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Winston G. Crenshaw

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THE FELLOW SERVANT DOCTRINE AND ITS APPLICATION IN VIRGINIA

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Geo. Winston Crenshaw
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The Fellow Servant Doctrine and Its Application in Virginia

Prior to early in the twentieth century, working men were forced to accept conditions as laid down by their employers. It was largely essential that they work under whatever circumstances their employers saw fit to apply—their jobs were dependent upon their submission.

Each job was characterized as having certain risks. These so-called "risks of the business" had to be assumed by the worker when he accepted the job. The risks included such accidents as those caused by fires, explosions, collapsing of buildings, the operation of old and defective machinery; as well as accidents resulting from the fault or negligence of a fellow-servant. It was this latter problem which caused so much suffering in the labor ranks, and against which employees have united and fought until they were able to get the necessary legislation for the abolishment of this old common law doctrine.

The application of the old common law principle naturally caused the courts a great deal of trouble in deciding where the actual liability should rest, prior to the adoption of specific laws passed in Virginia in 1902.
The question of the liability of the master to a servant for the negligence or misconduct of another servant was first suggested in an English case,¹ arising in 1837. In this case the plaintiff was a servant of the defendant who directed the plaintiff to go with another servant who was driving the defendant's van, and the plaintiff was to take goods of the defendant. Doing as he was directed, the plaintiff was injured due to the breaking down of the van, which caused him to be thrown to the ground. The plaintiff claims that it became the duty of the defendant, on that occasion to use due and proper care that the said van should be in a proper state of repair, that it should not be overloaded, and that the plaintiff should be safely and securely carried thereby.

From the mere relations of master and servant, no contract, and therefore no duty can be implied on the part of the master to cause the servant to be safely and securely carried or to make the master liable for damages to the servant, arising from any vice or imperfection, unknown to the master, in the carriage, or in the mode of loading and conducting it.

Neither can this relation imply an obligation on the part of the master to take more care of the servant than

¹ Priestley vs. Fowler, 3 M. & W. 1.
he may reasonably be expected to do for himself. The servant
is not bound to risk his safety in the service of his master,
and may, if he thinks fit, decline any service in which he
reasonably apprehends injury to himself; and in most cases
in which danger may be incurred, if not in all, he is just
as likely to be acquainted with the probability and extent
of it as the master.

The case was clearly one of equal knowledge on the part
of the two servants, and of voluntary exposure by the plain-
tiff to a known hazard not required by his duty; and both
servants were jointly engaged in the same business when the
accident happened to the plaintiff.

The general rule was thus established, that a master
is not liable to his servant for damages caused by the neg-
ligence of a fellow-servant.¹

This question of the liability of the master to a ser-
vant for the negligence or misconduct of another servant
was first maturely considered in an American case;² decided
in 1842, which has since been regarded both in England and
America as the leading case upon the subject.³

In this case a railroad company employed A, who was
careful and trusty in his general character, to tend the
switches on their road; and after he had been long in their
service, they employed B, to run the passenger train of cars

¹Ibid., p. 7.
²Farwell vs. B. & W. Ry. Co., 4 Metc. 49.
on the road; B knowing the character and employment of A. Held, that the company was not answerable to B, for an injury received by him, while running the cars, in consequence of the carelessness of A in the management of the switches.

Chief Justice Shaw delivered the Judgement of the Court and he said:

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 services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of a principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is likely to know, and against which he can as effectually guard, as the master. These are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. 5

This view of the law had been generally accepted in many of the states of the Union up until about 1900. 6

Judge Shaw rests the exemption of the employer from liability to its servant occasioned by the negligence of a fellow-servant upon implied contract. The controlling reason of that decision is that a person entering the employment of another assumes all risks incident to that employment, including the danger of injury by the fault or negligence of a fellow-servant. The difficulty which has been experienced is found in its application to par-

5 4 Metc. 49.
ticular cases, in determining who are and who are not fellow-servants, within the terms and meaning of the rule.

