Approved February 13, 1990
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Martha Jenkins
Vice- Chairperson at

3:30 ~~a.m./~~p.m. on February 6, 19 90 in room 313-S of the Capitol.

All members were present except:

Representatives Douville, Gomez, O'Neal, Peterson, Scott and Whiteman, who were excused

Committee staff present:

Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:

T. C. Anderson, Executive Director, Kansas Society of Certified Public Accountants
Kevin Fowler, Attorney, representing the Kansas Society of Certified Public Accountants
Nola Wright, Attorney, Atchison, Topeka and Santa Fe Railroad
Gary McCallister, Attorney, representing the Kansas Trial Lawyers Association

HEARING ON HB 2721 Privilege against discovery and finding of accountants

T. C. Anderson, Executive Director, Kansas Society of Certified Public Accountants, testified in support of HB 2721. He said this bill would grant a privilege against discovery or disclosure of any reports, working papers and findings of any person who conducts or participates in any C.P.A. program of positive enforcement, quality assurance or peer review, see Attachment I.

Kevin Fowler, Attorney, representing the Kansas Society of Certified Public Accountants, in answer to a Committee question, explained the language of the confidential peer review statutes relating to health care providers is more expansive than the rule articulated by the Supreme Court in 1984. The Kansas Society of C.P.A.'s and the State Board of Accountancy would like to have similar treatment by the Legislature.

T. C. Anderson explained this privilege is not designed to prevent the discovery of working papers or other items necessary to determine if a certified public accountant has committed an act of negligence in a particular engagement, nor is it designed to prevent the State Board of Accountancy access to any material currently available to them in considering a complaint against a permit holder.

Gary McCallister, Attorney, representing Kansas Trial Lawyers Association, appeared in opposition to HB 2721. He said it would not be appropriate to provide unnecessary protection for the granting of a special privilege and immunity to accountants. The legislative creating of another privilege applied to another specialty does not constitute good public policy. He said in a normal professional negligency action against an accountant, the standards of practice within the community are determined and proved by expert testimony from active practitioners. The granting of the proposed privilege may eliminate vital proof when the proof becomes disguised as "peer review", see Attachment II.

The hearing was closed on HB 2721.

HEARING ON HB 2753 Railroad not automatically liable to pay attorney fees in fire damage claims

Nola Wright, Attorney, Atchison, Topeka and Santa Fe Railroad, appeared in support of HB 2753. She said the automatic award of attorney fees and costs discourages settlement and promotes litigation. No other individual or corporation must automatically pay attorney fees and costs to a plaintiff in a strict liability situation, see Attachment III.

In answer to a Committee question she said the strict liability should be reduced in K.S.A. 66-232.

The hearing was closed on HB 2753.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,

room 313-S, Statehouse, at 3:30 ~~xxxx~~/p.m. on February 6, 1990.

Representative Snowbarger moved to approve the minutes of January 29 and January 30, 1990. Representative Solbach seconded the motion. The motion passed.

The Committee meeting was adjourned at 4:30 p.m. The next meeting will be Wednesday, February 7, 1990 at 3:30 p.m. in room 313-S.

GUEST LIST

COMMITTEE: HOUSE JUDICIARY DATE: Feb. 6, 1990

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Lonnie Hartman	Topeka	Ks Bar Assn.
Richard Ulsaker	"	KCDA
T. McCallister	"	KCDA
Kathy Taylor	"	Kans. Bankers Assoc.
Paul Shelby	"	OJA
Connie McKernan	"	ATSF
Kathy Matzek	"	KRA
Rozea A Baar	"	T.C.U.
John C. Bottenberg	"	K. Railroad Assoc.
Leroy Jones	"	B.L.E.

Kansas Society of
Certified Public Accountants

400 CROIX / P.O. BOX 5654 / TOPEKA, KANSAS 66605-0654 / 913-267-6460

FOUNDED OCTOBER 17, 1932

Testimony on HB 2721

Presented to the

House Committee on Judiciary

by

T. C. Anderson

Executive Director

Kansas Society of CPAs

February 6, 1990

2/6/90
H. Jud. Com.
Attachment I

Thank you Chairman O'Neal.

