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LIABILITY OF RAILROAD COMPANIES FOR NEGLIGENCE.

THE adjudicated cases in the United States, upon the liability of railroad companies for negligence, are far too numerous to be examined in detail within the limits of an essay. But the general principles applied by the courts are essentially the same in all the states, and it has been thought by the writer of the present article that a discussion of the most important rules which may be considered as established, although illustrated chiefly by reference to the decisions of a single state, will not be without interest and value to the profession generally.

A railroad corporation has relations to its employees, to its passengers, to the public generally, and to property. Its duties to the public may be considered with reference to adults and infants, and to them when at the crossings, and on the company's roadway. Its duties to property may be discussed in respect to the domestic animals, at crossings and on the company's roadway, and also in respect to real and other perishable property along its route.

The rights and duties of such a corporation as to its employees are determined by the law of master and servant. The company is bound to hire men who are fit for their business, and who are sober and tried. It is the right of each servant, that his fellow-servants should be able to discharge their duties, so that while he

is fulfilling his, he may not be imperilled by their incompetency. Passengers and the public have the same right. Hence it is that the company must answer for consequences resulting from the inefficient performance of the business of their employees.

The company engage, in law, to carry each passenger safely from his point of entrance to his point of exit. They must provide staunch and roadworthy carriages. They must have their track in good order and free from obstruction. They must provide convenient and easy means of access to and departure from their cars. The passenger, in turn, must comply with all reasonable regulations concerning his entrance into, his stay in, and his departure from the cars. Safe carriage is the paramount duty of the company. Hence they have a right to a free track as against all trespassers, and must keep a clear track for their passengers by the exercise of their utmost diligence.

The public are not entitled to occupy the roadway of the company except at the crossings, and then they must use reasonable despatch in crossing. The duty of care upon the company's servants and upon the public at intersections is mutual. Each has a right to expect this from the other. Therefore, in a city the company is bound to use all known and reasonable precautions to insure the safety of the public, such as the use of bells, steam-whistles, flagmen, gates, lights by night. The employment of any or all these must depend on the degree of public use of the high way. The public are bound to a diligence proportioned to the possible danger, and on warning given to stop. At all other places than crossings, the company is entitled to exclusive possession of their roadway, and any person on it without authority of law is a trespasser.

Off the crossings the company's servants have a right to presume that there are no trespassers on the roadway. They are not bound to look out for trespassers, except for the safety of passengers. If a trespasser is seen, the company's servants will not render the corporation liable except for wanton negligence. The obligations of care and diligence rest on the trespasser.

But in the case of a child of tender years the rule is different. Such a child lacks the capacity of exercising care. If left to go unattended, this is negligence in the parent and debars him from recovery. But the child is not barred. The company must exercise at crossings a diligence increased by the child's want of

capacity, and if, on the roadway, the child, though a trespasser, is seen, the engineer must use every practicable effort to stop.

Animals let loose and unattended are trespassers on the public road. Hence if injured at a crossing the company are not liable for anything but wanton negligence. But if attended, and traveling, and the attendant is not negligent, the company are liable for injuries done to them, if the result of want of care. What has been said of the duty of the company to the public at crossings, is predicable of its duty to animals also.

The company, as against the owners of animals, are not bound to fence. Hence cattle on the roadway of the company trespass, and the owner can recover only for wanton negligence. If injury accrues to the company, the owner is liable to it. A duty to fence or to take any other precaution, arises solely from the obligation to transport safely.

With respect to perishable property along the line of the route, such as woods, hay, lumber, buildings, the company are bound to use ordinary care. But care varies with circumstances. In dry weather ordinary care is a watchfulness much greater than in wet. The company are bound to use the best spark arresters as to have competent men to manage the fires of their engines.

Negligence is not doing what should have been done, or doing what should not have been done, in either case occasioning injury to another unintentionally. Where the measure or standard of duty is fixed, negligence is a question of law. Where the rule is a shifting one, the question is one of fact. Hence it is sometimes the province of the court to lay down what negligence is, at other times the jury alone must determine "what the standard is, as well as find whether it has been complied with."