And so, the Fellow-Servant Doctrine was first defined in America as follows: "When a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them, for an injury received by him in consequence of the carelessness of another while both are engaged in the same service." 7

Among the reasons given for the rule in this leading American case was that the servants, because of their association in the labor, were so situated that each could be an observer of the conduct of the others, could exert influence over the others for securing his own safety and could give notice to the master of any misconduct, incapacity or neglect of duty on the part of his fellow-servant. 8

It was also contended in this case that where the master's business was an extensive one, the rule should only apply to those servants who were working together in the same general department. This rule was rejected in this case as impracticable of application, but a number of courts have made it the basis of a distinction. 9

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7 4 Metc. 49.
8 Mechem, Agency, I, § 1649.
9 Ibid., § 1651
It was distinctly brought out in this case of Farwell vs. B. & W. Railroad Company, that although they, namely A and B, are employed to perform separate duties and services, they are employed to accomplish the one and same purpose, that of the safe and rapid transmissions of the trains.\textsuperscript{10}

It is an established fact that the aim of all the statutes concerning railroads is to protect the passengers; the principle of the doctrine is to increase the caution of railroad servants, and thus decrease the risk of the passengers.\textsuperscript{11}

However, some of the first cases in Virginia were not "fellow-servant" cases within the meaning of that phrase, and may be considered as exceptions to the doctrine already laid down.

Among these exceptions was the case of Moon's Adm'r. vs. R. & A. Ry. Company.\textsuperscript{12} This was a case in which the rear brakeman of a train was injured by the negligence of the section master, who was making repairs upon the track, upon which the dirt had not been filled in and firmly packed, but only "tamped," and who failed to signal the approaching train, which in passing over the track in its unsafe condition, was derailed, and the brakeman was caught under the wreck, and died from the injuries thus received. The court held that his administrator was entitled to recover, and in its opinion

\textsuperscript{10} 4 Metc. 49.
\textsuperscript{11} Ibid., p. 53
\textsuperscript{12} 78 Va. 745.
says that, "the section-master was not a fellow servant of the brakeman, and that the defendant company was liable for the injuries occasioned to the brakeman by the section-master's negligence."

In another case the question whether or not the "negligent employee was a co-employee of the party injured or was the representative of the defendant company," was a question of mixed law and fact, and would also be considered an exception as the principle could have no application to the fellow-servant doctrine.

Then in 1887 a workman, Mr. Norment, was employed by a railroad company, at its depot yards, as an "overhauler," to assist in fixing up cars needing repairs. On the day he received the injury, he was required to put a drawbar spring into the end of a certain car which stood on a "branch track." It became necessary for Norment to get under the damaged car, and while so situated another car was shifted on the branch track, and driven against the car which was in front of the car upon which he and his assistant were at work, by which it, in turn, was driven against the car upon which Norment was at work, and his hand was caught and greatly injured."

It appears that there was no repair track in the company's yard; so that such repair track was necessary; that the company knew it to be necessary and had them elsewhere; that it not only failed to provide a repair track, but failed

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³B. & O. Ry. Co. vs. McKenzie, 81 Va. 71. (1885)
also to provide signal flags. The Court held, "that Norment
was not of the same grade, or in the same line of duty, as
the engineer, or the conductor of the shifting engine, nor
was he under the orders of either of them, and that the case
was controlled by that of 78 Va. 745 and the liability of
the railroad company was again assented; the exact point de-
cided being that an overhauler engaged in the repair of the
company's cars is not a fellow-servant with the conductor
and engineer in the employment of the same company, engaged
in moving cars in the same depot yard, by the negligent per-
formance of whose duties the accident was sustained." The
Court laid much stress upon the fact that the defendant
company had failed to provide suitable appliances for the
protection of its workers, in that it had not furnished a
repair track and signal flags."5

The last of these early Virginia cases which may be
considered as exceptions to the Fellow-Servant Doctrine was
one which arose out of the same state of facts considered
in the case 78 Va. 745. The Court says, "that the defendant
company is liable for the negligence of its employees whose
duty it was to repair the road and give notice of its con-
dition, and those employees were not fellow-servants of the
plaintiff's intestate."6

Just why these cases were made exceptions to the general

5Ibid., p. 167 et seq.
6Torian's Adm'r vs. R. & A. Ry. Co., 84 Va. 192. (1887)
doctrine may be laid to the belief that the master's business was so extensive that the rule was made only to apply to those servants who were working together in the same general department.17

It has been frequently attempted by employers to obtain from their employees, at the time of entering upon the service and in consideration of it, a waiver of the liability of the master for injuries that may happen through the negligence of the master or of the other servants. Such waivers, however, are quite generally held to be opposed to public policy and void.18