Members of the Committee, I am T. C. Anderson, Executive Director of the Kansas Society of Certified Public Accountants.

Also with me today is Kevin Fowler, a Topeka attorney with the firm of Frieden, Haynes and Forbes. Mr. Fowler will be pleased to respond to any legal questions you might have on this bill.

I appreciate the opportunity to appear before you today in support of HB 2721 which would grant a privilege against discovery or disclosure of any reports, working papers and findings of any person who conducts or participates in any CPA program of positive enforcement, quality assurance or peer review.

At the outset, let me emphasize this privilege is not designed to prevent the discovery of working papers or other items necessary to determine if a certified public accountant has committed an act of negligence in a particular engagement, nor is it designed to prevent the State Board of Accountancy access to any material currently available to them in considering a complaint against a permit holder.

In 1987 the Kansas Legislature enacted K.S.A. 1-501 at the request of the Board of Accountancy and the Kansas Society. This legislation granted the Board of Accountancy the right to establish a positive enforcement program for the review of audits, reviews, compilations and projections and forecasts prepared by each CPA office in Kansas.

2/6/90
H. Jud. Com
Att I 2

In 1986 the Kansas Society initiated a similar positive report review program as a requirement for membership.

Even earlier, in 1983 the Kansas Society began a program of reviewing twice a year audit reports filed with state agencies by Kansas CPA firms. And in 1980 the American Institute developed its voluntary Division of CPA firms which required a comprehensive review of ones practice once every three years.

These programs have been designed to be educational in that written comments as to suggestions for improving financial reporting in Kansas have been issued to all CPA firms based upon these reviews.

In all instances the reports have been masked as to client and firm so the reviewers had no knowledge of whose work was being reviewed. Comment letters were typed, matched to the reports and returned to the firms. There was no requirement that the comments be retained by the firms. Such programs were truly educational and there was little chance that any of the results could be used against a CPA in a law suit.

However, in 1988 the American Institute of CPAs imposed a Quality Assurance Review of each CPA practice in the country once every three years as a requirement for membership.

Each firm that has one audit or more must have an on-site quality review every three years. Those firms not doing audits may elect to have an off-site review of their compilation and review reports.

2/6/90
H. Jud Com
Att I 3

These reviews will be conducted by CPAs whose firms have been through the review process and who have attended a training course.

The cost to Kansas CPA firms for on-site reviews are estimated to run from $1,200 for the smallest to over $20,000 for the largest, and this cost will reoccur every three years.

Quality reviews will cover the professional aspects of a firm's accounting and auditing practice. The reviewers will check each firm for its compliance with professional standards relative to independence, planning an engagement, methods for checking a client's internal control procedures and the accounting and auditing standards followed on selected engagements. For larger firms the Quality Review will take two reviewers three to four days to complete. A smaller firm with fewer audit clients might be done in a day.

At the conclusion of the Quality Review the CPA firm receives a report and letter of comments which contain a description of each deficiency found and a suggestion for improving that particular area of practice. In addition the reviewer has pages upon pages of notes and checklists from each financial report reviewed.

Regardless of how qualified a firm is, when you open the door of your practice to a peer and ask for suggestions for improvement...you're going to get them.

Finally, the report and letter of comment must be kept by the firm to give to those who conduct the review the following third year.

2/6/90
H. Jud Com
Att I 4

Five Kansas firms have undergone the review in 1989 and 60 more are scheduled for 1990. By 1993 some 350 CPA firms in this state will have had their first Quality Review.

These reviews meet the requirements established by K.S.A. 1-501 and over sight of the program will be available to the State Board through a program being developed by the National Association of State Boards of Accountancy since many state's have positive enforcement programs.

Because of the nature of these Quality Reviews, which are designed to be educational and not punitive, the Kansas Society hopes you will vote to recommend HB 2721 favorable for passage.

