

UNITED STATES *v.* YODER.

(District Court, D. Minnesota. November, 1883.)

## ACTION OF TROVER—RIGHT OF SETTLERS TO CUT TIMBER AND IMPROVE LAND BEFORE PRE-EMPTION.

A settler, claiming in good faith a homestead, can, for the purpose of improving the land, cut down the necessary timber before he files his entry in the land-office. There is nothing in the homestead act requiring an entry in the land-office before settlement.

This is an action of trover for the conversion of timber owned by the plaintiffs.

## ADMITTED FACTS.

In April, 1880, Hermann E. Robinson, the defendant's vendor, settled upon the surveyed land upon which the timber was cut with a view of making it his homestead, and in October, 1881, he made his entry at the proper land-office. In January, February, and March, 1881, for the purpose of improving the land, he cut thereon 110,000 feet of pine logs and sold the same to the defendant, delivering them at his saw-mill. Robinson, the settler, has resided upon the land from the time of his settlement up to the trial of this cause, except when absent temporarily for a few months.

*Mr. Congdon*, Asst. U. S. Atty., for plaintiff.

*O'Brien & Wilson*, for defendant.

NELSON, J. The government has no right to the logs or their value upon the facts above stated. It may be true that in pre-emption cases the government can dispose of the land by grant for public purposes, or reserve it from sale, before all the prerequisites for obtaining the title have been complied with by the settler; still, in this case, the government has not done so, and the authorities cited by the district attorney have no application to the existing facts. The naked question presented is whether or not a settler, claiming in good faith a homestead, can, for the purpose of improving the land, cut down the necessary timber before he files his entry in the land-office. I find nothing in the homestead act forbidding it; and if the settler is acting in good faith, the fact that the time above specified intervened between the settlement and filing of the entry, would not prevent him from doing, in the meanwhile, that which good husbandry would dictate. There is nothing in the act requiring an entry should be made in the land-office before settlement. Chapter 89, § 3, Supp. Rev. St. p. 526; *Johnson v. Towsley*, 13 Wall. 90. A person who has filed a pre-emption claim, and become entitled to the law governing pre-emptors, may avail himself of the homestead act, and certainly he must have settled and improved the land before he makes his pre-emption claim. In my opinion, this law, so wise and beneficial in its

results, should be liberally construed, and unless there is evidence of bad faith on the part of the settler, it is not the policy of the government to harass him by vexatious litigation.

Judgment for defendant.

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MENTZER v. ARMOUR and others.

(Circuit Court, W. D. Missouri. October, 1883.)

1. PERSONAL INJURY—NEGLIGENCE—BURDEN OF PROOF.

The law does not presume or impute carelessness or negligence, but requires it to be shown by him who alleges it, and unless he does show it he cannot recover.

2. SAME—CARPENTERS—RISKS ATTENDING THE TRADE.

A carpenter engaging himself as such is bound to know, and he assumes, the ordinary dangers of his calling, and must exercise prudence and caution accordingly.

3. SAME—OVERSEERS—CARE IN SELECTING.

In employing overseers or superintendents ordinary care and prudence must be used in ascertaining their qualifications and fitness, but the law presumes that self-interest is a sufficient stimulant in the ascertainment of the suitability of an overseer, and therefore the burden of proof is with him who alleges the unfitness.

4. SAME—SETTLEMENTS OF CLAIMS FOR DAMAGES.

The law favors settlements between those claiming damages for personal injuries and those who may be the cause of the same; but if such settlements are induced by false representations, or when the injured party is not in possession of his proper senses, they must be regarded as a nullity.

At Law.

*Scott & Taylor*, for complainant.

*Pratt, Krumbock & Ferry*, for defendants.

KREKEL, J., (charging jury.) This suit is brought by Mentzer, plaintiff, to recover damages from Armour and others, defendants, for personal injury sustained while in their employ as a carpenter upon a building which defendants were erecting in Kansas City. In the statement of his cause of action Mentzer alleges generally that his injury resulted from defendants failing to furnish proper material for the construction of the building; failing to furnish a safe and proper structure for him to stand and walk on; failing to furnish efficient and sufficient superintendents; charging that the defendants wholly disregarded their duty in these respects, carelessly and negligently furnishing unsound and defective lumber for joists; that defendants' agents carelessly and negligently nailed and fastened the joists; that they carelessly and negligently furnished unskilled and incompetent superintendents,—all of which the defendants knew, or might have known by the exercise of ordinary care; that this carelessness and neglect caused dangers of which they failed to advise him; that defendants' overseer ordered him to go upon said joists to brace them,