The Fellow-Servant Doctrine was defined in 1842 but it was not until 1892 that the general doctrine was fully and broadly accepted in Virginia, and in this particular case the court was unanimous.19

"This case repudiates the exceptions, and evinces a disposition to return to the simple terms of the rule stated by Chief Justice Shaw." It throws aside the doctrine of "inferior and superior," of "gradations in employment," and of "separate departments," and states forcibly and clearly that "all serving a common master, working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, although in different grades or departments, are fellow-servants, and take the

17Mecham, Agency, I, 1651
18Johnson v. Richmond, etc., Ry. Co., 86 Va., 975.
risks of each others negligence."^{10}

This case further shows that probably the first four Virginia cases should have been held within the rule and not considered as exceptions. This new view will be taken up more thoroughly in a discussion of a later case.

Another technical point in regard to the liability of the master to the servant was cleared up in the case of Norfolk, etc., Ry. Co. vs. Thomas, when it was decided that if the master has been guilty of actionable negligence, the fact that the negligence of a fellow-servant contributed will not defeat the servant's right of recovery against the master.\(^2\)

In any discussion of the Fellow-Servant Doctrine, the case 91 Va. 193 is the one most frequently cited to define the Virginia view of the doctrine and it is the leading case which accepts the old view of this doctrine and also shows that the early Virginia cases should have been held within the rule.

In this case of the administrator of G. V. Nuckols against the Norfolk and Western Ry. Co., to recover damages for the death of his intestate, alleged to have been occasioned by the negligence of the defendant company, Nuckols was employed as a track hand by the defendant company, and upon the morning of the accident which resulted in his

\(^2\)Refer to N. & W. Ry. Co. vs. Nuckol's Adm'r., 91 Va. 206.

\(^2\)90 Va. 205.
death, was engaged, along with others, in placing a rail upon the track of the defendant company, when he was struck by a passing engine drawing one of the trains of the defendant, and died in a short time from the injuries received.

In rendering a decision, the court's object was to seek a plain rule regulating and controlling some, at least, of the most important relations between railway companies and their employees. There are interested in the solution of this problem the employees, as a class, and not merely those who have been or may be injured, the employer and the public. The court's view was that the particular rule is, in its application, always invoked by the employer to defeat the demands of the injured employee, but it does not at all prove that the employees, as a class, are not greatly benefitted by it. The number of those injured by the negligence of their fellow-servants is very great, but the proportion they bear to the whole number of employees is very small. If the rule, while operating to the disadvantage of the injured few, promotes the safety of the far greater number of those who sustain no injuries by introducing a salutary superintendence over each other among the servants of the company, then the rule, while beneficial to the employer, is not less so to the employee; for that which promotes immunity from danger is more to be desired than the pecuniary compensation for the injured could be, and being promotive also of the efficiency of the service, is obviously
in the interest of the public.\textsuperscript{12}

Naturally, there must be some obligation put upon the master to make the rule fair to the careful and competent employee and so there is a duty imposed upon him. This duty forces the master to exercise caution and discretion in the selection of the servants who are to be "fellows," and mutually responsible to each other, and he, the master, must not retain in his service any one found to be unfitted to discharge the duties assigned him. In the due performance of this duty by the master, the employees, as a class, and the public at large, are deeply interested; and the effect of the rule is to make it to the interest of the employees to keep the employer advised as to the habits, character, and qualifications of the fellow-servants.\textsuperscript{13}

It was practically impossible to draw a hard and fast line delimiting the liability of the employer, and so, in this case, the judge offered the following proportions, which were fully warranted by the great weight of authority in this State and elsewhere:\textsuperscript{14}

1. A person entering the service of another assumes all risks naturally incident to that employment, including the danger of injury by the fault or negligence of a fellow servant.

2. The liability does not depend upon the fact that the servant injured may be in a different department of the service from the wrong doer. The test is, were the departments so-far separated from each other as to exclude the probability of contact, and of danger from the

\textsuperscript{12} 91 Va. 205.
\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid., p. 207.
negligent performance of their duties by employees of the different departments? If they are so separated, then the servant is not to be deemed to have contracted with reference to the negligent performance of the duties of his fellow-servant in such other department.

