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Case Comments

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CASE COMMENTS

AUCTIONS AND AUCTIONEERS—WHERE OWNER ELECTED TO STOP SALE TO PREVENT SACRIFICE, LIABILITY TO AUCTIONEER WAS LIMITED TO EXPENSES INCURRED AND REASONABLE COMPENSATION FOR AUCTIONEER'S SERVICES.—Appellant, owner of certain realty, contracted with appellee to put into his hands said realty for public auction, promising to pay him 25% of sales price, commission. Appellant contracted with appellee that the land would be sold on day of sale, regardless of price offered. On day of sale, after one lot had been bid in by appellant, to avoid sacrifice, and a second one, valued at $3,000, had been climax'd at $900, appellant, through her attorney, withdrew the property publicly. Appellee, notwithstanding this fact, after exhibiting his contract to the spectators and bidders, continued the auction. Appellant refused to convey the property. Appellee sued for commission on anticipated sales price. Held: that appellant's withdrawal did not subject her to payment of the commission; that where an owner's property is selling at a sacrifice it may be withdrawn any time before the hammer falls, or the bid is accepted, (though the contract with the auctioneer was to sell at the highest bid) and the auctioneer's compensation will be limited to expenses incurred plus reasonable pay for personal services. Becker v. Crabbe, 223 Ky. 549, 4 (2nd) S. W. 1050.

It does not appear that the Kentucky court had been confronted with this precise question prior to this time. But there is authority in other jurisdictions for the conclusion reached. The Louisiana court, in Girardy v. Stone, 24 La. Ann. 286, upon very similar facts, adopted the rule. There the owner of property, who, after contracting with an auctioneer and before date of sale, sold said property privately, was held not to be liable for commission upon sales price, but only for expenses incurred. Kolb v. Bennett, 74 Miss. 888, 21 So. 223; Taylor v. Barlow, 90 Miss. 888, 44 So. 998, are adequate to show the Mississippi court to be in accord with the Kentucky view.

The Minnesota court went farther than the Kentucky court in Stensgaard v. Smith, 43 Minn. 11, 44 N. W. 669. It appeared that defendant had contracted with plaintiff to give him exclusive agency of certain property for three months, and a commission for making a sale. The plaintiff endeavored to make such sale, published advertisements, solicited purchasers, but one month after making the offer the defendant himself sold the property. It was held that the plaintiff had no cause of action.

Until the hammer falls and bid is accepted, a locus poenitentiae remains, and the seller may withdraw property from sale (even though the condition of the offer is that it will not be withdrawn) without obligation. Tillman v. Dunn, 114 Ga. 406, 40 S. E. 244; Williston on Contracts, Vol. I, Sec. 30.

Thus it can be seen that, in the principal case, since the appellant's consideration for payment of commission was the consummation of the sale of said property, by appellee; the sale having failed, the considera-
tion failed—which is fatal to any contract. Hence, the position of the court can be justified upon a strict contract basis, if there were no precedent.

Though there is limited authority upon the precise question raised the conclusion is supported by the holdings available. Too, the result seems sound in principle, public policy, and is equitable in its relief. C. S. M.

CONSTITUTIONAL LAW—No Court Has Power to Review Action of Governor in Granting a Pardon.—The petitioner was duly convicted of a felony in the circuit court, but before judgment was entered, he was granted a full and complete pardon by the governor of the commonwealth. Upon discovering that the petitioner's name had been misspelled in this pardon, the governor at once executed another in which the name was correctly spelled. The court refused to recognize this second pardon on the ground that the governor had exhausted his power by issuing the first, and was therefore without authority to grant another. Held: No court has power to review the action of the governor in granting a pardon. Jackson v. Rose, Judge, 223 Ky. 285, 3 (2nd) S. W. 641.

In our system of government it is elementary that the courts cannot interfere with executive action in any case where an executive officer is authorized to exercise judgment or discretion in the performance of an official act. Taylor v. Kercheval, 82 Fed. 497.

The three departments of our government are co-ordinate, having their powers alike limited and defined by the constitution. Each is of equal dignity and within their respective spheres of action equally independent and exclusive, in respect to the duties assigned. The pardoning power is vested in the executive department and even a flagrant abuse of it does not authorize the courts to decline to give full effect to a pardon, which is regular on its face. To permit such action by the courts would be an exercise by them, at least in part, of the pardoning power which is clearly an usurpation of authority. Ex parte Crump, 10 Okla. Cr. 133, 135 P. 428, 47 L. R. A. (N. S.) 1038. The granting of a pardon, in its final analysis, is wholly within the discretion of the governor since he is clothed with this power by the constitution. Ibid.

In State ex rel. Rawlinson v. Ansel, 76 S. C. 395, 57 S. E. 185, 11 Ann. Cas. 613, the court says, "All the authorities agree that in the exercise of a discretionary official act an executive officer cannot be restrained, coerced, or controlled by the judicial department."

It has been repeatedly held that the courts have no inherent authority to indefinitely suspend the execution of a sentence because this is in effect an exercise of the pardoning power which is vested in the executive department. Vernon v. State, 79 So. 316; People v. Brown, 54 Mich. 15, 19 N. W. 571; State v. Voss, 80 Iowa 467, 45 N. W. 898; ex parte Bugg, 163 Mo. App. 44, 145 S. W. 831.
In the light of the cases examined, the courts seem unanimously agreed that the granting of pardons is purely an executive function. The court was therefore, in the instant case, using the only means at its command to curb the judiciary in what was clearly an attempted usurpation of executive authority.

J. C. B.

CORPORATIONS—PROPERTY HELD BY CORPORATION AT DISSOLUTION
VESTS IN STOCKHOLDERS, SUBJECT TO CORPORATE LIABILITIES.—A corporation acquired certain oil leases. Its corporate charter expired in 1914. There were no corporate liabilities and the names and addresses of the stockholders were unknown. Three of the stockholders brought suit against one other stockholder to cause the property to be sold and the proceeds divided among the stockholders. Held: On dissolution of a business corporation, its property vests in the stockholders, subject to the payment of corporate liabilities. Shadoin v. Sellars et al., 223 Ky. 751, 4 (2nd) S. W. 717.

A brief review of the history and development of the rule in question may be found in the leading case of Huber v. Martin, 127 Wis. 412, 3 L. R. A. (N. S.) 653. There the court said: "We are cited to the supposed rule of the common law that, upon the termination of a corporation, its real estate reverts to the grantor and its personality to the sovereign, and that its debts become extinguished. . . . . American courts have, except in a very few instances, never recognized the doctrine, and quite recently it was held by the Court of Queen's Bench in Bankruptcy that it never had any place in the common law of England. . . . . We may safely close this branch of the case by saying that, aside from dicta here and there, in the whole not worthy of serious consideration, there is no legitimate support anywhere for the rule that the property of a business corporation, upon its termination and the payment of its debts, goes otherwise than to its members, if it has members to take."

The rule adopted in the principal case is one that has been unanimously followed in previous Kentucky decisions. Ewald Iron Co. v. Commonwealth, 140 Ky. 692, 131 S. W. 774; Young v. Pitch, 181 Ky. 29, 206 S. W. 29; Neptune Fire Engine and Hose Co. v. Board of Education of Mason County, 166 Ky. 1, 178 S. W. 1138. This rule also represents the decided weight of authority in other jurisdictions throughout the United States. Rossi v. Claire, 174 Cal. 74, 161 Pac. 1161; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Muncie, etc., Tract. Co. v. Citizen's Gas, etc., Min. Co., 179 Ind. 322, 100 N. E. 65; Root v. Wear, 98 Kan. 234, 157 Pac. 1181; Hopkins v. Crossley, 138 Mich. 561, 191 N. W. 322; Huber v. Martin, supra.

