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Violation of Child Labor Laws as Grounds for Negligence

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adequately even the substance of the splendid discussion which took place at the conference. The full report of the proceedings should be read by every lawyer who is interested in the cause of legal education—and what lawyer is not? The keynote of the whole conference was that the problem should be approached, not from the viewpoint of making possible a great career as a lawyer or statesman for the occasional person of rare mould, but of insuring the adequacy of the average, everyday lawyer to the duties of able and intelligent public service in the administration of justice, required of every member of the profession.

—J. W. M.

STUDENT NOTES AND RECENT CASES

VIOLATION OF CHILD LABOR LAWS AS GROUND OF NEGLIGENCE.—The West Virginia Supreme Court of Appeals has recently reiterated the doctrine that "where the employment in a coal mine was of a minor under the age fixed by the statute,[1] making it unlawful to employ such minors", and the infant so employed brought an action for injuries received in the course of such employment, "the unlawfulness of the employment and subsequent injury to the employee resulting from and in the course of the employment make out a *prima facie* case of negligence on the part of the employer."[2]

The statute in question is penal, containing no provision for a recovery of civil damages by one injured as a result of its breach. The ground of recovery, therefore, is the failure by the employer to observe the common-law duty of care toward the person injured. Consequently, the right of action is properly founded upon negligence on the part of the defendant.

Prior to the first of the line of decisions[3] establishing the doctrine in question, the West Virginia Court was generally understood as having adopted the doctrine that the violation of a statutory duty is negligence *per se*, and not merely *prima facie* negligence.[4] In the

[1] The age was at first set at twelve years (W. VA. CODE 1906, § 412), was later raised to fourteen (1918 CODE SUPP., Ch. 15H, § 36a XXXII), and by the ACTS OF 1919 it was raised to sixteen (note 13 *post*).
[2] See Bobbs *v.* Morgantown Press Co., 108 S. E. 879 (W. Va. 1921).
[3] See the cases cited in the opinion in the case of Waldron *v.* Garland-Pocahontas Coal Co., 109 S. E. 729, 731 (W. Va. 1921).
[4] See L. R. A. 1915E, 500, 506, note.

case of *Bowles* v. *Chesapeake & Ohio R. Co.*,[5] which was thought to have established that doctrine, the specific negligence alleged was the failure by the railroad company's employees to sound a whistle or a bell before crossing a highway, in violation of the statute.[6] It may be said that these cases are distinguishable on the ground that the last-mentioned statute requires the performance of an *affirmative* act, *viz.*, the blowing of a whistle or the ringing of a bell, whereas in the case under consideration the statute merely requires the performance of a *negative* duty, *viz.*, refusing to employ an infant under the prohibited age. But when this distinction is drawn, it merely serves to accentuate the reasons for arguing that a failure to observe the statute under consideration should be held to be negligence of at least as condemnable a nature as is violation of the last-mentioned statute. Surely one who, having no positive duty to perform, does an act prohibited by a statute, is as culpable as one who, having the performance of a positive duty imposed upon him by a statute, fails to perform that duty.[7] It would seem that if failure to observe the locomotive signal statute is negligence *per se*, violation of the Child Labor Law ought also to be negligence *per se*. Indeed, this is the view that has been adopted by the majority of courts.[8] And an eminent text writer, drawing no distinction between statutes imposing negative and those imposing affirmative duties, has said that

> "the general conception of the courts, and *the only one that is reconcilable with reason,* is that the failure to do the act commanded, or the doing of the act prohibited, is negligence as mere matter of law, otherwise called negligence *per se;* and this, irrespective of all questions of the exercise of prudence, diligence, care or skill."[9]

And another eminent writer has said:

> " . . . an instruction that breach of the ordinance is no more than 'evidence of negligence' must mean that the jury is justified in pronouncing reasonable the conduct of a defendant when he not only assumed to be wiser than the legislature in his foresight, but when looked at also from the standpoint of

[5] 61 W. Va. 272, 57 S. E. 131 (1907). In part 1 of the syllabus, it is stated that, "It is negligence *per se* to back a train on a dark night over a public railway crossing without warning, by blowing a whistle or ringing a bell or guard or light on the advancing reversed car."

[6] CODE W. VA., 1913, Ch. 54, § 61.

[7] Dean Ezra Ripley Thayer, in an article entitled "Public Wrong and Private Action", in 27 HARV. L. REV. 317, draws this distinction.

[8] See note 4, *supra.*

[9] See 1 THOMPSON, NEGLIGENCE, § 10. (Italics ours).