3. The liability does not depend upon gradations in employment, unless the superiority of the person causing the injury was such as to put him in the category of principal or vice-principal.

4. It is the duty of the employer to furnish suitable and safe appliances, machinery, structure, and roadway.

5. It is the duty of the employer to exercise reasonable care, prudence and discretion in ascertaining the character, habits and fitness of his employees for the discharge of the duties to be assigned to them, and by proper supervision and superintendence, to keep himself informed as to the manner in which the duties intrusted to them are performed.

6. When the injury to the servant has been occasioned by the default of a fellow-servant, concurring with the negligence of the master, the latter is liable as though he only were at fault.

7. A track repairer and engineman, though in different departments, are, by the very nature of their employment, brought into frequent contact, and the risk of negligence by one must, therefore, be considered to have been in contemplation of the other where service under the common master was accepted.

These views of the Doctrine were prevalent in Virginia up until 1902 when the Fellow-Servant Doctrine was abolished as to steam railways engaged in "intra-state" commerce. For years the workingmen had been united in an effort to force the Virginia Legislature to abolish this worn out and anti-social doctrine, but the railroads were too strong and its political influence kept the legislature from protecting the employees who were made to suffer under the existing doctrine.

When this anti-social measure was defined its principle was to increase the caution of railroad servants, and thereby decrease the risks of the passengers. Yet, for all the good
it was supposed to do the harm it brought about was far more excessive, as innocent employees often lost their lives and others were badly injured and their dependants never recovered anything from the railroads which were at fault.

Since the case 91 Va. 193, the evil effect of the doctrine was felt more keenly by the employees and each case which was ruled a fellow-servant case made the employees, as a class, determined to have this beastly measure abolished. The principle of the thing was all right but it was worthless when it abused the rights of the employees to so great an extent.

As already stated, the evil effect was felt more between 1890 and 1902 than at any other time. The following cases cited will illustrate this statement, but the courts could offer no remedies because there was no legislation on the matter.

In 1892 an engine-man, on a railroad locomotive, was killed, without fault on his part, in a collision with another locomotive of the same railroad company. The collision was occasioned wholly by the negligent misconstruction of a right-of-way order by the engine-man in charge of the colliding locomotive. Although the plaintiff's intestate was proven entirely innocent of any fault or negligence, his dependants were not able to recover since the two engine-men, though on different locomotives, were fellow-servants, and
therefore the railroad was not held liable. 15

In another case, 16 a nineteen year old boy who was employed as a brakeman for the railroad, had his arm so badly injured that it had to be amputated above the elbow. He was engaged in uncoupling cars at the time of injury which was due to the negligent driving back of a train by the engineer or fireman of the train. But, as these two employees were fellow-servants of the brakeman injured, the company was not liable and the boy could not recover for his loss.

In another instance, an employee, acting as conductor of a shifting crew upon its yard, was run over by one of the company's cars and died from the injuries received. Just because he was a fellow-servant of the engineer and fireman of the crew, his administrator could not recover from the company for injury inflicted through their negligence. 17

As late as 1903, the court ruled that a railroad company, under the law which existed in 1900, was not liable for an injury resulting from the escape of cars from a siding to the main track, and a resulting collision, where the escape was due to the cars being displaced and set adrift by contact with shifting cars, resulting from the negligence of fellow-servants. 18

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From these cases alone, the injustice of this antique doctrine is brought out clearly and its evil effect was felt by the entire working class. So, when the employees grew strong enough to bring pressure on the legislature they had this anti-social and damaging doctrine abolished, thereby putting the liability of future injuries on the masters of the railroads.

Thus, after repeated efforts, this abrogation has, to a certain extent, been finally effected in Virginia—an innovation which England and most of the states have for years deemed absolutely essential to meet modern social and industrial conditions. It is probably advisable to quote verbatim and in full, not only the Article of the Constitution, but also the Statute on this subject, because, as will be observed, there is a decided discrepancy between them.

Virginia Constitution—Article XII.
Sec. 162. The doctrine of fellow-servant, so far as it affects the liability of the master for injuries to his servant, resulting from the acts or omissions of any other servant or servants of the common master, is, to the extent hereinafter stated, abolished as to every employee of a railroad company, engaged in the physical construction, repair or maintenance of its roadway, track or any of the structures connected therewith, or in any work in or upon a car or engine standing upon a track, or in the physical operation of a train, car, engine, or switch, or in any service requiring his presence upon a train, car or engine; and every such employee shall have the same right to recover from every injury suffered by him from the acts of omissions of any other employee or employees of the common master, that a servant would have, if such acts or omissions were those of the master himself.

