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Torts–Assumption of Risk–Workmen's Compensation

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TORTS — ASSUMPTION OF RISK — WORKMEN’S COMPENSATION — NONSUBSCRIBERS. — A, an employee in the wholesale house of D, was present when D instructed X to open a trap door in the floor, the two by four foot opening being located in the hall which was ten feet wide directly opposite the door to D’s office in which A worked, directly in front of the door of the candy storeroom, and just inside the building’s main door which was at one end of the hall. X removed the trap door and placed boxes containing groceries around the opening as a protection. Later the same day, A, on her way to the candy room to get a piece of candy, an act which D had expressly forbidden his employees to do, fell into the hole and was killed. D though eligible was not a subscriber to the workmen’s compensation fund, and was thus deprived of his common law defenses of contributory negligence and assumption of risk. In action for negligence brought by P, administrator of A, against D, verdict and judgment were given for P. D brings error. Held, that the question of negligence is one for the jury, and the court will not disturb its verdict. Judgment affirmed. Thorn v. Addison Bros. & Smith.1

The holding in the Thorn case is a striking example of the extent to which the courts of West Virginia may go in imposing a

1 W. Va. Const. art. III, § 5: “... nor shall any person ... be twice put in jeopardy of life or liberty for the same offense.” Id. at art. III, § 13: “No fact tried by a jury shall be otherwise re-examined than according to the rules of the common-law.”

2 Ex parte Bornea, 76 W. Va. 360, 85 S. E. 529, L. R. A. 1915F 1093 (1915).

3 194 S. E. 771 (W. Va. 1937).
duty of care on employers who are eligible for but who are not subscribers to the state workmen's compensation fund, or who are subscribers thereto but are not complying fully with the requirements of the compensation statute at the time of an injury to an employee. The statute still requires that there be some wrongful act or neglect on the part of the nonsubscriber before liability will be imposed, thereby giving rise to the interesting question of the effect, if any, which the abolition of the common law defenses of contributory negligence, assumption of risk, and the fellow servant rule has on the standard of care required of employers in this class of cases. In a situation such as that in the principal case, the same facts which constitute contributory negligence on the part of the decedent or an assumption of risk by her may indicate that there is no duty owing to this particular employee, or, if such duty does exist, that it has been performed. The English case of Thomas v. Quartermaine gives voice to this view by saying, "The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognizant of the full extent of the danger, and voluntarily run the risk". Reasoning along this same line in the case of De Francesco v. Piney Mining Co., also an action against a nonsubscriber, the West Virginia court concluded that the duty of a mine operator to instruct an employee as to the dangers of picking up a lighted stick of dynamite, though it appeared to be extinguished, ended where the bounds of the employee's negligence began. However, if this theory of assumption of risk and contributory negligence were applied to the facts of the principal case, it might seem that the court would be indirectly giving effect to these defenses, an act which it is forbidden by statute to do directly. Whatever be the theory of our court concerning negligence in actions against nonsubscribers to the compensation fund, it is clear that in most

2 W. VA. REV. CODE (1931) c. 23, art. 2, § 8.
4 W. VA. REV. CODE (1931) c. 23, art. 2, § 8.
5 L. R. 18 Q. B. 685 (1887).
6 76 W. Va. 756, 88 S. E. 777 (1915); Note (1916) 22 W. VA. L. Q. 187.
of such cases the question of negligence will be left to the jury, and its finding will not be disturbed by the court.  

A. F. G.

TRUSTS — DISTINCTION BETWEEN DEBT AND TRUST ARRANGEMENT IN BANK DEPOSIT. — A, trustee for B and C under a will, deposited trust funds in D bank as a sinking fund for emergency calls for taxes and other charges against the corpus of the trust property. The money so deposited consisted of 15% of the rentals from the trust res. A and D entered into a "trust agreement", calling the deposit a "trust", A a "trustor", and D a trustee. The deposit so created was subject to withdrawal by order of A, and yielded 41/2% interest. After the first two deposits the account was recorded not in the trust department of D but in the savings department. Tax returns were filed on it, in accordance with the custom as to deposits generally, but not as to trusts. Periodical statements were rendered instead of giving A a passbook, because "we are regarding it not as a deposit but as a trust", to quote the language of the president of the bank concerning the agreement. D failed, and the question arose on suit by A, B, and C, against E, the receiver of D, to hold him as trustee of this account and to gain priority over creditors of D in the distribution of assets, whether the arrangement between A and D created a debt or a trust. Held, that the deposit in question created a debt rather than a trust. Bowne v. Lamb.¹

The court pointed out that the solution depends on the manifested intention of the parties. In this case they spoke of a trust, but their actions spoke louder than their words, since the arrangement partook of the essential characteristics of a debt rather than of a trust. The arrangement for interest is controlling unless the intention of the parties is clear, and sufficient to create a trust anyway. Here the parties attempted to create a trust, and wanted the arrangement to be a trust, but failed in the essential points of the arrangement to overcome the presumption that a bank deposit is a debt rather than a trust. Therefore plaintiffs, not having sufficiently specified that the funds should remain intact, are not entitled to any preference, in the absence of any showing that D was insolvent at the time of the deposit, or of a deposit ex maleficio.

The case was decided under the controlling authority of Cam-

¹ 193 S. E. 563 (W. Va. 1937).