Thank you and Mr. Fowler or I will by happy to respond to questions.

2/6/90
H. Jud Com
Att I 5

Testimony of Kansas Trial Lawyers Association
in Opposition to House Bill No. 2721
Before the House Judiciary Committee

February 6, 1990

Presented by Gary D. McCallister

Mr. Chairman and members of the Committee. My name is Gary D. McCallister of Topeka, Kansas. I am frequently involved in litigation of professional liability cases. I am appearing here today to speak in opposition to House Bill No. 2721.

As a result of prior legislation, K.S.A. 1989 Supp. 1-501, the Legislature authorized and the Board of Accountancy has pursued the implementation of a positive enforcement program for the review of audits, reviews, compilations, projections, forecasts or other public accounting reports for each office practice engaged in the practice of public accountancy in Kansas. The purpose for the positive enforcement program is to determine whether the reports comply with applicable public accounting standards.

The underlying purpose for the positive enforcement program is commendable in that it initiates self-enforcement in the professional specialty of accountancy. Although this effort is commendable, it is not appropriate under the circumstances, to provide what we see as unnecessary protection for the granting of a special privilege and immunity to accountants.

There is not a factual basis demonstrating a need for the privilege suggested by the proposed sub-paragraph (d) of K.S.A. 1989 Supp. 1-501. Public policy neither requires nor dictates

2/6/90
H. Jud. Com.
Attachment II

the passage of this specialized privilege and immunity for the exclusive benefit of accountants.

We must ask ourselves, what bona fide public policy ground truly exists that should entitle accountants to be afforded protection for engaging in a self-policing program which prudence and the monitoring of standards of practice requires? The legislative creation of yet another privilege applied to yet another specialty does not, in our view, constitute good public policy. By comparison, the accountants within the state of Kansas cannot credibly be said to be situated in a fashion similar to our physicians who have previously been the only other profession afforded such a privilege by the enactment of K.S.A. 65-4917(b).

In the normal professional negligence action against an accountant, the standards of practice within the community are determined and proved by expert testimony from active practitioners. The granting of the proposed privilege may eliminate vital proof when that proof becomes disguised as "peer review". In these circumstances, documents which are otherwise properly discoverable and admissible may become subject to a claim of privilege resulting in unnecessary expense and protracted litigation relating to the attempt to obtain these documents. If an accountant has engaged in a departure from the standard of practice which has damaged his client, then shouldn't that client be entitled to properly discover all relevant and

2/6/90
H. Jud Com
Att II 2

material information concerning facts and circumstances giving rise to the particular claim?

Existing rules of evidence currently afford adequate protection which obviates the need for the proposed privilege as found in sub-paragraph (d). A trial court is granted broad discretion to exclude relevant evidence if its probative value is substantially outweighed by prejudice. (K.S.A. 60-445). Specific instances of conduct or evidence of a person's character trait with respect to care is inadmissible to tend to prove the quality of his or her conduct on a specified occasion. (K.S.A. 60-448). Such evidence only becomes admissible for very limited purposes or when there is a sufficient showing that there are a sufficient number of instances to warrant a finding of a particular habit or custom. Typically, proof of negligence in a case against an accountant cannot occur in this manner. (See, generally, extrinsic policies affecting admissibility as found in K.S.A. 60-441 et seq.).

A further protection exists in the area of the admissibility of evidence of other crimes or civil wrongs. (K.S.A. 60-455). Suffice it to say, so called peer review records do not provide an avenue for proof of a professional negligence case.