James Greenwood, Appt., v. Union Freight R. R. Co., 105 U. S. 13, 26 L. Ed. 961, was a case which went to the Supreme Court of the United States to determine the rights of the shareholders of a corporation after the legislature had repealed the act of incorporation. In that case the court said, "that where the legislature repealed an act of
incorporation that the rights of the shareholders to the real and personal property acquired by the corporation, and rights of contract and choses in action, are not destroyed by such repeal and if the legislature has provided no specific mode of enforcing and protecting such rights, the courts will do so by the means within their power."

At present there are four modes of dissolution of corporations in Kentucky. (1) By act of legislature, (2) by death of all the members, (3) by forfeiture of the franchise, (4) by surrender of the charter or voluntary dissolution. Byers, Law of Kentucky Corporations; Economy Bldg. & Loan Ass'n v. Paris Ice Mfg. Co., 113 Ky. 246, 68 S. W. 21. After the expiration of the corporate charter, a corporation is fully authorized to act, though only for the purposes of closing up its business. Kentucky Statutes, Sec. 561 (Acts of 1893, Ch. 171, Sec. 24). In interpreting the above act it was held that no specific mode was prescribed nor was one at all desirable. Knott v. Evening Post Co., 124 Fed. 342.

That the result in the principal case with regard to this point is both just and logical, is evidenced not only by a long line of authorities but by the fact that there is little, if any, conflict. C. E. B.

CRIMINAL LAW—PERTINENT, DEMONSTRABLE FACTS, DEVELOPED BY EXAMINATION OF NON-EXPERT WITNESSES ON TECHNICAL SUBJECT ARE COMPETENT.—Defendant was convicted of the murder and robbery of D. The defendant sought a reversal on the ground that the court had erred in allowing the Commonwealth to introduce certain evidence. The Commonwealth introduced two witnesses, one a former jailer and the other the present jailer, who had had experience in the handling of firearms and had studied various catalogues. Through the testimony of these witnesses it was proved beyond a doubt that the bullet taken from D.'s head had been fired from the pistol found on the defendant when he was arrested. This proof was secured through certain magnifying tests on the technicality of the pistol. Held: Pertinent, demonstrable facts, developed by examination of non-expert witnesses on technical subject are competent, though witnesses' conclusions are inadmissible. Jack v. Commonwealth, 222 Ky. 546, 1 S. W. (2nd) 962.

The principle involved in the instant case is a comparatively new one. In Wisc v. State, 11 Ala. App. 72, 66 S. 128 it was held that a witness who is not qualified by experience and study in the particular matter inquired about cannot testify as an expert. A witness who has had experience in the handling of firearms and cartridges may testify as to their nature, condition, and use including such matters as their size, calibre, carrying and scattering capacity, and to the number of times of firing. Jackson v. U. S., 102 Fed. 473; Garner v. State, 6 Ga. App. 788, 65 S. E. 842; State v. Legster, 71 N. J. L. 586, 60 Atl. 361. But in the case under consideration the witnesses who were non-expert, were allowed to give pertinent and demonstrable facts concerning the technicality of the gun. The principle being discussed seems reconcilable, because, at the time the witnesses gave their testimony, they had studied
and experimented with the gun. In recent years much study and research have been devoted to ballistics, and it has been shown by experiment and study that the rifles in the barrel will make the same impressions on the bullets, and these can be plainly seen by using a properly constituted microscope. There is no reason why the witnesses in question should not give in evidence their experiments. However, the witnesses have no right to draw their inferences; this is for the jury.

Although this is a new principle in the law, it has been adopted in many of the jurisdictions. It was held in Feree v. Commonwealth, 193 Ky. 347, 236 S. W. 246, that before a non-expert witness can be allowed to express an opinion as to the mental condition of a defendant in a criminal prosecution, he must state facts sufficient to show that he had opportunity to see, observe, and to form an opinion as to the mental status of the defendant, and even then his opinion is not of so much value, as evidence, as the facts upon which it is based. A thorough search of the authorities failed to disclose other cases. In a recent case it was laid down by the Supreme Court of Nebraska in Williams v. State, 212 N. W. 606, that a physician's opinion as to the capacity to commit crime, in response to a hypothetical question, may be rebutted by evidence as to facts by non-expert witnesses; evidence of non-expert witnesses, rebutting opinion of physician, based on hypothetical question as to mental capacity to commit crime, may justify finding of defendant's legal responsibility. Trial of offenses under the Eighteenth Amendment has been a stimulus to the extension of the principle. Chemical analysis of liquor for purpose of proving its intoxicating character is not the exclusive method of ascertaining such a fact. It may be established by non-expert opinion of those accustomed to drink liquor and acquainted with various kinds of liquors. State v. Snyder, 227 Pac. 613; State v. Abraham, 158 La. 1021, 105 S. 50; Stoecke v. U. S., 1 Fed. (2nd) 612; Pane v. U. S., 2 Fed. (2nd) 855.

**Criminal Law—Improper Question of Commonwealth Attorney in Murder Case, Respecting How Many Persons Defendant Has Shot, Held Not Reversible When Objection Was Immediately Sustained, the Presumption Being that the Jury Was Governed by the Ruling of the Court.**—The appellant was convicted of manslaughter. There was a motion for new trial on the ground of alleged misconduct of the Commonwealth's attorney in asking appellant how many persons he had shot in the last five years. Appellant's objection to this question was immediately sustained. Held, that reversal was not required, presumption being that the jury was governed by ruling sustaining objection to improper question and was not influenced by such question. Walton v. Commonwealth, 223 Ky. 393, 3 S. W. (2nd) 764.

It is a well-established rule that a defendant cannot be prejudiced in the trial of his case by intimation that he was formerly convicted of other offenses. Hall v. United States, 150 U. S. 76. In the case at hand
the court found that the misconduct of the attorney was not such as to prejudice the rights of the appellant, since the objection to his question was promptly sustained.

This decision seems to be in accord with the authorities and supported by logic. Unless the misconduct of the prosecuting attorney is so prejudicial that it is obvious that the error is not cured by the court's action in sustaining objection, or reprimanding the attorney, such action is sufficient to render it harmless. *Carroll v. United States*, 154 Fed. 425; *Ammerman v. United States*, 185 Fed. 1.

The Kentucky Court of Appeals has previously upheld this doctrine. In *Baker v. Commonwealth*, 210 Ky. 524, 276 S. W. 550, the defendant admitted on cross-examination that he had served a term in prison and was asked to name the charge on which he was convicted. The court sustained an objection to the question and admonished the jury that they would not consider such evidence as affecting the guilt of defendant. The court held this was not a reversible error since it could not be presumed the jury disregarded instructions. That decision differs from the principal case in that the court admonished the jury not to consider the evidence. However, it does not appear that such admonition was requested, and in absence of request the court need not admonish the jury not to consider a question to which objection is sustained. *Fenley Model Dairy v. Secuskie*, 218 Ky. 59, 290 S. W. 1044.

