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APPEARANCE—A MOTION TO QUASH AN ATTACHMENT CONSTITUTES A GENERAL APPEARANCE.—The appellee brought suit against appellant, a resident of Illinois for malpractice resulting in the death of his intestate. By the regular process a warning order attorney was appointed for appellant. A general attachment was then levied on property of the appellant found in Kentucky. The latter appeared and made a motion to quash the order of attachment, specifying that it was made without entering his appearance. Held, the motion to quash the attachment constituted a general appearance. *Johnson* v. *Holt's Adm'r.*, 235 Ky. 518, 31 S. W. (2d) 895.

It is undoubtedly the rule that an appearance for any purpose other than to challenge the *jurisdiction* of the court amounts to a general appearance. *Martin* v. *Cole*, 191 Ky. 418, 230 S. W. 535; *Swecker* v. *Reynolds*, 246 Pa. 197, 92 Atl. 76; *Zobel* v. *Zobel*, 151 Cal. 98, 90 P. 191. The reason for the rule, as given by the instant case, is that "The party challenging the jurisdiction of the court must object on that ground alone, and keep out of the court for every other purpose. If he goes into court and invokes its action for any purpose incompatible with the theory that the court has no power or jurisdiction on account of defective service of process, he thereby submits himself to the jurisdiction of the court for all purposes, and cannot insist thereafter that the court had no jurisdiction."

A party may appear for the sole purpose of attacking the jurisdiction. *Martin* v. *Cole*, *supra*. The weight of authority holds that an appearance only by motion to quash the return of service of a writ of garnishment is a special appearance. *Lyon* v. *Baldwin*, 194 Mich. 118, 16 N. W. 428. It is generally held that a motion to quash a writ of attachment is an objection to the jurisdiction of the court and, without more, constitutes a special appearance. Note in 55 A. L. R. 1121, and cases cited. If with the motion the defendant also submits a question going to the merits, there is a general appearance. *Big Vein Coal Co.* v. *Read*, 229 U. S. 31, 37, 57 L. ed. 1053.

The better reasoning is against the rule that a non resident who has not been personally served cannot appear specially to set aside the attachment of his property. "A court without personal service can acquire no jurisdiction over the person, and when it attempts to assert jurisdiction over the property it should be open to the defendant to specially appear to contest its control over such property; in other words to contest the ground of its jurisdiction. . . . The jurisdiction of the court, therefore depended upon the attachment, and an appearance to set that aside was an appearance to object to the jurisdiction. In other words, the defendant was only in court through its property, and it appeared specially to show that it was improperly in court. *Davis* v. *C. U. C. & St. L. R. Co.*, 217 U. S. 157, 174, 54 L. ed. 708. To oblige a resident of Illinois to submit to the jurisdiction of

the Kentucky court, generally, because he has property in this state which he wishes to defend, seems unreasonable. *Cheshire National Bank* v. *Jaynes*, 224 Mass. 14, 112 N. E. 500. L. B. R.

BOUNDARIES—NATURAL BOUNDARIES—ARTIFICIAL LINES.—The line in a description in a deed of land was declared to run "with the top of the ridge", from one monument to another. It was claimed that the line should be drawn straight, and not following the meanderings of the ridge. The court held that the line should follow the sinuosities of the ridge instead of running in a straight line. *Staley* v. *Richmond*, 236 Ky. 11.