Finally, privileges have historically been sparingly granted and only for overriding public policy reasons. Examples of these privileges include the following:

1. Privilege of an accused in a criminal case not to testify. (K.S.A. 60-423(a)).

2/6/90
H. Jud. Com.
Att II 3

2. Privilege of a spouse from testifying. (K.S.A. 60-423(b)).

3. Privilege against self-incrimination. (K.S.A. 60-425).

4. Lawyer-client privilege. (K.S.A. 60-426).

5. Physician-patient privilege. (K.S.A. 60-427).

6. Marital communications. (K.S.A. 60-428).

7. Penitential privilege. (K.S.A. 60-429).

8. Certified psychologist. (K.S.A. 74-5323).

9. Religious belief. (K.S.A. 60-430).

10. Political vote. (K.S.A. 60-431).

11. Trade secret. (K.S.A. 60-432).

12. State secret. (K.S.A. 60-433).

13. Official information. (K.S.A. 60-434).

14. Grand jury. (K.S.A. 60-435).

15. Identity of informer. (K.S.A. 60-436).

For the above and foregoing reasons, the Kansas Trial Lawyers Association respectfully requests you to vote against this proposed legislation. We thank you for your consideration.

2/6/90
H. Jud. Com.
Att II 4

Repeal of Attorney Fees Statute
K.S.A. 66-233

House Bill No. 2753 February 6, 1990

K.S.A. 66-232 and the case law interpreting it holds railroads absolutely liable to landowners for fire damage. The railroads liability is easily proved by showing that a train had traveled through the vicinity where the fire originated. In the State of Kansas, trains may travel through a particular area up to twelve times in a 24 hour period. Once the landowner shows this, the burden then shifts to the railroad to prove that it did not start the fire, which is a difficult and usually unsuccessful task. It does not matter how the fire started, only that the railroad is responsible. For example, if a train is put into emergency to avoid colliding with a motorist stalled on the tracks, and a spark from the engine or from the wheels during that emergency braking ignites the right-of-way and a nearby pasture, then the railroad must pay for all of the landowner's damages, including lost present and future profits. Plus, K.S.A. 66-233, states that the railroad must also pay the claimant's attorney fees and expenses, which include expert fees, deposition costs, travel, meals, and lodging.

Eighteen other states have statutes designed to hold railroads liable for fire damage. Some of them create absolute liability, such as Kansas, and others make it a simple negligence action. However, no other state has an automatic attorney fees award. All the states have repealed its attorney fees statute in this area. In fact, the State of Illinois has repealed all of its railroad fire liability statutes.

The automatic award of attorney fees and costs discourages settlement and promotes litigation. Even though liability is absolute, the more time that the attorney spends on the case, the more money he/she receives. This has resulted in a disparaging impact on the railroads. No other individual or corporation must automatically pay attorney fees and costs to a plaintiff in a strict liability situation.

2/6/90
H. Jud. Com.
Attachment III

Research and Practice Aids:
Railroads⇨94(2).
C.J.S. Railroads § 142.
Cattle guards, request or application for, Vernon's Kansas Forms §§ 8726, 8727.

CASE ANNOTATIONS

1. Statute is constitutional and valid. Railroad v. Public Utilities Comm., 115 K. 545, 224 P. 51.

66-231. Same; civil liability. Any railroad company neglecting or refusing to comply with the provisions of K.S.A. 66-230 shall be liable for all damages sustained by anyone by reason of such neglect and refusal; and in order for the injured party to recover all damages he has sustained it will only be necessary for him to prove such neglect or refusal.

History: L. 1919, ch. 243, § 2; June 17; R.S. 1923, 66-231.

66-231a. Dangerous grade crossings; designation; installation and maintenance of safety devices; closing and abolishment of crossings on certain roads; payment of costs. At the request of the governing body of any city, county or township, and after proper investigations made in cooperation with the secretary of transportation, the state corporation commission shall designate those railroad grade crossings on city, county or township roads which are dangerous. At all crossings so designated, the state corporation commission shall order the installation of appropriate safety devices to be installed and maintained by the railroad or railroads and to set a date for completion thereof. The state corporation commission shall have the authority to determine the number, type and location of such safety devices which shall conform with generally recognized national standards, to close and abolish grade crossings on city, county or township roads that are in proximity to crossings on which safety devices have been ordered pursuant to this section, subject to the approval of the governing body of such city, county or township, and to require the payment of a portion of the cost of the installation of such safety devices by the railroad or railroads involved: *Provided*, That the cost to such railroad or railroads shall be not less than twenty percent (20%) nor more than fifty percent (50%) of the total installation costs.