However, in some cases courts have held that such questions or remarks would prejudice the jury in spite of instruction. A statement as to former murders committed by defendant was held ground for reversal notwithstanding verbal instruction to the jury not to consider the argument in *Wilson v. State*, 95 Tex. C. R. 620, 255 S. W. 627. Remarks of the prosecuting attorney describing defendant and his witnesses as bootleggers and liars was held reversible error and not cured by instruction to consider only law and facts. *Jones v. Commonwealth*, 213 Ky. 356, 281 S. W. 164. The misconduct of the commonwealth's attorney was so gross as to call for a sharp reprimand and the instruction did not sufficiently protect the defendant.

In the instant case the question was not so prejudicial as the remarks in the cases just cited, and the court's action in sustaining the objection to it was sufficient to correct it. Other cases in accord with the principal case are: *State v. Lee*, 95 Iowa 427, 64 N. W. 284; *Copeland v. United States*, 2 F. (2nd) 637; *People v. Garcia*, Cal. App., 256, Pac. 876.

**Criminal Law—Jury's Statement He Did Not Want to Try Defendant for Malicious Shooting Unless Proof Called for Life Sentence, Held No Evidence of Prejudice.**—Defendant had been convicted under section 1166 Kentucky Statutes and the habitual criminal statute (section 1130), and had been sentenced to life imprisonment for malicious shooting and wounding. After verdict, defendant made a
motion for a new trial, which was overruled. On appeal, several rulings of the trial court were objected to—one of them a remark made by a juror before trial, that he would not want to try this defendant unless he had a case that would send him to the penitentiary for life, because he had such a temper he would probably kill the members of the jury who tried him. Defendant contends that this was prejudicial to his case and a new trial should have been given. Held, that this was no evidence of prejudice to make a new trial necessary. *Mills v. Commonwealth*, 223 Ky. 165, 3 S. W. (2nd) 183.

Where it can be shown that the remarks of a juror before trial have been prejudicial to defendant's cause, a new trial will be given. However, remarks made by jurors which may indicate bias, are not of themselves conclusive grounds for a new trial. *Elliott v. Commonwealth*, 154 Ky. 696, 159 S. W. 534; *Chilton v. Commonwealth*, 170 Ky. 491, 186 S. W. 191. An opinion expressed by a juror, in order to be objected to as prejudicial to defendant's case must be a fixed, deliberate and determined one, which can not be overcome by the evidence. *Gleason v. Commonwealth*, 145 Ky. 128, 140 S. W. 63, Ann. Cas. 1913B 757. A transient opinion or expression does not disqualify a juror where the juror believes such impressions will disappear before the evidence. *Myers v. State*, 97 Ga. 76, 25 S. E. 252.

The defendant is not permitted to assign prejudicial statements of jurors as error after the case has gone to trial, where he knows of the juror's statements or does not avail himself of the means of determining if he is so prejudiced before trial. *Collins v. State*, 20 Ark. 28. The expression of an opinion by a juror before trial concerning the guilt or innocence of accused, although good grounds for challenge, is not good grounds for a new trial. *Smith v. State*, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20; *United States v. Baker*, 3 Ben. 68; *Bloodworth v. State*, 65 Tenn. 614, 32 Am. Rep. 546.

The court remarked in the principal case that the expressions of the juror would not indicate prejudice against defendant in the first instance, but that it would rather indicate that he was afraid of defendant, and fear would have the tendency to induce the juror to seek some means of acquitting accused, in order to avoid his wrath.

H. C. C.

**Electricity—Closing an Automatic Switch Thrown Out by Breaking Electric Wire Without Investigation, Held Not Actionable Negligence.**—Appellee, the deceased's administrator, averred that his intestate's death occurred because of the negligence of appellant's agent who turned on the electric current without heeding the warning given by the automatic opening of the switch. Held, "that since the evidence in these cases showed without contradiction that re-closing the switch in such or similar circumstances is a proper practice and is so recognized by all those engaged in same or similar business, we are constrained
to hold that the re-closing of the switch by appellant's agent was not negligence." *Kentucky Utilities Co. v. Woodrum's Adm'r.*, 224 Ky. 33, 5 (2nd) S. W. 283.

It has been often held in the Kentucky court that one engaged in the generation or distribution of electricity must exercise the highest degree of skill and care known in the operation of its business to prevent injury to persons at any place where they might have a right to be for either business or pleasure. *Smith's Adm'r v. Middlesboro Electric Company*, 164 Ky. 46, 174 S. W. 773; *Paducah Light and Power Company v. Parkman's Adm'r*, 156 Ky. 197, 160 S. W. 931; *Lexington Railway Company v. Fain*, 24 Ky. Law Rep. 1443, 71 S. W. 623.

It is also well established in Kentucky that where specific negligence is pleaded, proof of general negligence is not admissible. *Illinois Central Railroad Company v. Cash's Admr's*, 221 Ky. 655, 299 S. W. 590. It is conceded that the conclusion in the instant case is sound and proper, but it would not have been so, according to Kentucky Law, had the case been decided upon the act of appellant's agent in re-energizing the broken wire.

In order to establish a case of negligence the defendant must owe the plaintiff a duty and neglect to act or act so as not to breach that duty. *Arkansas Telephone Company v. Ratteree*, 57 Ark. 429, 21 S. W. 1059; *Jones v. Union Railroad Company*, 18 N. Y. App. Div. 267, 46 N. Y. Supp. 321.

The court in the particular case relied upon the specific facts presented. The result seems to cut in on the general rule holding generators and distributors of electricity to the highest degree of care possible under the circumstances.

C. S. M.

**EMINENT DOMAIN—MUNICIPALITY CANNOT CHANGE ESTABLISHED STREET GRADE WITHOUT RESPONSIBILITY TO ABUTTING PROPERTY OWNERS.**

—Plaintiff sued to recover damages for injuries to his property resulting from changing the grade of a street upon which the plaintiff was an abutting owner. The injury was apparently consequential. It was admitted that in making the improvement, the city was establishing the original grade of the street. Held, that municipal corporations are not liable for the establishment of the original street grade, but if the grade, once established, is changed, then the municipality is liable, under section 242 of the Constitution. *Pursiful v. City of Harlan, et al.*, 222 Ky. 668, 1 (2nd) S. W. 1043.

Section 242 of the Kentucky Constitution provides that: "Municipal corporations, and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by them." Prior to its adoption in 1891, it was the accepted rule in Kentucky that municipalities, acting under legislative authority to make, repair, and level streets, were not in any case liable to the abutting owners if they kept within the limits of the street, and did not actually trespass or invade
private property. *Keasy v. City of Louisville*, 4 Dana 154; *Bridge Co. v. Foots*, 9 Bush 264; *Wolfe v. Railroad*, 15 B. Mon. 323. But under Section 242 of the present Constitution, the Court of Appeals has held that it was the intention of the framers to change the organic law, and to abolish the requirement of direct physical injury to property in order to establish a claim for damages. *City of Henderson v. McClain*, 102 Ky. 402, 43 S. W. 700. Since that case, in an unbroken line of decisions, it has been held that municipal corporations are liable for consequential injuries to abutting property owners from changing the established grade of a street. *City of Ludlow v. Detwiler*, 47 S. W. (Ky.) 881; *City of Louisville v. Lansberg*, 161 Ky. 361, 170 S. W. 962; *City of Erlanger v. Cody*, 158 Ky. 625, 166 S. W. 202.

