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Stare Decisis in the F.E.L.A.

*Harry G. Fuerst**

JUDICIALLY SPEAKING, uniformity is *stare decisis.* The law leans towards the approval and application of the doctrine.[1]

The advocate in a given cause must determine what, if any, are the changes in the law affecting his case. Thereby he may take advantage of *metamorphosis,* as well as of any additional or unique evidence in his case that must compel a different or new conclusion, and thus force the judge to depart from stare decisis.

The operation of the doctrine of stare decisis has been described as follows:

> Under doctrine a deliberate or a solemn decision of court made after argument on question of law fairly arising in a case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy.[2]

Wherein can the advocate find aid in solving the problem of *stare decisis et non quieta movere*? [3]

The general doctrine on stare decisis is that when a court has once laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle and apply it to all future cases, *where the facts are substantially the same.*[4] Thus, the basic question here is: Do the facts in an advocate's case compare substantially to the precedent or stare decisis he is confronted with?

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* Of Miami Beach, Florida; member of the Bar of Illinois and Ohio.

[1] This study is especially directed to the subject of torts and the provisions as to the rights of railroad interstate employees governed by the Federal Employers' Liability Act, 45 U. S. C. Secs. 51-60 (1958), the Federal Safety Appliance Acts, 45 U. S. C. Secs. 1-16 (1958), and the Federal Boiler Inspection Acts, 45 U. S. C. Secs. 22-34 (1958).

[2] Black, Law Dictionary 1577 (4th ed. 1951). The Latin translation of stare decisis is, "To abide by, or adhere to, decided cases." Also defined as, "Policy of courts to stand by precedent and not to disturb settled point."

[3] "To adhere to precedents and not to unsettle things which are established." Black, Law Dictionary, *op. cit. supra* note 2 at 1578.

[4] Black, Law Dictionary, *op. cit. supra* note 2 at 1577.

A. Was the F. E. L. A. Statute Changed or Amended in the Interim?

Congress on August 11, 1939, amended the Federal Employers' Liability Act,[5] and by the sweep of the President's pen the old and archaic defense of assumption of risk was completely eliminated from the Act. As Justice Black announced in the case of *Tiller v. Atlantic Coast Line R. R.*,[6] the doctrine of assumption of risk is as dead as a dodo bird.

The applicability of the Act prior to August 11, 1939, was determined by the principle announced and stated in *Illinois Cent. R. R. v. Behrens*,[7] in which the Court said: "by its terms the true test is the nature of the work being done at the time of the injury." [8]

This narrow interpretation and construction of the Federal Employers' Liability Act resulted in two evils. First: It produced the question: Was the relation of master and servant at the time of the injury in interstate commerce?

Second, in many cases the employee was deprived of his remedy because, while working on both interstate and intrastate shipments indiscriminately, he could not prove the exact nature of the movement in which he was engaged at the very instant of an injury, and the evidence by which he might attempt to prove this vital fact was in the hands and under the control of the defendant railroad. By the 1939 amendment, this test was abolished.[9]

The benefits of the amendatory act are now, by its terms, extended to an employee

> . . . any part of whose duties shall be the furtherance of interstate and foreign commerce; or shall, in any way directly or closely and substantially affect such commerce.[10]

Following the adoption of the F. E. L. A. amendment, in *Lavender v. Kurn*,[11] the Supreme Court startled the entire Bar by permitting an advocate to speculate a theory from the evi-

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[5] See note 1 *supra*.

[6] 318 U. S. 54 (1943).

[7] 233 U. S. 473 (1914).

[8] *Id.* at 478.

[9] 53 Stat. 1404 (1939).

[10] *Ibid.*

[11] 327 U. S. 645 (1946).

dence by which the jury could find that the decedent's death was negligently caused by the railroad.[12]

A most important decision was reached in the case of *Gallick v. Baltimore & O. R. R.*[13] The action was predicated upon an insect bite. The cause was tried in the Court of Common Pleas of Cuyahoga County, Ohio. Judgment for the plaintiff was appealed and the Ohio Court of Appeals reversed, rendering final judgment for the railroad.[14] The Supreme Court of Ohio dismissed the plaintiff's appeal, holding that no debatable constitutional question was involved.[15] After granting the writ of certiorari, the United States Supreme Court found that the evidence present was sufficient to raise an issue for the jury's determination as to whether the insect emanated from the pool.[16]

