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Federal Employer's Liability Act--Master and Servant--Assumption of Risk (Tiller v. Atlantic Coast Line R. R., 63 Sup. Ct. 444 (1943))

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such extraordinary facts as would warrant that result. The courts, however, have stated that being punished twice for the same offense is contrary to the fundamental concepts of the Bill of Rights, even though there is no technical bar to prosecution by both federal and state courts for the same act. In two cases where there was a double conviction in this manner the court either suspended sentence or imposed only a nominal penalty.[11] It is evident, therefore, that when the Court in *Jerome v. United States,* declined to construe a federal criminal statute so as to include state felonies within its scope, and gave as one of its reasons for so doing, the danger of double punishment for the same offense, it was following the principles enunciated in the aforementioned cases[12] which uphold the spirit of the constitutional guaranty as to the prevention of double jeopardy.

L. Y.

FEDERAL EMPLOYER'S LIABILITY ACT—MASTER AND SERVANT—ASSUMPTION OF RISK.—Death action brought under Federal Employer's Liability Act[1] by widow and administratrix of decedent, a railroad policeman employed by respondent. The complaint alleged negligence and failure to provide a reasonably safe place to work. Decedent was standing between two narrowly separated tracks in the respondent's unlighted switchyards on an exceedingly dark night, and as he was using a flashlight to inspect the seals of a slowly moving train, he was suddenly struck and killed by the rear car of a train which was backing in the opposite direction on an adjoining track. No warning by sound or light was conveyed to decedent.[2] Motion by defendant for a directed verdict on the ground that the evidence disclosed no actionable negligence—was granted. Circuit Court of Appeals affirmed,[3] holding that decedent had assumed the risk of his position and that therefore no duty was owing to him by respondent. On *certiorari* before the United States Supreme Court, *held,* reversed and remanded with directions. The 1939 amendment to the Federal Employer's Act[4] obliterated every vestige of "assumption of risk"

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[11] United States v. Holt, 270 Fed. 639 (1921); *cf.* United States v. Palan, cited *supra* note 10.

[12] See note 10 *supra.*

[1] 45 U. S. C. § 51 *et seq.,* 45 U. S. C. A. § 51 *et seq.* (1906), *repassed with alterations not material* (1908), cited *infra* note 10.

[2] Circuit Court found (128 F. [2d] 420, 422 [1942]) that it was "probable that Tiller did not hear cars approaching" from behind him.

[3] *Id.* at 420.

[4] 53 STAT. 1404, 45 U. S. C. § 54 (1939), ". . . employees shall not be held to have assumed the risks of employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." See note 13 *infra* for provision in § 54

doctrine. No concept of such doctrine should be the basis for withholding from the jury any determination of questions of negligence. *Tiller v. Atlantic Coast Line R. R.*, 63 Sup. Ct. 444, 87 L. ed. 446 (1943).

Master-servant tort law adopted the judicially created doctrine of "assumption of risk" over a century ago.[5] A master was held blameless in actions by employees (1) who have entered and remained in hazardous occupations.[6] (2) who accepted or continued employment with notice of negligence,[7] on the premise that the employee assumed the risk. Cases applied the doctrine interchangeably as a defense to the employer's actual negligence and as an equivalent to non-negligence.[8] From a question of fact on the general issue of negligence to be determined by the jury, the defense of assumption of risk evolved by gradual extension and amplification to a question determined by the court as a matter of law.[9] A purported modification of the common law concept of negligence with its barriers against employee recovery in industrial accident suits, while adopting the general theory itself as a basis, was legislated in the Federal Employer's Liability Act in 1906,[10] covering interstate railroad employees. Certain statutory safeguards were thrown around the plaintiff: Fellow-servant rule was abolished;[11] comparative negligence was substituted

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prior to 1939 amendment relating to "risks of employment", and which is still retained in amended section.

[5] Priestly v. Fowler, 3 M. & W. 1, 6 (Ex. 1837) (reputedly the first case creating this doctrine); *see* (1939) 53 HARV. L. REV. 341, in which the court said, "The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself: and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master." *Cf.* Chicago, M. & St. P. R. R. v. Ross, 112 U. S. 377, 58 Sup. Ct. 184, 28 L. ed. 787 (1884).