However, there is a distinction between the right of abutting owners where no grade has been previously fixed, and where one has already been made and is changed. The reason for this is that in the former case the owner is presumed to have been compensated for injury done by proper grading when he accepted the price for the dedicated strip. *City of Owensboro v. Hope*, 128 Ky. 524, 108 S. W. 373. It is therefore the well accepted rule that a city is not liable for consequential damages to abutting property in the establishment of the original grade. *Gernert v. City of Louisville*, 155 Ky. 589, 159 S. W. 1183; *City of Somerset v. Carver*, 221 Ky. 552, 299 S. W. 191.


The Missouri Constitution of 1875, Article 2, Section 21, has a similar provision to that of Kentucky's Constitution found in Section 242. Under it the Missouri courts have uniformly held the municipalities liable for consequential injuries in changing a street grade. *Householder v. Kansas City*, 33 Missouri 458. Prior to the adoption of this section there was no liability in such a case. *Swenson v. Lexington*, 69 Mo. 157. In other states where similar provisions are found in statute, constitution, or charter, the rule is the same as in Kentucky and Missouri. *Montgomery v. Maddox*, 89 Ala. 151, 7 So. 433; *Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146; *People v. Green*, 64 N. Y. 606.

It is submitted that the Kentucky rule is sound both upon principle and authority.

W. C. S.

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**GAS**—Failure to instruct that removal of lever of gas regulator was willful or wanton act of trespasser for which defendant coal company was not liable held not error.—The plaintiff left a gas stove burning in her residence, and during the night the gas was cut off. The next morning pressure was restored and plaintiff became ill from gas fumes. The regulator which controlled the flow of
gas into plaintiff's residence was left unguarded, and anyone could regulate it by manipulation of a lever. The defendant insisted that the fact that a scantling had been laid across the lever indicated that someone, in endeavoring to increase the pressure had cut off the supply, and that this was a willful act of a trespasser for which the company should not be liable. Held, that the plaintiff should recover, and that the court did not err in failing to instruct as to defendant's non-liability for willful act of trespasser where there was no evidence to indicate such a willful or wanton act. *Standard Elkhorn Coal Co. v. Davis*, 222 Ky. 773, 2 S. W. (2nd) 670.

This decision is based on the well-established rule that instructions should state the law applicable to the particular facts which the evidence tends to prove, and with reference thereto, and not mere abstract propositions of law. *Moses v. Lockwood*, 54 App. D. C. 115, 295 Fed. 936; *Chaney v. Moore*, 101 W. Va. 621, 134 S. E. 204. Where instructions are given on any phase of a case the jury presumes that there was evidence to support a verdict on that instruction. Since the abolition of the scintilla doctrine an instruction ought not to be given when the evidence on which it is based is insufficient to sustain a verdict. *American Locomotive Co. v. Whitlock*, 109 Va. 233, 63 S. E. 991.

In the case of *Louisville Gas Co. v. Gutenkuntz*, 82 Ky. 432, defendant sent an agent to turn off gas from plaintiff's premises. He did so with a key, leaving it in the box for about ten minutes. Plaintiff was injured by escape of gas. It was held that there was not sufficient evidence to support an instruction as to non-liability of defendant for willful act of a trespasser; that although the flow of gas may have been caused by some other person turning the key while the employee was out, still defendant was liable for employee's negligence in leaving the key.

The decision in the principal case seems in accord with this holding and the general doctrine of a gas company's liability. The negligence of the company in leaving the regulator unguarded was the proximate cause of the injury, and the concurrent negligence of a third person does not relieve the company from liability. *Brown v. Kansas Natural Gas Co.*, 299 Fed. 463; *United States Natural Gas Co. v. Hicks*, 134 Ky. 13, 119 S. W. 166.

In view of these decisions it seems evident that the circumstantial evidence in the principal case would not support a verdict based on such instruction as was asked, and that it was correctly refused. Other cases holding an instruction correctly refused when not based on the evidence are: *Bell's Admr. v. Louisville Ry. Co.*, 148 Ky. 199, 146 S. W. 383; *Adams Express Co. v. Hibbard*, 145 Ky. 818, 141 S. W. 397; *Miller v. Neale*, 137 Wis. 426, 119 N. W. 94.

**HOMICIDE—PERMITTING COMMONWEALTH TO INTRODUCE TRANSCRIPT OF ALL EVIDENCE OF CORONER'S INQUEST HELD ERRONEOUS.**—Defendant was accused of murder and at the coroner's inquest a stenographic re-
port of all evidence was taken. At the trial defendant sought to con-
tradict the testimony of certain witnesses given at the inquest; where-
upon the court over the defendant's objection permitted the common-
wealth to introduce a transcript of all the evidence given at the inquest.
Held: Permitting commonwealth to introduce a transcript of all evi-
dence of coroner's inquest was erroneous. Canterbury v. Common-
wealth, 222 Ky. 510, 1 (2nd) S. W. 976.

Wigmore, Vol. III, Sec. 1374, in discussing the status of testimony
taken at a coroner's inquest says, "In the United States the proper con-
clusion has been reached that the lack of cross-examination as an ele-
ment in the coroner's procedure makes such testimony inadmissible."

It is a fundamental principle of our law that every person accused
of a crime is entitled to meet his accuser, face to face in open court,
and have an opportunity for cross-examination. Where this is done
our courts have allowed testimony given at the examination of the
accused to be introduced provided the witnesses cannot be found upon
diligent search. People v. Shepps, 186 N. W. 508, 21 A. L. R. 658; 
People v. Mescs, 226 Mich. 137, 197 N. W. 542. However, the same juris-
diction has declared that since an inquest is held without an accusa-
tion of crime the testimony there given could not be introduced as sub-
stantive proof at the trial. People v. Dewitt, 233 Mich. 222, 206 N. W. 
562. The West Virginia court has likewise held that a coroner's verdict
is not proper evidence and therefore should not be admitted at the trial.
State v. McCausland, 83 W. Va. 525, 96 S. E. 938.

Some courts have held that where the accused voluntarily makes
statements at the coroner's inquest, they may be introduced against
him at the trial. Under these circumstances, however, there is no
necessity for the above mentioned safeguard. Regan v. People, 49 Colo.
316, 112 P. 785; Moki v. People, 18 Wyo. 481, 112 P. 334. The New York
court has modified this doctrine somewhat by saying that if a party is
not accused at the time of the inquest, statements made by him may be
introduced as evidence at the trial. People v. Strollo, 191 N. Y. 142, 
33 N. E. 578; Pruett v. Commonwealth, 199 Ky. 35, 250 S. W. 131. How-
ever, some jurisdictions have held that even the accused's own state-
ments voluntarily made at a coroner's inquest are not admissible at the
trial. People v. Heacock, 10 Cal. App. 45, 102 P. 543; Mullins v. Com-
monwealth, 113 Va. 73, 75 S. E. 193.

Although from the above cited cases there is some doubt as to the
extent and purpose for which accused's own statements at an inquest
may be introduced at the trial, the courts seem agreed that statements of
witnesses given at the inquest cannot be introduced as evidence at the
trial, People v. Heacock, 10 Cal. App. 450, 102 P. 543; Dupree v.
State, 33 Ala. 380, 73 Am. Dec. 422; Sylvester v. State, 71 Ala. 17; State
86; State v. Campbell, 1 Rich. Law (S. C.) 124.

