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Agency--Workmen's Compensation Act

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herently dangerous potentialities of explosives, but the case is not an adoption of the turntable or attractive nuisance doctrine.

While the case cites with approval certain quotations taken from decisions whose distinct tendency is to accept the turntable doctrine in appropriate cases, it has also utilized quotations from opinions of courts whose trend of decisions apparently repudiate the doctrine. See 36 A. L. R. 69, 106 for alignment of courts on this question. Consequently it is submitted that the principal case is entirely in accord with the previous West Virginia cases which repudiate this doctrine, and is an express approval and affirmation of the doctrine laid down in *Wellman v. Fordson Coal Company, supra*. This doctrine is not an innovation upon the law of this state, but rather it will, in consonancy with previous decisions, allow recovery in appropriate cases, without the adoption of a doctrine which our court has deemed undesirable.

—LESTER C. HESS.

AGENCY—WORKMEN'S COMPENSATION ACT.—The defendant, a manufacturer of lumber, who was subject to the Workmen's Compensation Act and who had failed to comply therewith used an unguarded circular saw in his business. The plaintiff, an employee of the defendant, was injured while using this saw and seeks to recover damages, basing his claim on a violation of section 59 of chapter 15H of BARNES' CODE which is in part as follows:

“All power driven machinery, including all saws, * * * shall be so located, whenever possible, as not to be dangerous to employees, or where possible, be properly inclosed, fenced or otherwise protected.”

The defense was contributory negligence on the part of the plaintiff. The court held that the defendant was liable, under this statute, and the court said, among other things, that the duty of a principal to guard a power driven saw (if possible to do so) is absolute, and that disregard of a statutory duty is *prima facie* negligence when it is the natural and proximate cause of the injury. *Tarr v. Keller Lumber & Construction Company*, 144 S. E. 881 (W. Va. 1928).

The decision of the case presents two questions; first, whether the plaintiff's injury resulted from a breach of duty owed him by

the defendant, and second, whether the defendant has a defense. It is plain that the first question must be answered in the affirmative. *McClary v. Knight*, 73 W. Va. 385, 80 S. E. 866. The statute imposed a duty upon the defendant to guard the saw, he violated this duty and as a result the plaintiff was injured. Second, the question whether contributory negligence is a defense. The defendant is subject to the Workmen's Compensation Act, BARNES' CODE, Chapter 15P, section 15; and has failed to comply therewith. The Act, CODE, *supra*, chapter 15P, section 26, provides, in effect, that as to any employer subject to the Act who fails to comply therewith, such employer cannot set up contributory negligence as a defense. Therefore the statute bars this defense, and the decision of the court is clearly justifiable. The court in referring to the Compensation Act, said: "As the defendant was not a subscriber to the workmen's compensation fund, it cannot avail itself of the plaintiff's contributory negligence."

—ROSCOE H. PENDLETON.

EVIDENCE — HOMICIDE — SELF-DEFENSE—VIOLENT ACTS OF DECEASED.—In an indictment for murder the accused relied on self-defense, and was permitted to testify that deceased was a dangerous man, and had on one occasion shot at an officer who was attempting to arrest him. It was not shown that the accused saw this occurrence. The officer was not permitted to testify as to the incident. *Held*, that there was no error prejudicial to the accused. *State v. Peoples*, 145 S. E. 389 (W. Va. 1928).

In general, proof of the character or reputation of the deceased is inadmissible in homicide cases. *Evers v. State*, 31 Tex. Crim. 318, 20 S. W. 744; *State v. Madison*, 49 W. Va. 96, 38 S. E. 492.

On the issue of self-defense, however, communicated reputation for violence is admissible to show that the accused had reasonable apprehension of bodily harm. *Commonwealth v. Tircinski*, 189 Mass. 257, 75 N. E. 261. There is some conflict as to uncommunicated reputation of this character, but the better and majority rule is that such evidence is admissible to show the probability that the deceased did an act of aggression. *State v. McClausland*, 82 W. Va. 525, 96 S. E. 938; *Palmore v. State*, 29 Ark. 248; *Thomas v. People*, 67 N. Y. 224; 1 WIGMORE, EVIDENCE, (2nd ed.) §63.