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Federal Employers' Liability Act--Disability Resulting from Inhaling Silica Dust--Duty of Railroad Company to Furnish Safe Place to Work and Protective Devices (Sadowski v. Long Island Railroad Company, 292 N.Y. 448 (1944))

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marriage, who claims to be the sole distributee of the decedent's estate (Surrogate's Ct. Act § 118). *Held,* affirmed. The court held this divorce invalid as to the child, a third party, because the surrogate found, as a matter of fact, that the decedent did not comply with the Florida residence requirement,[1] and also that under those circumstances the courts of this state did not violate the full faith and credit clause in refusing to give effect to the Florida divorce decree of 1939.[2] *Matter of Lindgren,* 293 N. Y. 18, 55 N. E. (2d) 849 (1944).

That a state, in giving full faith and credit to judicial proceedings of a sister state, may determine whether the sister state's residence requirements for divorce have been complied with was conceded by dicta in a leading U. S. Supreme Court case.[3] A New York court, in a later decision,[4] availed itself of this opening in the *Williams* case, declaring a Nevada divorce decree invalid because the parties had not met the residence requirements. The Court of Appeals, however, has not, until this decision, gone that far. It rested its decision in the *Matter of Holmes*[5] squarely upon the *Williams* case, giving full force and effect to the divorce decree until impeached by evidence which establishes that the court had no jurisdiction over the *res.* In the principal case, the surrogate has found the evidence necessary to impeach the foreign decree, and New York's highest court has taken the step which the U. S. Supreme Court, though it pointed the way, has so far refused to take.

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FEDERAL EMPLOYERS' LIABILITY ACT—DISABILITY RESULTING FROM INHALING SILICA DUST—DUTY OF RAILROAD COMPANY TO FURNISH SAFE PLACE TO WORK AND PROTECTIVE DEVICES.—Plaintiff, an employee of defendant, brought suit for personal injuries which he claimed he sustained on August 28, 1939. He had been continuously employed by defendant for some sixteen years as an engine service man. Among his other duties, he was required to prepare sand for use in the locomotive sand boxes, during which operation clouds of silica dust were raised. The plaintiff was furnished no protection such as a mask against the inhalation of the dust, nor

[1] F. S. A. § 65.02 provides that "In order to obtain a divorce, the complainant must have resided ninety days in the State of Florida before the filing of the bill of complaint." The requirement as to residence has been construed by the Florida courts to mean domicile as distinguished from a mere residence in the state. Taylor v. Taylor, 132 Fla. 690, 182 So. 238 (1938).

[2] Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237 (1903).

[3] North Carolina v. Williams, 317 U. S. 287, 63 Sup. Ct. 207 (1942). This decision forced the North Carolina authorities to give full faith and credit to the Nevada decree, but "assumed that petitioners had a *bona fide* domicile in Nevada, and not that the Nevada domicile was a sham."

[4] Ammermuller v. Ammermuller, 181 Misc. 98, 45 N. Y. S. (2d) 654 (1943).

[5] Matter of Holmes, 291 N. Y. 261, 54 N. E. (2d) 424 (1943).

was he warned of the dangers incident to such inhalation. The silica dust destroyed the tissues of his lungs, causing tuberculosis and total permanent disability. Plaintiff received a verdict from the jury which the Appellate Division reversed, holding that such facts did not establish negligence as a matter of law. *Held,* reversed. The Court of Appeals remitted the case to the Appellate Division, holding that the plaintiff had made out a *prima facie* case and was entitled to have the jury pass upon the question of negligence. *Sadowski v. Long Island Railroad Company,* 292 N. Y. 448, 55 N. E. (2d) 497 (1944).

The action was brought under the Federal Employers' Liability Act (U. S. Code, tit. 45, c. 2, §§ 51–60). Section 51 of the Act, among other things, provides that every common carrier railroad, while engaged in interstate commerce, shall be liable in damages to any employee injured through the negligence of the carrier while working in interstate commerce. The carrier conceded that it was engaged in interstate commerce and that the plaintiff was in its employ and engaged in such commerce at the time of his injury. The rights and obligations of the parties relating to questions of negligence, weight of evidence, assumption of risk, and contributory negligence depend exclusively upon the provisions of the federal statute, upon applicable principles of the common law, and upon the federal precedents.[1] The trial court held that the law of the State of New York applied and that the plaintiff had to establish, if he was to recover at all, complete freedom from contributory negligence. This was not, however, the standard fixed by Congress as a basis for recovery under the federal act.[2] Under the federal act contributory negligence does not defeat a recovery but merely diminishes the amount of the damages in proportion to the amount of negligence attributable to the plaintiff, except in cases where the injury is caused by a violation of the federal safety statutes.[3]

