1933

Torts--Negligence--Inference of Negligence from Proven Facts

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Available at: https://uknowledge.uky.edu/klj/vol21/iss3/11

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effort to put them under public observation. In every community there should be some civic organization to which citizens could report abuses with the knowledge that such complaints will be thoroughly investigated. Every effort should be made to bring about the cessation of the practice of the third degree, which is a violation of some of the most fundamental principles of the law.

Martha Manning.

Torts—Negligence—Inference of Negligence from Proven Facts.—The defendant railroad company was the owner of a bridge in Frankfort, Kentucky. It permitted the city and county to build a foot-path along the side for public use, but reserved the right to stop the public use at any time by paying for all the expense of constructing said path. The public used this for many years. Sometime before the accident the defendant closed the bridge for repairs. When the bridge was again opened to the public one of the guard rails between the path and the railroad track was left exposed. The deceased was killed while crossing this bridge at night, and the first evidence of blood was found near the exposed rail. There were no witnesses except the deceased's small son who was not permitted to testify. While there are other facts in the case, these are all that are necessary for the point we will discuss, namely, "Inference of negligence from proven facts." In handing down the decision in this case the court said that while negligence cannot be presumed, it can be inferred from proven facts; and in this case the facts are sufficient to justify such an inference. L. & N. Ry. Co. v. Snow's Admrs., 235 Ky 211, 30 S. W. (2d) 885.

It appears that the Kentucky court has held consistently to the rule laid down in the principal case. Louisville Trust Co. v. Morgan, 180 Ky. 609, 203 S. W. 555, John R. Coffin Co. v. Richards, 191 Ky 720, 231 S. W. 229. It is likewise the rule in practically every other jurisdiction. Penn. Sash Door Co., 273 F. 993; Burke v. City of Baltimore, 127 Md. 554, 6 A. 693; O'Donnell v. Lange, 163 Mich. 654, 231 S. W. 555. However, there seems to be some dispute as to how strong the inference must be. The better view seems to be that the facts need not tend to exclude the inference of the accident happening in any other way, but need only raise the inference of its being caused by the wrongful act, and this must be shown by a preponderance of the evidence. Austin v. Penn. R. Co., 82 N. J. Law 416, 81 A. 739; Hurcher v. N. Y. & Queens Elec., Etc., Co., 143 N. Y. S. 639, 158 App. Div. 422. Yet at least one jurisdiction holds that the evidence must not only affirmatively show negligence but must also tend to exclude any other cause. Wallace v. Chicago M. & P S. Ry. Co., 48 Mont. 427, 138 P. 499. We have been unable to find where the Kentucky court has considered this point, but it can be fairly deduced from the cases that it would not follow the Montana court.

Inference of negligence from proven facts is not to be confused with res ipsa loquitur. Res ipsa loquitur is a rule of evidence by which
negligence is presumed, while an inference of negligence is an inference that is drawn by the jury from the facts. Res ipso loquitur is a question of law. The cases are collected in 20 R. C. L. 157.

In conclusion we would say that Kentucky follows the general rule, that negligence may be inferred from proven facts, and the evidence need not be such as would tend to exclude any other cause, but only such as would permit a reasonable inference to be drawn.

Edward Duval.

Crimes—Prescription Does Not Run Against the Public.—A prescriptive right to maintain a public nuisance does not exist. Ashbrook v. Commonwealth, 64 Ky. (1 Bush) 139 (1866), Kraver v. Smith, 164 Ky. 674, 177 S. W 236 (1915), Joyce's Law on Nuisances, Sec. 50. This general, and long existing rule of law, was laid down as early as 1699. Anonymous, 12 Mod. 342. In this case, the defendant was indicted for keeping gunpowder in a house in town. Holt, C. J., in deciding that case, did so on four points: (1) Evidence—"to support this indictment there must be apparent danger, or mischief already done;" (2) Time—"though it had been done for fifty or sixty years, yet if it be a nuisance, time will not make it lawful;" (3) Place—"if at the time of setting up this house in which the gunpowder was kept there had been no houses near enough to be prejudiced by it, but some were built since, it would be at the peril of the builder;" (4) Benefit—"though gunpowder be a necessary thing, and for defense of the kingdom, yet if it be kept in such a place as it is dangerous to the inhabitants, it will be a nuisance."

Although place is indeed a vital element in deciding whether a thing may, or does, constitute a nuisance, the untenable position that one might build a house in the wilderness and continue to keep a dangerous substance in it to the peril of the public, who later build around the house, was soon destroyed. Commonwealth v. Upton, 6 Gray (Mass.) 473 (1856), Ashbrook v. Commonwealth, 64 Ky (1 Bush) 139 (1866), Sexton v. Youngkau, 202 Ky. 256, 259 S. W 335 (1924). The basis for these decisions is, of course, public policy. As the court said in the second of the foregoing cases, "A contumacious holder of real estate cannot retard the public of a city, by refusing to let a street car run through his land; nor can he, by a noxious trade or pursuit, deprive the public of its use after its appropriation."

How, then, do so many courts find a way of sanctioning the continuance of public nuisances? What is there that so often makes a mockery of this strong, unhesitant, unequivocal language?

It is in the first of Mr. Chief Justice Holt's four points that the courts find the necessary loophole. It appears a very narrow loophole. Used rightly, it would no doubt prove an elastic, useful tool, whereby the ends of justice might be more nearly served. But, also, it is an opening through which a number of judges have unconcernedly driven a team of horses. Thus, in Richmond v. House, 177 Ky. 814, 198 S. W 218, (1917), a stockyard was held not to be a nuisance per se although