The rule is everywhere emphatically sustained that a line described as a natural boundary will override other methods of marking boundaries. This rule is supported by so much authority in Kentucky as to make it superflous to cite particular cases. The rule is of course only applicable in those cases in which there is an ambiguity, and the intention of the parties cannot be definitely ascertained, and is therefore only a method of determining the most satisfactory evidence to prove the intention of the parties. There seems to be one type of case which is an exception to this rule, and in which a contrary intention will be presumed in spite of a delineation of natural boundaries. Such a situation arises when a line between two monuments is described as running along some natural boundary, and also as running in a straight line. In such case, that is, if the words as to the line being straight are express and explicit, such line will be established by the courts rather than the line as coincident with the natural boundary. *Varney* v. *Orinoco Mining Co.*, 201 Ky. 571. This after all is the natural explanation of such an apparent ambiguity. It seems more logical to suppose that if a party says "in a straight line, along the ridge," he means for the line to be straight and only approximately along the ridge. However, a more difficult case arises when the line is described as running between two monuments and along a certain natural boundary, but without expressly stating that the line shall be straight. It is made more difficult by the fact that a line between two points is, when in a description in a deed, presumed to be straight. "In the absence of some controlling indication to the contrary, when a description of the boundaries of land calls for a line from one monument to another, a straight line is intended." 4 R. C. L. 112; 9 C. J. 167; *Carter* v. *Elk Coal Co.*, 173 Ky. 378. In such case, we must choose one of these two conflicting rules, and so too must the courts. "Learned counsel for the appellees argue most earnestly that the ridges called for are known and fixed objects on the land. and must therefore control, in the location of the patent, over courses and distances, where there is an ambiguity in the description, and uncertainty as to the proper location. This is unquestionably one of the most thoroughly established rules for construing and locating a patent, and, when applicable, often controls. The trouble here is not with the rule but its application to the facts. The extraneous

evidence proves that these known and fixed ridges were not run or intended to be run by the surveyor in the original location of this patent along their crests as they meander, but were to be followed only in a general way and by straight lines." *Swift Coal and Timber Co.* v. *Sturgill and Collins*, 188 Ky. 699. In the absence of such "extraneous evidence" however, and without some express declaration that the boundary shall run "in a straight line," along the natural boundaries, the courts seem to hold that the natural boundaries, with their meanderings, override the logical presumption that the line shall be straight. *Webb* v. *Bedford*, 2 Bibb. 354; *Runyon* v. *Pond Creek Coal Co.*, 197 Ky. 757. "If the patent call had been 'down the crest of the spur', or 'the top of the spur', there would be no doubt that the line must be run on the top or crest of this spur with its meanders." *Carter* v. *Elk Coal Co.*, 173 Ky. 378.

The general rule to be derived from these cases seems to be as follows: A line between two points, described as running along a natural boundary, is determined by that boundary unless there is also a stipulation that it be a straight line, or unless there is some extraneous evidence of a contrary intention in the parties, that it be a straight line. The case under review is in accord with this statement. In this case, there was only the line between the two points, without either an express statement, or extraneous evidence, that the parties intended it to be straight. We conclude then, that the presumption that a boundary line between two points is straight, is unavailable when that boundary is described as following the sinuosities of a natural dividing line, as a stream, ridge, or cliff H. T. W.

CONSTITUTIONAL LAW—EFFECT OF DECLARING STATUTE UNCONSTITUTIONAL.—Plaintiff, the mother of an illegitimate child, sued the alleged father, under the provisions of a Missouri statute. The plaintiff recovered in the trial court. Defendant appealed to the St. Louis Court of Appeals, setting out in his brief that the statute invoked on behalf of the plaintiff was unconstitutional. The case was then transferred to the Missouri Supreme Court, which found that the question of constitutionality had not been preserved by the defendant. The case was then sent back to the St. Louis Court of Appeals. Meanwhile the statute was declared unconstitutional by the Supreme Court in another case presenting the identical question in a proper manner. The St. Louis Court of Appeals then held that the effect of that decision was to render the statute null and void from the date of its enactment. *Leiber* v. *Heil*, St. Louis (Mo.) Court of Appeals No. 19886, 32 S. W. (2d) 792.

The case presents the question as to the effect of a decision which holds a statute unconstitutional. The principle that an unconstitutional act is void ab initio had its genesis in the language of Chief Justice Marshall in his opinion in *Marbury* v. *Madison*, 1 Cranch 137. The Supreme Court of the United States seems to have been greatly influenced by this decision, since it has been followed in a long line of

cases. *Norton* v. *Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121; *Little Rock & Ft. S. R. Co.* v. *Worthen*, 120 U. S. 97, 7 Sup. Ct. Rep. 469; *Chicago, etc. R. Co.* v. *Hackett*, 227 U. S. 559, 57 L. ed. 966.

