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Workmen's Compensation Act--Employer's Right to Subrogation

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any reasonable construction it can be avoided;[5] and that a construction which will sustain the will, if consistent with the testator's intention and with existing rules of law, must be adopted.[6] Having ascertained that a remainder passed to the grandchildren, under our present statutory law it would necessarily follow that an estate in fee passed,[7] there being no words of limitation thereon. Thus, it would seem that our court has merely echoed the express holdings of many former cases and has applied sound principles of law upon which, it appears, West Virginia lawyers can rely.

Although the parties and the court made no mention of it, the present case might have been considered as one of mistake in the description of the property. Had *T* said "*the* share," indicating the moiety held by *A* and *B* respectively, instead of "*his* share," which seemed to refer to the life estate preceding the remainder, then the remainders would have been clearly designated. The appellant in the instant case could have proceeded from this viewpoint, introducing evidence to show that the language meant "*the* share."[8] The court could then have construed the will in the light of that testimony on the theory of *falsa demonstratio non nocet* — a false description does not harm a document.[9]

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WORKMEN'S COMPENSATION ACT — EMPLOYER'S RIGHT TO SUBROGATION. — *P* brought an action against *D* to recover the amount that *P* had been compelled to pay into the workmen's compensation fund as a result of *D's* allegedly wrongful act. *D* operated a railroad which had a spur track that ran under *P's* tipple. One of *D's* engines pushed a train of empty cars onto this spur, and one of the cars struck and killed *P's* employee. Because

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[6] Leary v. Kerber, 255 Ill. 433, 99 N. E. 662 (1912); *In re* Gallien, 247 N. Y. 95, 160 N. E. 8 (1928); and see Chicago Bank of Commerce v. McPherson, 62 F. (2d) 393, 397 (C. C. A. 6th, 1932), "Nothing is better settled than that the law strives to uphold testamentary dispositions of property wherever it can, and that *no matter what words are used* by the testator to express his intention, or in what *peculiar* or technical language he expresses it, courts will give effect to it as it may be gathered from the entire will." Italics supplied.)

[7] W. VA. CODE (Michie, 1937) c. 36, art. 1, § 11.

[8] HARRISON, WILLS & ADMINISTRATION § 197 (5).

[9] ATKINSON, WILLS (1937) § 111; Warren, *Interpretation of Wills—Recent Developments* (1936) 49 HARV. L. REV. 689, 699; Note (1930) 78 U. OF PA. L. REV. 1035; Warren, *The Progress of the Law* (1920) 33 HARV. L. REV. 556, 560-565.

of this death *P* was forced to pay into the fund $15,000. *P* claimed that by common-law principles of subrogation he should be entitled to recover this amount from *D*, the tort-feasor. *Held*, that in the absence of any provision in the workmen's compensation act, providing for subrogation, the employer has no remedy against the third-party tort-feasor for the amounts paid by the employer into the fund as a result of the death of an employee caused by the negligence of a third-party tort-feasor. *Crab-Orchard Imp. Co. v. Chesapeake & Ohio Ry.*[1]

The theory of recovery of damages is to arrive at compensation; no more, and no less.[2] In West Virginia this common-law principle has not been followed with regard to recovery of damages under the workmen's compensation act. The act, as a result of its silence regarding the employer's right of subrogation, has been interpreted by our court to give the employee two remedies; the one in tort against the third party, and the other in contract against the workmen's compensation fund.[3] The two West Virginia cases in so holding also deny the employer the common-law right of subrogation. The court in reaching this seemingly inequitable result applied the analogy of life and accident insurance at the expense of the rule against double recovery.

The silence of the act gave ample opportunity for the application of the principle of subrogation, since this doctrine is independent of statute and independent of any privity or contractual relationship between the parties to be affected by it.[4] Such result could have been reached by applying the broad definition of suretyship so as to consider the employer as surety for the third-party

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[1] 115 F. (2d) 277 (C. C. A. 4th, 1940).