[6] Delaware, L. & W. R. R. v. Koske, 279 U. S. 7, 49 Sup. Ct. 202, 73 L. ed. 578 (1929); Toledo, St. L. & W. R. R. v. Allen, 276 U. S. 165, 172, 48 Sup. Ct. 215, 217, 72 L. ed. 513 (1928); Seaboard Air Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. ed. 1062 (1914).

[7] New York, C. & St. L. R. R. v. Boulden, 63 F. (2d) 917, *certiorari denied*, 289 U. S. 753, 53 Sup. Ct. 785, 77 L. ed. 1498 (1932); Gila Valley, G. & No. Ry. v. Hall, 232 U. S. 94 (1914).

[8] *See* Toledo, St. L. & W. R. R. v. Allen, 276 U. S. 165, 171, 172, 48 Sup. Ct. 215, 217, 72 L. ed. 513 (1928); Missouri Pac. R. R. v. Aeby, 275 U. S. 426, 430, 48 Sup. Ct. 177, 179, 72 L. ed. 351 (1928). *See also* 35 AM. JUR. 719 and 3 LABATT, MASTER AND SERVANT (2d ed.) pars. 1164–1172, 1205, 1210.

[9] Kansas City So. Ry. v. Williford, 65 F. (2d) 223, *certiorari denied*, 290 U. S. 666, 54 Sup. Ct. 87, 78 L. ed. 576 (1933); Delaware, L. & W. R. R. v. Koske, 279 U. S. 7, 49 Sup. Ct. 202, 73 L. ed. 578 (1929); *cf.* Jacob v. City of New York, 315 U. S. 752, 757, 62 Sup. Ct. 854, 856, 86 L. ed. 1166 (1942); Jones v. East Tennessee *etc.* R. R., 128 U. S. 443, 9 Sup. Ct. 118, 32 L. ed. 478 (1888).

[10] 34 STAT. 232, 45 U. S. C. § 51 *et seq.* (1906) (declared unconstitutional as to intrastate commerce aspect in *First Employer's Liability Cases*, 207 U. S. 463 [1908] and repassed in conformity with constitutional requirements of the decision, 35 STAT. 65, 45 U. S. C. § 51 *et seq.* [1908]).

[11] Adams v. Chicago & E. R. R., 314 Ill. App. 404, 41 N. E. (2d) 991

for the strict rule of contributory negligence;[12] survivor's actions for tort liability were allowed.[13] Prior to the 1939 amendment one inroad was made upon the "assumption of risk" doctrine, to wit, that it shall constitute no defense to a carrier in cases where there was a violation by the carrier of a safety statute.[14] This latter provision in the Act was inferentially interpreted in *Seaboard Air Line v. Horton*[15] to leave the defense intact in other situations as a common law bar to recovery, on the theory of implied contract, or *volenti non fit injuria*.[16] The construction of the 1939 amendment by the Supreme Court in the instant case eliminated completely "assumption of risk" as a defense by employers against the consequence of their own negligence. By applying the universally accepted test of negligence, "lack of due care under the circumstances", and fixing the standard of care as "commensurate to the dangers of the business", the Court in effect reverted from a question of law, to a jury question, the issue of whether assumption by an employee of the dangers of the business left the employer in a position of non-negligence.

Congress has not yet seen fit to abandon entirely the concept of negligence in favor of a system of workmen's compensation[17] as a remedy for employees of interstate railroad carriers who are victims of industrial accidents. Congress undoubtedly is aware of the social desirability and economic justice in insuring an employee against hazards of occupation over which he has little or no control.[18] However, the gradual alleviation from the Act of some of the harsh doctrines of the common law of negligence evinces at least a recognition of the

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(1942); Chesapeake *etc.* R. R. v. Atley, 241 U. S. 310, 60 L. ed. 1016 (1916) (rule abrogated by construction).

[12] 45 U. S. C. § 53 provides in part: ". . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

[13] 45 U. S. C. § 59 (1910).