The Supreme Court stated, referring to the case of *Tennant v. Peoria & P. U. Ry.*:[17]

> The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. . . The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . . (321 U. S., at 35)[18]

Again citing precedents, the Supreme Court further stated:

> These cases, as does the instant case, all involved the question of whether there was evidence that *any* employer negligence caused the harm, or more precisely, enough to justify a jury's determination that employer negligence had played *any* role in producing the harm.[19]

When there is such evidence, "it is error to refuse to accept jury's verdict against railroad in a suit under the Employers' Liability Act." [20]

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[12] See, Tennant v. Peoria & P. U. Ry., 321 U. S. 29, 35 (1944); Bailey v. Central Vermont R.R., 319 U. S. 350, 353, 354 (1943); Tiller v. Atlantic Coast Line R.R., 318 U. S. 54, 67, 68 (1943). See also Moore, Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act. 29 Marq. L. Rev. 73 (1946).

[13] 372 U. S. 108 (1963).

[14] 173 N. E. 2d 382 (Ohio St. App. 1961).

[15] 172 Ohio St. 488, 178 N. E. 2d 597 (1961).

[16] *Supra* note 13.

[17] 321 U. S. 29 (1944).

[18] *Supra* note 13.

[19] *Id.*

[20] 83 Sup. Ct. 659, 660.

Concerning the reasonable foreseeability of harm, the Court says:

> . . . Reasonable foreseeability is an essential ingredient of Federal Employers' Liability Act negligence, . . . but this requirement has been satisfied in the present case by the jury's findings . . . of negligence in maintaining the filthy pool of water.[21]

It was on the question of foreseeability that the Ohio Appellate Court reversed the verdict for the plaintiff. Uniformly, the courts have denied the defense of the doctrine of foreseeability where a defendant was guilty of negligence per se.

The Supreme Court of the United States disposes of the contention advanced by the Ohio court with the following language:

> . . .We have no doubt that under a statute where the tortfeasor is liable for death or injuries caused even "in slightest part" . . . by his negligence, such a tortfeasor must compensate his victim for even the improbable or unexpectedly severe consequences of his wrongful act.[22]

B. Has the Federal Employers' Liability Act Been Changed to Affect Any of the Decisions Under the Federal Safety Appliance Acts?

The Supreme Court, in interpreting actions arising solely under the Safety Appliance Act[23] and prior to the F. E. L. A. amendment of August 11, 1939, had determined that a claim predicated solely upon a Safety Appliance Act did not of itself give rise to a cause of action. In *Gilvary v. Cuyahoga Valley Ry.*,[24] the Court denied recovery for a violation of a Safety Appliance Act, as the injury was incurred during intrastate work. The amendment has done away with such distinction of intrastate and interstate work.

C. What Benefits Were Created for Railroad Employees Affecting Prior Decisions Under the Federal Boiler Inspection Acts by the Amendment of the Federal Employers' Liability Act of August 11, 1939?

It must be remembered that neither the Safety Appliance Acts, the Boiler Inspection Act,[25] nor any of their amendments

[21] *Supra* note 13.

[22] *Id.*

[23] *Supra* note 1.

[24] 292 U. S. 57 (1934).

[25] *Supra* note 1.

give rise to a cause of action. Thus, it is essential to establish a right to sue by joining the Federal Employers' Liability Act together with its amendments with the Safety Appliance Acts and/or Boiler Inspection Act.

In observing the benefits derived from the coupling of the Federal Boiler Inspection Act with the Federal Employers' Liability Act, the Supreme Court in *Urie v. Thompson,*[26] an action to recover damages for silicosis, agreed that the rule of the I. C. C. was intended merely to afford additional braking power which under the conventional tort doctrine would not impose absolute liability. The Supreme Court held that the Boiler Inspection Act itself, irrespective of the rule, provided the rights of recovery.[27]

Here again, the United States Supreme Court called attention to the fact that the Boiler Inspection Act, although not intended as protection against silicosis, when coupled with the F. E. L. A. provides recovery for railroad employees who are injured through use of an unsafe locomotive. No back-shop employee, or employee of a plant engaged in making repairs, rebuilding, or constructing cars or equipment and parts thereof prior to the F. E. L. A. amendment of August 11, 1939, could ever maintain a cause of action against an interstate railroad carrier under the same set of facts.[28] How could any employee establish interstate commerce when the *Behrens* case[29] was the controlling provision as to his rights of recovery, *i.e.,* the work he was engaged in at the time of the accident was not in interstate commerce?