The balance of such costs shall become an obligation of the state, payable from the state highway fund under the provisions of paragraph (4) of subsection (b) of K.S.A. 68-416: *Provided*, That not more than three hundred thousand dollars ($300,000) of such state highway fund may be obligated in any one (1) fiscal year for such costs, and none of the moneys in the state highway fund shall be used to pay for any such costs which may be paid from funds available to the governing body of the city, county or township, wherein such safety devices are installed, under any federal or federal-aid highway act. The provisions of this section shall be deemed to provide an additional and alternative method of providing for safety at railroad grade crossings and shall be regarded as supplemental and additional to powers conferred by other state laws.

Notwithstanding the foregoing provisions of this section, nothing herein shall be construed as affecting the civil liability of any entity for the maintenance or designation of any railroad crossing.

History: L. 1972, ch. 242, § 1; L. 1975, ch. 342, § 1; L. 1975, ch. 427, § 69; Aug. 15.

Cross References to Related Sections:
Erection of stop signs at dangerous grade crossings by secretary of transportation and local authorities, see 8-1552.

Law Review and Bar Journal References:
"Practice and Procedure Before the State Corporation Commission," Fred B. Adam, 41 J.B.A.K. 199, 202 (1972).

66-231b. Same; rules and regulations. The state corporation commission is hereby authorized to adopt and enforce such rules and regulations as may be deemed necessary for the proper administration of this act.

History: L. 1972, ch. 212, § 2; July 1.

DAMAGES BY FIRE

66-232. Action for damages by fire. In all actions against any railway company organized or doing business in this state, for damages by fire caused by the operating of said railroad, it shall be only necessary for the plaintiff in said action to establish the fact that said fire complained of was caused by the operating of said railroad, and the amount of his damages (which proof shall be prima facie evidence of negligence on the part of said railroad): *Provided*, That in estimating the damages under this act, the contributory negligence of the plaintiff shall be taken into consideration.

History: L. 1885, ch. 155, § 1; May 1; R.S. 1923, 66-232.

2/6/90
H. Jud. Com.
att III

(2)

Research and Practice Aids:

Railroads⇐483.

C.J.S. Railroads § 546.

Petition in action against railroad company for damages by fire, Vernon's Kansas Forms § 8728.

CASE ANNOTATIONS

1. Measure of damages for burning and destruction of orchard, Mo. Pac. Rly. Co. v. Haynes, 1 K.A. 586, 42 P. 259; St. L. & S. F. Rly. Co. v. Hoover, 3 K.A. 577, 43 P. 854; Barker v. Railway Co., 94 K. 61, 145 P. 829.

2. Effect of showing of contributory negligence; negligence not compared. Mo. Pac. Rly. Co. v. Haynes, 1 K.A. 586, 42 P. 259.

3. Instruction concerning presumption that defendant set out fire, held erroneous. Mo. Pac. Rly. Co. v. Haynes, 1 K.A. 586, 42 P. 259.

4. Instruction concerning negligence held not prejudicial to defendant. A. T. & S. F. Rld. Co. v. Huitt, 1 K.A. 781, 41 P. 1049.

5. Statute construed; negligence of plaintiff not contributory to injury. U. P. Rly. Co. v. Eddy, 2 K.A. 291, 42 P. 413.

6. Care and caution required of railway company. St. L. & S. F. Rly. Co. v. Hoover, 3 K.A. 577, 43 P. 854.

7. Railway company not liable for unavoidable accidental escape of fire. St. L. & S. F. Rly. Co. v. Hoover, 3 K.A. 577, 43 P. 854.