Unless the accused was given the right of cross-examination at the
trial and the witnesses are proved to be beyond the jurisdiction of the
court at the time of trial, the testimony is inadmissible. *Hobbs v. State*, 53 Tex. Cr. R. 71, 113 S. W. 308.

In the instant case the court excluded the evidence with the simple statement that its admission was "manifest error," and in view of the "best evidence rule" this seems sufficient because from the record it does not appear that the witnesses, whose testimony was sought to be introduced, were not present at the trial. However, from the cases cited we must conclude that the court is in accord with the overwhelming weight of authority in excluding the proffered testimony. *J. C. B.*

**Insurance—Directed Verdict for Insurer in Suit on Accident Policy Held Error as Question Whether Shooting Was Accidental Was for the Jury.—** The appellee issued to appellant’s husband a policy insuring him against bodily injury caused by accidents. According to the terms of the policy, the injury must be due solely to external, violent and involuntary causes. The facts showed that the injury occurred while insured was scuffling over a pistol. He died in three or four hours as a result of the wound. At the conclusion of the evidence, the lower court instructed the jury to return a verdict for the appellee. Held: The lower court erred in directing a verdict for appellee as it was a question for the jury to determine whether the shooting was accidental. *Davis v. Massachusetts Protective Association*, 223 Ky. 626, 4 (2nd) S. W. 398.

This case is in accord with earlier cases in Kentucky. In an action on an accident insurance policy it was held that under the evidence the manner in which the plaintiff was injured was a question for the jury. *Aetna Life Insurance Company v. Crabtree*, 146 Ky. 368, 142 S. W. 690. Whether the insured’s death was caused by a fall downstairs or pneumonia contracted thereafter was also held to be a question for the jury in *National Life and Accident Insurance Company v. Cox*, 174 Ky. 583, 192 S. W. 636. Other Kentucky cases which express the same view: *Hill's Adm'x. v. North American Accident Insurance Company*, 185 Ky. 520, 215 S. W. 428. Also, *Cotton States Life Insurance v. Spencer*, 220 Ky. 536, 295 S. W. 861.

This same rule prevails in other jurisdictions as the better view. In *Nerrow v. Pacific Mutual Life Insurance Company of California* cited in 294 S. W. 97 (a Missouri case) the same question was raised and decided the same as in the present case. Also in *Mulvihill v. Commercial Casualty Insurance Company* 224 N. Y. S. 544; *Newsoms v. Commercial Casualty Insurance Company*, 147 Va. 471, 137 S. E. 456; *Borosich v. Metropolitan Life Insurance Company*, 194 Wis. 15, 215 N. W. 575.

In conclusion it is clear that the holding in the case before us is in accord with the cases previously decided in Kentucky. It is also in accord with the majority rule in other jurisdictions. *G. C. B.*
INSURANCE—Fire Policies Will Not in Themselves Entitle Insurer to Subrogation to Rights of Property Owner Against Water Company Where Water Company Was Not a Party.—Plaintiffs are the insured and the insurer and they are seeking damages for a failure of water company to supply sufficient water pressure as it had contracted to do in its franchise with the city; whereby the insured, a citizen of the city lost a building by fire. The insurer has paid the full amount of its debt and is seeking to be subrogated to the rights of the insured against the water company. Held: (1) that an insurance company will not be entitled to subrogation when the fire was not caused by the defendant; (2) that the insurance company was not a party to the contract providing for subrogation therefore the contract is not a ground for holding the water company liable; (3) that to allow an application of subrogation here would be contrary to public policy since if the water companies had to bear such burdens they would have to raise the rates and this would be detrimental to the public good. Bufford & Company, et al. v. Glasco Water Company, 223 Ky. 54, 2 S. W. (2nd), 1027.

The opinion does not disclose on which of these grounds the court bases its decision, probably that of public policy, at least that argument is more convincing. The final results, however, are in accord with the majority view.

Upon the first argument the court held that the water company was liable to the individual citizen on its contract with the city, as laid down in Paducah Lumber Company v. Paducah Water Supply Company, 89 Ky. 340, 12 S. W. 554. It is upon this ground chiefly that the Kentucky courts differ from other courts. The majority view is that the individual user does not have a cause of action because there is no privity, and therefore, there can be no right to subrogation if the insured himself had no action. German Alliance Insurance Company v. Home Water Company, 174 Fed. 764, 33 Supreme Court 32; Brown v. Somerville Water Company, 84 N. J. Law 611, 87 Atl. 140.

The Kentucky courts hold that such right exists but will not extend it to the insurer because the water company has not committed any tort against the insured. This is a much narrower view than is taken by most courts. It is generally held that the right of subrogation extends to all the rights of the insured arising out of the wrong of a third party. Phoenix Insurance Company of Brooklyn v. Erie & Western Transportation Company, 117 U. S. Supreme Court Reporter 873; Regen v. N. Y. & Eastern Railway Company, 60 Conn. 124, 22 Atl. 503; Spaulding v. Harvey, 129 Ind. 106, 28 Am. State Rep. 176.

The second argument set forth by the court is that since the debt owing by the wrong doer is in no way connected with the obligation of the insurer there is not sufficient relation to support the action, and the insurer will not be paying the debt of the wrong doer. There seems to be no direct authority on this point in other cases. Harnsberger v. Yancy, 33 Gratt. (Va.) 527; Johnson v. Barrett, 117 Ind. 551.
The third argument of the court disregards the usual purpose for which subrogation is applied. In one sentence the court said; "Subrogation is of equitable origin and was devised for the purpose of doing justice between the parties concerned." The court later said that since insured has recovered there should be no attempt to hold the water company. This is not very favorable to the insurer who has borne the loss of the water company's negligence when it is clearly, primarily liable. The court in effect holds that the insurer must bear the loss because it has contracted to do so, or to do otherwise might be detrimental to the public good because it would require a raise in rates. This seems to be contrary to the rule laid down in Illinois Central Railway Company v. Hickin, 131 Ky. 624, 115 S. W. 752.

The final result cannot be criticized since it is in accord with the majority rule. The general rule is that the insurer cannot be subrogated since the insured has no right, therefore, the insurer can have none. Phoenix Insurance Company v. Trenton Water Company, 42 Mo. Appeals 118. The Kentucky court holds that the individual has a right, but that of itself will not allow the insurer to be subrogated to such right. The court does not intimate just what would enable the insurer to exercise this right.

W. H. C.

Lost Instruments—In Suiting On Lost Note, Plaintiff Must Alleg: Facts in Effect That Loss Was Brought About Without Fraud on Plaintiff's Part.—Plaintiff was the payee of a promissory note, made by, and payable by the defendant. Plaintiff gave the note to a friend, the president of a bank, to keep for him. The president lost the note. The plaintiff failed to state in his petition that the note was lost without fraud on his part. To this the defendant demurred. The court overruled the demurrer and the defendant filed an answer and proceeded to trial. Upon a verdict for the plaintiff, defendant asked for a judgment notwithstanding the verdict, the motion was upheld, and the petition dismissed. The plaintiff appeals. The Court of Appeals held that verdict cured the defect in the petition and entitled the plaintiff to a judgment in accord with the verdict. Crawford v. Crawford, 222 Ky. 708, 2 S. W. (2nd), 401.