The Court of Appeals stated that the defendant furnished the place in which the work was done, supervised the performance of the work, and, for a period of at least sixteen years, was aware of the conditions under which the plaintiff was required to work and of the means and methods by which his work was accomplished; that no means were used by defendant to minimize the quantity of silica dust arising from the work, nor was any effort made to provide the plaintiff with a safe place to work or with safety devices, such as a respirator or a mask, which would enable him to avoid inhaling the dust. These facts, said the court, furnished a basis for a conclusion by reasonable men that defendant negligently had failed in its duty to

[1] Bailey, Adm. v. Central Vermont Railway, Inc., 319 U. S. 350, 63 Sup. Ct. 1062 (1942).

[2] U. S. CODE, tit. 45, § 53; Seaboard Air Line v .Tilghman, 237 U. S. 499, 35 Sup. Ct. 653 (1914).

[3] Grand Trunk Western R. R. Co. v. Lindsay, 233 U. S. 42, 34 Sup. Ct. 581 (1913); Norfolk & W. R. R. Co. v. Earnest, 229 U. S. 114, 33 Sup. Ct 654 (1912).

the plaintiff.[4] The Court of Appeals further held that "The ultimate question of fact was not what particular protective means someone else used in similar work. It was whether or not, under the particular conditions described in this case, the defendant furnished plaintiff a reasonably safe place in which to work and such protection in connection with his work against the inhalation of silica dust as would be expected of a person in the exercise of ordinary care under those conditions. Nor does the fact that no other person in defendant's works, so far as defendant knows, incurred similar injuries to those plaintiff received relieve defendant, as a matter of law, from liability or indicate that defendant did everything for the protection of plaintiff that ordinary care and prudence dictated."

Although defendant pleaded the Statute of Limitations[5] as a defense to the action, the court determined that it was immaterial whether or not the defense of the statute was one relating to substantive law or one relating to the remedy, holding that it was a continuing non-delegable duty of the defendant to furnish the plaintiff with a reasonably safe place in which to work until the plaintiff left the particular employment.[6] It has been held that the statute begins to run from the last date of continuous employment.[7] It would seem that the Court of Appeals is following more closely the decision of the Supreme Court of the United States in the *Bailey* case, *supra.* In the Bailey case the Supreme Court of Vermont sustained a reversal by its Appellate Court of a judgment in favor of the plaintiff, holding that the plaintiff failed to establish actionable negligence on the part of the defendant. The federal Supreme Court reversed, holding that where fair-minded men might differ as to negligence the right to a trial by jury was a remedy afforded under the Act. The holding in the instant case would seem to abandon the familiar rule that a mere scintilla of evidence is, in effect, no evidence at all[8] in favor of the principle that any evidence, however slight, is sufficient to require the submission of a case under the Act to the jury. Since the defense of "Assumption of Risk" was abolished August 11, 1939,[9] it would seem that a carrier is shorn of all defenses to an action of this type except those relating to negligence and contributory negligence.[10]

W. F. McG.

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[4] The United States Supreme Court in *Bailey, Adm. v. Central Vermont Railway, Inc., supra,* held that where fair-minded men might reach different conclusions from the evidence on the issue of negligence, the question was one for the jury.

[5] U. S. C. A., tit. 45, c. 2, § 56.

[6] Kreigh v. Westinghouse & Co., 214 U. S. 249, 29 Sup. Ct. 619 (1908).

[7] Plazak v. Allegheny Steel Co., 324 Pa. 422, 188 Atl. 130 (1936).

[8] Matter of Case, 214 N. Y. 199, 108 N. E. 408 (1915).

[9] U. S. C. A., tit. 45, c. 2, § 54; Tiller v. Atlantic Coast Line R. R. Co., 318 U. S. 54, 63 Sup. Ct. 58 (1943).

[10] Prior to the Federal Employers' Liability Act there were two theories concerning comparative negligence extant in the United States. Under the