30 Ibid.
in the performance of non assignable duty; provided, that the injury, so suffered by such railroad employee, result from the negligence of an officer, or agent of the company of a higher grade of service than himself, or from that of a person employed by the company, hav- ing the right, or charged with the duty, to control or direct the general services of the immediate work of the party injured, or the general services of the im- mediate work of the co-employee through or by whose act or omission he is injured, or that it results from the negligence of a co-employee engaged in another depart- ment of labor or engaged upon, or in charge of any car upon which, or upon the train of which it is a part, the injured employee is not at the time receiving the injury, or who is in charge of any switch, signal point or locomotive engine, or is charged with dispatching trains or transmitting telegraphic or telephonic orders therefor and whether such negligence be in the perform- ance of an assignable or non-assignable duty. The physi- cal construction, repair or maintenance of the railway, track or any if the structures connected therewith, and the physical construction, repair maintenance, cleaning or operation of trains, cars, or engines shall be re- garded as different departments of labor with the mean- ing of this section. Knowledge by any such railroad em- ployee injured, of the defective or unsafe character or condition of any machinery, ways, appliances or struc- tures shall be no defense to an action for injury caused thereby. When death, whether instantaneous or not, re- sults to such an employee from any injury for which he have recovered, under the above provisions, had death not occurred, then his legal or personal representative, surviving consort and relatives (and any trustee, curator, committee, or guardian of such consort or relatives) shall, respectively, have the same rights and remédies with respect thereto as if his death had been caused by the negligence of a co-employee while in the performance, as vice-principal of a non-assignable duty of the master. Every contract or agreement. express or implied, made by an employee, to waive the benefit of this section, shall be null and void. This section shall not be construed to deprive any employee or his legal or personal repre- sentative, surviving consort or relatives (or any trustee, curator, committee or guardian of such consort or rela- tive), of any rights or remédies that he or they may have by the law of the land, at the time this constitu- tion goes into effect. Nothing contained in this section shall restrict the power of the general assembly to further enlarge, for the above-named class of employees, the rights and remédies herein before provided for, or to extend such rights and remédies to, or otherwise en- large the present rights and remédies of any other class
of employees of railroads or of employees of any
person, firm or corporation.


Sec. 1294 K. An Act imposing upon railroad
corporations liability for injury to their employees
in certain cases.
(Approved March 27, 1902.)

1. Be it enacted by the General Assembly of Virginia,
That every corporation operating a railroad in this State,
whether such corporation be created under the laws of
this State or otherwise, shall be liable in damages
for any and all injury sustained by an employee of such
corporation as follows:

When such injury results from the wrongful act,
neglect, or default of an agent or officer of such cor­
poration superior to the employee injured, or of a per­
son employed by such corporation having the right to
control or direct the services of such employee injured,
or the services of the employer by whom he is injured;
and also when such injury results from the wrongful act,
neglect, or default of a co-employee engaged in another
department of labor from that of the employee injured,
or of a co-employee or another train of cars, or of a
co-employee who has charge of any switch, signal point,
or locomotive engine, or who is charged with dispatching
trains or transmitting telegraphic or telephoni orders.
Knowledge by any employee injured of the defective and
unsafe character or condition of any machinery, ways,
appliances, or structures of such corporation shall not
of itself be a bar to recovery for any injury or death
caused thereby. When death, whether instantaneous or
otherwise results from any injury to any employee of
such corporation received as aforesaid, the personal
representative of such employee shall have a right of
action therefore against such corporation, and may re­
cover damages in respect thereof. Any contract or agree­
ment, express or implied, made by any such employee to
waive the benefit of this section or any part thereof
shall be null and void, and this section shall not be
construed to deprive any such employee, or his personal
representative, of any right or remedy to which he is
now entitled under the laws of this State.
2. The rules and principles of law as to contributory
negligence which apply to other cases shall apply to
cases arising under this Act, except in so far as the
same are herein modified or changed.
3. This Act shall be in force from its passage.