8. Negligence of parties a question for the jury. Padgett v. Railroad Co., 7 K.A. 736, 52 P. 578.

9. Burden of proof upon defendant to disprove negligence. Walker v. Kendall, 7 K.A. 801, 54 P. 113.

10. Rule of negligence changed by this act; distinction between cases. Railroad Co. v. Hays, 8 K.A. 545, 54 P. 322.

11. Direct evidence that fire escaped from engine unnecessary; circumstantial evidence. Railroad Co. v. Hutchinson, 8 K.A. 605, 56 P. 144; Railway Co. v. Ellithorp, 9 K.A. 503, 59 P. 286.

12. Fire escaping from sectionmen; burden of proof concerning negligence. Railway Co. v. Ellithorp, 9 K.A. 503, 59 P. 286.

13. Dry grass, etc., on right of way question of negligence for jury. White v. Mo. Pac. Rly. Co., 31 K. 280, 1 P. 611; St. L. & S. F. Rly. Co. v. Richardson, 47 K. 517, 28 P. 183.

14. Allegations of negligence construed; defective engine. St. L. & S. F. Rly. Co. v. Fudge, 39 K. 543, 18 P. 720.

15. Presumption applies to all cases where fire results; negligence. Mo. Pac. Rly. Co. v. Merrill, 40 K. 404, 19 P. 793.

16. Statute held valid. Mo. Pac. Rly. Co. v. Merrill, 40 K. 404, 19 P. 793.

17. Prima facie case made by evidence; burden of proof. A. T. & S. F. Rld. Co. v. Gibson, 42 K. 34, 21 P. 788.

18. "Burning off grass on right of way" is within "operation of railroad." Mo. Pac. Rly. Co. v. Cady, 44 K. 633, 24 P. 1088.

19. Burden of proof on railroad after prima facie case made. Ft. S. W. & W. Rld. Co. v. Karracker, 46 K. 511, 516, 26 P. 1027.

20. Prima facie case; contributory negligence not chargeable; facts shown. Ft. S. W. & W. Rly. Co. v. Tubbs, 47 K. 630, 28 P. 612.

21. Sufficiency of petition; facts to make prima facie case sufficient. St. L. & S. F. Rly. Co. v. Snavely, 47 K. 637, 28 P. 615.

22. Joinder of company and others; separate trial refused, not error. Latham v. Brown, 48 K. 190, 29 P. 400.

23. Evidence held sufficient to sustain finding; conflicting testimony. Ft. S. W. & W. Rly. Co. v. Fortney, 51 K. 287, 32 P. 904.

24. Evidence considered and held prima facie case made. C. R. I. & P. Rly. Co. v. McBride, 54 K. 172, 186, 37 P. 978.

25. Interest not recoverable on claim for damages from fire. A. T. & S. F. Rld. Co. v. Ayers, 56 K. 176, 183, 42 P. 722.

26. Direct evidence of origin of fire not indispensable; circumstantial evidence. Railroad Co. v. Matthews, 58 K. 447, 49 P. 602, (Affirmed: Atchison, Topeka & Santa Fe R. Co. v. Matthews, 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909); Railroad Co. v. Perry, 65 K. 792, 70 P. 876.

27. Act held constitutional. Railroad Co. v. Matthews, 58 K. 447, 49 P. 602. Affirmed: Atchison, Topeka & Santa Fe R. Co. v. Matthews, 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909.

28. Judgment on findings; when not rendered for defendant; negligence. Railroad Co. v. Chace, 64 K. 380, 67 P. 853.

29. Destruction of orchard and hedge; measure of damages; instructions. Railroad Co. v. Perry, 65 K. 792, 70 P. 876.

30. Pleading of negligence; proof must sustain allegations; sufficiency of petition. Railway Co. v. Garrison, 66 K. 625, 72 P. 225.

31. Evidence to overcome prima facie case; question for the jury. Railway Co. v. Geiser, 68 K. 281, 282, 75 P. 68; Manley v. Railway Co., 82 K. 211, 107 P. 540.