It is law that a plaintiff whose negligence has assisted at all in causing the alleged injury cannot recover. Where the rule of duty is fixed and definite, it is usually the plaintiff's duty to show that he complied with it; and in such cases the burden of proving that he was not negligent falls on him. But where the standard shifts with the facts of each case, negligence must be proved by the party averring it. The plaintiff must always establish the alleged negligence of the defendant. The law will not presume it for him.

Where a rule of duty is fixed and clear, proof of what the plaintiff's conduct was will show at once whether he has or has

not complied with the rule, or, it will enable the court to ascertain and pronounce whether the plaintiff has or has not committed contributory negligence. But where the rule is not a fixed one, but the question is whether either party did as they should not have done, or did not do as they should have done, the proof of the conduct of the parties is at most evidence of negligence for the jury.

In *Ryan v. Cumberland Valley Railroad*, 11 Harris 384, it was ruled that where several persons are employed in the same general service, and one is injured from the carelessness of another, the employer is not responsible. This rule was affirmed in *Frazier v. The Penna. Railroad*, 2 Wright 104; but the following exception was announced: that the company is responsible to an employee for the carelessness of another known by it to be unfit for his business.

The same principle is announced in *Caldwell v. Brown*, 3 P. F. Smith 453, 6 Am. Law Reg. N. S. 752, which, however, is not a railroad case, in these words: "An employer is not bound to indemnify an employee for losses in consequence of the ordinary risks of the business, nor of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee."

The rule, as stated, was adhered to in *Armstrong v. Catawissa Railroad*, 13 Wright 186, but not extended; it being held that where two companies used a road in common, a servant of the one was not a fellow-servant of the servants of the other; and the employers of the latter were responsible to the former for their carelessness. In *Frazier's Case* it was ruled that the exception was nullified, if the servant injured was aware of his fellow-servant's incompetency and made no complaint, and continued to serve with him. In *Lockhart v. Lichtenhaler*, 10 Wright 151, 4 Am. Law Reg. N. S. 15, it was held, that a brakeman in the employment of the owner of a private line of cars was not a servant of, but a passenger on the road furnishing the motive power.¹ *Penna.*

¹ Judge REDFIELD, commenting on *Railroad Co. v. Collins*, 5 Am. Law Reg. N. S. 274, claims that the master is responsible for any want of skill or care in respect of employing competent and trustworthy servants and in sufficient numbers; and also in respect of furnishing safe and suitable machinery for the work in hand, unless the servants knowing, or having the means of knowing of the deficiency in furnishing proper help or machinery, consent to continue in the employment. And the neglect or want of skill of the master's general agent employed in procuring help and machinery is the act of the master.

Railroad v. Zebe, 1 Wright 423, holds that a company is bound to have safe and convenient means of egress and regress to and from the line of the road. *Penna. Railroad v. Kilgore*, 8 Casey 292, and *Passenger Railway v. Stutler*, 4 P. F. Smith 375, hold that a company is bound to stop a sufficient length of time to allow all passengers whose destination is a given point to alight there. *Penna. Railroad v. Zebe*, 9 Casey 318, holds that the passenger must alight at the point and on the side provided by the company. These principles are illustrated by the opinion of WOODWARD, late C. J., in *Sullivan v. Phila. and Reading Railroad*, 6 Casey 238, who announces that, on the part of the passenger, his consent is implied to all the company's reasonable rules and regulations for entering, occupying, and leaving their cars, and if injury befall him by reason of his disregard of them, this is his own negligence concurring in causing the mischief. On the part of the company, the contract implies that they are provided with a safe and sufficient railroad to the point indicated; that their cars are staunch and roadworthy; that means have been taken beforehand to guard against every apparent danger that may beset the passenger, and that the servants in charge are tried, sober, and competent men. If in performing this contract a passenger not at fault is hurt, the law presumes negligence and throws on the company the onus of showing it did not exist. Their paramount duty is the passenger's safety.

But the company is not bound to place guards on the car windows; and if the facts are undisputed that a passenger was injured from putting his arm out of a car window, the court should pronounce him negligent as matter of law: *Pittsburgh and Conn. Railroad v. McClurg*, 7 Am. Law Reg. 277.

