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

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treated in a comprehensive and practical manner. Part VI., Appendix. List of American Reports, Federal and State, showing the manner of designation. The different volumes and the place where the National Reporter System connects with the different series. English Reports listed in both alphabetically and chronological order. List of Digest; table of abbreviations, &c.

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

WYATT'S TRUSTEES, ET AL. VS. GRIDER, ET AL.

This appeal was prosecuted from the Warren Circuit Court, and involves the question of the power of trustees to sell lands belonging to infants, which power is given under the following will.

"I, Laura Wyatt, being of sound mind and disposing memory, do make this my last will and testament as follows:

"(1.) I want all my just debts paid.

"(2.) I want my trustee named hereafter to use all my property for the maintenance, support and education of my two infant daughters, till they are educated or quit school. My daughter, Lena, is in business.

"(3.) Subject to the foregoing provision, I give and devise to my five children in equal parts all my real and personal estate of every kind and character, to be held in trust till the youngest child is twenty-one years of age and then divided between them equally, provided that if three of my children be of age and all such agree that it would be best and so advise, my said trustee may dispose of said property and give the said three their interest and retain in trust and all the remainder for the benefit of the said other infants till they arrive at age respectively."

The question then arises whether or not the language of the will dispenses with the necessity of complying with the provision of the Civil Code regulating the sale of infant's lands; the court says:

(1.) "Where under a will, power is given to a trustee to dispose of the property devised if three of the testatrix's children, on arriving at age, so agree and advise, and the property is sold at a judicial sale which is void by reason of the fact that the infants were made plaintiffs and not served with process as required by the code, the fact that three of the infants, who were then of age, filed an answer ratifying and confirming the sale, is not sufficient to validate the proceedings or vest the purchases with title, and presents no defense to an action by the purchaser to have

the sale, is not sufficient to validate the proceeding or vest the purchasers

(2.) "Where an action is brought by the trustee of infants pursuant to sub-section 1, 2 and 3 of Section 489, Civil Code, to sell lands belonging to the infants for the purpose of paying the debts of their mother and for their maintenance and education, and all the infants are made plaintiffs, and neither the infants nor anyone for them are served with process, and no guardian ad litem is appointed or makes defense for them the judgment of sale is void."

COMMONWEALTH VS. NANCE.

This case was appealed from the Hopkins Circuit Court, and further construes section 1972 of the Kentucky Statutes so as to make it plain that what is ordinarily known as a pool table is included within the provision of this section, and subjects the operator of the table to a fine for permitting persons under 21 years of age to play any game on the table. The section referred to and the indictment there under is set out as follows:

"If any person, being the owner or controller of the tables called 'pigeon-hole tables,' or any table similar thereto, or any billiard table, shall knowingly suffer or permit, for compensation or reward, any minor under the age of twenty-one years, without the written permission of the parent or guardian of said minor, or other person having the care, custody or control of said minor, to play any game thereon, either by betting or not betting, or shall knowingly suffer or permit any person to bet upon any game played, every such person so offending shall be fined for each offense one hundred dollars, and shall forfeit the right and privilege of again keeping such tables."

The indictment in this case was under that section and charges that,

"The said Nance, in the said county of Hopkins, on ——— day of September, 1913, and before the finding of this indictment, the said Willis Nance being then and there the owner and having control of pool-tables, did unlawfully, willingly, and knowingly suffer and permit for compensation and reward Hubbard Cansler, a person under twenty-one years of age, to play games of pool on said tables without permission from the father, mother or guardian or other person having custody or control of said minor authorizing him so to do."

At the close of the evidence for the Commonwealth the lower court directed the jury to find the defendant not guilty, being of opinion that under the evidence the pool-table in question was not "similar" to a pigeon-hole table, and therefore not embraced within the terms of the statute; and the Commonwealth has appealed.

It is admitted that the defendant was at the time named in the indictment the licensed owner and controller of an ordinary pool-table.

The undisputed evidence is that Cansler was a minor, and played pool on the pool-table and paid defendant therefor, and that he had no written permission from any one authorizing him to play. The court expressly holds,

(1.) Within the meaning of the term as used in Section 172, Kentucky Statutes, an ordinary pool table is "similar" to a pigeon-hole table, it being the purpose of the Legislature to embrace within the act any table resembling in its general characteristics a pigeon-hole table, and upon which is played a game alike in a general way the game played upon the pigeon-hole table.

(2.) Statutes must be given a reasonable interpretation, and will always be construed so as to effectuate the purpose of their enactment when it can be done without doing violence to the language itself.

MORGAN VS. MORGAN.