The question involved in this case is purely a matter of pleading and practice. Section 7 of the Civil Code requires that a person suing on a lost note must allege and prove that the note was lost without fraud on his part, and upon failure to so allege the petition is demur-able. Hoyland v. National Bank of Middlesboro, 137 Ky. 632, 126 S. W. 355. But the lower court having refused to uphold the demurrer, and having proceeded to a verdict, the verdict cures the defect. This view is in accord with Civil Code, section 134, and is in keeping with Kimborough v. Lexington City National Bank, 150 Ky. 336, 150 S. W. 323; and also U. S. Fidelity and Guaranty Co. v. Trustee, Baptist Church of Columbus, 31 Ky. Law Reporter 520, 102 S. W. 325 and Bell v. Mobile and O. Ru. Co., 71 U. S. 598, 18 Law Ed. 338.
There seems to be little authority on this point from other states. A thorough search has revealed no other state with a similar statute or code provision. However, there are two states which hold directly contra, though, there was no statute involved. In Storey v. Kerr, 39 N. W. 601, 2 Neb. 568, the court held that it was not necessary to allege the manner of the loss since that was only a matter of secondary evidence. In Thomas v. McCormick, 1 N. Mexico 369, the same view was taken.

From an examination of the authorities it is very evident that the Kentucky rule, as based on the Civil Code, section 7, is not in accord with the weight of authority. In Kentucky it is necessary to aver that the note was lost without fraud on the part of the plaintiff. In other states such is a matter of secondary evidence to establish the fact of the loss.

W. H. C.

MASTER AND SERVANT—SECTION HAND UNDER 16 YEARS OLD INJURED WHILE CRAWLING UNDER TRAIN HELD NOT PRECLUDED FROM RECOVERY UNDER FEDERAL STATUTE ON GROUND OF IMPROPER, UNNECESSARY, AND UNAUTHORIZED USE OF PREMISES (KY. ST., SEC. 331A9)—FEDERAL EMPLOYERS' LIABILITY ACT (45 U. S. C. A., SEC. 5159).—Appellee, a boy 15 years old had been in the employ of the appellant for a period of nine months as a section hand. It was part of appellee's duty to carry water from a spring located across the tracks of the appellant. Appellee was engaged in carrying water at the time of the injury complained of. He was in the act of crawling under a freight train, when the engineer started the train, catching appellee under it and inflicting severe injuries. No one knew that appellee was under the train. Held, that appellee was entitled to recover under the Federal Employers' Liability Act (45 U. S. C. A., sections 51-59), and that the act of the Kentucky Legislature (Ky. Stats., section 331a-9), fixing liability was not in conflict with the Federal statute. Chesapeake & Ohio Ry. Co. v. Stapleton's Guardian, 223 Ky. 154, 3 (2nd) S. W. 209.

The Kentucky statute forbids the employment of children under 16 years of age, and a violation of the statute is negligence (Ky. Stats., section 331a-9). Such a statute is not in conflict with the Federal Employers' Liability Act (45 U. S. C. A., sections 51-59), which precludes from recovery on grounds of improper, unnecessary, and unauthorized use of premises. Frese v. Chicago, Burlington & Quincy Ry. Co., 263 U. S. 1, 44 S. Ct. 1, 68 L. Ed. 131.

The Federal Employers' Liability Act (U. S. Comp. Stats., sections 8657-8665) erects no standard of what shall constitute negligence, but this is to be determined by the law of the jurisdiction. Woods v Chicago B. & Q. R. Co., 137 N. E. 806. But in cases under the Federal Employers' Liability Act (U. S. Comp. Stats., sections 8657-8665), questions of the injured servant's or defendant employer's negligence in connection with the injury are controlled by the principles delivered by the federal rather than the state courts. Kalaskian v. Hines, 171 Wis. 429, 177 N. W. 602.
Where the provisions of a federal statute actually cover any point, whether it is one of substantive law or practice or procedure, the state statute is superseded, and the federal statute alone controls. L. R. A. 1915 C. 52. It can be seen that this does not conflict with the Kentucky decision, however.

Regardless of the decisions to the contrary it appears that the Kentucky rule is in conformity with the Federal Statute. It is stated in the principal opinion that the Federal Employers' Liability Act does not undertake to define negligence, and that therefore there appears no reason why it should supersede section 331a-9 Ky. Stats. H. C. C.

**Mortgages—Recorded Purchase Money Chattel Mortgage on Automobile Held Superior to Subsequent Statutory Lien for Labor and Accessories.**—Plaintiff asserted a statutory lien on an automobile for labor and accessories. The defendant asserted a prior, recorded purchase money mortgage on the same automobile. Held, that where a purchase-money mortgage is recorded prior to the acquiring of a statutory lien for labor and accessories, the recorded purchase money mortgage is superior to the statutory lien. *Indiana Truck Corporation of Kentucky v. Hurry Up Broadway Co.*, 222 Ky. 527, 1 (2nd) S. W. 990.

As is pointed out by the court the case depends upon the construction of the statute which created the lien, Ky. Statutes 2739h-1, 2739h-2. In the first consideration the court interprets the statute in the light of the law in force at the time of its enactment. This interpretation makes it consistent with prior statutes to the effect that a deed or deed of trust or mortgage shall take effect when recorded, Kentucky Statutes, Sections 496 and 497. The general rule as to liens is that, in the absence of statutory regulation to the contrary, a lien which is prior in time gives a prior claim, *Rankin v. Scott*, 6 U. S. (L. Ed.) 592; *Howard v. Milwaukee and St. Paul Railroad Co.*, 25 U. S. (L. Ed.) 1081. It was in following this rule that the court arrived at the conclusion that since there was nothing in the statute creating the lien for labor and accessories which gave it a prior right to other liens, then the lien created by the recorded mortgage being prior in time must confer a prior claim and is entitled to satisfaction, out of the subject matter it binds, before the subsequent statutory lien for labor and accessories binding the same property. R. M. O.

**Municipal Corporations—City Operating Street Material Quarry Held Engaged in Governmental Function, Precluding Liability for Servants' Negligence in Storing Dynamite Found by Child Licensee.**—The city, appellee, maintained and operated a quarry for the purpose of furnishing material to be used on the city streets. A child licensee, while at city quarry, found dynamite caps which he took and later gave to another child, appellant, who was injured by the explosion of one of these caps. The servants of the city who were in charge of the dyna-
mite did not take the necessary and due precaution to guard against their being taken by some child. Suit was brought against the city for the injury caused by the negligence of its servants. Held, that a city was not liable for any negligence of its servants in the operation of the quarry, since it was a governmental function. White v. City of Hopkinsville, 222 Ky. 664, 1 (2nd) S. W. 1068.

The immunity of a municipality from liability for negligence in the performance of a governmental function is an old and well-established rule. Schwalk's Administrator v. City of Louisville, 135 Ky. 570, 122 S. W. 860; Kipps v. City of Louisville, 140 Ky. 423, 131 S. W. 184; City of Bowling Green v. Bandy, 203 Ky. 258, 270 S. W. 837; Bédson v. City of Olathe, 82 Kans. 4, 107 P. 539.

