, but a number of cases arising under similar statutes have been decided in other states during the last few years and the present case seems to follow the line of decisions favored by the weight of authority. The proposition that where a railroad company leases its property, to be operated by another road, the lessor company is liable for all the torts of the lessee, cannot be supported. The lessor company by virtue of its charter assumes the obligation to perform certain duties for the public in carrying freight and passengers, and in observing statutory precautions for the protection of the public from danger in the operation of its road. When it shifts to another company the burden of the discharge of these duties to the public, any loss resulting

to any member of the public from a failure by its lessee to discharge them may be made the basis for a claim for damages against the lessor company, *Abbot v. Ry Co.,* 80 N. Y. 27. The duty owing from the lessee company to its employees is, however, one which arises wholly from contract, and is not imposed by the charter of incorporation. The lessor company is not obliged to employ any particular members of the public. A person entering the service of the lessee company, therefore, acquires no right against the lessee except by virtue of the contract of employment. Such an employee comes into no privity of contract with the lessor company and cannot hold it liable for the negligence of the lessee whereby he is injured. *Ry. Co. v. Washington,* 86 Va. 629; *Lee v. Ry. Co.,* 116 Cal. 97; *Banks v. Ry. Co.,* 112 Ga. 655. The same rule applies where there is no statute authorizing the lease of the road, *Ry. Co. v. Culberson, 72* Tex. 375.

In *Ry. Co. v. Hart,* 70 N. E. 654 and *Ry. Co. v. Mayes,* 49 Ga. 355, the courts held that the lessor was liable for an injury to a servant of the lessee, resulting from the lessee's negligence, but in view of the fact that in the former case three justices dissented and in the latter the immediate question was not the sole ground upon which the decision was based, the cases are deprived of much weight as authority upon the question.

It is conceded that the liability in tort may be enforced against the lessor company, where the person injured is a member of the public, with a right to rely upon the discharge of the duties assumed by the lessor company in the operation of the road. Such persons are shippers and passengers, who have a common-law right to the exercise of peculiar care by the common carrier and travelers upon the highway, who have a statutory and common-law right to such a reasonable and careful operation of the road as shall not unduly injure them in the pursuit of their lawful rights, *Ry. Co. v. Curl,* 28 Kan. 222; *Freeman v. Ry. Co.,* 10 N. W. 594; *Arrowsmith v. Ry. Co.,* 57 Fed. 165. This principle, however, is not involved in the present case.

There is one class of cases where the lessor may be held liable to the employees of the lessee, *i. e.,* where the duty is retained by it to keep the road in repair and the lessee's servant is injured by its failure to do so. In such cases where the injury results directly from the negligence of the servant of the lessor or from the negligence of the company itself, the lessor is liable. Here it is the duty of the lessor to keep the road in a safe and proper condition for use, and to exercise the care in the management of the road and its appliances that is necessary to prevent any

injury arising from that source. This duty is imposed by the common law irrespective of any contract. A sufficient privity, in all cases of this class, exists between parties from and to whom duties are owing, when their breach is the cause of the injury. Here there is a legal duty owing to the servant, irrespective of the contract between the lessor and the lessee, and though he can sustain no action on the contract, he can for neglect of duty. These duties involve the safety and security of those who are in the lawful use of the road and are of a general and public character, and for their non-performance any person particularly injured can sustain his action. *Smith v. Ry. Co.*, 19 N. Y. 127; *Merrill v. Ry. Co.*, 54 Vt. 200; *Sawyer v. Ry. Co.*, 27 Vt. 370; *Nugent v. Ry. Co.*, 80 Me. 62.

THE DOCTRINE OF ASSUMPTION OF RISK, AS APPLIED TO THE BREACH OF SPECIFIC DUTIES IMPOSED BY STATUTE.

When a statute imposes upon the employer some specific duty for the protection of the employee, and the employer fails to comply with the requirements of the statute, and by reason thereof, the employee is injured, whether or not the employer is liable, is a question upon which there is much conflict.

There seem to be three doctrines. One doctrine is still that the statutory provisions imposing specific duties upon the employer for the protection of the employee, do not change the common-law rule, relating to obvious risks, and that the servant may waive compliance with the statute. *Goodrich v. Washington Mills Co.*, 160 Mass. 234. The cases which support this doctrine, hold that where a servant enters into the employment of his master, knowing of the dangers and of the failure to comply with the statute, which is obvious, he cannot recover for injuries received during the course of his employment. They hold that he impliedly agrees to assume the risks of the employment. This being so, the master owes him no duty and he cannot say that the master was negligent in failing to supply the safeguards required by statute. *O'Maley v. Gaslight Co.*, 158 Mass. 135. Some of these cases reason that if the requirements of the common law may be waived, why cannot the requirements of statutes be waived? No reason can be found why a man may not accept the obvious risks of his employment, under a statute, as well as at common law. He may be induced to do so by higher wages. The statute does not deprive a man of his free agency. *Monzie v. Friedline*, 33 N. Y. App. Div. 217.