To this may be subjoined, by way of *in pari materia*, observations of Judge GIBSON in *Tenery v. Pippinger*, 1 Phila. Rep. 543, that "a carrier of passengers is bound to exercise the utmost care and discretion. He is answerable for the least possible degree of negligence or carelessness. The happening of an injury raises a presumption of want of care, and throws on the carrier the burden of disproving it."

But, as ruled in *Goldley v. Penna. Railroad*, 6 Casey 242, a contract, limiting the liability of a railroad as carriers, may relieve them from those conclusive presumptions of law which arise when the accident is not inevitable, and require that negli-

gence be proved against them. This ruling is maintained in *Powell v. The Railroad*, 8 Casey 414, and in *Henderson v. The Railroad*, 1 P. F. Smith 315.

At this point may be noticed a proposition of Judge GIBSON in *Tenery v. Pippinger*, *supra*. This case related to the rights and duties of passengers on a public stage, but, it is submitted, is applicable to railroads. "Passengers engage their passage on the basis of the customs of the country. These are incorporated with, and become a part of, the contract. It is matter of experience, I might almost say of general history, that our public stages have been crowded with as many passengers as they could carry. A railway company differs from a stage company, in its possession of an almost limitless motive power, and in its ability to attach to an engine a great number of carriages. There is, therefore, ordinarily no necessity for overcrowded cars, and the company would seem bound to take notice of the habits of the travelling public, and to provide corresponding accommodations." In *The Railroad v. Hind*, 3 P. F. Smith 517, WOODWARD, C. J., says, "To allow undue numbers to enter a car is a great wrong, and in a suitable case we would not hesitate to chastise the practice severely." Of course it is only possible to allude to first principles in this connection. In all cases arising under them, the rule of duty would vary with their special circumstances, and negligence would be for the jury pre-eminently. But it may be noticed that it was recently held in one of the New York courts, that, though the company had a rule forbidding its passengers to stand on the car platform, yet a passenger obliged to stand there from overcrowding the car and injured, could maintain his action equally with one seated within.

In *The Railroad v. Robinson*, 8 Wright 175, which was a suit brought by children for the death of their father, a pedestrian, alleged to have been occasioned by negligence of the company's servants in roping a coal-car into a private yard, the court approved the charge of HARE, J., in the court below, "that if a warning was given to the deceased, and was such as to convey knowledge of the state of the case and the danger to be incurred, and he went on with knowledge of his situation so derived, or derived from any other source, it was a bar to the action."

The Railroad v. Heileman, 13 Wright 60, was the case of one travelling in his wagon on the public road and injured by col-

ion at a crossing. The court say that at such an intersection neither the company nor the public have exclusive rights of passage. Their rights are concurrent. When the traveller approaches it, it is his duty to look out for approaching trains and engines. This is a fixed rule of duty. If he fails to take the precaution, his omission to perform his duty is negligence, and he cannot recover.

The obligations of the company are enforced in *Reeves v. The Railroad*, 6 Casey 461, where it is said that a person lawfully using a public road, which crosses a railroad at grade, has a right to presume that the servants of the company will take all reasonable and proper precautions to avoid injury to a person lawfully on the road. He is not bound to give a signal to an approaching train.

These principles were expanded in *The Railroad v. Evans*, 3 P. F. Smith 255. The plaintiff, who was entering Pittsburgh with his team when injured, "had a right to pass along the street across the railroad in pursuit of his usual avocations. On approaching the road it was his duty to look and listen for an approaching locomotive, and if he saw or heard one coming to get himself out of the reach of it. He had no right to stop on the railroad, nor so near it as to be struck by the engine or the train. If he might have heard or seen the train approaching, or if he saw it, and mistook the track it was on, it was negligence in him not to exercise his senses correctly and place himself out of danger. It was the right of the defendants to run locomotives on their road at the speed usual in cities and towns. In approaching grade-crossings, they are bound to give signals by a bell, a whistle, or head-light, or a flagman, or such other device as would be sufficient to give people of ordinary prudence notice of their approach. Any neglect of either of these duties would be culpable negligence, and if the accident resulted from such negligence on the part of both parties, neither could recover against the other."

