

Workmen's Compensation Act: Right to Maintain Common Law Action

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tained injuries to property interests like those sustained by the plaintiff in the present case the situation is different. Has the plaintiff's property been taken from him without compensation? Has he been denied due process? Does the record in a case like this present any federal question? It is submitted that the majority opinion, which follows accepted grooves of legal thinking, has overlooked the realities of the case to present an artificial analysis. The idea of nuisance is used (perhaps because of the plaintiff's own presentation) to cover the choice which the court in fact had to make, the fixing or refusing to fix responsibility upon the defendant when no one was at fault. That the job is a public contract job ought not be important if any other contractor in the position of the defendant would be held to this absolute responsibility.

HENRY G. SCHROEDER.

WORKMEN'S COMPENSATION ACT—RIGHT TO MAINTAIN COMMON-LAW ACTION.
—An employee in the course of his employment was injured by the discharge of a spring gun set by his employer. Compensation was awarded under the Workmen's Compensation Act. Subsequently the employee brought an action against the employer at common law for the same injury. The right to bring such an action is preserved where the injury is the result of deliberate intention of the employer. Oregon Code (1930) § 49-1828. The employer defended on the grounds that deliberate intention was not shown. The trial court found for the plaintiff. On appeal, *Held*, judgment affirmed. *Weis v. Allen*, (Ore., 1934) 35 P. (2d) 478.

Where the right to compensation under the Wisconsin Workmen's Compensation Act exists, [Wis. Stats., (1933) § 102.03], the Act purports to make recovery under it the exclusive remedy against the employer. *Milwaukee v. Althoff*, 156 Wis. 68, 145 N.W. 238 (1914). It is the exclusive remedy for injuries for which the employer might have been liable at common law by reason of his failure to exercise ordinary care or to comply with a safety provision as well as from the negligent acts of a fellow servant. See, *Knoll v. Schaefer*, 180 Wis. 66, 69, 192 N.W. 399 (1923). [Where the injury is traceable to a violation by the employer of a safety statute the award is increased 15 per cent. Wis. Stats., (1923), § 102.57.] Being under the Act does not affect the right of the employee to maintain an action in tort against any other party for an injury. Wis. Stats., (1933) § 102.29 (1) (a); *McGonigle v. Gryphan*, 201 Wis. 260, 229 N.W. 81 (1930). It is no defense to such an action to show that the plaintiff has received an award under the Act for the injury. *Sheban v. A. M. Castle Co.*, 185 Wis. 282, 201 N.W. 379 (1924). Where the Workmen's Compensation Act is silent as to the preservation of common law recovery for injuries resulting from the *deliberate intention* of the employer, (and it is silent in Wisconsin), it is no defense to an action, brought by an employe for assault committed on him by the employer, to assert that the employee's sole remedy is under the Act. *Boek v. Wong Hing*, 180 Minn. 470, 231 N.W. 233, 72 A.L.R. 108 (1930) (the court said that the relationship of employer and employee did not exist when the assault was perpetrated). In that case there was *dicta* to the effect that the employee must make an election either to be compensated under the Act or to rely on his common law action. Cf. Note L.R.A. 1916 F, 987 (assault by fellow employee, foreman, etc., compensable under the Act.).

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