[2] McCORMICK, DAMAGES (1935) 561; Burruss v. Hines, 94 Va. 413, 416, 26 S. E. 875 (1897): "The general rule in awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if . . . the tort [had] not [been] committed." Miller v. New York Rys., 171 App. Div. 316, 157 N. Y. Supp. 200, 201 (1916); 1 HONNOLD, WORKMEN'S COMPENSATION (1917) § 46.

[3] Merrill v. Marietta Torpedo Co., 79 W. Va. 669, 92 S. E. 112 (1917); Mercer v. Ott, 78 W. Va. 629, 89 S. E. 952 (1916).

[4] Bassett v. Streight, 78 W. Va. 262, 266, 88 S. E. 848 (1916): " 'This doctrine of subrogation has been applied freely in this state, and to its full extent, upon the general principles of equity, without the aid of any statute; . . . ' 'The doctrine is eminently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation.' . . . 'The doctrine of subrogation, being the creation of courts of equity, is so administered as to secure essential justice, without regard to form, and is independent of any contractual relation between the parties to be affected by it.' "

tort-feasor.[5] By viewing the relationship of employer and employee under the act, it is apparent that the former is in a sense an involuntary or nonconsensual surety[6] and should be subrogated to the rights and remedies of the employee against the third party.[7]

The apparent purpose of the workmen's compensation act is to insure the workman aganist loss from accident resulting from his employment[8] and to give him a speedy and expeditious remedy for his injury.[9] As a result of the act the subscribing employer is forced, as in the principal case, to make large payments in compensating for injuries resulting from the fault or negligence of others. Could this be the intent of the legislature? True, the employer passes on such costs or expenses of compensation to the consumers of his products,[10] but why should the particular class of consumers be held liable indirectly, when the injury was occasioned by the negligence of a third party and was really not a risk or hazard integral with the production of the articles? If the common-law principle of subrogation were applied in such cases, the employer could reduce the cost of the products to the extent of the extra hazard of being liable for the injury inflicted upon his workmen by third-party tort-feasors.

Although there is a paucity of authority in support of our position, it seems that the West Virginia court erred in the two earlier cases. The circuit court of appeals went so far in the instant case as to admit that the equities favored placing the ultimate loss on the third-party tort-feasor rather than on the innocent employer and that the injured employee should be given only one recovery for a single injury. These equities become more apparent when it is realized that the employee is fully protected, for it is a settled principle of subrogation that the doctrine is never to be

[5] Watriss v. Pierce, 32 N. H. 560 (1856); Magill v. Brown, 20 Tex. Civ. App. 662, 50 S. W. 642 (1899): "The term 'surety' in its broadest sense includes every person whose estate is obligated to answer for the default of another."

[6] Wayman v. Jones, 58 Mo. App. 313, 319 (1894): "There is no distinction between a suretyship created with the consent of the creditor and that which arises by operation of law."

[7] Johnson v. Young, Carson & Bryant, 20 W. Va. 614 (1882): "A surety is defined as a person who being liable to pay a debt . . . is entitled, if it is enforced against him, to be indemnified by some other person who ought himself to have made payment . . . before the surety was compelled to do so . . ."

[8] Hoffer Bros. v. Smith, 148 Va. 220, 138 S. E. 474 (1927).

[9] Humphries v. Boxley Bros. Co., 146 Va. 91, 135 S. E. 890 (1926).

[10] 1 HONNOLD, WORKMEN'S COMPENSATION 6 - 9.

applied so as to prevent the injured party from being fully indemnified.[11]

If the West Virginia court cannot reach the result urged herein, then there is a glaring gap in our compensation act which should be remedied by the legislature.

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[11] Hardman, *The Common-Law Right of Subrogation under the Workmen's Compensation Acts* (1920) 26 W. VA. L. Q. 183, citing Phoenix Ins. Co. v. First National Bank, 85 Va. 765, 8 S. E. 719 (1889).