The provisions of the Constitution changing the old
common law doctrine should be liberally construed, so as to
give effect to the Constitutional policy and intent. Under these provisions of section 162, a railroad company is liable for an injury inflicted on an engineer of a moving train, occasioned by the failure of a telegraph operator of the company to deliver to the conductor of such train a message from the train dispatcher. 31

That section includes all agents of the company whose duty it is to transmit telegraphic or telephonic orders for the movement of trains to the conductors of such trains, no matter what instrumentalities may be employed for that purpose. 32

The case, in question, is about a locomotive engineer in the employment of the defendant company, who lost his life in a collision between two of the trains of that company, occasioned by the failure of its telegraph operator to transmit, or deliver, an order sent out from the train dispatcher's office to the conductor of one of the colliding trains.

There can be no reason for holding that a train dispatcher is not a fellow-servant of the trainmen to be affected by the order, and the clause of section 162 abolishes the fellow-servant doctrine, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of a co-employee "charged with dispatching

32 Ibid., p. 868.
trains or transmitting telegraphic or telephonic orders therefor."

Therefore, the judgement was that the injured party should be able to recover.33

The effect of the Constitutional provisions, as was held in another case,54 was merely to abrogate the previously existing rule, which forbade the servant's recovery if he knowingly used defective machinery, etc., and to declare that such knowledge, of itself, should not bar a recovery.35

The present constitution has also abolished the fellow-servant doctrine in cases like this;56 where a yard master of a railroad company, who has no power to employ or discharge servants, but who directs the movements of trains on the yard, the shifting and changing of cars and the making up of trains, and who possesses none of the powers of a vice-principal, was a fellow-servant of an engineer on the yard, and the company is liable for an injury inflicted on a yard master through the negligence of the engineer.

If the presence of a yard master on a switching engine is in the usual and proper discharge of his duties, he is rightfully there, and is entitled to the benefit of the protection afforded him by the constitutional provisions abolishing the common law doctrine as to every employee engaged

33 Ibid.
in any service requiring his presence on a train, or engine.\textsuperscript{37}

In one instance, however, the provisions which abolish the doctrine of fellow-servant as to employees of railroad to not apply to employees of electric street railway companies, but as to the latter, the common law fellow-servant doctrine still holds. The words "railroad company" as employed in section 162 were only intended to apply to railroads proper or commercial railroads. "The language of the Constitution and of the Statute passed in pursuance thereof, and the history and reason of these provisions indicate that street railways were not intended to be embraced."\textsuperscript{35}

The statutes which abolished the fellow-servant rule only with reference to railroads have been uniformly held constitutional against contentions that they are founded on an arbitrary classification, a denial of equal protection of the laws, etc., on the ground that it is an occupation that is peculiarly and inherently hazardous.\textsuperscript{39}

On March 14, 1912 an act was passed and approved which amended and re-enacted the Virginia Employer's Liability Act of 1902, imposing upon railroad corporations liability for injury to their employees in certain cases.\textsuperscript{40} The original act was only amended to a slight degree and now states; (in

\textsuperscript{37}Ibid.
\textsuperscript{35}N. \& P. Traction Co. vs. Ellington's Adm'r., 108 Va. 245.
\textsuperscript{39}C. \& O. Ry. Co. vs. Hoffman, 109 Va. 44.
\textsuperscript{40}Code 1904, §1294-K.
the amended portions only.)

When such injury results from the wrongful act, neglect or default of an agent or officer; and also when such injury results from the wrongful act, neglect, or default of a co-employee engaged in another department of labor from that of the employee injured, or a co-employee (notwithstanding the fact that the party injured had the right to direct the services of the co-employee) in the performance of any duty on or about the same or another train of cars, or on or about an engine.

As a result, it was found in Co. & O. Ry. Co. vs. Swartz, decided in 1914, that the duty owed by a railroad company to a car repairer to furnish him a reasonably safe place in which to work is non-assignable; and hence the omission of a hostler to discharge his duty relative to removing cars beneath which a car repairer was working constituted negligence for which the railroad company was liable, though the cars were actually moved by a fireman under the hostler's direction.

It was also decided at a later date in 1914 that a servant assumes all ordinary risks incident to the employment, but not any risk as to primary duties imposed on the master.