32. Two measures of damages; when both methods used. Railway Co. v. Geiser, 68 K. 281, 282, 75 P. 68.

33. Offer to burn fire guard no defense. U. P. Rld. Co. v. Holmes, 68 K. 810, 74 P. 606.

34. Leasing right of way does not excuse railroad for fires. Sprague v. Railway Co., 70 K. 359, 78 P. 828.

35. Instruction as to company's duty held erroneous. Railway Co. v. Sprague, 74 K. 574, 87 P. 733.

36. Company held liable for fire set out by independent contractor. Railroad Co. v. Madden, 77 K. 80, 85, 93 P. 586.

37. Market value of growing crops destroyed; cost of restoring hedge. Hilligoss v. Railway Co., 84 K. 372, 114 P. 383.

38. Jury need not specify particular element of negligence of defendant. Hilligoss v. Railway Co., 84 K. 372, 114 P. 383.

39. Damages for growing grass and for restoration of meadow allowable. Hayden v. Railway Co., 84 K. 376, 114 P. 384.

40. Evidence of other fires under similar circumstances admissible. Tuttle v. Railway Co., 86 K. 28, 119 P. 370.

41. Burden of proof concerning negligence of parties; instruction held erroneous. Tuttle v. Railway Co., 86 K. 28, 119 P. 370.

42. Party may demand answers to special questions, when; expert testimony. Saunders v. Railway Co., 86 K. 56, 119 P. 552.

43. Fire caused by defective engine; finding held within issues joined. McVeigh v. Railway Co., 87 K. 527, 124 P. 898.

44. Negligence restricted by petition; prima facie case; burden of proof. Murry v. Railway Co., 96 K. 740, 742, 153 P. 493.

2/6/90
H. Jud. Com.
Att III
(3)

45. Statutory presumption of negligence overcome by defendant's evidence. Tacha v. Railway Co., 97 K. 571, 574, 155 P. 922.

46. Proof fire caused by railroad prima facie evidence of negligence. Smith v. Railroad Co., 102 K. 150, 154, 169 P. 217; Rice v. Monroe, 108 K. 526, 530, 196 P. 756.

47. Fire from sparks from engine; issue of fact for jury. Otey v. Railroad Co., 108 K. 755, 758, 197 P. 203.

48. Where appeal involves sufficiency of evidence, complete transcript necessary. Barker v. Chicago, R. I. & P. Rly. Co., 158 K. 549, 550, 148 P.2d 493.

49. Discussed; justice court has jurisdiction to award attorney's fee as statutory penalty. Hinds v. Fine, 162 K. 328, 336, 176 P.2d 847.

50. Court may separate issue of liability from attorney's fees and determine fees without jury. Thomas v. Kansas City Southern Rly. Co., 197 K. 747, 748, 754, 755, 421 P.2d 51.

51. Construed as having been intended to cover damages to persons as well as property. Daily v. Missouri Pacific Railroad Company, 298 F.Supp. 911, 912, 913, 914, 915.

66-233. Same; attorney's fee. In all actions commenced under this act, if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment.

History: L. 1885, ch. 155, § 2; May 1; R.S. 1923, 66-233.

Research and Practice Aids:

Railroads⇨483.
C.J.S. Railroads § 546.

Law Review and Bar Journal References:

"Recovery of Attorney Fees in Kansas," Mark A. Furney, 18 W.L.J. 535, 538, 562 (1979).

CASE ANNOTATIONS

1. Evidence concerning reasonable attorney's fees; finding of jury; judgment. A. T. & S. F. Rld. Co. v. Huitt, 1 K.A. 788, 41 P. 1051.

2. Party recovering against company entitled to reasonable attorney's fees. St. L. & S. F. Rly. Co. v. Hoover, 3 K.A. 577, 43 P. 854.

3. Section does not violate fourteenth amendment to federal constitution. Clark v. Ellithorpe, 7 K.A. 337, 51 P. 940.

4. Necessary to demand attorney's fee in petition and submit question. Ft. S. W. & W. Rld. Co. v. Karracker, 46 K. 511, 519, 26 P. 1027; Ft. S. W. & W. Rly. Co. v. Tubbs, 47 K. 630, 28 P. 612.