Another class of cases goes upon the theory that if the statute is a mere affirmation of the common law, the rule as to assumption of risk remains the same. But if the statute sets up a definite standard and requires specific measures, to be taken by the employer, other considerations come up. The fact of such legislation shows that the common law rules did not afford sufficient protection to the employee; that the employee did not stand upon a footing of equality with the employer in contracting for his safety. On account of these conditions the legislature required certain specific measures to be taken for his protection. The standard of safety is no longer left to the employer. How then can there be any lawful contract that the employer shall violate the law and not be liable for it? An agreement that the employee shall waive the breach by the master, of an obligation imposed upon him by statute is void as against public policy. *Baddeley v. Granville,* 19 Q. B. Div. 423; *Durant v. Mining Co.,* 97 Mo. 62; *Narramore v. R. R. Co.,* 96 Fed. 298. These cases hold that the common law rule has nothing to do with a breach of a specific duty imposed by statute upon the employer; that the knowledge by the servant, that the master has not complied with the statute will not prevent him from recovering damages for injuries resulting from such breach of duty. *Hochstetter v. Coal Co.,* 8 Ind. App. 442. This was the finding of Indiana court in the recent case of *Indiana & C. Co., v. Neal,* 15 N. E. 295. In the case of *Quackenbush v. R. R. Co.,* 62 Wis. 411, the statute required all railroad companies to fence their road. The plaintiff entered into their employment, knowing that the road was not fenced. He was killed as a result of defendant's breach of duty, and the court held the company liable. They said that if the plaintiff knew the road was unfenced, he must also be presumed to know that the statute protected him.

The third class of cases has for its theory that a sharp distinction must be drawn between assumption of risk and contributory negligence. A man may continue in dangerous work. knowing of the failure to comply with the statute and while taking great care to avoid any accident, be injured. These cases hold that he may recover in such a case. But if he has been guilty of contributory negligence he cannot of course recover. In a Michigan case, an employee was killed as a result of the employer's breach. The court held the company not liable but expressly stated that it would have been liable but for the contributory negligence of the employee. *Grand v. R. R. Co.,* 83 Mich. 564. This last doctrine seems to be the soundest, both in reason and in justice.

MUST EVERY CIRCUMSTANCE NECESSARY FOR A CONVICTION BE PROVED BEYOND A REASONABLE DOUBT?

In line with the recent agitation over the great, and often unnecessary and unfair, handicap of technicalities against which the state must contend to convict a guilty person of his crime, comes the case of *State v. Blydenburgh,* 104 N. W. 1014 (Iowa). In that case—all the evidence that the accused poisoned his wife being circumstantial—the majority of the court hold that a refusal to give an instruction to the jury that "each fact in the chain of circumstances necessary to be established to prove the guilt of the accused, must be proven by competent evidence beyond a reasonable doubt," was not error, the jury having elsewhere been instructed that each of the *fact elements* of the crime must be proved beyond reasonable doubt. Thus the case stands as authority for the statement that while the state must prove the crime in its entirety, and also each constituent element of the crime beyond a reasonable doubt, yet every fact which, though not a distinct element of the crime, is nevertheless essential to a conviction, need not be so proved.

"There is a marked distinction," says Judge Deemer, in his dissenting opinion, "between an essential element of a crime and a fact or circumstance in a chain of circumstances essential to a conviction," and as an example of the latter he gives the rather unsatisfactory illustration, from the present case, of "how the poison came to be found in the stomach of the deceased." Now the above distinction is abstruse, but when he cautions to avoid Charybdis by distinguishing between "each link in the chain of circumstances relied on by the State" and "every circumstance or fact necessary for a conviction" (although this proposition must be admitted to be correct), it is hard to imagine that an ordinary jury, in the face of this double instruction would retire to the jury room with a very clear notion of what was expected of it.

Where the first of the above distinctions has been passed upon, nevertheless (although it is hard to determine whether such a distinction was really in the mind of the judges), the authorities are with Judge Deemer and Judge Weaver. In the celebrated case of *Commonwealth v. Webster,* 5 Cush. 319, Chief Justice Shaw, in the most careful of jury instructions, said: "The several circumstances upon which the conclusion depends must be fully established by proof. They are facts from which the main fact is to be inferred by competent evidence and by the same weight and evi-

dence as if each one were itself the main fact in issue. Under this rule, every circumstance relied upon as material is to be brought to the test of strict proof."

The instruction liable to be confounded with the one under discussion, is to the effect that though the jury is not sure as to the accused person's connection with some of the fact essentials of the crime, nevertheless, if it is convinced of guilt, as a whole, beyond a reasonable doubt, then it should find a verdict of guilty. Illinois is the only state that sustains this instruction. "The reasonable doubt the jury is permitted to entertain, must be as to the guilt of the accused on the whole evidence and not as to any particular fact in the case." *Mullins v. People,* 110 Ill. 42. *Lehigh v. People,* 113 Ill. 372. But in *Bressler v. People,* 8 N. E. 62, the judge, while ostensibly upholding these decisions, practically admits that the instruction was error, though in that case, "harmless." For the collected authorities on the point see the case of Dr. Graves. (32 Pac. 63.)

The great mistake in these instructions is the continued and unfortunate use, on the part of the trial judge, of the metaphor "link in the chain." To be sure, no chain is stronger than its weakest link, but the metaphor is usually inapplicable. This is especially true in the case of the second of the two distinctions given by Judge Deemer, to which the statement in *Leonard v. Territory,* 2 Wash. 381, that the different kinds of evidence to support a point were rather a crowd than a chain and that many could be absent without allowing escape, applies. The "cable" metaphor (*State v. Gleim,* 41 Pac. 1001) in which the circumstances which go to make up the ultimate facts and circumstances are the "strands," is true enough, but not altogether satisfactory in directing the mind of a jury. But the "link-and-chain" metaphor is almost universal, and as Judge Ladd remarks in *State v. Cohen,* 108 Ia. 208, "is extremely likely to be misunderstood by the jury."

The omission of it in the present case, and in many others, would have prevented much confusion.