An exception to this rule is where in the maintenance of streets within the municipality, although consisting of the performance of public duties and governmental functions, the city is liable for negligence in failing to maintain them in a reasonably safe condition. Braunstein v. City of Louisville, 146 Ky. 777, 143 S. W. 372; Shida v. City of St. Paul, 51 Minn. 466, 53 N. W. 763. The court places this case under the general rule and not under the exception on the ground that injury was due to negligence in storing dynamite which could not come under the narrow confines of the exception which deals exclusively with injuries due to unsafe conditions of the streets.

It is equally well-established exception to the rule that where a municipality performs a duty for its strictly private benefit, the function is said to be ministerial and the rule of immunity does not apply. Smith's Administrator v. Commissioners of Sewerage of Louisville, 146 Ky. 562, 143 S. W. 3; City of Pas Christian v. Fernandy, 100 Miss. 76, 56 So. 329; Johnson v. City of Chicago, 258 Ill. 493, 101 N. E. 980. The court, in holding that this case did not come under this exception, followed the majority rule. Cotelwell v. City of Waterbury, 74 Conn. 568, 51 Atl. 530; Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228.

R. M. O.

**NEGLIGENCE**—**GUEST IN AUTOMOBILE WHO FAILS TO OBSERVE OBVIOUS DANGERS OR TO WARN DRIVER THEREOF IS GUILTY OF CONTRIBUTORY NEGLIGENCE.**—An automobile while being driven by its owner was struck by a train at a grade crossing on a public road. At the time of the accident another person was riding in the automobile as the owner's guest. Both the owner and his guest were killed. The administratrix of the guest brought an action to recover damages for the guest's death. Held, that since the guest did not exercise ordinary care for his own safety in approaching the crossing, no recovery could be had against the estate of the driver. Stephenson's Administratrix v. Sharp's Executors et al., 222 Ky. 496, 1 S. W. (2nd) 957.

It is the duty of one riding in a machine on approaching a railroad crossing at grade to use ordinary care to avoid injury to himself, even though a guest. Barksdale, Administrator v. Southern Railway
While one riding in a vehicle as the guest or by invitation of another is not responsible for the negligence of the latter, yet the guest is not relieved from exercising ordinary care for his own safety in approaching the crossing. *Milner's Administrator v. Evansville Railways Co.*, 138 Ky. 14, 221 S. W. 207. Under the circumstances in the principal case, the duty of the guest is well stated by the court in *Davis v. Chicago, R. I. & P. Ry. Co.*, 159 Fed. 18, 88 C. C. A. 496, where the court said: "It is now the better recognized rule of law that as to such a person situated as was the plaintiff, riding in a vehicle in mere companionship with his friend, engaged upon a mutual adventure, it is as much his duty as that of the driver to take observation of dangers, and to avoid them, if practicable, by suggestion and protest. In other words, he is required to exercise ordinary care to avoid injury." If the guest is cognizant of danger resulting in injury, and fails to call the driver's attention to it, but permits him to drive recklessly into it without protest on his part, no recovery can be had. *Cunningham v. Thief River Falls*, 84 Minn. 21, 86 N. W. 763. A guest in an automobile is guilty of contributory negligence, as against the driver, where riding in mere companionship with him and failing to take observation of dangers and to avoid them by suggestion and protest, the alleged negligence being dangerous speed. *Lavine v. Abramson*, 142 Md. 222, 120 Atl. 523. An invitee, a gratuitous passenger or guest, riding in an automobile driven by the owner at an obviously dangerous speed, must exercise ordinary care for their own safety, and if they fail to warn the driver and do not take any precautions for their own safety, they are guilty of contributory negligence and cannot recover for injuries resulting therefrom due to the negligent operation of the car by the driver. *Glick v. Baer, et al.*, 186 Wis. 268, 201 N. W. 752; *Naglo v. Jones*, 115 Kan. 140, 222 Pac. 116; *Wagenbauer v. Schwinn*, 285 Pa. 128, 131 Atl. 699; *Knoxville Railway & Light Co. v. Vangilder*, 132 Tenn. 489, 178 S. W. 1117; *Sheehan v. Coffey*, 200 N. Y. Supp. 55; *Irvine v. McDougal*, (Mo.) 274 S. W. 923; *Rogers v. Ziegler*, (Ohio) 152 N. E. 781; *Nicora v. Cerveri*, (Nev.) 244 Pac. 897.

The doctrine of the cases cited is not that the negligence of the driver is imputed to his guest, but that it is also the duty of the guest to exercise ordinary care for his own safety. Undoubtedly it is a sound rule to hold, that a passenger, the guest in an automobile operated by another, is bound to exercise reasonable care for his own safety, and that a failure to do so constitutes contributory negligence and bars recovery against the owner for injury resulting, in part, from the operator's negligence.

B. C.

**SUNDAY—WHERE BROKER'S CONTRACT REGARDING EXCHANGE OF FARM WAS EXECUTED ON SUNDAY, IT WAS NONENFORCEABLE, NO RATIFICATION BEING SHOWN.** (Kentucky Statutes, Section 1321).—Plaintiff met defendant at plaintiff's office on Sunday and defendant addressed and signed a letter to plaintiff by which he proposed to exchange the land owned
by him for two houses owned by J. on condition that the offer be accepted in one day by J. The letter also contained the agreement between defendant and plaintiff as to what was to be the commission. Plaintiff brought this action to recover his commission. Defendant pleaded that the contract under which plaintiff sought to recover was executed on Sunday. Held: The contract was nonenforceable. Hofgesang v. Silver, 223 Ky. 101, 3 S. W. (2nd) 185.

At common law, there is no doubt but that plaintiff could have recovered, because under the common law all business other than judicial proceedings could be lawfully transacted on Sunday. Heisin v. Smith, 138 Cal. 46, 71 Pac. 180; Ward v. Ward, 75 Minn. 269, 77 N. W. 965. This doctrine, however, has been changed in the various jurisdictions by statutes differing somewhat in phraseology but having the same purpose. These statutes prohibit the performance of work and labor in one's "ordinary calling" on the Sabbath. "Ordinary calling" means that the ordinary duties of the calling bring into continued action. Reed v. State, 19 Ga. 562, 46 S. E. 837; Rex v. Whittash, 7 B. & C. 596.

In Kentucky the common law rule was changed by Section 1321 of Carroll's Kentucky Statutes which provides that no work or business shall be done on the Sabbath day, except the ordinary household offices, or other work of necessity or charity, or work required in the maintenance or operation of a ferry, skiff or steamboat, or steam or street railroad.

It is clear that plaintiff was not engaged in a work of necessity or charity. He was acting within the ordinary calling of his work. He was a real estate broker, and at the time this contract was made he was at his own office. There is no reason whatsoever why plaintiff should recover under the statute. Also, defendant never ratified or accepted the benefits of the services rendered by plaintiff. He refused to carry out the contract to exchange with J. Had defendant accepted the benefits, there would be no question but that plaintiff could recover. Ross v. Oliver Bros. & Honeycutt, 152 Ky. 437, 153 S. W. 756; Campbell v. Young, 72 Ky. 240; Bertram v. Morgan, 173 Ky. 655 191 S. W. 317.

The courts have fully defined a work of necessity. A work of necessity is not a physical or absolute necessity but a work of a moral fitness or propriety of the work and labor done under the circumstances of each particular case. Johnson v. People, 31 Ill. 469; McClary v. Lowell, 44 Vt. 116, 8 Am. Rep. 366. The work done must be for the public safety and good. Such work would include furnishing food, water, and artificial light, the feeding and care of animals, and acts to secure public safety, etc. Turner v. State, 85 Ark. 188, 107 S. W. 388.

