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Important Cases Decided by the Court of Appeals of Kentucky During the Month of March, 1914

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Important Cases Decided by the Court of Appeals of Kentucky During the Month of March, 1914.

OSBORNE'S ADMINISTRATOR VS. CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY.

This case was appealed from the Pulaski Circuit Court and decided March 24th, 1914. In the case a construtction of the Federal statute known as the Employers Liability Act was brought before the court.

The plaintiff's decedent was killed while not in the discharge of duty as an employe but was answering a call to report for duty and begin his work. He was a regular employe, and at intervals was not actually engaged in work, but his time belonged to the company and subject to its orders.

The court in determining as to whether or not he must be at actual labor in order to recover or whether he might recover while in the employe and in the act of reporting for labor lays down the following rules for construing said statute in this state.

Under the Federal Hours of Service Act, an employe is not engaged in service within the meaning of the Act unless he is actually engaged in or connected with the movement of a train. And so a brakeman is not engaged in service when he is on his way from his home to his work, although he left his home in obedience to an order of the company directing him to report for service connected with the movement of the train.

A brakeman who is "dead-heading" from one point to another on the road under direction of the company so that he may be able to report for duty at the place to which he is going, is not, while so "dead-heading" engaged in service within the meaning of the Act, when he has no duties

to perform in connection with the movement of the train on which he is "dead-heading."

When an employe, in obedience to a rule of the company, reports for train service a half hour before the time fixed for the departure of the train, this time is to be counted in computing the hours of service if he is ordered to report so that he may perform some service in connection with preparing the train for its departure.

When it is sought to recover damages for negligence or wrongful acts, there must be some evidence to show that the injury complained of was caused by the negligence of the defendant, and this evidence must be sufficient to charge the defendant with a breach of duty. A recovery cannot be had on mere surmises or speculations as to how the injury happened, nor will it be presumed that the defendant was guilty of actionable negligence.

Mere proof of the injury, with attending circumstances, is not sufficient. There must be some evidence conducing to show that the injury was caused by the negligence of the defendant. When the plaintiff merely presents theories as to how the accident happened or speculative reasons that caused it, no recovery can be had.

LUCAS VS. HAGEDORN, ET AL.

This case was appealed from the Fayette Circuit Court, and decided March 27th, 1914. This case involves the construction of section 2127 of the Kentucky Statutes, which provides against a wife signing as surety for her husband.

Frequently money is borrowed and to avoid the binding force of that statute the woman is caused to sign as principal so as to bind her and then the husband signs as surety. But when a case presents such facts, that the wife is in reality the surety for the husband, although signed as principal recovery from her cannot be had, and no property that she has can be subjected to the payment of such a debt. The opinion lays down the following as the law of this state upon that subject.

In determining whether a married woman is principal or surety on a note, the courts will scrutinize the entire transaction, and regard the substance and not the form, and if it appear that the form of the transaction was a mere device or subterfuge to evade the statute, and that the wife was a mere surety in fact, she will not be held liable.

In an action to recover on two notes executed by two married women as consideration for a business which by certain contracts was sold and transferred to them, evidence examined, and held that H., the brother-in-law of one and husband of the other, was the real purchaser,

and that plaintiff knew this fact, and that the contracts were simply a device to evade section 2127, Kentucky Statutes, providing that no part of a married woman's estate shall be subjected to the payment or satisfaction of any liability, upon a contract made after marriage, to answer for the debt, default or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed of mortgage or other conveyance.

KENTUCKY MILITARY INSTITUTE VS. BRAMBLET.

This case was appealed from the Jefferson Circuit Court, and raises the question as to whether or not the said Military Institute can collect the whole amount required to maintain a student in that institution for one year, when the student has matriculated and after having spent but a short time in the school was expelled for hazing. Two hundred dollars was paid down when the student entered, and the institution sought not only to retain the $200 but to collect the remaining amount due for the whole year. The terms were advertised in the circulars issued by the institution in accordance with the claim made by it. The court in deciding the case holds as follows:

In an action by a father to recover tuition paid for his son following the son's expulsion from school after having been found guilty of hazing, the counterclaim for the unpaid tuition for the scholastic year was properly disallowed, but the father having entered the boy for the school term, paying in advance $200 he obligated himself for so much of that term as that sum would pay, and the boy by his conduct having forfeited his right to remain in school, thereby depriving the school from carrying out its contract, the father is not entitled to recover any portion of the amount paid.

The conduct of the student in being guilty of hazing was in violation of the published rules with which he was familiar, and was of such a character as to warrant expulsion.

It was error to submit to the jury the question as to whether the regulation with reference to hazing was just or reasonable, or the abstract question as to whether there was just or reasonable cause for the dismissal. The court being of the opinion that the rule was reasonable, it became the province of the jury to try the question as to the boy's guilt and as to this there was no question for the facts were admitted.

RUSSELL VS. W. E. CALDWELL COMPANY.

This case was appealed from the Jefferson Circuit Court, and was affirmed by the Court of Appeals fixing the law as to how far an employee

assumes the risk so as to exempt his employer from responsibility in doing certain kinds of work.