It is said in *Railroad v. Norton*, 12 Harris 465, that because a company undertakes to carry its passengers safely it must have a clear track. If therefore a man places himself on the track, he must not expect the law to do more for him than to punish wanton injury. If he be injured from the ordinary pursuit of the company's legalized business, let him blame his own rashness and

folly. And in *The Railroad v. Spearer*, 11 Wright 300, it is said that if the engineer sees an adult on the roadway, where he has no legal right to be, and the train is in full view, and nothing to indicate a want of consciousness by the adult of the approach of the train, the engineer, having a right to a clear track, would be entitled to presume that the trespasser would remove in time to avoid danger, or if he thought the adult did not notice the train, it would be sufficient to whistle to attract his notice, without stopping the train.

The Railroad v. Spearer, 11 Wright 300, was the case of a child five years old suing by her next friend. In place of crossing at the intersection of the street, she went down about thirty yards upon the company's roadway. As she stood there a train passed her. An engine was following in close proximity. When the train got by, the child tried to cross the track before the engine could get to her, and was thrown down by it and mutilated. The court ruled in substance as follows: The child had no right to be on the roadway of the company. After the engine had got by the crossing, the engineer had a right, as against those not lawfully on the roadway, to expect it to be clear, and was therefore required to use only the ordinary care appropriate to his duties in that locality. But a child of five is not subject to the rule of contributing negligence like an adult. Upon seeing it, it would be the duty of the engineer to stop his train. The change of circumstances from the possession of a capacity in an adult trespasser to avoid the danger, to a want of it, would create a corresponding duty in the engineer. In the latter case, the child not concurring, for want of capacity, in the negligence causing the disaster, the want of ordinary care in the engineer would create liability. But if the train came unexpectedly on the child, or if it threw itself in the way of the train suddenly, the engineer being then incapable of exercising the measure of ordinary care to save it, the child would be without remedy, for the company's use of its track was lawful, and the child's presence there was unlawful.¹

¹ *Smith v. O'Connor*, 12 Wright 218, was the case of a child suing a wagoner for running over and injuring her in the public street. The court there ruled, that a child of tender years is held only to the exercise of that degree of care and discretion ordinarily to be expected from children of that age, and is not culpable for failing to exercise a prudence and care which belongs only to persons of riper years. But, intimated the court, the foregoing rule is applicable *only where the child sues*. If a parent sue for an injury by which the services of his

The principle was noted in *Glassey v. The Hestonville and Fairmount Passenger Railway*. In this case, recently decided by the Supreme Court of Pennsylvania, but not yet reported, it was held that it was contributing negligence in a parent knowingly to allow a child of four years of age to go about unattended in a public street of Philadelphia, and that he could not recover for the injury occasioned by the negligence of the Passenger Railway Company to his child.

In *The Passenger Railway v. Stutler*, 4 P. F. Smith 345, a strong distinction is taken between pure wrongs, such as seduction, or battery, and torts springing from a breach of contract; and it was held that in torts which consist in a mere omission of a contract duty, no legal remedy exists except an action on the case, which must be brought by the party injured, and cannot be by the master.

The suit was by a mother for injury done to her minor son, a passenger, by the negligence of a carrier.

These principles were inculcated in *The Railroad v. Skinner*, 7 Harris 298. A railway company is in exclusive possession of ground paid for as an incorporeal hereditament, and owns a license to use the greatest attainable rate of speed, with which neither the person nor the property of another may interfere. An American company is not bound to fence its railway. It is within the English rule, that the entry of another's cattle upon its possession is a trespass. The common law of Pennsylvania excepts from this rule only woodland and waste field. Hence, as regards any one except the owner of a forest or a waste field, the owner commits negligence in the very act of turning his cattle loose. If they are killed or injured on a railway, the owner has no recourse, but is himself liable for damage done by them to the company or its passengers.