The general rule followed in most of the jurisdictions is: where two parties execute a contract on Sunday, it is valid unless made void by statute. But if the contract is made on Sunday, and it is necessary in order to completely perform the contract for one party to act on a secular day, the contract will be valid and will be enforced by courts.
It is only where the contract is completely performed on Sunday that it is made void. Hill v. Dunham, 7 Gray (Mass.) 543; Farrow v. Arnold, 22 R. I. 305, 47 A. 693; Cross v. Bank of Eusley, 203 Ala. 561, 84 So. 267.

The Supreme Court of the United States in Gibbs and Stetret Mfg. Co. v. Brucker, 111 U. S. 597, expressed its view in regard to Sunday contracts. This case arose in Wisconsin where a statute made it penal to do any manner of business on Sunday. Revised Statutes, 1878, S. 4595. A contract was signed by one of the parties on Sunday and delivered to the second party's agent. The second party assented and signed on a week day. Held: The contract was valid. The court stated in its dicta that if the second party had signed on Sunday the contract would have been void.

The Supreme Court rule has never been overruled. Consequently through a thorough search of the authorities, it can be seen that both the states and the Supreme Court hold that the doctrine that contracts made on Sunday are void depends alone on statutes of the various states.

W. C. W.

TAXATION—COMPANY ENGAGED IN BLASTING, CRUSHING AND DELIVERING ROCK FOR ROADS, HELD "MANUFACTURING" WITHIN THE EXEMPTION STATUTE (Ky. Stats., Sec. 40, 19a-10).—Rock was blasted from its native place, broken into sizes small enough to be placed in a crusher, then crushed into sizes ranging from ordinary stones to macadam chips. According to Kentucky Statutes Sec. 4019a-10 "Machinery and products in course of manufacture of persons, firms or corporations actually engaged in manufacturing and their raw material actually on hand at their plants for the purpose of manufacture" are exempt from local taxation. Held, this case came within the statute, Commonwealth for use of Rockcastle County v. W. J. Sparks Company, 222 Ky. 606, 1 (2nd) S. W. 1050.

A company was engaged in assembling buggies. The parts were bought already manufactured. Held, this was manufacturing within the above mentioned statute in City of Henderson v. George Deiker Co., 193 Ky. 248, 235 S. W. 732. A company was engaged in roasting, cleaning and grinding coffee beans after which it was packed in containers to be sold for domestic purposes. Held, manufacturing in City of Louisville v. Zinmeister and Sons, 188 Ky. 570, 222 S. W. 958. The court said, "Whether it is such an establishment (manufacturing) does not depend upon the size of the plant, the number of men employed, the nature of the business or the articles to be manufactured, but upon all these together and upon the result accomplished." This same conclusion was reached in the case of City of Louisville v. Louisville Tin and Stove Company, 170 Ky. 577, 186 S. W. 124; and in Bogard v. Tyler, 119 Ky. 637, 55 S. W. 709, the court decided that an ordinary saw mill was a manufacturing establishment. In Hall and Son v. Guthrie's Sons, Assignee, 31 Ky. Law Reports 801, 103 S. W. 721, it was held a flour mill was a manufacturing establishment.

The courts in interpreting the statutes in tax exemption cases seem to look to the broader definitions of the word “manufacture” and often limit the scope of general lexicographical definitions. The court followed the broader interpretations of the word “manufacture” in this case, and in so doing it followed the weight of authority. G. C. R.

**TAXATION—FACTS HELD TO SHOW THAT DEFENDANT WAS RESIDENT OF FLORIDA, NOTWITHSTANDING HE SPENT MORE TIME IN KENTUCKY THAN IN FLORIDA, AND HENCE INTANGIBLES WERE NOT TAXABLE BY KENTUCKY.**—Defendant expressed his intention to remove to Florida and make it his residence. He purchased a home in Florida, notified church and county officers and his business friends of his intentions, sold two farms in Kentucky, and no longer voted in elections there. Held, that defendant was a resident of Florida and hence the state of Kentucky could not assess certain intangible property to him for taxation, notwithstanding he spent more time in Kentucky than in Florida. *Commonwealth v. Ott*, 223 Ky. 612, 4 (2nd) S. W. 417.

Section 4020 of the Kentucky Statutes under which an attempt was made to tax the present defendant, has been interpreted as follows: “Under our Statute, Sec. 4020, all intangible personal property has a situs for the purpose of taxation at the domicile only of the owner.” Sampson, J., in *Millet's Executor v. Commonwealth*, 184 Ky. 193, 211 S. W. 562. There is no conflict in Kentucky with respect to the interpretation given this part of the Statute and while the doctrine which it represents, namely, that of *mobilia sequuntur personam*, has been the subject of much discussion with regard to tangible personal property, it is well settled that it is not only expeditious but necessary to apply it to cases involving intangibles. *Tappan v. Merchants National Bank*, 19 Wall. 490; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Blackstone v. Miller*, 188 U. S. 189.

The real question in the principal case involves the meaning of the word “domicile” or residence as it is more commonly known. Cooley, in his work on Taxation, Volume I, page 641, says, “No exact definition can be given of domicile; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case. It is a maxim that every man must have a domicile somewhere, and also that he can have but one. Of course it follows that his existing domicile continues until he acquires another, and vice versa, by acquiring a new domicile he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question.”
In *Hurst v. City of Flemingsburg*, 172 Ky. 127, 188 S. W. 1085, the court clearly states the Kentucky Rule as follows: "The question of residence is one of fact and intention. Both must concur. But where a party has an actual residence in two different states and spends a substantial portion of his time in each, he may establish his residence in either state, and neither the fact that his dwelling house in the other state is more comfortable or better furnished, nor the fact that he spends the greater portion of his time there, will be conclusive on the question of residence." The following cases are to the same effect: *Robinson v. Paxton*, 210 Ky. 575, 276 S. W. 500; *City of Winchester v. Van Meter*, 158 Ky. 31, 164 S. W. 323; *Semple v. Commonwealth*, 181 Ky. 675, 205 S. W. 789; *Millets' Ex'r v. Commonwealth*, supra; *Boyd's Ex'r v. Commonwealth*, 149 Ky. 764, 149 S. W. 1022, 42 L. R. A. (N. S.) 580. It will also be found that the following additional authorities are also of like effect: *Ennis v. Smith*, 14 Howard 400, 14 L. Ed. 398, 55 U. S. 472; *People v. Moir*, 207 Ill. 180, 69 N. E. 905; *In re Newcomb*, 193 N. Y. 238, 84 N. E. 950; *Tally v. Commonwealth*, 127 Va. 516, 103 S. E. 612.

It is perfectly obvious that it is impossible to lay down any set rule by which the question of domicile can be determined but as a summary on this question, a part of the opinion in the case of *Stiar's Admr. v. Commonwealth*, 194 Ky. 316, 239 S. W. 49, is pertinent. There the court said, "The only principle that can be laid down as governing all questions of domicile is this, that where a party is alleged to have abandoned his domicile of origin, and to have acquired a new one, it is necessary to show that there was both the factum and the animus. There must be the act, and there must be the intention. A new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence in some other county but until also this intention has been carried out by actual residence there."

In the instant case there was evidence of defendant's intention to change his domicile and also evidence of residence in the other state, consequently the decision seems correct. C. E. B.