In accord with the void ab initio doctrine are the following cases: Ex parte Bockhorn, 62 Texas Cr. App. 651, 138 S. W. 706; *Minn. Sugar Co.* v. *Iverson*, 91 Minn. 30, 97 N. W. 454; *Norwood* v. *State*, 101 So. 366; *Brewer* v. *State*, 39 So. 972.

The complications arising from an inexorable deference to the void ab initio theory have been presented by O. P. Field in an article styled "Effect of an Unconstitutional Statute," 1 Indiana Law Journal 1. Since a statute induces action on the part of both private citizens and officers charged with the enforcement of the law, it is often embarrassing for the court to remove the protection afforded by the statute by holding it null and void from the date of its enactment. The de facto doctrine presents a device for evading such a situation, and the courts are inclined to use it whenever necessary. It is well stated in *Lang* v. *Bazonne*, 74 N. J. L. 455, 68 Atl. 90, a case which held that police commissioners appointed under an unconstitutional law, are, until the statute is declared to be unconstitutional, de facto officers whose acts are binding on persons affected thereby. This theory seems to be the child of necessity, since the courts are averse to declaratory judgments and a person, acting under authority of a statute, would otherwise act at his peril before he was aware that the statute was unconstitutional. No distinction is made between criminal and civil statutes.

The Kentucky Court of Appeals has held that a judge commissioned under an unconstitutional statute acts as a de facto officer until the statute has been declared unconstitutional. *Nagel* v. *Bosworth*, 148 Ky. 807, 147 S. W. 940. Accord, *Wendt* v. *Berry*, 154 Ky. 589, 157 S. W. 1115. But the same court in *Hildreth* v. *McIntire*, 1 J. J. Marsh. 209, 19 American Dec. 61, held that a court of appeals created by an act of the legislature contrary to the constitution was not a de facto body. The two cases cited supra are distinguished from the McIntire case on the ground that the act creating the legislative court of appeals was void on its face, whereas the act creating a circuit judgeship was not void on its face. Such a distinction cannot be defended, since every act, if unconstitutional, is unconstitutional on its face.

Since the void ab initio doctrine, when applied in a suit by a private individual against a police officer who has acted under an unconstitutional statute, has been explained by resort to the fallacy that everyone is presumed to know the law, the de facto theory has a firmer foundation in its practical results. C. S.

CRIMINAL LAW: RAPE.—Prosecutrix admitted having had intercourse with another party before the act for which the defendant is indicted. She consented to the intercourse with the defendant. The question presented to the court is whether the evidence is sufficient

to show that the prosecutrix was under fifteen years of age. If she was under fifteen at the time the defendant committed the act, then prior intercourse is no defense to him. Held, since evidence is insufficient to show that prosecutrix was under fifteen at the time the present act was committed, prior intercourse does not make her subject to rape. *Searcy* v. *State*, ... Tex. Cr. R. ....., 33 S. W. (2nd) 453.

A Texas statute reads as follows: "Rape is ..... the carnal knowledge of a female under the age of eighteen years, other than the wife of the person, with or without her consent, and with or without the use of force, threats or fraud. Provided, that if the woman if fifteen years or over, the defendant may show in consent cases, she was not of previous chaste character as a defense." Act of Thirty-fifth Legislature, Fourth Called Session, c. 50.

A chaste woman, within the meaning of the law as applied to an unmarried woman, means one who has had no carnal knowledge of men. Cyc. of Law and Proc. vol. 6, p. 978; Words and Phrases, Second Series, vol. 1, p. 652; *State* v. *Kelley*, 191 Mo. 680, 90 S. W. 834; *Kerr* v. *U. S.*, 7 Ind. T. 486, 104 S. W. 809; *Marshall* v. *Territory*, 2 Okla. Cr. 136, 101 Pac. 139.

The courts of Texas have construed the above statute to mean that only the first act of intercourse with consent of the female over fifteen years of age can amount to rape. *Lyons* v. *State*, 94 Tex. Cr. R. 566, 252 S. W. 518; *Coots* v. *State*, 110 Tex. Cr. R. 105, 7 S. W. (2nd) 539; *Bayless* v. *State*, 97 Tex. Cr. R. 87, 260 S. W. 587. Unchastity prior to reaching the age of consent is as good a defense as showing unchastity after reaching fifteen. *Norman* v. *State*, 89 Tex. Cr. R. 330, 230 S. W. 991. The facts of the principal case bear out this same point. Nor does it matter that the prior act was done by the party now under indictment. *Cloninger* v. *State*, 91 Tex. Cr. R. 143, 237 S. W. 288.