> hindsight he was wrong and the legislature right in this particular case. Unless the court were prepared to go this length it would be bound to say that if the breach of the ordinance did in fact contribute to the injury as a cause the defendant is liable as a matter of law; but this is treating it as 'negligence *per se*', to use the ordinary phraseology, and not merely 'evidence of negligence.' "[10]

If the Court was correct in holding, in the case of *Norman* v. *Virginia-Pochontas Coal Co.*[11] that violation of the statute in question was *prima facie* negligence, it is contended that that opinion is not applicable now. At the time that case was decided the statute provided that—

> "no boy under fourteen years of age, nor female persons of any age shall be permitted to work in any coal mine, and *in all cases of doubt* the parents or guardians of such boys shall furnish affidavits of their ages; any operator, agent or mine foreman who shall *knowingly* violate the provisions of this section . . . shall upon conviction, be fined . . . . or be imprisoned. . . "[12]

This statute was amended in 1915, and reenacted at the 1919 session of the legislature to read as follows:

> "No child under the age of sixteen years shall be employed, permitted or suffered to work in any mine, quarry, tunnel or excavation. . . .and it shall be unlawful for any person, firm or corporation, to take, receive or employ such child for any

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[10] 27 HARV. L. REV. 317, 323. At p. 324, it is further stated: "The proposition that his breach of law is 'prima facie evidence' of negligence helps but little, for the very statement implies that the *prima facie* impropriety may be rebutted. . . . The State has spoken through a legislative body having authority to deal with the situation; a standard of conduct has been fixed in order to prevent a public evil; and the liberty of the individual has been curtailed for the protection of others. When such a prohibition has been violated and the evil aimed at by the law has been brought about, approval of the wrongdoer's conduct by the court is not consistent with proper respect for the other branch of the government."

[11] 68 W. Va. 405, 69 S. E. 857 (1910). In this case the court relied on two quotations from texts which are thought to have been misapplied. The first is from 4 THOMPSON, NEGLIGENCE, § 3827: " . . . . the view which more nearly comports with juridical analogies is that such an unlawful employment of a child does not *per se* constitute negligence which will render the employer liable for injuries to the child, *where such employment is not the direct or proximate cause of the injury.*" (Italics ours.) It seems that this is inapplicable to such a case as that under consideration for the reason that the theory of the action is that it is the unlawfulness of the employment which is the direct or proximate cause of the injury. This statement apparently has reference to actions in which the right to recover is based not upon violation of the statute, but upon some subsequent negligent act which itself results in injury to the child, leaving the unlawfulness of the employment aside. The other quotation mentioned is from 21 AM. & ENG. ENCYC. LAW 480: " . . . the fact that the defendant's act complained of was a violation of a statute or ordinance is merely a circumstance to be considered by the jury on the question of negligence, *except when the court can say, as a matter of law that the consequence against which the statute or ordinance was intended to provide for actually ensued from its violation.*" Here, too, it seems, the exception and not the rule as stated should be applied to a case of this kind,—for was it not the intention of the legislature in enacting a Child Labor Law to provide against the consequences which actually ensued in such a case as that here under consideration?

[12] W. VA. CODE, 1906, § 412. (Italics ours.)

of the purposes or occupations mentioned in this paragraph."[13]

Note that the word "knowingly", used in the act of 1907, does not appear in the latter statute, which also eliminates the provisions relating to cases of doubt as provided for in the former. Might not the court, in view of the change in the statute of 1919, have very well said that the legislature intended, by omitting these provisions from the statute, to make a change in its meaning, denying to the person who violates the statute the defense, in a suit of the kind under consideration, of showing that he was not negligent in violating it? Nevertheless the court has not done so. It apparently understood the statute merely as raising the prohibited age from fourteen to sixteen years. In *Waldron* v. *Garland-Pocahontas Coal Co.*,[14] which is the latest West Virginia case dealing with this statute, the court indicates, at least, that it considers the doctrine of the Norman Case unchanged by the statute.[15] It is submitted that in an action of this kind the court should denominate violation of the statute in question at least negligence *per se*.

—W. F. K.

CRIMINAL PROCEDURE—INSTRUCTIONS TO JURIES—WEIGHT OF EVIDENCE.—The West Virginia Supreme Court in two recent cases[1] held that an instruction which tells the jury that "they are the sole judges of the evidence and of the weight to be given thereto, and that they may believe, or refuse to believe, any witness or any part of his evidence, and that when passing upon the credibility of any witness they may take into consideration his interest in the matter in controversy, the reasonableness or unreasonableness of his statements, his bias or prejudice in the matter, if any appear, and his demeanor upon the witness stand", is erroneous, prejudicial and reversible error. The court cites to support its decision the case of *State* v. *McCausland*,[2] wherein the court had held that this same instruction was erroneous on the ground that it would permit the jury to reject the testimony of a witness arbitrarily. It would seem that the reasoning of the court is hardly applicable to the particular instruction in question, for the reason

[13] ACTS 1919, Ch. 17, § 2.
[14] 109 S. E. 729 (W. Va. 1921).
[15] *Id.* At p. 731 it is said: "The fact that the child is under sixteen years of age makes the employment unlawful; and, if injury results, there is *prima facie* negligence on the part of the employer. See Norman *v.* Coal Co. . . . ."

[1] State *v.* Long, 108 S. E. 279 (W. Va. 1921); State *v.* Weisengoff, 109 S. E. 706 (W. Va. 1921).
[2] 82 W. Va. 525, 96 S. E. 938 (1918).