The above rulings were amplified in *The Railroad v. Rehman*, 13 Wright 101, 5 Am. Law Reg. 49. Rehman's mules had escaped from a pasture adjoining the railroad, the fences of which were proved to be in good order. The court observes, "Whether, therefore, the plaintiff's mules escaped from an enclosed field or not, in view of the trespass on the defendants' road, I do not think makes any difference in this case. It was undisputed that they

infant son are lost, there would enter into the case, his duty to shield his child from danger, which is the greater the more helpless he is.

were on defendants' road without license. If so, they were there wrongfully—they were trespassers. How can the owner separate his case from the wrong done by his cattle? Intention, nay, effort to prevent, will not make their occupancy of the track lawful. He was bound to restrain them at his peril. He did not restrain them so as to prevent their being in the way of the defendants, and I see not how he can lawfully demand compensation in such an aspect of the case."

The company's obligation as carriers are enforced in *Sullivan v. The Railroad*, 6 Casey 236. As between the company and the passenger, the company are bound to see that the cattle are fenced out. If cattle are accustomed to wander on unenclosed grounds through which the road runs, the company are bound to take notice of this fact, and either by fencing in their track, or by enforcing the owner's obligation to keep his cattle at home, or by moderating the speed of the train, or in some other manner, to secure the safety of the passenger. If they tolerate obstructions, they must avoid the danger by reduced speed and increased vigilance, or answer for the consequences.

In *Rehman's case, supra*, his loose mules were killed at a crossing. *Reeves v. The Railroad*, 6 Casey 454, was a suit brought for cattle killed at a crossing, which were attended. The drove numbered above three hundred. The drover when about thirty rods from the crossing was answered by an employee of the company that the train would be along in five minutes or so. He divided his cattle into sections, moved one across the track, and was moving a second when the train dashed into it at the rate of twenty-five or thirty miles an hour and killed several. The crossing was approached by the train through a cut and curve. For some half mile before coming to the cut, the turnpike was in full view of the engine, and the cattle stretched for that distance along the pike. The court say, "Duties grow out of circumstances. And in view of these circumstances, we have no hesitation in saying that it was the duty of the engineer to observe the cattle on the turnpike, and to presume that the head of the drove might be at the crossing, or so near thereto, as to make it prudent to moderate the rate of his speed in such degree as to give him entire control of the engine. This he was bound to do, and what he was bound to do the plaintiff had a right to presume would be done. And the measure of precaution taken or omitted by the plaintiff,

cannot be properly estimated without *allowing him the full benefit of this presumption*. If the rate of speed was under all circumstances, imprudent and unreasonable, the plaintiff was not only not bound to anticipate it, *but he had no right to presume that the company would violate their rule of duty*. Nor was it the plaintiff's duty to send a signal along the road. He had no right to be on the track himself except for the single purpose of passing along the turnpike. The company are bound to employ all necessary agents, to instruct them properly in their duties, and to look to *them* for the performance of every act which the business of the road requires. If the occasion required signals, it was the business of the company's agent who was at hand to give them."

The cases of *The Railroad v. Hummel*, 3 Casey 101, and *The Turnpike Co. v. The Railroad*, 4 P. F. Smith 345, furnish the principles determining the responsibility of railroads for firing perishable property along their lines of route. The first declares the general proposition of law, that railroad companies are liable at common law for the damage done by fire occasioned by the negligent management of their engines. The second avers that the degree of care has no legal standard, but is measured in every case by its circumstances. That which is ordinary care in a case of extraordinary danger, would be extraordinary care in a case of ordinary danger; and that which would be ordinary care in a case of ordinary danger, would be less than ordinary care in a case of great danger, which, to adopt Mr. Justice THOMPSON'S observation in *The Railroad v. McTighe*, 10 Wright 321, is an acute and active attention to the means of safety. Applying these principles to the case in point, which was a suit for a bridge set on fire by sparks from the railroad company's engine, the allegation being that there was not a proper spark-arrester, the court say: "If the construction was that which was best adapted for those purposes in known practical use at the time the alleged cause of action arose, the duty of the company was performed, nor should I look to entire uniformity in practice in a matter so difficult of accomplishment as this. I know no better proof of so difficult a problem than its practical accomplishment as far as it has been. When something certainly better is invented, and approved by the only true test of mechanical contrivances—practical experiment continued long enough to test its real utility—then railroad companies will be bound to use it."