The principal case lines up with the court's previous interpretation of the statute. The prosecutrix admitted she had intercourse by consent with a third party when she was fourteen years old. Under the statute this first act would have been rape whether it was before or after she became fifteen. But consenting to intercourse after reaching fifteen is not rape, in view of the prior act. It should be noted that no question of force, threat or fraud enters where there is consent.

The 1930 Kentucky legislature enacted a statute which bears on the point under discussion. After reciting the prison sentence for rape between the ages of sixteen and eighteen years, the statute says: "Provided, however, that in all prosecutions for carnally knowing a female between the ages of sixteen and eighteen years, it shall be permissible to introduce evidence of any previous acts of sexual immorality committed by said female, and her general reputation for sexual immorality may be proven, and where it is shown beyond a reasonable doubt that prosecutrix is sexually immoral or of such

reputation, then the defendant shall only be guilty of a misdemeanor and upon conviction shall be fined not more than $500."

Kentucky Acts, 1930, Chap. 18. (Amending and re-enacting sec. 1155 Carroll's Kentucky Statutes, 1922 ed.). J. C. B.

EMBRACERY—NECESSITY FOR JUROR TO BE SWORN.—The defendant promised one Driscoll, if he would hang the jury or cause them not to reach a verdict in the case of *Commonwealth* v. *Grady*, set to be tried at the coming term of court in Todd County, Ky., that he would give him, Driscoll, $100.00. Defendant was the attorney for the defense in that case. Driscoll was a citizen of the county, eligible for jury duty, but had never even been summoned for duty at that term. Later he was summoned, and on the stand qualified as a juror for the case. Whether he served or not does not appear. The defendant was indicted for the common law offense of Embracery, the indictment setting out the above facts. Defendant's demurrer to it was sustained and the Commonwealth appeals for a certification of the law on the question. Held, Judgment affirmed. The fact that the person to whom the bribe was promised was not a juror, but a private citizen at the time renders the indictment insufficient to convict of the offense charged in it. *Commonwealth* v. *Denny*, 236 Ky. 98, 31 S. W. 2nd, 940.

The Common Law definition of embracery was "An attempt to influence a jury corruptly to one side, by means of promises, persuasions, entreaties or the like." 4 Blackstone, 140 Clark's Criminal Law, Sec. 436. *Brown* v. *Beauchamp*, 5 T. B. Monroe, 413. The Kentucky Statutes, Sec. 1367, limit this by saying: "If any person shall procure any juror to take gain or profit for rendering his verdict, or refusing to render his verdict, he shall be fined not less than one hundred nor more than one thousand dollars". An essential element of the offense under either the common law or the statute is that the promise must have been made to a juror. It does not matter that the attempt was unsuccessful, or that a verdict was or was not rendered in the case. 20 C. J. 496, and cases there cited.

There have been but 24 cases appealed on this offense from 1658 to 1930, if the Digest reports are accurate. Under the doctrine of one of them, *State* v. *Connors*, 70 Calif. App. 315, 233 Pac. 362, the instant case might have held otherwise. In it the defendant mailed out 20,000 letters in the county, influencing, or attempting to do so, the recipients thereof in a suit, involving the activities of the I. W. W. One person who received one of the letters became a juror in the case. All who received the letters were eligible for jury service. Defense set up that the defendant did not know that the witness was to be a juror. This was held to be immaterial, and the intent to influence all included the intent to influence one of the jurors. The defendant was freed on other grounds, but this shows that a juror does not have to be sworn, in order that the crime be committed.

That the definition includes Grand Juries is shown by the case of *Wiseman* v. *Commonwealth*, 143 Va. 631, 130 S. E. 249, where the

defendant attempted by letters and offers of gain to get the Grand Jury to fail to return an indictment in a case wherein he was an interested party.