5. Section held constitutional and valid. Railroad Co. v. Matthews, 58 K. 447, 49 P. 602. Affirmed: Atchison, Topeka & Santa Fe R. Co. v. Matthews, 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909.

6. Section cited in construing insurance statute. Insurance Co. v. Corbett, 69 K. 564, 571, 77 P. 108. Modified: Insurance Co. v. Corbett, 81 K. 209, 105 P. 7.

7. Reasonable attorney's fee is question of fact. Wheat Growers Ass'n v. Rowan, 125 K. 657, 658, 266 P. 104.

8. Discussed; justice court has jurisdiction to award attorney's fee as statutory penalty. Hinds v. Fine, 162 K. 328, 336, 176 P.2d 847.

9. Court may separate issue of liability from attorney's fees and determine fees without jury. Thomas v. Kansas City Southern Rly. Co., 197 K. 747, 748, 752, 753, 754, 755, 421 P.2d 51.

10. Applicable where undersheriff was injured while fighting fire caused by the railroad. Daily v. Missouri Pacific Railroad Company, 298 F.Supp. 911, 912, 913.

DAMAGES CAUSED BY NEGLIGENCE

66-234. Liability for negligence. Railroads in this state shall be liable for all damages done to person or property, when done in consequence of any neglect on the part of the railroad companies.

History: L. 1870, ch. 93, § 1; March 24; R.S. 1923, 66-234.

Research and Practice Aids:

Railroads⇨214.
C.J.S. Railroads §§ 390 to 392.

Law Review and Bar Journal References:

Liability of a land occupier to persons injured on his premises, William D. Stites, 18 K.L.R. 161, 177 (1969).

CASE ANNOTATIONS

1. Statute applied; section held to govern liability for damages. St. L. & S. F. Rly. Co. v. Fruit Co., 1 K.A. 551, 557, 42 P. 267.

2. Negligence must be alleged and proved under this section. A. T. & S. F. Rld. Co. v. Ditmars, 3 K.A. 459, 463, 43 P. 833.

3. Section does not abolish fellow-servant rule; negligence between employees. K. P. Railway v. Salmon, *Adm'x*, 11 K. 83, 93.

4. Section has changed law; instruction concerning exercise of ordinary care. St. Jos. & D. C. Rld. Co. v. Grover, 11 K. 302, 306.

5. Section has not wiped out defense of contributory negligence. K. C. Ft. S. & G. Rld. Co. v. McHenry, 24 K. 502; Central Branch, U. P. R. Co. v. Walters, 24 K. 504.

6. The words "any neglect," as used herein, construed. A. T. & S. F. Rld. Co. v. Shaft, 33 K. 521, 526, 527, 6 P. 908.

7. Rules of common law concerning "contributory negligence" not overturned. A. T. & S. F. Rld. Co. v. Shaft, 33 K. 521, 527, 6 P. 908.

8. Failure to fence right of way as constituting negligence considered. A. T. & S. F. Rld. Co. v. Shaft, 33 K. 521, 527, 6 P. 908.

9. Duty of railroad company to passengers; sick or insane passenger. A. T. & S. F. Rld. Co. v. Weber, *Adm'r*, 33 K. 543, 6 P. 877.

10. Railroad company responsible for damages negligently done to stock. L. & W. Rld. Co. v. Ross, 40 K. 598, 20 P. 197.

11. Negligence in permitting steam to escape; proximate cause of injury. Railway Co. v. Bailey, 66 K. 115, 71 P. 246.

12. What constitutes contributory negligence considered. Railway Co. v. Bailey, 66 K. 115, 71 P. 246.

13. Duty which railway company owes to trespassers considered. Wilson v. Railway Co., 66 K. 183, 71 P. 282.

14. Failure of employees to care for injured person considered. Railway Co. v. Cappier, 66 K. 649, 72 P. 281.

15. Injury occurring without negligence; negligence

2/6/90
H. Jud. Com.
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