

MASTER AND SERVANT—FELLOW SERVANTS—SHOULD ACCUSED PERSONS BE WITNESSES?

among which are to be counted the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful conduct of the person placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason and cannot receive our sanction."

In this connection an important practical question may be adverted to, and that is, as to the effect of knowledge on the part of the servant injured that the master had not discharged his duty in providing competent fellow-servants or fit and safe materials or machinery. The following are the more important cases on this point: *Watling v. Oastler*, Law Rep. 6 Excheq. 73, 1871; *Senior v. Ward*, 1 El. & El. 385 (102 Eng. C. L. 384); *Dynen v. Leach*, 26 L. J. 221; s. c. 40 Eng. L. and Eq. 491; *Assop v. Yates*, 2 H. & N. 768; *Griffiths v. Gidlow* 3 H. & N. 648; *Smith v. Dowell*, 3 F. & F. 238; *Laning v. New York Central R. R.*, 49 N. Y., 521, 1872 (full discussion); *Frazier v. Penn. R. R. Co.*, 38 Penn. St. 104; *Davis v. Detroit, etc., R. R. Co.*, 20 Mich. 105, 127, 1870, where the cases are referred to and the subject fully examined by Cooley, J.; *Hayden v. Manufacturing Co.*, 26 Conn., 538, 1861; *Buzzell v. Manufacturing Co.*, 48 Maine, 113; *Jones v. Yeager*, 2 Dillon C. C. 65, 68. They authorize the deduction of the general rule that if the plaintiff voluntarily continue in the master's service with full knowledge of the incompetency of the co-servant, or of the unfit and defective machinery, and

of the danger thereby occasioned, this will be considered such "contributory negligence" on his part as to defeat his right to recover unless upon some special ground, as in *Holmes v. Clark*, 6 Hurl. and N. 349, affirmed 7 ib. 937, where the servant made complaint, and the master thereupon promised that the grounds of it should be removed. This rule, that knowledge by the servant injured of the danger will disentitle him to recover if he voluntarily remains in the service without complaint, clearly applies to a case where it is the duty of the servant himself to inform the master or superior of the co-servant's unfitness, or the unfitness of the materials or structures. The reason for this exemption of the master from responsibility, would not seem to apply when the servant injured could not reasonably be held to know the danger to which the master's neglect of duty exposed him. It seems to us that some of the cases have asserted rather too rigid a rule against the servant, arising out of his knowledge of the neglect of the personal duty of the master as respects co-servants and materials, and his supposed acquiescence in it; and there are aspects of this subject that need to be further discussed and decided before the law can be regarded as settled.

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At the late Social Science Congress the following question was discussed:—

"Is it desirable that defendants in criminal proceedings should be competent or compellable to give evidence in their own behalf, or on behalf of or against others jointly indicted?"

We heartily agree with the Attorney-General that if we are to alter our law, the alteration must be thorough. An optional witness would be an intolerable anomaly, and if an accused person is to be a competent witness he must also be a compellable witness.

The gentlemen who have from time to time agitated this question do not appear to have tested their theories by facts. We all admit that the object of a judicial inquiry should be to elicit truth, and that is also the professed object of