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Abstracts of Cases Decided by the Kentucky Court of Appeals

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ADIEU TO THE LAW.

A last farewell, thou jealous jade,
In vain I've tried to love thee;
And thou no love hast shown me,
So now my resolution's made,
To here resign my legal trade,
And go thro' life without thee.

Thou'rt dull and dour and staid and drear,
In musty tones encased;
To dry bones full related;
So, I depart without one tear;
No flower I lay upon Thy bier—
We two were never mated!

A. P. G.

ABSTRACTS OF CASES DECIDED BY THE KENTUCKY COURT OF APPEALS.

DICE'S ADMINISTRATOR v. ZWEIGART'S ADMINISTRATOR, ET AL.
(Decided December 15, 1914.)
Appeal from Mason Circuit Court.

A landlord's promise to repair does not make him liable in damages for the death of a member of his tenant's family, resulting from defective premises.

Section 6, Kentucky Statutes, giving a right of action for death from injury inflicted by negligence or wrongful act does not impose any liability on a landlord for a breach of his promise to repair. That section is confined to torts, and does not cover a case of a breach of an ordinary contract.

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MCILVAINE, ET AL v. ROBSON, ET AL.
(Decided December 15, 1914.)
Appeal from Campbell Circuit Court.

A will must be construed as a whole, and where advancements of a certain sum are directed to be charged to a son in the final settlement of the estate, it will not be concluded that the son is excluded from all interest in the estate because he is excluded from the distribution to be made by the executor one year after the death of the testator, there being

other property which the testator did not contemplate should be brought into this distribution.

Where the testator devises property to a son and wife for life, directing that at their death it should revert to his heirs, the heirs take as though there has been no will and each of the children in the distribution of the proceeds of this property after the death of the life tenants, must be charged with all advancements they have received.

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CHESAPEAKE & OHIO RAILWAY COMPANY v. KELLY'S ADMINISTRATRIX.
(Decided December 15, 1914.)
Appeal from Montgomery Circuit Court.

In cases brought in the State court under the Federal Employers' Liability Act, three-fourths or more of the jury may return the verdict, as provided in section 2268 of the Kentucky Statutes, and the fact that under our Constitution and laws three-fourths of the jury may return a verdict, does not deny the courts of our State jurisdiction to enforce rights under the Federal Employers' Liability Act.

Of State Courts to Enforce Rights Under Congressional Legislation.—State courts have jurisdiction to enforce civil rights arising under congressional legislation, unless the jurisdiction is denied by the legislation.

When State courts are given jurisdiction to hear and determine causes of action created by Federal legislation, they may exercise this jurisdiction according to the practice and procedure of the forum, subject to such conditions as Congress may attach to the legislation.

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WATHENS, ET AL. V. SKAGGS, ET AL.
(Decided December 15, 1914.)
Appeal from Larue Circuit Court.

In this State the deed of a person of unsound mind is not void but merely voidable. Deeds—Validity—Capacity of Grantor.—To constitute mental incapacity invalidating his deed, the grantor must have been incapable of comprehending or understanding the subject of the contract, its nature and probable consequences. If he has sufficient mental capacity to know and understand the nature, meaning and effect of his act, then mere weakness of intellect will not invalidate his conveyance unless coupled with inadequacy of consideration, undue influence or other inequitable circumstances.

To overcome the presumption that the grantor of land is possessed of sufficient mental capacity to give effect to his conveyance, there must be more than a mere equilibrium of proof. An inquest upon which such grantor is found to be of unsound mind is conclusive evidence of his

mental condition only at the time of such inquest. If the inquest is had before the execution of the deed, it is only prima facie evidence of mental incapacity and the presumption thereby raised may be repelled by proof.

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DICK v. JAMES CLARKE, JR., ELECTRIC COMPANY.
(Decided December 15, 1914.)
Appeal from Jefferson Circuit Court
(Common Pleas Branch, Second Division).