Again, in the case of *Lilly v. Grand Trunk Western R. R.*[30] the Supreme Court held:

> The Act, . . . is to be liberally construed. . . . Any employee engaged in interstate commerce who is injured by reason of

[26] 337 U. S. 163 (1949).

[27] *Id.* n. 34.

[28] The following cases have now determined that it is immaterial whether or not a member of a switching crew, or a car repairer, employed in a back shop or in construction work is engaged in work then used in or designated for interstate commerce. The only requirement needed to bring a case within the amendment is that "any part" of this employee's duties, past, present or future, be in furtherance of, or such as to affect commerce in any way, directly or closely and substantially, Copley v. Industrial Acc. Comm., 120 P. 2d 879 (Cal. Sup. 1942); Lewis v. Industrial Acc. Comm., 120 P. 2d 886 (Cal. Sup. 1942); Southern Pac. Co. v. Industrial Acc. Comm., 120 P. 2d 880 (Cal. Sup. 1942).

[29] *Supra* note 7.

[30] 317 U. S. 481 (1943).

a violation of the Act may bring his action under the Federal Employers' Liability Act, charging the violation of the Boiler Inspection Act.[31]

It is interesting to see how the Federal Boiler Inspection Act, which is applicable to travelers in a crossing collision between an automobile and a freight train, enables injured plaintiffs to recover. The Act provides that it shall apply to railroad employees and highway travelers. The generic term "highway travelers" includes persons lawfully using vehicles on the highways and their occupants or passengers.

A violation of the Federal Boiler Inspection Act may be proved in two ways: First, by the inefficiency of the engine, its parts and appurtenances; second, by proving a definite defect in the engine, its parts and appurtenances. The braking equipment, including the train's air brakes, are a part of the appurtenances to an engine and also are covered separately in the Safety Appliance Acts. The duty of the railroad carrier as established by the Boiler Inspection Act is absolute.[32] Failure on the part of the carrier to comply with safety provisions of the Boiler Inspection Act deprives the carrier of any and all of the common law defenses against the rights of employees and highway travelers, thus creating an absolute right of recovery.

The advantages can readily be seen in the "crossing" case of *Fairport R. & E. R. R. v. Meredith.*[33] The claimants contended that not the impact at the crossing was the cause of their injuries, but the failure to provide adequate and sufficient braking equipment. The Court agreed that violation of the Federal Boiler Inspection Act was the direct and proximate cause of the injuries.

Generally speaking, "crossing" cases in Ohio, and in a majority of the states without benefit of the Federal Boiler Inspection Act or any of the Safety Appliance Acts, usually have less favorable results,[34] since the decision in *Baltimore & O. R. R. v. Goodman.*[35] The drivers in such cases appear guilty of con-

[31] *Id.* at 486, 485.

[32] Lilly v. Grand Trunk Western R.R., 317 U. S. 481 (1943); Urie v. Thompson, 337 U. S. 163 (1949).

[33] 292 U. S. 589 (1934).

[34] Baltimore & O. R.R. v. Joseph, Same v. Winland, 112 F. 2d 518 (6th Cir. 1940); Patton v. Pennsylvania R.R., 136 Ohio St. 159, 24 N. E. 597 (1939); Detroit, T. & I. R.R. v. Rohrs, 114 Ohio St. 493, 151 N. E. 714 (1926); Lang v. Pennsylvania R.R., 134 Ohio St. 345, 18 N. E. 2d 271 (1938).

[35] 275 U. S. 66 (1927).

tributory negligence. Under a more humane rule established in Wisconsin, the jury decides the right of recovery in crossing cases under a proper charge of comparative negligence. The doctrine of comparative negligence is not provided for under the laws of Ohio. Advocates, if successful in establishing a violation of the Boiler Inspection Act or one of the Safety Appliance Acts through investigation, may find the results more favorable than in an ordinary crossing case. It therefore becomes vitally important to determine whether in any crossing accident involving a carrier such a violation directly or proximately contributed to the accident, because in this event the carrier is denied the defense of contributory negligence.