The statute of Missouri on embracery reads "Any person summoned or sworn as a juror". *State* v. *Williams*, 136 Mo. 293, 38 S. W. 75, was a case where the witness was at the time the offer was made one of forty summoned and retained after voir dire examination to make up the smaller jury of twelve for the trial. The defendant was held guilty under the statute.

Another Missouri case, that of *State* v. *Williford*, 111 Mo. App. 668, 86 S. W. 570, where the witness was also one of 40, held that the defendant was not guilty, that the juror must have been one sworn and impaneled in a certain case at the time the offer was made. This, it is submitted, is the proper view, for a juror, accurately speaking, is one sworn and impaneled to hear a specific case, or for a certain term of court.

The South Carolina court sustained a conviction under a statute providing for punishment for any attempt to "Corrupt a juror—by gift or gratuity, with the intent to bias the opinion or influence the decision of such juror," where the juror was improperly summoned, but appeared and was approached by the defendant, before he was sworn in the case. J. H. C.

SURETY—CONTRACTOR'S BOND—LIABILITY TO MATERIALMEN.—The contract in question in this case obligated the contractor to furnish all materials and to perform all work required for the construction of bridge work and to give bond of a surety company obligating the contractor well and truly to keep and perform all terms and conditions of his contract and to indemnify the commonwealth against any loss occasioned by the failure of the contractor to construct the bridge. Payment of the materialmen was not mentioned either in the contract or the bond. The plaintiff, a materialman, brought this action against the surety and based his claim on the argument that "it will be presumed that the bond was intended for the benefit of laborers and materialmen" since a lien cannot be asserted against the state. The court rendered a decision in favor of the surety company. *Standard Oil Company* v. *National Surety Co.*, 234 Ky. 764; 29 S. W. 2nd 29.

The court in its opinion stated: "When the bond is one solely to secure performance of the contract and contains no language from which an express covenant for the benefit of third parties may be derived, an action thereon by a stranger to the contract may not be maintained." *Dayton Lumber Co.* v. *New Capital Hotel*, 222 Ky. 29, 299 S. W. 1063; *Kentucky Rock Asphalt Co.* v. *Fidelity and Casualty Co.*, 27 Fed. 2nd 279; *Owens* v. *Georgia Life Insurance Co.*, 163 Ky. 507, 177 S. W. 294. This conclusion it would seem can hardly be questioned. Since the principal case involved such a contract and there was no mention of third parties either in the contract or the bond, obviously they had no right of action.

However, in amplification of its argument the court further stated: "If the bond, when read in connection with the contract contains a provision obligating the contractor to pay for the material, or to compensate the laborers it constitutes a provision for the benefit of the laborers and materialmen." *Federal Union Surety Co.* v. *Commonwealth*, 139 Ky. 92, 129 S. W. 335; *Fidelity and Deposit Co.* v. *Hegewald Co.*, 144 Ky. 790, 139 S. W. 975; *Citizen's Trust and Guaranty Co.* v. *Peeble's Brick Co.*, 174 Ky. 439, 192 S. W. 508; *National Surety Co.* v. *Daviess County Mill Co.*, 213 Ky. 677, 285 S. W. 791; *Mid-continent Petroleum Corp.* v. *Southern Surety Co.*, 225 Ky. 501, 9 S. W. 2nd 229. This language is capable of two interpretations. If it means that in every case where payment of materialmen is mentioned they may sue without reference to the question to whom and for whose benefit the promise was made, then it would seem that an undesirable result is reached. Surely the mere fact that a promise to pay is made to someone is not conclusive evidence that it was made for their benefit. It is not difficult to suppose a case where an owner would demand a provision for the payment of materialmen merely as an added definition of the obligation owed to himself and without the least desire to benefit the said materialmen.

If on the other hand the language in question means that materialmen have a right of action when and only when the promise is made for their benefit, though made to the owner, the statement would seem to be a nice exposition of a desirable rule. Such an interpretation gives effect to that ultimate principle in the interpretation of contracts, the intent of the parties. According to this view the discovery of a promise to pay materialmen is not the final step in the determination of a case, but is merely precedent to the further question for whose benefit was it made.

