Contributory Negligence--Look and Listen Rule

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at law, where the doctrine of subrogation is not recognized. There are no reported cases in this state where the remedy has been refused the beneficiary when the action was a bill in equity. The seeming conflict in the West Virginia cases is readily explainable on the theory that the right of the third party to sue at law in West Virginia on such contracts is not recognized, but when he sues in equity he is given substantially the same relief under the doctrine of subrogation.

—M. T. V.

Contributory Negligence—Look and Listen Rule.—The plaintiff sued for injuries sustained while attempting to cross the tracks of the defendant. He passed between freight cars standing on the side track and started to cross the middle track, when he was struck by an engine. Nine feet separated the tracks, and plaintiff had an unobstructed view each way, but failed to look in the direction of the approaching engine. Held, recovery is denied. Failure to use his senses amounts to contributory negligence, which becomes a question of law for the court and not for the jury. Robinson v. Chesapeake & Ohio R. Co., 110 S. E. 870 (W. Va. 1922.)

Widely divergent views exist among the various state courts in regard to the liability of the railroad for injuries to pedestrians who fail to stop, look and listen before attempting to cross the railroad track. Pennsylvania enforces the arbitrary rule, declaring failure to observe the rule is negligence as a matter of law. The decisions declare the rule to be "peremptory, absolute and unbending." Atken v. Pennsylvania R. Co., 130 Pa. 380, 18 Atl. 686. This extreme rule has practically no following, and has received widespread criticism. 1 Am. Law Rep. 204. The view that it is not a rule of evidence, but one of absolute and unbending law cannot be affirmed as a rule of American law. 2 Thompson, Negligence, § 1642. For the court to say that the plaintiff is negligent as a matter of law in every case if he does not stop, look and listen, seems to be an unwarranted encroachment on the province of the jury. 13 Harv. L. Rev. 226. Other authorities emphatically maintain that such failure on the part of the plaintiff is not negligence per se, or as a matter of law, but is only evidence to be submitted to the jury. 2 Thompson, Negligence, § 1642; Judson v. Central Vermont R. Co., 158 N. Y. 597, 53 N. E. 514; Illinois Cen-
tral R. Co. v. Jones, 95 Fed. 370; French v. Taunton Branch R. Co., 116 Mass. 537. These two views show the extreme holdings. One line of decisions holding it an arbitrary rule of law, and the other line considering it evidence for the jury. There is an intermediate class of cases that seemingly meets with popular approval in determining whether the question is for the court or jury, and that is, that the surrounding circumstances impose upon the traveller the duty of stopping, looking and listening. This is the view of the principal case, and we submit that it is the most reasonable doctrine. 3 Elliott, Railroads, § 1167; 22 R. C. L. 1030. For extensive citation of authorities, see 1 Am. Law Rep. 203. This holding seems to be the trend of late decisions in many jurisdictions. If the negligence of the plaintiff is palpable, showing a disregard of personal safety, the courts do not hesitate to pronounce such conduct contributory negligence as a matter of law. On the other hand, if the circumstances indicate doubt as to the negligence of the plaintiff, the question is submitted to the jury. There are a number of cases from various states decided within the last year which are clearly in line with reasoning and holding in the principal case. Loughman v. Hines, 200 Pac. 1036 (Wash.); Butler v. Payne, 203 Pac. 869 (Utah); Saddler v. Northern Pacific R. Co. 203 Pac. 10 (Wash.); Morrow v. Hines, 233 S. W. 493 (Mo.); Alexander v. St. Louis, San Francisco R. Co., 233 S. W. 44 (Mo.); Holtkamp v. Chicago etc. R. Co., 234 S. W. 1054 (Mo.); Reynolds v. Hines, 185 N. W. 30 (Iowa); Murden v. Virginia R. & Power Co., 107 S. E. 660 (Va.); Swearingen v. United States Ry. Administration, 183 N. W. 330 (Iowa). It is submitted that these cases lay down the more reasonable rule, and that the measure of caution depends on the circumstances. Ruenzi v. Payne, 231 S. W. 294 (Mo.).

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Evidence—Rape—Complaint.—In a prosecution for attempt to commit rape, the husband of the prosecutrix was permitted to testify, in corroboration of his wife, as to the particulars of the offence as related to him by his wife six hours after it occurred. Held, it is reversible error to permit a witness to testify to the particulars. State v. Peck, 110 S. E. 715 (W. Va., 1922.)

Formerly it was laid down that one could corroborate his witness by evidence showing that he had been consistent with himself, but, as a general doctrine, that ceased to be the law in England a