The employee was sent to do repairing on a roof and while working he fell and was injured. And in his suit against his employer his case was dismissed in the lower court and on appeal the case was affirmed and the law laid down as follows:

One employed to do repair work on a roof and the guttering thereof, knows in advance that his employer is not undertaking to furnish him a reasonably safe place to work, because the place being out of repair is necessarily in some measure dangerous, and the employee necessarily assumes the additional risk growing out of the then condition of the place.

The allegation that he was only employed to repair certain places in the roof or guttering, and was not employed to repair the particular guttering or appliance which gave way with him and caused him to fall, cannot relieve the employee from the assumption of the added risk. The fact that some parts of the roof and guttering were out of repair was notice to him that it was all more or less dangerous.

HOUSTON, STANWOOD AND GAMBLE CO., vs. BAIN.

This case was appealed from the Kenton Circuit Court and presents these factr:

John F. Bain brought this suit against the company to recover for a personal injury which he alleged he received while in its employ as a boiler maker, by reason of its negligence in furnishing him an unsafe tool to work with. He was engaged in beading the tubes in a boiler and in doing this used a beading tool operated by compressed air. It appears that this tool was given him to work with by the foreman Evans, and it was 2 1-2 inches long and had a flaw or crack in it. Bain told Evans that it was unsafe, Evans responded by saying to him to go ahead anyhow and he would get him a better tool; that he was in a hurry for the work, and that the boiler had to go out. While working with the tool a short time after this during the same morning, it is alleged by reason of the defectiveness of the tool Bain's index finger of the right hand was caught between the air gun and the boiler and was injured so that the finger is now crooked and he is without power to straighten it. Bain in the lower court was given judgment for $342.00.

On appealing the court affirms the judgment of the Lower Court and fixes this as law of the case; a servant who continues at work on a hurried job upon an order of the master who promises to give him bet-

ter tools, may recover for an injury received by reason of the defective tool if the danger was not so imminent that a person of ordinary prudence would not have continued at work; this is the question always for the jury ordinarily acting to determine from the facts.

ROHRMAN, ETC., vs. BONSER.

This case was appealed from the Jefferson Circuit Court and raises the question of how far the misrepresentation in securing the name of a surety upon a note, may be used by the surety as defense when suit is brought upon the note.

The facts in this case show that the note was presented to the individual member of the corporation and he was asked to sign the note as security to secure the payment of a debt due by the company and it was represented to be past due, although it had not yet matured.

Another question by way of defense was raised by alleging that when the note was presented for the signature of the surety, the note holder stated he would get another to go on the note with the surety, but never did so, and in determining how far responsibility was assumed by the surety by reason of these facts the court lays down this law.

A representation by one holding a claim against a corporation, that the claim was long past due when in fact it was not, to induce the officers or stock holders in the corporation to become bound as sureties of the claim, can not operate to relieve those signing as such sureties.

An agreement by the holder of a note when delivered to him by the surety, that he would procure the signature of another to the instrument does not impair the obligatory force of the note nor bar the holder's right to recover thereon, yet where the surety by way of counter-claim asserts as against the holder damages by reason of his failure to comply with his agreement makes a counter-claim for such damages which may be used against the collection of the note.

LOVE vs. McCANDLESS, ETD.

In this case, which was appealed from the Metcalfe Circuit Court, the question of what amounts to an abandonement of a homestead under Section 1707 of the Kentucky Statutes is raised, but that feature of the decision establishes no particular new law, as it seems to be well settled in this state that when a homestead is allotted to a widow she can use it without interruption during her life unless she voluntarily abandons it. It seems to be well settled that it is not necessary for her to reside upon the homestead but that she may have it used

and occupied by a tenant, and as long as it is clear that she is not intentionally abandoning it she has the right to retain all the rights and privileges connected therewith.

The question in this case is whether or not an infant widow by reason of certain acts abandons her homestead so as to lose it. In summing up the law and repeating some of the old well established law the court lays down this rule.

Under Section 1707 of the Kentucky Statutes a widow is only entitled to a homestead as long as she occupies the same by herself or a tenant or she may forfeit the homestead right by selling it or by abandoning it.

The mere abandonment by an infant widow of the occupancy of a homestead either by herself or a tenant does not operate to deny her the right on or before arriving of age to assert her right to a homestead although she may have fully abandoned same.

The abandonment by a widow of her homestead may be shown by her acts and conduct independent of any writing. The fact of her abandonment may be shown by parol evidence. Where an infant widow is entitled to a homestead, removed to another state and when she comes of age by the laws of the state to which she moves, although under 21 years of age (the period at which she becomes of age in this state), sold her homestead rights, this act in connection with the fact that she had never occupied the premises of the homestead, worked an abandonment of it, and after she became 21 years of age she could not assert her right to the homestead.

CLIPPINGS.

FULL PANEL.

The jurors filed into the jury box, and after all the twelve seats were filled there still remained one juror standing outside.

"If the Court please," said the Clerk, "they have made a mistake and sent us thirteen jurors instead of twelve. What do you want to do with this extra one?"

"What is your name?" asked the Judge of the extra man.

"Joseph A. Braines," he replied.

"Mr. Clerk," said the Judge, "take this man back to the jury commissioners and tell them we don't need him as we already have here twelve men without Braines."—The Green Bag.