There is not much light on the question on whom does the burden rest to prove the plaintiff's alleged negligence, when the defence is contributory negligence? In *Beatty v. Gilmore*, 4 Harris 463, the court below charged that the *onus probandi* lay upon the party averring the plaintiff's negligence. In error, the Supreme Court did not disaffirm the charge.

In *Railroad v. McTighe*, 10 Wright 320, THOMPSON, J., says, "I have no doubt there may be cases in which the plaintiff's case would be incomplete without proof of care; such, for instance, as where a prescribed mode of doing an act was required out of which the injury sprang, or where a party should leap from a train of cars to avoid a collision on well-grounded apprehension thereof. But if a party omit this, where it is not necessary to aver it in the *narr.*, and the other side do not demur, but go to the jury on the want of such element, or assume the burden of proof, he could not nonsuit the plaintiff or ask a court to do more than to submit the question to the jury, whether, from all the evidence, the plaintiff had been guilty of negligence or not.

In *Railroad v. Hagan*, 11 Wright 246, the court below was asked by the plaintiff to charge, *inter alia*, that "unless the jury are satisfied by affirmative evidence that the deceased did not use ordinary care, the plaintiff is entitled to recover." The court so charged, and the Supreme Court did not disaffirm it.

In *Myers v. Snyder*, Bright. Rep. 489, the question of contributory carelessness was raised. But the plaintiff was not required to show that he was not negligent. This is plain from the case, it being a suit by a newspaper carrier, who fell into a cellar-way about three o'clock in the morning of October 25th, and was there found by others.

With respect to the defendant's negligence, the burden of proof is of course on the plaintiff: *McCully v. Clarke*, 4 Wright 399, except where he is a passenger suing his carriers: *Sullivan v. Railroad*, 6 Casey 234.

A study of the foregoing cases will compel admiration for the excellent judgment and sound reasoning of the court which has virtually laid down a code respecting the rights and obligations of these corporations. The opinions consist so well, and are in many instances so luminous with principles, that they furnish the means of solving nearly all cases which can arise between pedestrians and drivers of vehicles in large towns or cities. Each of

these classes of persons has concurrent rights in the roadway of a street. But the rights of the former away from crossings are regulated by the fact that the vehicle is limited to the roadway, and has less facility of control, while the rights of the former at crossings are measured by the fact that these are the customary places of public passage. Hence a driver, either of a passenger railway car or of any other vehicle, is bound to approach an intersection at such a rate of speed as to have complete control of his vehicle. All drivers are bound to be watchful for the presence of persons in the roadway, and to exert a more active attention at crossings. If a little child is in the street, the burden of care falls on the driver. If an adult is there, and the driver is going at the rate of speed customary in cities and towns, he has a right to presume that the adult is exercising his requisite measure of care, and the adult has a right to presume that the driver will continue to approach at the lawful rate of progress. If a parent suffers an infant to go about unattended, this is negligence on his part, and bars his action; while if his child should occasion injury to a vehicle lawfully progressing on its legalized business, the parent would be responsible. And as to fire companies, it would seem they have only the same rights as others. They may proceed along the street at a rate customary to the roadway, and on approaching a crossing must moderate enough to have complete control of their apparatus. On arriving at the vicinage of the fire, their duty to extinguish and arrest the spread of the flames entitles them to obstruct the street to a degree necessary to the discharge of their duty. And if any appliances by which the obstruction could be mitigated should be devised, and used long enough to test their utility, it would be their duty to use them. It may be added that if a pedestrian observes fire apparatus, a vehicle, approaching at unlawful speed, he is bound to use care proportioned to the danger. He may not rush into peril, and claim that the unlawful movement of the vehicle creates a responsibility to him. Its responsibility in such a case would be to the criminal law in certain contingencies, and always to the municipality for breach of its police regulations.

T. B. D.