D. Was There a Custom or Practice Existing at the Time the Action Arose?

In the case of *Baltimore & O. R. R. v. Robertson,*[36] the employee, while guarding a bridge and trestle at night, was injured through negligent operation of a train by the defendant carrier. Despite the defense of assumption of risk, which was still admissible then, a custom established by the defendant, was proved whereby warning by several blasts of the whistle were to be given. This was not done. The Court held that the failure to comply with the custom and practice was substantial evidence of the defendant's negligence.

The decision clearly indicated that the advocate in the preparation for trial reaped the advantage of his investigation which resulted in the proof of custom and practice.

E. Was There a Change in the Rules of Procedure or Pleading?

In the case of *Warden v. H. E. Culbertson Co.,* the plaintiff obtained a verdict in the Common Pleas Court of Cuyahoga County, Ohio, which was affirmed by the Court of Appeals, and thereafter the question of the statute of limitations arose in the Supreme Court of Ohio.[37] The defendants then filed a motion for judgment *non obstante veredicto* on the ground that the statute of limitations was properly raised by a general demurrer originally filed in the lower court when the action was instituted, and overruled by the trial court.[38] The defendants' motion for

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[36] 300 Fed. 314 (6th Cir.), *cert. den.,* 266 U. S. 613 (1924).

[37] H. E. Culbertson Co. v. Warden, 123 Ohio St. 297, 175 N. E. 205 (1931).

[38] The statute of limitations in Ohio provided four years for the commencement of an action when Warden's accident occurred. During the pendency

(Continued on next page)

judgment was further based on *Smith v. New York Cent. R. R.*,[39] in which the Supreme Court of Ohio ruled, in effect, that a general demurrer properly raised the question of the statute of limitations.

In *Seymour v. Pittsburgh C. & St. L. Ry.*,[40] the Supreme Court of Ohio still held that the general demurrer raised the statute of limitations.

The *Seymour* case was the last pronouncement in which the Ohio Supreme Court passed upon this question under the old Revised Code section 5026. When the legislature later adopted the Act of 1900, it added the new ground that the action was not brought within the time limit for the commencement of such actions. It was, therefore, the contention in the *Warden* case that the general demurrer did not reach the question of the statute of limitations in this cause, and that the only way to raise the bar of the statute of limitations by demurrer was by specifying and relying on added grounds.

F. Does the Contractual Relation of Master and Servant Differ so that the Relation of Master and Servant Does Exist, as Distinguished from Other Cases?

In the case of *Linstead v. Chesapeake & O. Ry.*,[41] the United States Supreme Court reversed the decision of the Court of Appeals and affirmed the verdict for plaintiff obtained in the District Court, where an action had been filed under the Federal Employers' Liability Act for the death of Linstead, whose wages were paid by the Cleveland, Cincinnati, Chicago and St. Louis Railroad Company.

The accident happened on the Chesapeake & Ohio railroad property while a Big Four crew, of which Linstead was a member, was bringing a Chesapeake & Ohio train from Kentucky to Riverside, Ohio. The Court said:

> The work which was being done here by Linstead and his crew was the work of the Chesapeake & Ohio Railway. . . . We do not think that the fact that the Big Four road paid

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(Continued from preceding page)

of the claim the Ohio Leglislature by amendment curtailed this right to only two years. Warden's suit was instituted after the two-year period had elapsed.

[39] 122 Ohio St. 45, 170 N. E. 637 (1930).

[40] 44 Ohio St. 12, 4 N. E. 236 (1886).

[41] 276 U. S. 28 (1928).

> the wages of Linstead and his crew, or that they could only be discharged or suspended by the Big Four, prevented their being the servants of the Chesapeake & Ohio Company for the performance of this particular job.[42]

The Court differentiated the *Linstead* case from *Hull v. Philadelphia & R. Ry.*[43] In that case, Hull, the plaintiff's deceased, was employed by the Western Maryland Company as a brakeman. Although the accident occurred on the tracks of the Philadelphia & Reading Railway Company, the Court held that Hull was still in the employ of the Western Maryland Railway Company because his work was the work of the Western Maryland Railway Company. Even though it was carried on for a part of the way over the rails of the Philadelphia & Reading Railway, the loads were being carried for the Western Maryland Railway Company, and presumably the rates which were received for the transportation were the receipts of the Western Maryland Railway Company.[44]

G. If the Precedent Is Based upon a Rule, Does That Rule Still Exist or Was It Changed, Altered or Repealed?

In *John C. Byrnes v. The New York, New Haven, and Hartford Railroad Company,* in the United States District Court for the Eastern District of New York (File No. 12397), plaintiff alleged that as an employee of the defendant he was injured while assisting in loading United States mail from a handtruck into a mail car. The action was predicated under the Federal Employers' Liability Act.