Where machinery is sold under a guarantee that it will operate to the satisfaction of the purchaser, he has the right to determine for himself whether it is giving satisfaction, and if it does not give satisfaction, he has the right withn a reasonable time to return it.

If machinery is bought under a guarantee that it will work in a manner satisfactory to the purchaser, he has a reasonable time in which to discover whether it will work to his satisfaction or not and a reasonable time after making the discovery that it is not satisfactory in which to return it, but if he fails to return it within a reasonable time he must pay for it. What is a reasonable time depends on the facts and circumstances of each particular case and is a question for the jury, unless the evidence plainly shows a state of facts that authorize a directed verdict.

Where machinery is bought under a contract that it will give satisfaction to the purchaser, and it fails to do this, the fact that the seller makes repairs every time complaint is made, will not extend the reasonable time in which a return must be made, unless the seller requests the purchaser to keep the machine under a promise that he will make it operate in a satisfactory manner, or unless the seller, by his course of dealing, has induced the purchaser to believe that he may keep the machine without losing his right to return it within a reasonable time.

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CHESAPEAKE & OHIO RAILWAY COMPANY v. KELLY'S ADMINISTRATRIX.
(Decided December 15, 1914.)
Appeal from Montgomery Circuit Court.

When a judgment for the recovery of money has been superseded in the lower court and an order of supersedeas has issued, the supersedeas bond and order that was issued, if obtainable, should be made a part of the record on appeal, but if the supersedeas bond is not brought up with the record and is not a part of the record when the opinion is delivered affirming the judgment appealed from, a supplementary record containing the supersedeas bond and order of supersedeas, if one issued, may be filed in this court at any time before the mandate issues, and if so filed

it will be treated as being a part of the record when the opinion was delivered and damages will go accordingly.

Under section 760 of the Civil Code it is the duty of the clerk to issue the mandate as a matter of course within the time provided in that section, but if a petition for a rehearing is filed, it suspends the issual of the mandate until it is disposed of. The mandate is the judgment of this court, the opinion being merely an expression of the views of the court that are made effective by the mandate.

Damages will not be awarded on the affirmance of a judgment unless the supersedeas bond is in the record and an order of supersedeas has issued, but when the bond has been executed it will be presumed that an order of supersedeas issued unless it is affirmatively shown that it did not.

The case of Mutual Fire Ins. Co. v. Hammond, 21 Ky. L. R., 204, is overruled.

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MULLIGAN v. MULLIGAN.

(Devided December 15, 1914.)

Appeal from Fayette Circuit Court.

Where a husband whose estate consisted of both mortgaged and unmortgaged real estate placed the same in trust, the trustee to sell sufficient thereof to pay his indebtedness; and unmortgaged properties were sold to realize money with which to discharge the liens on mortgaged propreties not sold, the amount of the mortgages should be deducted from the proceeds of the properties sold in finding the amount upon which to base a calculation of the value of the wife's inchoate right of dower.

The wife's inchoate right of dower is extinguished by a sale of the husband's real estate to enforce the payment of tax liens thereon.

Where a husband conveyed to a trustee all his property, the trustee to sell so much thereof as was necessary to discharge his indebtedness; and in the meantime was to maintain the grantor's home and support and maintain his wife and family therein, the grantor still continued as pater familias, and he is the only person who may rightfully complain of the action of the trustee in interpreting and executing that provision of the deed. The wife was not entitled to an allowance payable directly to her.

Where such conveyance provided that the cash value of the wife's inchoate right of dower should be paid to her out of the proceeds of such properties as might be sold, and she employed attorneys to represent her interests, their bills for services rendered cannot be classed as necessaries for which the husband is made liable by statute.