[14] *Id.* § 54 (still part of § 54 after amendment—cited *supra* note 4): ". . . and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

[15] 233 U. S. 492, 502, 34 Sup. Ct. 635, 640, 58 L. ed. 1062, L. R. A. 1915C (1914); *accord*, Great Northern Ry. v. Leonidas, 305 U. S. 1, 59 Sup. Ct. 51, 83 L. ed. 3 (1915).

[16] For attack on doctrine, *see* Buford, *Assumption of Risk Under Federal Employer's Liability Act* (1914) 28 HARV. L. REV. 163; Note (1939) 53 HARV. L. REV. 341.

[17] Forty-seven states of the Union have enacted workmen's compensation laws, leaving only Mississippi with no legislation on this subject. Territorial acts have established workmen's compensation in Alaska, Hawaii, Philippine Islands, and Puerto Rico. The Federal Congress has enacted a law covering the District of Columbia, and Federal Acts have also been made applicable to all United States civil employees and to longshoremen and harbor workers. U. S. HANDBOOK OF LABOR STATISTICS (1941 ed.) Bulletin No. 694. *See* BOYD, WORKMEN'S COMPENSATION AND INDUSTRIAL INSURANCE UNDER MODERN CONDITIONS (1913); DOWNEY, WORKMEN'S COMPENSATION (1924).

[18] *Ibid.* (witness employments within the scope of federal power that have been sheltered by workmen's compensation laws).

now well-settled distinction between duties of care and protection [19] emanating from an employer-employee relationship and the usual duties of care flowing between individuals not so related.[20]

B. B. L.

UNIFORM TRUST RECEIPT ACT—SECURITY INTEREST—LIBERTY OF SALE—BUYER IN THE ORDINARY COURSE OF BUSINESS.—On March 5, 1940, Carl Florio borrowed $2,500 from plaintiff, giving therefor his promissory note, secured by a trust receipt. By the terms of the receipt, Florio agreed to hold two trucks just received from the manufacturer in trust for the plaintiff. Florio was to have the privilege of exhibiting the trucks and could sell them only with the written consent of the plaintiff. If they were sold, he was to hold the proceeds of the sale for the plaintiff. Three days later, Florio sold the trucks to Louis Neveloff, who was unaware of the existence of the trust receipt, pursuant to a conditional sales contract which provided that title should remain in the seller, named as Carl Florio in the conditional sales agreement, until the agreed price was paid, and that the seller could repossess the trucks upon default in payments, or if they were attached by creditors. Within the next two weeks, the conditional sales contract was assigned for new value to the plaintiff, and duly filed. The purchaser defaulted in making payments under the conditional sales contract, but before plaintiff could repossess the trucks, they were attached by defendants, who are a deputy sheriff and creditors of the conditional vendee. This action is brought to replevin the trucks, and is resisted on the ground that the conditional sales contract is invalid as against the defendants because it failed to comply with a statute requiring all the conditions of a conditional sales agreement to be incorporated in the filed contract.[1] It is claimed that the filed contract is defective in that it failed to mention the trust receipt transaction, and falsely described Florio as the seller and holder of title, whereas in truth he had no authority to sell, and title was in the entruster, by virtue of the trust receipt. *Held,* the conditional sales contract was validly filed as against defendants; failure to mention the trust receipt was not material and its description of the vendor as the seller and holder of title was accurate, since

[19] *See* Mr. Justice Brandeis, dissenting in *New York Cent. R. R. v. Winfield,* 244 U. S. 147, 165 (1917).

[20] *See* Schoene and Watson, *Workmen's Compensation on Interstate Railways* (1934) 47 HARV. L. REV. 389; Richberg, *Advantages of a Federal Compensation Act for Railway Employees* (1931) 21 AM. LAB. LEG. REV. 401.

[1] CONN. GEN. STATUTES OF 1930, § 4697 in substance requires that a conditional bill of sale must be recorded to protect the vendor against innocent purchasers from the conditional vendee, and further provides that it must set forth "*all conditions* of such sale."