This is the general rule in cases involving third party beneficiaries and the question of intended benefit is generally determined by reference to the terms of the contract which are considered in the light of surrounding circumstances. In the ordinary builder's bond if there is a promise to pay materialmen it is usually in the form A promises to B to pay C and the lack of any expression bearing on the intention to benefit renders recourse to the surrounding circumstances a necessity. This fact has led to a certain distinction between private and public building contractor's bonds. In the private owner's case his fear of the operation of the mechanic's lien has served as an excellent reason for exacting a promise that materialmen shall be paid—the promise is for his benefit primarily and only incidentally for the benefit of the materialmen. Any right which they may have must be derived from his right. They have no direct interest in the contract unless of course it expressly so provides. On the other hand, where the owner is the public and therefore the building is not subject to mechanic's liens, it is necessary to presume that the promise was for the benefit of materialmen in order to give a meaning to the promise, for if the promise were only for the benefit of the owner it could

never recover substantial damages because it would never suffer loss by the failure to pay. See Williston on Contracts, section 372 and accompanying sections. This argument of the necessary distinction between building contracts for private individuals and those for the public was presented by the plaintiff but dismissed by the court with the statement that "such distinction is artificial and drawn from the accidental circumstances of the case." However it is to be noted that this conclusion could have no bearing on the disposition of the principal case because in it the question of benefit did not arise since there was no promise to anyone to pay the materialmen.

W. H. D.

VENDOR AND PURCHASER—REFUSAL OF VENDOR'S WIFE TO SIGN DEED. —Moran entered into a written contract with Potts to sell certain land. Moran refused to carry out the contract because his wife refused to sign the deed to the land. Potts sued for the difference between the contract price and that at which he claimed he sold the land. The court held that in the absence of fraud on the part of the vendor who is unable to convey title, the measure of damages is the contract price and the vendee cannot recover the value of his bargain, and in this case the court held that the refusal of the vendor's wife to sign the deed alone was not sufficient to show fraud on the part of the vendor. The court directed a verdict for one dollar in favor of the vendee, Potts. This judgment was affirmed on appeal. *Potts* v. *Moran's Executors*, 236 Ky. 28; 32 S. W. 2nd 534, (1930).

The court relied upon several early Kentucky cases which laid down the rule followed in this case, and upon a later Kentucky case, *Crenshaw* v. *Williams*, 191 Ky. 559, 231 S. W. 45 (1921), which cited these former cases and disapproved of and overruled another case which held that the vendee might recover the difference betwen the contract price and the market value at the time the land was to have been conveyed under the contract. *Jenkins* v. *Hamilton*, 153 Ky. 163, 154 S. W. 937 (1913).

The court also cited an early English case which held that one who contracts for the purchase of real estate as to which the vendor is without fraud or collusion and is incapable of conveying good title, cannot recover for the loss of his bargain. *Flureau v. Thornhill*, 96 Eng. Rep. 635, (1775). Also a later case in which the House of Lords approved this rule and overruled the English cases which were contra to it. *Bain* v. *Fothergill*, L. R. 7 H. L. 158, 1874.

The Kentucky court conceded that the courts of Virginia, New York, and several other states hold a different rule, but declined to follow them in so holding. The rule in Kentucky is referred to as the "good faith rule", and in applying it to the facts of the case, the court held that the refusal of the vendor's wife to sign the deed did not alone show fraud or connivance on the part of the vendor so as to subject him to the payment of more than nominal damages.

The rule is well grounded in reason. The logic of it seems to be

that the vendee could not recover for the loss of his bargain because he, in fact, had no bargain. He merely had a contract signed by the vendor by which the vendor agreed to convey title to the vendee. This contract, similarly to a deed signed by the vendor only, was subject to the dower right of the vendor's wife, and so was a failure of title in the vendee so that he could not have conveyed perfect title and thereby have taken advantage of his bargain.

The rule is sound in that it protects the rights of both the vendor and the vendee, for, in like manner, the vendee is protected as against his vendee by operation of the same rule. Also, the rule would operate so that in the absence of good faith the vendor would be liable for substantial damages, and the rule is therein consistent with the maxim that a man shall not profit from his own wrong.

G. B. F.