

June 1928

Counsel Fees and Expenses in Resisting Preliminary Writ of Injunction Cannot be Recovered in Suit on Injunction Bond

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Recommended Citation

Clara D. Whitten, *Counsel Fees and Expenses in Resisting Preliminary Writ of Injunction Cannot be Recovered in Suit on Injunction Bond*, 34 W. Va. L. Rev. (1928).

Available at: <https://researchrepository.wvu.edu/wvlr/vol34/iss4/19>

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against express liability, is nevertheless relieved from personal liability on the contract. Therefore, the court apparently has repudiated the doctrine of *descriptio personae*, in favor of a rule which has seldom, if ever, been recognized by the courts. No authority has been cited by the court to sustain this proposition, and only one case has been found which even remotely seems to support this principle. That is the case of *Printup v. Trammel*, 25 Ga. 240, where a party signed a promissory note as "Daniel Printup, trustee for Mrs. Abbey Farrar," in which the court held: "A trustee is not liable out of his own estate, on a note given by him as 'trustee' and so expressed when the consideration of the note enured exclusively to the cestui que trust." The Georgia court argues briefly against the personal liability of a trustee so contracting. However, the duty is upon the trustee to prove that the consideration inured to the benefit of the trust estate, which was the difficulty of the defendant in the principal case. The only case cited by the majority opinion in the principal case, *Taylor v. Davis*, *supra*, is directly in support of the general rule.

What will be the effect of this decision? It is possible, though highly improbable, that a later court may follow this case in its apparent repudiation of the doctrine of *descriptio personae*. With the increasing tendency of the courts to give a remedy directly against the trust estate, or rather, to extend the number of exceptions to the general rule, will naturally come the relaxation of the rule of personal liability of trustee. See the article of Justice Brandeis in 15 AM. L. REV. 449. But, should the same question arise in this jurisdiction within the next few years, the probability is that the Court will then construe the statement in the syllabus of this case to mean that it is but a statement of the general rule. This, the writer believes, may well be done, as shown above. We can only wait until the Court is given an opportunity to decide upon this question again.

—CLAIR SMITH.

FATHER'S CONSENT TO UNLAWFUL EMPLOYMENT OF INFANT SON IN DANGEROUS OCCUPATION AS BAR TO RECOVERY IN AC-

TION BY FATHER FOR SON'S DEATH.—Plaintiff sues to recover damages for alleged wrongful death of his son, an infant under the age of sixteen years, while the latter was employed by defendant in violation of §§72 and 73, ch. 15H, W. VA. CODE, 1923. The employment was with the consent of the plaintiff, sole beneficiary. Defendant had complied with the provisions of the Workman's Compensation Act. *Held*, father's consent is bar to recovery. *Hammack v. Hope Natural Gas Company*, 140 S. E. 1 (W. Va. 1927).

This decision is in accord with the other decisions in this state and elsewhere. *Dickinson v. Stuart Colliery Company*, 71 W. Va. 325, 76 S. E. 654. The Dickinson Case restricted the application of the rule to those cases where, in the language of the court, the unlawful employment consented to by the father was the proximate cause of the injury. So far as can be determined with any degree of accuracy, the court by this language means, apparently, that the rule applies to those cases where the act causing death or injury to the child under the statutory age limit, would not have caused death or injury to an employee of greater age; in other words, where the act is of such a nature that it can reasonably be said to be just such an act from which the infant is intended to be guarded by the statute. See *Swope v. Keystone Coal & Coke Company*, 78 W. Va. 517, 89 S. E. 284; L. R. A. 1917 A, 1128. See also the cases annotated under §72, ch. 15H, W. VA. CODE, 1923. Just what constitutes consent, so as to bar a recovery, is often difficult to determine. *King v. Floding*, 18 Ga. App. 280, 89 S. E. 451, holds that consent may be inferred from the parent's knowledge of, or acquiescence in, the unlawful employment. The employment of a minor in a lawful business or occupation is not unlawful merely because of lack of knowledge or consent by the parent or guardian, if the employment be otherwise lawful. *Adkins v. Hope Engineering & Supply Company*, 81 W. Va. 449, 94 S. E. 506. If there is a serious and substantial conflict in the evidence as to whether the father did in fact consent to the employment, the question is for the jury to decide. *Waldron v. Garland Pocahontas Coal Company*, 89 W. Va. 426, 109 S. E. 729 (approved in the principal case). It will be noted that where the employment is unlawful neither employer nor employee can claim the benefit of the Workman's Compensa-