This case was appealed from the Daviess Circuit Court, and further construes the section of law regulating appeals from the lower court to the Court of Appeals. In so far as the amount in controversy is concerned the law now provides that the amount in controversy shall be $200.00 exclusive of interest and cost, and frequently the question arises as to how the calculations are to be made so as to determine whether or not that amount is involved.

This case brings up a peculair phase of the subject which is explained in the following language expressed by the court.

"Ordinarily where plaintiff sues for a certain amount, and defendant asserts a counterclaim for a certain amount and recovers on his counterclaim, the amount in controversy on an appeal by the plaintiff is the amount sued for plus the recovery on the counterclaim; but where plaintiff's own proof, construed most favorable in his behalf, conclusively shows that if there had been a finding in his favor he could not have recovered the sum sued for, but only a part thereof, and that $200, exclusive of interest and costs, this court is without jurisdiction to entertain the appeal."

WITT, ET AL. VS. LEXINGTON & EASTERN RAILWAY COMPANY, ET AL.

This case was appealed from the Perry Circuit Court, and lays out the rule definitely as to the time allowed for prosecuting appeals from the Circuit Court to the Court of Appeals.

This common law action went to trial before a jury, and upon the conclusion of the evidence for the appellant, who was plaintiff below,

the court directed a verdict for the defendant, now appellee. Thereafter, on September 12th, a judgment was entered dismissing the petition, and this appeal prosecuted. On September 16th the plaintiff filed his motion and grounds for a new trial, which was overrured o nthe same day.

The first question raised is that as the motion for a new trial was not made or filed in time, this court will not consider the correctness of the ruling of the trial court in giving the peremptory instruction but will be limited to the single inquiry whether the answer stated facts sufficient to constitute grounds of defense. If this position is well taken, the judgment must be affirmed, as the answer did state grounds sufficient to support a defense.

A motion and grounds for a new trial is necessary to enable this court to review the action of the lower court in sustaining peremptory instruction.

When the motion and grounds for a new trial is not filed in time, the judgment will be affirmed on appeal if the pleadings support the judgment. L

A motion and grounds for a new trial must be filed in court and within three days from the day the decision complained of is rendered, and if the motion for a new trial is not filed within this time, the situation will be the same as if no grounds for a new trial had been filed.

In computing the three days allowed, Sundays and days on which the court is not in session and does convene, will be excluded, as the code contemplates three juridical days, or days in which the court is in session, and the days on which the decision is entered and the day on which the motion and grounds for a new trial is filed are both to be computed. For example, if the decision is entered on Thursday, the 12th, the motion and grounds for a new trial must be filed in court on Saturday, the 14th, if the court is in session on Friday and Saturday.

DORSEY VS. COMMONWEALTH.

This appeal from the Jefferson Circuit Court, Criminal Division, construes the meaning of what is known as the Anti-sweating Act, of 1912, in so far as it effects the question of voluntary statements made by an accused when in the hands of the arresting officer.

In this case appellant was indicted in the Jefferson Circuit Court and charged with grand larceny committed by stealing $81.78 in lawful money of the United States from one Kay Simmons. Upon his trial he was convicted and from that judgment he appealed.

The evidence against him was wholly circumstantial, and it was insisted by appellants counsel that it was insufficient to authorize the sub-

sisted by appellants counsel that it was insufficient to authorize the submission of the case to the jury in the lower court.

The whole of the proof introduced was circumstantial, the main part of which depended upon statements made by the defendant after he was arrested and while in the hands of the arresting officer. It is urged by appellants counsel that under the Anti-sweating Act of 1912, the testimony of the officers as to what occurred when the defendant was arrested was incompetent; but the statement of the officer is that every statement by appellant to him was voluntary upon his part and not in response to any question of his.

This court has heretofore held that it was not the purpose of said Act to make incompetent as against a defendant his voluntary statements (Com. vs. McClanahan, 153 Ky., 412). In this case there is nothing in the evidence indicating that at the time the statement was made by the defendant, there was anything smacking or coercion or dictation upon the part of the officers.

The Court goes further and says,

It was not the purpose of the Anti-sweating Act of 1912 to make incompetent voluntary statements of persons in custody; and where there is nothing to indicate that at the time the statements were made there was coercion or dictation upon the part of the officers the voluntary statements are competent.

Circumstantial evidence alone is sufficient to authorize a conviction where all the links are supplied in the chain of circumstances. Judgment affirmed.

KIMBLE VS. WARREN, ET AL.

