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Domestic Relations--Liability of a Married Woman as Surety

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be. In the case of *Ohio Valley Electric Railway Co.* v. *Payne*,[6] the plaintiff, who had been knocked to the tracks of the defendant street railway company at a place located several feet from the highway and hence where no one was expected to be, was run over by a car driven by a servant of the defendant. The court held that there was no duty of lookout under these circumstances and that the motorman was negligent only if he failed to exercise ordinary care *after* he discovered the plaintiff on the tracks.

In the case of *Cahill* v. *Cin., Etc., Ry. Co.*,[7] the court, referring to trespassers on the tracks of railroads, said "the only duty a railroad company owes to such persons is to use reasonable diligence to prevent injuring him when his actual peril is discovered in time to do so." This statement is but dictum, yet in view of the Ohio Valley case,[8] it represents the probable attitude of the court.

Thus we see that in applying the humanitarian doctrine, the place where the injury occurs is important. Should an injury occur where those in charge of a train had a right to expect a clear track, and a trespasser is struck and injured, the company cannot be held liable unless its servants could have avoided the injury after they had actually discovered the peril of the person injured. But where the injury occurs at a much traveled public or private crossing or other place where those in charge of the train might reasonably expect persons to be on the tracks, then the welfare of the public demands that the railroad company keep a lookout to protect the lives of those who are on the tracks. Nor is there a great hardship imposed on the company to require such a lookout.

The humanitarian doctrine is more than an exception to the law of contributory negligence—it is a rule based on the precepts of humanity and natural justice for the preservation of those who cannot or who will not look out for themselves.

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DOMESTIC RELATIONS—LIABILITY OF A MARRIED WOMAN AS SURETY.

In a recent Kentucky case,[1] defendant, a married woman, executed her own promissory note to enable a payee to borrow money. The payee pledged defendant's note as collateral to secure his own indebtedness evidenced by another note which he himself executed. The action was brought on the note executed by defendant to the payee.

[6] 213 Ky. 590, 281 S. W. 523 (1926).

[7] Note 3, *supra*.

[8] Note 6, *supra*.

[1] *Cawood* v. *Madison Southern National Bank and Trust Co.*, 251 Ky. 637, 65 S. W. (2d) 734 (1933).

The court held that the note was not illegal as involving a suretyship transaction.[2]

The court based its decision on the grounds that the facts disclose an individual undertaking on the part of the married woman, whereby she intended to incur a personal obligation, notwithstanding the fact that the note was executed for the benefit of another, and such incurring of a personal obligation to pay by a married woman is not prohibited by the Kentucky Statute.[3]

It is universally recognized that under the common law the attempted contracts of a married woman were absolutely void. It is submitted, by way of analogy, that a married woman's attempts to act as surety for the obligation of another's promise to pay would under the common law have been null and void. There have been cases so holding.[4] The courts make what might be called an exception to the general common law rule, in the courts of equity. There a married woman could contract with reference to her equitable separate estate so as to bind the estate but not so as to bind herself personally.[5]

Under modern statutes the liability of a married woman as surety depends wholly upon the existing statutory provision peculiar to the particular jurisdiction in which the problem might arise. For example, under a statute enlarging her general contractual powers, but specifically providing that a married woman cannot bind herself as surety or guarantor,[6] it is obvious that a married woman cannot become surety for another's debt.[7] Where on the contrary in some jurisdictions the statutes give a married woman general contractual power without express limitation of her capacity to become surety,[8] it has been held, by necessary implication that a married woman may become a surety.[9]

[2] Ky. Stats., Sections 2127, 3720b-27.

[3] Note 2, *supra.*

[4] *Shores-Mueller* v. *Bell*, 21 Ga. 194, 94 S. E. 83 (1917); *Yale* v. *Dederer*, 18 N. Y. 265, 72 Am. D. 503 (1858); *Hyner* v. *Dickinson*, 32 Ark. 776 (1878); *Bank of St. Helens* v. *Mann's Ex'r.*, 226 Ky. 381, 11 S. W. (2d) 144 (1928).

[5] Madden on Domestic Relations, p. 96; Peck on Domestic Relations, 3rd Ed., p. 254.

