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suit, although some courts, including Kentucky, do allow them if reputation is involved, or if the sole purpose of the suit is to annoy. But in most cases where recoveries were allowed for malicious prosecution in civil suits, the offending party had brought successive suits upon the same cause of action.[7] Therefore, it is doubtful if defendant's claim for damages for malicious prosecution would have been allowed even if the termination of the suit could have been alleged and proved, because of the hesitancy upon the part of all courts to allow the maintenance of this type of action. In view of this oft expressed disfavor to this type of action, a court would hardly be justified in making an exception to the rule regarding termination of suits simply because of the non-residency of a party and the consequent hardship upon the party sued to later maintain his possible action for malicious prosecution.

Defendant would have had no cause of action if she had attempted to bring an independent suit, rather than asserting her purported claim as a counterclaim, before termination of the present suit. For this reason the demurrer to the counterclaim should have been sustained. It is well settled that a counterclaim *must be a cause of action*, and state all the necessary allegations of such cause of action,[8] and here defendant had no cause of action for malicious prosecution until the final termination of the present suit. For this reason, if for no other, plaintiff's demurrer to defendant's counterclaim should have been sustained by the court.

JAMES M. TERRY.

VIOLATION OF A STATUTE IN DETERMINING NEGLIGENCE

In the recent case of *Southern Mining Company* v. *Saylor*,[1] the plaintiff sued for damages for injuries sustained by him when the improperly supported ceiling of the mine room in which he was working fell on him. The plaintiff based his right to recover on the failure of the defendant mine owners and mine foreman to comply with Kentucky Statutes 2726-4, which imperatively imposed upon the mine foreman and the assistant mine foreman the duty of examining the plaintiff's working place not less than two times a week while he was working, and to see that his working place was properly secured by props and timbers, and not to direct him to work in an unsafe place except for the purpose of making it safe; and Kentucky Statutes 2726-7, which states that it shall be the duty of the mine foreman or the assistant mine foreman of every coal mine in this state to see that every person employed to work in such mine shall, before beginning

[7] Pierce v. Thompson, 6 Pick. (Mass.) 192 (1828); Kolka v. Jones, 6 N. D. 461, 71 N. W. 558 (1897); Payne v. Donegan, 9 Ill. App. 566 (1881); Shedd v. Patterson, 302 Ill. 355, 134 N. E. 705 (1922).

[8] Kelly v. Kelly, 1 Ky. Opin. 328 (1866); Rice v. Pulliam, 141 Ky. 10, 131 S. W. 1053 (1910); Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420 (1916); Albrecht v. Dillon, 224 Ill. App. 421 (1922); Braden v. Gulf Coast Lumber Co., 89 Okla. 215, 215 Pac. 202 (1923); J. M. Broat Lumber Co. v. Van Houten, 66 Mont. 478, 213 Pac. 1116 (1923).

work therein, be instructed in the particular danger incident to his work in such place.[2] *Held*: The failure to notify the plaintiff as to the particular danger incident to his work, and the failure of the mine foreman or the assistant mine foreman to visit the working place of the plaintiff, and to see that the plaintiff's working place was properly secured by timbers and props, was a violation of the statutes and was "negligence per se".

The decisions are not in accord as to the violation of a statute being "negligence per se".[3] The majority view is that such does constitute negligence, for the reason that failure to observe what the legislature has prescribed as a reasonable precaution is failure to observe the care which an "ordinary prudent man" would observe.[4] The minority rule is that violation of a statute is not "negligence per se", but is only "evidence of negligence", and, at most, only can amount to a "prima facie" case of negligence.[5] This rule is supported in part by the States of Maine, Massachusetts, New York, Minnesota, Ohio, Pennsylvania, and New Jersey.

Some courts, which apply the rule that the violation of a statute is "negligence per se", deny the application of the rule in cases of ordinances and insist that it is solely applicable to laws enacted by the legislature.[6] These courts state that the breach of a municipal ordinance is "evidence of negligence", to be considered with the other facts of the case. No reasonable or plausible ground can be found for making such a distinction. When an ordinance is passed within the proper sphere of municipal legislation, and is not inconsistent with or in contravention of general laws, and though local in its application, there is no reason why it should not be held to impose a legal duty, such that a civil action for damages might be maintained for a breach thereof.[7]

In the absence of a statute the plaintiff would have to base his case on negligence, and such would be a proper case for the jury.

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[1] Southern Mining Company v. Saylor, 264 Ky. 655, 95 W. (2d) 236 (1936).

[2] Kentucky Statutes (1930), Sections 2726-4 and 2726-7.

[3] Twitchell v. McConn, 116 Me. 490, 102 Atl. 740 (1917); Lane v. Atlantic Works, 111 Mass. 136 (1872); Martin v. Herzog, 228 N. Y. 164, 126 N. E. 814 (1920).

[4] McElhimey v. Knittle, 199 Iowa 778, 201 N. W. 586 (1925); Coffey v. Slingerland, 9 Cal. A. Rep. 731, 50 P. (2nd) 830 (1936); Carron v. Guido, 54 Idaho 494, 33 P. (2nd) 345 (1934); Gonchar v. Kelson, 114 Conn. 262, 158 Atl. 545 (1932); State v. Cope, 204 N. C. 28, 167 S. E. 456 (1933); Propulanus v. Goebel Construction Co., 279 Mo. 358, 213 S. W. 782 (1919); Della Mora v. Favillo, 37 Cal. App. 164, 173 P. 770 (1918).

