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Master and Servant—Federal Employers' Liability Act—Res Ipsa Loquitur—Evidence

less, if any, change. In the instant case the Supreme Court has looked at the judicial process of one of that class of states which provides through its courts the minimum in the way of judicial review for the utility contesting a regulatory commission's order. A recent decision of the Oklahoma Supreme Court, apparently conscious of the need for some change in policy, restricts the field of suits which fall within the constitutionally-prescribed legislative reviewing powers of the State Supreme Court.[25]

J. H. W., JR. '37.

MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—RES IPSA LOQUITUR—EVIDENCE.—Plaintiff, employed by defendant as train auditor, was injured in a wreck of defendant's train in which the engine and five or six forward coaches left the track. Plaintiff had no control over the management of the train, knew nothing of the condition of the track or equipment, and was engaged only in the duty of collecting fares. In an action by plaintiff under the Federal Employers' Liability Act, it was *held* that plaintiff was entitled to go to the jury under the res ipsa loquitur rule. *Williams* v. *St. L. & S. F. Ry Co.* (Mo. 1935) 85 S. W. (2d) 624.

This case is of interest in that, first, it holds the res ipsa loquitur rule applicable under the Federal Employers' Liability Act, an act which affects the liability of carriers by railroad engaged in interstate commerce to their employees in case of injury or death to the latter.[1] There are earlier cases which hold that the res ipsa loquitur rule cannot be invoked where the master-servant relation exists.[2] But it has been suggested that these cases are based upon a misinterpretation of two previous cases.[3] The defendant in the case under discussion relied upon these two cases, among others, to support its contention that the res ipsa loquitur rule was inapplicable in cases arising between master and servant. The court, in disposing of this contention, states that these cases are merely authority for the proposition that the fact of an accident raises no presumption of negligence, a principle which is well established.[4] The only reasons offered for withholding the rule in a suit by employee against employer are that the accident may be attributed to the negligence of a fellow servant, or to the contributory negligence of the plaintiff.[5] These defenses have been abolished by the Act,[6] and therefore the reasons for not applying the rule lose their force. What-

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[25] Oklahoma Cotton Ginners Assn. v. State (1935) 51 P. (2nd) 327 (Okl.).

[1] 45 USCA sec. 51 et seq.

[2] Chicago & N. W. Ry. Co. v. O'Brien, C. C. A. 8, 1904, 132 Fed. 593; Northern Pacific Ry. Co. v. Dixon, C. C. A. 8, 1905, 139 Fed. 737; Shandrew v. Chicago, St. P. M. & O. Ry. Co., C. C. A. 8, 1905, 142 Fed. 320.

[3] 5 *Tulane Law Review* 321. The cases misinterpreted were Patton v. Ry. Co. (1901) 179 U. S. 658; Looney v. Metropolitan Ry. C. (1906) 200 U. S. 480.

[4] Harper on *Torts*, p. 182.

[5] Ridge v. Norfolk Southern Ry. Co. (1914) 167 N. C. 510, 83 S. E. 762.

[6] 45 USCA secs. 51, 53, 54.

ever confusion may have resulted from the decisions before the Act, it is clear that the rule is now applicable in cases arising under it.

After having decided that the res ipsa loquitur rule may be applied in a case between master and servant, the court then proceeds to consider whether the evidence of negligence produced by the plaintiff is such as to preclude him from invoking the rule. If the plaintiff in his petition alleges general negligence and then offers evidence of specific acts of negligence clearly constituting the cause of the injury, he loses the benefit of the res ipsa loquitur rule.[7] Moreover, having thus deprived himself of the right to go to the jury on his general allegation of negligence, the plaintiff is thereafter not entitled to go to the jury on the issue of specific negligence because of his failure to plead such specific negligence in his petition.[8] Nevertheless, the plaintiff may introduce evidence tending to show specific acts of negligence on the part of the defendant, but the benefit of the res ipsa loquitur rule will not be waived, provided this evidence of specific negligence still leaves the exact cause of the accident in doubt.[9] The plaintiff in the instant case, under a petition alleging general negligence, did introduce evidence tending to show acts of specific negligence on the part of the defendant. But, as in the *Glasco case*,[10] upon which the court relied, the precise cause of the accident was not clearly shown, and the res ipsa loquitur rule was therefore still applicable.

In the course of the opinion, however, the court attempts to distinguish between procedural and substantive law on the ground that in an action brought in a state court under the Federal Employers' Liability Act the procedural law of the state court applies, but that in substantive matters, only the federal law is applicable. Although this distinction does prevail in such an action,[11] it is not clear why the court attempted the distinction in this case. It is said in the opinion that a mere scintilla of evidence is not enough to take an issue of fact to the jury under the applicable federal law. But it should also be noticed that this is also true under Missouri law.[12] Since the amount of evidence necessary to make a proper case for the jury is the same under both the federal and the Missouri decisions, the talk of the court about any such distinction is only confusing, and it appears to have no bearing upon the decision. J. L. F. '37.

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[7] Glasco Elec. Co. v. Union Elec. Light & Power Co. (1933) 332 Mo., 1079, 61 S. W. (2d) 955. In some jurisdictions the proof of specific acts of negligence does not deprive the plaintiff of the rule res ipsa loquitur. For a discussion of the effect of such proof upon res ipsa loquitur in the various states, see Heckel & Harper, "Effect of the Doctrine of Res Ipsa Loquitur," 22 Ill. Law Review 724.

[8] Conduitt v. Trenton Gas & Elec. Co. (1930) 326 Mo. 133, 31 S. W. (2d) 21.

[9] Supra, note 7.

[10] Supra, note 7.

[11] Inge v. Seaboard Air Line Ry. Co. (1926) 192 N. C. 522, 135 S. E. 522, cert. den. 273 U. S. 753; McIntosh v. St. Louis & S. F. R. Co. (1914) 182 Mo. App. 288, 168 S. W. 821.

[12] McNulty v. St. Louis & S. F. R. Co. (1912) 166 Mo. App. 439, 148 S. W. 973; Scrivner v. American Car & Foundry Co. (1932) 330 Mo. 408, 50 S. W. (2d) 1001.