This is an appeal from a judgment of the Hickman Circuit Court, quieting appellees' right to a passway leading from their home to a public road, traveled by them in going to and from the county seat; requiring appellant to remove from the passway a fence which he had erected upon and across same, and awarding appellees one cent in damages against appellant on account of the obstruction in question. It was alleged in the petition that appellees were the owners of the passway by deed of conveyance from their vendor and also by prescription growing out of its continuous adverse use by themselves and vendors for more than fifteen years before the institution of their action and its obstruction by appellant.

The appellants answer denied appellees' ownership of the passway; also the adverse user of more than fifteen years relied on by appellees; and alleged that the passway is included in the boundary of his (appellant's) deed, and that whatever use appellees had made of same was purely permissive.

The proof is conflicting in this case, but the court in passing upon the rights of the parties emphasized the law of this state regulating such cases in this language.

A right by prescription to passaway is founded upon the presumption of a grant; such presumption arising from the adverse, uninterrupted and continuous user of the passway, by the person asserting the prescriptional right thereto, for the statutory period of limitation.

The evidence presented by the record being sufficient to show an uninterrupted, adverse and continuous user of the passway by appellees, as a matter of right, for more than fifteen years before its attempted obstruction by appellant; held—that the judgment of the chancellor, quieting their right to and possession of the passway, will not be disturbed. Judgment affirmed.

FARMERS MUTUAL EQUITY INSURANCE SOCIETY VS. SMITH.

This case was appealed from the Henderson Circuit Court, and makes clear the rule of construction that shall be applied in construing the clauses of fire insurance policies.

Plaintiff, Herbert Smith, was the owner of a frame dwelling house which was insured by defendant, Farmers Mutual Equity Insurance Society, for the sum of $300. The policy which was to continue for a period of five years, contained the following provision:

"Insurance will not be carried upon unoccupied buildings unless covered by a vacancy permit, which will be granted only on the written application filed with the secretary for a period of thirty days, with privilege of one renewal. The amount of the insurance shall be reduced one-half during said vacancy."

The Court holds:

1. The language of warranties and conditions in policies of insurance must be clear and unambiguous, and if of doubtful meaning, the doubt will be resolved in favor of the insured.

2. In determining the effect of a provision of a policy avoiding the insurance if the premises become vacant or unoccupied, it is generally held that the intention of the parties will control, and that such intention will be ascertained from the whole instrument, the subject matter of the contract, and the situation of the property insured.

3. Where the insured premises are occupied by a tenant who moves out on Saturday evening, and another tenant is to move in on Monday morning, but the premises are destroyed by fire the same morning, the interval incident to the change of tenants is within the contemplation of the parties to the contract, and is not such as to avoid the policy on the ground of non-occupancy.

BRACKEN VS. LAM COAL COMPANY.

This appeal from the Muhlenberg Circuit Court, involves the question of care the master must observe in preparing a place in which his servant may work.

Appellant instituted this action for damages against appellee for injuries received by him while at work in its mine, caused by the falling of slate, rock, and coal upon him.

The petition alleges that for some months prior to November, 1912, appellant had been employed in defendants's mine as a loader of coal, but that during that month he was employed by the defendant to assist in timbering certain parts of its said mine, the plaintiff being inexperienced in such work. That defendant negligently failed to furnish him a safe place to work and negligently failed to warn him of the dangers in said work, and that defendant's foreman, under whom he was working, directed the plaintiff into an unsafe place, and negligently assured him that the place was safe, when in fact it was dangerous.

The defendant answered, denying the material allegations of the petition, and in a separate paragraph pleaded contributory negligence.

The Court concludes by fixing this as the law in this case:

Where a workman is at work in a place known to be more or less dangerous, but is working under the immediate or direct orders of his superior, and that superior after an investigation expresses an opinion that the place is safe, or directs him to proceed with the work, the workman has a right to rely upon the presumed superior knowledge of the master, and proceed with the work, unless the danger is so obvious as that no reasonabel man in the exercise of fair judgment for his own safety would continue to work in it even under the orders of his master.

BREVITIES OF A BARRISTER

Arthur M. Harris in The Docket.

Carelessness has lost more professional reputations than unscrupulousness.

The skillful lawyer flirts with the court, woos the jury, but marries the record.

A cause is often won by what is not said.

A sleeping juror may render a just verdict.

Recipe for reversal: Let the judge try the case as well as hear it.

Whom God hath joined never come into the divorce court.

Legal metaphor: "Twelve good men and true."

Epitaph for some lawyers: Incompetent, irrelevant, and immaterial.

THE ENTHUSIASM OF YOUTH.

A certain young fellow located in a New Mexico county seat and hung out his shingle. One day he left his office with this notice tacked on the door: "Will be back in thirty minutes."

When he returned he found this addition: "What for?"