[5] Johnson v. American Reduction Co., 305 Pa. 537, 158 Atl. 153 (1931); Renner v. Martin, 16 N. J. Law 240, 183 Atl. 185 (1936); Conrad v. Springfield Const. Co., 240 Ill. 12, 88 N. E. 180 (1909).

[6] Chambers v. Ohio Trust Co., 1 Disney (Ohio) 327 (1857); Knupple v. Knickerbocker Ice Co., 84 N. Y. 488 (1881).

[7] Davis v. Hopkins, 50 Ga. A. Rep. 654, 179 S. E. 213 (1935); Hataway v. Strauss, 158 So. 408 (1935).

The defendant's acts are subjected to the test of the "ordinary prudent man".[8] Courts, under certain conditions and in some cases, have said that reasonable men could not differ and that certain conduct is, as a matter of law, negligent—having fallen below the standard set. If the courts can say that certain conduct is negligent, then there is no plausible reason why the legislature can not also say that certain conduct is as a matter of law negligent. The difficulty that arises in the cases where the legislature has said that certain conduct is below the standard comes from the fact that in some statutes there is no provision giving an action for civil damages. It seems that if the statute is passed for the protection of the individual who is injured, he should have a civil action for damages no matter whether such provision is placed in the statute or not. The legislature has spoken and the matter should seem closed to a difference of opinion.

It is not every violation of a statute or ordinance, of course, that constitutes negligence, or gives an individual harmed thereby, a right of action in tort. The plaintiff to come within the protection of the statute must show: (A) That he is one of the general class of persons intended to be protected by the prohibition of the unreasonable risk involved in the defendant's conduct.[9] A harm sustained as a result of a defendant's breach of a statutory duty by one not a member of the general class of persons for whose protection the statute was enacted, will not support an action based upon the violation of the statute. (B) That the harm sustained by him is of the general type of harms which make the defendant's conduct unreasonable—the type of injury the statute is designed to prevent.[10] (C) That the harm happened in such a manner that it would not be unfair to hold defendant liable therefor, that is, that the damage was the proximate or legal result of defendant's breach of the statute.[11]

It is indeed gratifying to know that the high court of Kentucky has definitely taken its stand, regarding the violation of a statute in determining negligence, along with the great majority of the authoritative courts in the United States, and it is to be hoped that those few jurisdictions which hold to the "evidence of negligence" theory

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[8] Restatement, Torts, Section 168, Comment (d).

[9] Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182 (1892); Hamilton v. Minn. Desk Mfg. Co., 78 Minn. 3, 80 N. W. 693 (1899); Zajowski v. American Steel and Wire Co., 258 F. 9, 6 A. L. R. 348 (1918); King v. San Diego Electric Ry. Co., 176 Cal. 266, 168 P. 131 (1917); Ross v. Schooley, 257 F. 290 (1919).

[10] Falk v. Finkleman, 268 Mass. 89, 168 N. E. 89 (1929); Denten v. Mo. K. and T. Railroad Co., 90 Kans. 51, 133 P. 558 (1913); Sheldon v. Wichita R. and Light Co., 125 Kans. 476, 264 P. 732 (1928); Franklin v. Houston Electric Co., 286 S. W. 578 (1926).

[11] 27 Mich. L. Rev. 116 (1928); Hennington v. Markowitz, 230 N. Y. Sup. 313 (1928); Osborne v. Montgomery, 203 Wis. 223, 234 N. W. 372 (1931); Restatement, Torts, Section 305.

will soon realize their mistake and remedy it at their first opportunity.

CHARLES GADD.

TERMINOLOGY OF THE COURT OF APPEALS OF KENTUCKY IN REGARD TO CERTAIN INTERESTS IN REALTY

The Kentucky court has been rather careless in its use of the terms "reversion" and "reversionary interest". This is illustrated in the recent case of Fayette County Board of Education, et al. v. Bryan, et al.[1] This action instituted under the declaratory judgment act involved the construction of three deeds conveying land to the Board of Education's predecessor in title for school purposes. The first deed after making an absolute conveyance by the granting clause provided, "subject, however to the following trusts and conditions; the said tract of land shall be used only for school purposes, . . . and should the said land ever be used for any other purpose, the title thereto shall at once revert to and be vested in the first party, free from any right or claim of the second party".

The court termed and held the interest of the transferor a vested reversionary right, which she could convey or release to the holder of the defeasable or determinable fee.

The second deed was to the trustees or their successors in office "so long as it is used for a school".

The court said, "This was a specified condition subsequent which created a determinable or qualified fee subject to termination and reversion upon cessation of that use". "There was a remnant of an estate continuing in the grantor which was capable of being transmitted."

The third deed was conveyed to the trustees upon condition that it be used for school purposes, and if said property ever ceases to be used for the purpose of a school, "then said lot of land shall revert to the estate from which it is hereby granted". The court also used the term "reversion" here in referring to the interest of the grantor.

From the authorities it would appear that the term "reversion" is not correctly applicable to the interest of the transferor in either of the above deeds. The correct terminology for the interest of the transferor in each instance is a possibility of reverter.

A reversionary interest has been variously defined as "any future interest left in a transferor or his successor in interest",[2] or "the residue of an estate left in the grantor, to commence in possession after the termination of some particular estate granted out of him".[3] A possibility of reverter arises from a grant so limited that it may last forever, or may terminate on a contingency. It is the possibility

[1] 263 Ky. 61, 91 S. W. (2d) 990 (1936).

[2] Ten. Restat. Law of Prop., Sec. 199B.

[3] 2 Bl. Com. 175; 4 Kent. 354; Frank Fehr Brewing Co. v. Johnston, 97 S. W. 1107, 30 K. L. R. 211 (1906).