[6] Ga. Civil Code, Section 3007; Carroll's Ky. Stats., Sec. 2127; Ind. Code, Section 38-104; Mich. Stat. 13057; South Carolina Stat., Section 8575.

[7] *Gross* v. *Whitley*, 128 Ga. 79, 57 S. E. 94 (1907); *Cawood* v. *Mad. So. Nat. Bank & Trust Co.*, 251 Ky. 637, 65 S. W. (2d) 734 (1933); *Pabst Brewing Co.* v. *Schuster*, 55 Ind. 375, 103 N. E. 950 (1914); *Fisk* v. *Mills*, 104 Mich. 433, 62 N. W. 559 (1859); *Collins* v. *Hall*, 55 S. C. 336, 33 S. E. 466 (1899).

[8] Kan. Stat., Sec. 23-202; La. Act. No. 132 of 1926; Me. Pub. Laws of 1866-c52; Ark. Act of 1915, Sec. 1, p. 684; Minn. Laws 1869-c56; Oregon, Hills Ann. Laws, Secs. 2992, 2997, 2998.

[9] *Holland* v. *Bond*, 125 Ark. 526, 189 S. W. 165 (1916); *Wicks* v. *Mitchell*, 9 Kan. 80 (1872); *Mayo* v. *Hutchinson*, 57 Me. 546 (1868); *Northwestern Mut. Life Ins. Co.* v. *Allis*, 23 Minn. 337 (1877); *Southern Oregon First Nat. Bank* v. *Leonard*, 36 Or. 390, 59 Pac. 873 (1900).

In a late Federal case,[10] it was held under code, Section 1155, that a note and deed of trust signed by a married woman, undertaking to bind herself as surety of her husband was absolutely void, and failed to impose on her any obligation enforceable either at law or in equity. The reasons for the rule outside of any statutory provisions can readily be seen. It is submitted that were the wife permitted to act as surety of the husband the elements of persuasive force and coercion in a degree not sufficient to constitute duress might be used on the wife by the husband, in order that he might be able to borrow money. However, the cases are not so clear, although the rule seemingly is the same,[11] where the wife has attempted to act as surety of a third person, since the aforementioned elements do not enter in.

In Kentucky the attempted contracts of suretyship of a married woman are void and cannot be ratified.[12] In fact, a married woman who attempts to become a surety of the obligation of another cannot be held after her disabilities are removed unless there is a sufficient new consideration.[13] However, the wife may appoint her husband agent and she will be bound by the statements he made that she is principal on a note,[14] but if the payee of the note knows that the wife is merely a surety, she will not be bound.[15]

The problem has been fairly well covered in this state by statute.[16] The statute, by necessary implication, provides that although a married woman cannot be held as surety of the obligation of another as such, still if she intended by her act to incur a personal obligation to pay, she will be held liable, but not as a surety, notwithstanding the fact that the note was executed for the benefit of another.[17] In other words, each case depends strictly upon its own facts as to what shall be the decision of the court. The court in reaching its decision would seem, from the principal case,[18] to place a liberal construction on the statute in order to reach the most expedient result.

The purpose of such a statute is to give married women a favored place in the law, viz., exemption from liability as the surety of another. It preserves that which might be destroyed by coercion and mere persuasion. Such has been the policy of the legislature from time immemorial, and such it shall remain, if the lawmaking powers are placed in the hands of competent persons.

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[10] *Bradbury* v. *Howard*, 31 Fed. (2d) 222, 58 App. D. C. 383 (1929).
[11] Note 10, *supra* (dictum).
[12] *Farmers Bank* v. *Williams*, 205 Ky. 261, 265 S. W. 771 (1924); *Prater* v. *Hays Elkhorn Coal Co.*, 253 Ky. 713, 70 S. W. (2d) 378 (1934).
[13] Note 10, *supra*.
[14] *Tompkins* v. *Triplett*, 110 Ky. 824, 62 S. W. 1021 (1901).
[15] *Postell* v. *Crumbaugh*, 23 Ky. L. Rep. 2193, 66 S. W. 830 (1902).
[16] Note 2, *supra*.
[17] Note 1, *supra*.
[18] Note 1, *supra*.