The defendant contended that at the time of the accident plaintiff was not in the employ of the railroad company. The question, therefore, was whether the railroad company was immune from liability under the "lent-servant" or *"ad hoc"* doctrine announced in *Denton v. Yazoo M. v. R. R.*[45] At the time Denton was injured, the Regulations of the Postmaster General provided:

> Railroad companies shall furnish the men necessary to handle the mails, to load them into and receive them from the doors of the railway post office cars, and to load and pile the mails in and unload them from storage and baggage

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[42] *Id.* at 34.

[43] 252 U. S. 475 (1920).

[44] *Supra* note 42 at 35.

[45] 284 U. S. 305 (1931).

> cars, under the direction of the transfer clerk, or clerk in charge of the car, if one is on duty, except as provided in Section 1290. Mails intended for delivery to postal clerk shall never be placed in a postal car unless there is a clerk on duty to receive and care for them.[46]

The Court, in deciding the statutory obligation imposed upon the railroad company in the *Denton* case, held that:

> The statutory obligation imposed upon the railroad carriers is simply to transport mail offered for transportation by the United States. They are not required to handle, load or receive mail matter, but only to furnish the men necessary for those purposes.[47]

Under the provisions of the above Postmaster's rule, the *Denton* case was decided correctly. However, when the cause of *Byrnes* was filed, the Postmaster General, under Rule No. 39 C. F. R. 92.36, Postal Service Duties of Railroad Companies, changed the former rule to read:

> (b) *Necessary help to be furnished by railroad.* Railroad companies shall furnish the men necessary to handle the mails, to load and pile the mails in and unload them from storage and baggage cars, except as provided in Section 92.43.

One can readily appreciate and distinguish from the change of the rules that the doctrine laid down in the *Denton* case was no longer applicable. The Postmaster undoubtedly had in mind the decision of the Court in *Denton* when he deleted the phrase, "under the direction of the transfer clerk, or clerk in charge of the car, if one is on duty." His further intent to change the rule of the *Denton* case is manifested by the modification of Rule 39 C. F. R. 92.41 by 39 F. R. 92.77:

> *Railroad employees handling mails regarded as agents of railroad*: At places where railroad companies are required to take mails from and deliver them into post offices or postal stations or to transfer them to connecting railroads, the persons employed to perform such services shall be regarded as agents of the companies and not employees of the postal service, and need not be sworn; but such persons shall be more than 16 years of age and of suitable intelligence and character. Postmasters shall promptly report any violation of this requirement to the Post Office Department.

The investigation by the advocate, in discovering the change in the rule, produced a complete reversal of the reasoning in the

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[46] *Id.* at 307.

[47] *Supra* note 46 at 309-10.

Denton case and was sufficient in character for the defendant railroad to drop the subterfuge of its defense. This produced a settlement commensurate with the total and permanent injury sustained by Byrnes.

H. Inherent Power to Decide and Determine the Common-Law Doctrine

In the case of *Erie R. R. v. Tompkins*,[48] the Supreme Court of the United States upset the *Tyson* case,[49] which was a precedent in force for more than seventy-five years. The *Erie* case established that the federal courts do not have an inherent power of common law and that each state, through its statutory law and decisions handed down by the highest tribunal of the state, has the sole right of determination of common-law rights.

In federal courts, except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state.[50] The phrase "laws of the several states," includes not only statutory law, but also court decisions.

Many states, for example, recently have changed the old immunity rule concerning negligence suits against hospitals, now holding that it is not fair to deny compensation on the ground that the hospital is immune from tort action.[51] Obviously, then, the applicability of state law is most important.

Felix Frankfurter wrote an article on stare decisis[52] in which he spoke on the Court's observance of stare decisis in denying acceptance of modified working laws for women. He contended that courts must make allowances by reducing the working hours for women.

He said, in effect, that if the Court recognized the need to protect women, it could well destroy the basic reasoning of its prior judicial decisions. Therefore, the doctrine of stare decisis has no legitimate application to constitutional decisions where

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[48] 304 U. S. 64 (1938).