The Statute imposes upon the husband liability for necessaries furnished to the wife. Medical services are necessaries; and the reasonable value thereof, when rendered, may be recovered from the husband. But

the wife is not entitled to an allowance out of her husband's estate to pay for medical services before the same have been rendered

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BROTHERHOOD OF RAILROAD TRAINMEN v. SWEARINGEN
(Decided December 18, 1914.)
Appeal from Kenton Circuit Court
(Common Law and Equity Division).

The beneficiary in a certificate or policy of insurance issued by a fraternal association, must, before bringing suit for insurance due upon the death of a member, resort to such remedies as the Constitution of the Association may reasonably impose as conditions precedent to the bringing of an action for its recovery; but where this in good faith has been done by the beneficiary in accordance with the rules of the Association, and it arbitrarily refuses to act upon the claim, the beneficiary may then sue in a court of competent jurisdiction to enforce the payment.

Where in an action on an insurance policy the defence is made that false statements, material to the risk, were made by the insured in his application, and there is a contrariety of evidence as to whether they were true or false, the question should be submitted, under proper instructions, to the jury.

Where in an application for insurance the question: "Have you ever been affected with any of the following complaints or diseases: any disease of the alimentary, genital or uninary organs?" was untruthfully given a negative answer by the insured, such answer will not prevent a recovery on the policy by the beneficiary on the ground that the insured was then affected with a kidney disease, if in making it the insured was ignorant of the meaning of the question and it would not necessarily have been understood by an ordinarily intelligent person as requiring an answer as to diseases of the kidneys.

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KEINER v. COLLINS.
(Decided December 18, 1914.)
Appeal from McCracken Circuit Court.

Where it is complained, on appeal, that the Circuit Court twice granted the defendant, in an action for malicious prosecution, a new trial; that following the third trial of the case and the return of a verdict for the defendant, plaintiff was refused a new trial, and her motion to substitute the judgment entered on the verdict returned for her on the first or second trial for that rendered for defendant on the third trial, was overruled, the Court of Appeals will review the rulings and judgment of the Circuit Court on the first and second as the third trial. But where

it is shown by the record, as in this case, that the granting of each of the new trials was authorized because of errors committed by the Circuit Court in instructing the jury, and that the rulings and instructions of the Circuit Court on the third and last trial, were free from substantial error, the judgment rendered on the last trial will be affirmed.

The instruction as to probable cause, given both on the first and second trial, was improperly confined to a definition of the term in the abstract. In an action for malicious prosecution what facts constitute probable cause is a question of law for the court, but the court should tell jury what facts constitute probable cause, and let them determine, in such case, whether these facts are proved. This was done on the third and last trial.

The meaning of the word "malice" or "maliciously" depends largely upon the subject to which it is applied. In the law of malicious prosecution it requires the mental condition or purpose. It is not a mere fiction of law, but it must be malice in fact. Therefore, the malice in a malicious prosecution is not, while it may be, ill will to the individual; but it is any evil or unlawful purpose, as distingushed from that of promoting the justice of the law. The instruction defining malice on each of the three trials did not correctly state the law, but being more favorable to the plaintiff than she was entitled to have it given, and prejudicial to the defendant alone, the error of the court in giving it on the last trial is not ground for a reversal.

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TANDY VS. CITY OF HOPKINSVILLE.

This case was appealed from Christian Circuit Court, and decided by the Kentucky Court of Appeals October 13, 1914.

This case involved the question as to whether or not the City of Hopkinsville was responsible for the destruction of certain houses within her borders by a band of Night Riders under the laws found in the Kentucky Statutes, which provide as follows:

> "If, within any city, any church, convent, chapel, dwelling house, or house used or designed for the transaction of lawful business, or shipyard, boat or vessel, or railrooad, or property of any kind belonging to any street or other railroad company, or any article of personal property, shall be injured or destroyed, or if any property therein or thereon shall be taken away or injured by any riotous or tumultous assemblage of people, the full amount of the damages so done shall be recoverable by the person injured by action against the city if the authorities thereof have the ability of themselves or with the aid of their own citizens to prevent such damage; but no such liability shall be incurred by such city unless the authorities thereof shall have

notice or good reason to believe that such riot or tumultous assemblage was about to take place, or having taken place, shall have had notice of the same in time to prevent said injury or destruction either by their own force or by the aid of the citizens of such city. No person shall maintain such action who shall have unlawfully contributed by word or deed toward exciting or inflaming such tumult or riot, or who shall have failed to do what he reasonably could toward preventing, allaying or suppressing it."