In 1916 the legislature undertook to determine the liability of intrastate common carriers by railroads operated by steam for injury to, or death of, employees. The Code thus reads:

Every common carrier by railroad engaged in intrastate commerce, whose motive power is steam, shall be liable in damages to any of its employees suffering injury while employed by such carrier, except when such employee is injured while engaged in interstate commerce, and except when such employees are injured in the course of.

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#Acts 1912 have been omitted from Code 1919, and thereby repealed.
#115 Va. 723.
of their regular employment, which regular employment does not expose such employee to the hazards incident to the maintenance, use and operation of such railroads, and in case of his death, to his personal representative, for such injury or death, resulting in the whole or in part from the wrongful act or neglect of any of its officers, agents, servants or employees of such carriers or by reason of any defect or insufficiency due to its neglect in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment." 44

"By a resolution of the General Assembly of 1916, a Commission was created by Henry Carter Stuart, Governor of Virginia, to study the advisability of adopting a Workmen's Compensation Act for the State. This Commission reported to the General Assembly of 1918. A law was enacted on March 21, 1918, and became effective on January 1, 1919." 45

The purpose of the compensation law was to make the risk of the accident one of the industry itself, and that compensation resulting from such accidents should be treated as an element in the cost of production, added to the cost of the article and therefore borne by the community in general. 44

"The Workman's Compensation Act is said to be in the nature of a compromise between the employer and employee to settle their differences arising out of personal injuries, but is a compromise greatly to the advantage of the employee. By it the question of negligence of the employer is eliminated, and the common law doctrine of assumption of risk,

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44Va. Code, Sec. 5791.
45Deans, ed., The Va. Workmen's Compensation Act, p. 3.
'"Ibid., p. 8.
fellow-servants, and contributory negligence are abolished and the rules of evidence are laxly enforced; so laxly that an award may be made on hearsay evidence alone, if creditable and not contradicted. The relief afforded is fixed, certain and speedy and at a time when most needed. Under it there is no doubt or uncertainty as to the right of recovery of the amount thereof. The damage resulting from an accident is treated as a part of the expenses of the business and to be borne as such, as much as expenses of repairing a piece of machinery which has broken down."

"This act shall not apply to common carriers whose motive power is steam and engaged in intra-state trade or commerce, nor shall this act be construed to lessen the liability of such common carriers or to take away or diminish any right that any employee, or in the case of his death, the personal representative of such employee, of such common carrier may have, under the act of the General Assembly of Virginia, approved March 21, 1916, (which has already been stated, above.) or under the act of March 14, 1912, nor to casual employees, farm and horticultural laborers and domestic servants nor to employees of such persons, nor to any person, firm, or private corporation, including and public service corporation, that has regularly in service less than eleven operatives in the same business

\[7\] \textit{Ibid.}, p. 8.
within this State; unless such employees and their employers voluntarily elect to be bound by this act. 

"An employer who elects not to operate under this act shall not in any suit at law instituted by an employee subject to this act to recover damages for personal injuries or death by accident, be permitted to defend any such suit at law upon any or all of the following grounds:"

(1.) That the employee was negligent.

(2.) That the injury was caused by the negligence of a fellow-employee.

(3.) That the employee had assumed the risk of injury.

The act also states that "an employee who elects not to operate under this act shall, in any action to recover damages for personal injury or death brought against an employer accepting the compensation provisions of this act, proceed at common law, and the employer may avail himself of the defenses of contributory negligence of a fellow-servant and assumption of risk, as such defenses exist at common law."

Also, "when both the employer and employee elect not to operate under this act, the liability of the employer shall be the same as though he alone rejected the terms of this act, and in any suit brought against him by such employee the employer shall not be permitted to avail himself of any of

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"Ibid., p. 51; sec. 15
"Ibid., p. 56; sec. 16.
"Ibid., p. 57; sec. 17."
the common law defenses," cited in the above section.\footnote{Ibid., p. 57; sec. 18.}

And so, from these sections of the Workman's Compensation Act which refer to fellow servants, it is seen that although the Act abolishes the old common law doctrine under certain other circumstances, not all, it is still possible for the employer, in certain instances, to get out of his liability as stated in the Compensation Act and thus place himself and the employee back in the same position as they were when the Fellow-Servant Doctrine was held just.

No further legislation has been passed concerning the fellow servants and so, generally speaking, the fellow servant doctrine is considered fully abolished in most all cases.
Bibliography