tion Act. See CODE, W. VA., 1923, ch. 15P, §9, and also *Banner Morrison v. Smith-Pocahontas Coal Company*, 88 W. Va. 158, 106 S. E. 448; *Barnett v. Coal & Coke Railway Company*, 81 W. Va. 251, 94 S. E. 150; *Mangus v. Proctor Eagle Coal Company*, 87 W. Va. 718, 105 S. E. 909. This is true even where the employer is otherwise entitled to the benefits of the statute. Suppose, however, that death of a minor employee is proximately caused by illegal employment (to use the language of the West Virginia court), and the employer has not elected to comply with the provisions of the Workman's Compensation Act, although the nature of his business is such that failure to avail himself of the benefits of the Act would ordinarily result in depriving him of the common law defenses, as provided by §26, ch. 15P, CODE, W. VA., 1923. In a suit by the father, sole beneficiary, or by an administrator for his benefit, should the employer, defendant, be permitted to defend on the ground that the father's consent to such unlawful employment bars him from recovering? The principal case and *Swope v. Keystone Coal & Coke Company*, supra, speak of such defense as being, in effect the defense of contributory negligence, although it might well be argued that the term "consent to an unlawful act resulting in injury" is more appropriate. However, since the theory of our court is that the violation of §§72 and 73, ch. 15H, CODE, W. VA., 1923 is actionable or *prima facie* negligence, it may be reasonably assumed that in this state such defense is that of contributory negligence. Does, then, the statute, ch. 15P, §26, CODE, W. VA., 1923, deprive the employer of such defense? Since the employment, being unlawful, is not within the scope of the statute, and the rights and liabilities of both employer and employee are to be determined as at common law, *Banner Morrison v. Smith-Pocahontas Coal Company*, supra; *Mangus v. Proctor Eagle Coal Company*, supra; also *Barnett v. Coal & Coke Railway Company*, supra, it is submitted that the employer has a good defense. As authority to the effect that where an employer, engaged in both interstate and intrastate business, in the absence of acceptance of the Compensation Act, is not deprived of his common law defenses (as the statute applies to such employer only upon condition that he and his employees accept its provisions by filing with the commissioner

written acceptances approved by him) see *Miller v. United Fuel Gas Company*, 88 W. Va. 82, 106 S. E. 419, and also *Smith v. United Fuel Gas Company*, 91 W. Va. 52, 112 S. E. 205.

—HUGH R. WARDER.

COUNSEL FEES AND EXPENSES IN RESISTING PRELIMINARY WRIT OF INJUNCTION CANNOT BE RECOVERED IN SUIT ON INJUNCTION BOND.—This is a proceeding by notice of motion for judgment on an injunction bond. Several years ago, the defendant in error, after applying unsuccessfully for an injunction against the plaintiff, applied to this court and was granted such restraining order. The defendant in error then gave a bond in the penalty of \$10,000, conditioned to well and truly pay all damages as should be incurred or sustained by plaintiff on account of said injunction in case it should be dissolved. The injunction was dissolved by the circuit court, which ruling was later affirmed by this court. In estimating the amount of damages recoverable in the present case, this court held that counsel fees and expenses in resisting the preliminary writ cannot be taken into account in a suit on the bond. *State ex rel Meadow River Lumber Company v. Marguerite Coal Company et al.*, 104 W. Va. 324, 140 S. E. 49.

Our statute provides that an injunction shall not take effect until bond be given in such penalty as the court shall direct, conditioned to pay all costs as may be awarded against the party obtaining the injunction, and also such damages as shall be incurred or sustained by the person enjoined in case the injunction be dissolved. W. VA. CODE, Ch. 133, §10. This statute changes the common law rule under which there could be no recovery of damages on issuance of injunction except in cases where the suit was without probable cause, or was prosecuted through malice. *Glen Jean, L. L. and D. R. Company v. Kanawha, G, J. and E. R. Company*, 47 W. Va. 725, 37 S. E. 978. In estimating damages caused by the improper issuing of an injunction, only those proximately resulting from the issuance of the injunction are