The plaintiff in his suit alleged that in December, 1907, he was the owner of two large tobacco warehouses within the said city limits. That on and prior to December, 1907, there existed in that part of the State in which Hopkinsville was located, a corporation known as the Dark Tobacco District Association, the object of which was to control the price of dark tobacco by getting producers and dealers to join the association. That a number of producers and dealers refused to become members, and in order to force them to do so, there was organized a secret society known as the "Night Riders," the purpose of this society being to compel by force and intimidation such persons as refused to join the association to do so. That the Night Riders committed a number of depredations in an effort to coerce and intimidate and for some months prior to December, 1907, had been preparing and threatening to make a raid on the City of Hopkinsville, in which a large tobacco business was conducted, for the purpose of burning and destroying warehouses and other property in the city occupied and owned by dealers in tobacco who had refused to join the association. That the unlawful purpose of this band to destroy property in the city was well known to the city authorities prior to December, but that no effort was made by them to protect the threatened property. That on the night of December 6, 1907, some two hundred or more of the Night Riders made a raid on Hopkinsville, and with force and arms set fire to and destroyed warehouses owned by the plaintiff. That the authorities of the city had the ability of themselves or with the aid of their own citizens to protect the property of this plaintiff, and that they had notice or good reason to believe that the raid was about to take place, in time to have prevented the destruction of his property, but that the city authorities did nothing to protect his property and negligently permitted it to be destroyed by the raiders.

The Defendant denied the important averrments of the petition. The case was tried out and tried before a jury, and a verdict found on the instructions of the court for the City of Hopkinsville.

Upon appeal, the court in viewing the case, and aside from commenting upon the weight of testimony, reaffirmed the plain language of the Statute. But as to whether or not the city had notice that injury to the property was about to be committed or had good reason to believe that an assemblage was about to take place or had taken place, and that the city had notice in time to prevent the injury, is a fact to be determined by the jury from the evidence offered.

The court holds that the citizen who is complaining may have employed guards to protect his property and may have thereby prevented its destruction. His failure to do this, although he may have reason to anticipate its destruction by a mob, will not excuse the city from its duty to protect the property of its citizens.

The Statute imposes upon the city a liability, and this liability it can escape only by doing its duty as specifically prescribed in the Statute. Under the said Statute, the city in this particular is not liable to the plaintiff, as he contributed toward exciting and inflaming the riot. Before this provision of the Statute can be invoked against the owner, it must be evidenced that he did something to bring himself within its scope.

JUDGE'S STERN WARNING TO DESPERATE PRISONER.

There is a good story going around the capitol about Congressman Small, who hails from South Carolina. In prehistoric days, when Smith was young in the law, he was prosecuting a town bully who bore a desperate character. This desperado was supposed to have added greatly to the population of the village cemetery and to be ready to kill his man at the drop of the acorn.

So when Small stood up at the bar before a country justice of the peace, the embryo congressman painted the prisoner in such dark colors that his own mother would not have recognized him at five paces. In the very height of his eloquence, Small pointed a long finger at the trembling man and shouted:

"Why, that man at the bar would just as soon kill me as not right here before your face, judge."

The judge leaned thoughtfully over, took off his specs and glowered at the offending criminal.

"John Smith," he thundered, "if you dare kill Small here before me, I will fine you a dollar and fifty cents for contempt of cote; durn my soul if I don't!"—Neb. Legal News.