[49] Swift v. Tyson, 41 U. S. (16 Pet.) 1 (1842).

[50] 28 U.S.C.A. 1652.

[51] Taylor v. Flower Deaconess Home and Hospital, 104 Ohio St. 61, 135 N. E. 287 (1922), illustrates the old view. As to the new view see 2 Encyc. of Negligence, Sec. 321 (1962).

[52] Frankfurter, The Present Approach to Constitutional Decisions on the Bill of Rights, 28 Harv. L. Rev. 790 (1914-15).

the Court is presented with a new body of knowledge, largely non-existent at the time of its prior decision.

Frankfurter again said that this was precisely the situation in *People v. Charles Schweinler Press.*[53] In this case, the New York court overruled *People v. Williams,*[54] and sustained a statute prohibiting night work for women. Frankfurter stated that during the seven years which had elapsed between the two cases, an overwhelming mass of authoritative data was developed which demanded a departure from stare decisis.

Conclusion

This writer believes that once a court of authoritative jurisdiction has thoroughly considered a given question and has announced a decision which appeals to reason, the res adjudicata so pronounced should be followed. But one must remember that a decided case is worth only as much as it weighs in reason and righteousness, and no more. As Justice Wanamaker stated:

> It must prove its right to control in any given situation by the degree in which it supports the rights of a party violated and serves the cause of justice as to all parties concerned.[55]

The importance of vigilance is illustrated in the case of *Biermacher v. N. Y. C. & St. L. R. R.*[56] (Nickel Plate Road). When this case was first submitted to a jury in 1910 in the Court of Common Pleas of Cuyahoga County, Ohio, the Supreme Court of the United States had not yet decided whether the Federal Employers' Liability Act covered *res ipsa loquitur* cases. The plaintiff obtained a verdict, and the Supreme Court of Ohio reversed the decision. Thereafter, the cause was again assigned to a trial judge, who entertained a motion to dismiss on the ground that neither the pleadings nor the opening statements of counsel presented sufficient facts to establish a cause of action. The Court of Appeals thereafter reversed, and the case proceeded to trial for a third time. The verdict in favor of the plaintiff for a substantially lesser amount was affirmed by the Supreme Court of

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[53] 214 N. Y. 395, 108 N. E. 639 (1915).

[54] 189 N. Y. 131, 81 N. E. 778 (1907).

[55] Adams Express Co. v. Beckwith, 100 Ohio St. 348, 352, 126 N. E. 300, 301 (1919).

[56] 110 Ohio St. 173, 143 N. E. 570 (1924); 114 Ohio St. 554, 151 N. E. 665 (1926); 22 Ohio App. 104, 153 N. E. 525 (1925); (Ohio Ct. App.) 162 N. E. 720; (mem. 278 U. S. 614, *cert. den.* (1928)).

Ohio, and in the concurring opinion by Chief Justice Marshall, the real gist of the reasons for reversal in the first instance became known.

The Chief Justice stated that if the Supreme Court had known that the doctrine of *res ipsa loquitur* applied to master-servant cases under the Federal Employers' Liability Act, the court originally would never have reversed the judgment. Likewise, discussing federal cases in his concurring opinion, he further said that the doctrine of *res ipsa loquitur* does apply to F. E. L. A. master-servant cases.

The Supreme Court of the United States has finally laid to rest any uncertainty on this score by holding that the *res ipsa loquitur* doctrine is applicable to all causes arising from the Federal Employers' Liability Act.[57]

The concepts and changes in existing precedents, illustrated by the selected cases cited herein, convey the importance of examining the law and the facts in every individual instance. Every jurist, advocate and brief writer must be certain that metamorphosis has not changed stare decisis, before abandoning his search or resigning himself to the quoted precedent.

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[57] Johnson v. U. S., 333 U. S. 452 (1947); see also, Carpenter v. Baltimore & O. R.R., 109 F. 2d 375 (6th Cir. 1940); Chesapeake & O. Ry. v. Smith, 42 F. 2d 111 (6th Cir. 1930), *cert. den.* 282 U. S. 856 (1930); Cochran v. Pittsburgh & L. E. R.R., 31 F. 2d 769 (N. D. Ohio 1923); Jesionowski v. Boston & M. R.R., 329 U. S. 452 (1947).