1928

Case Comments

Kentucky Law Journal

Follow this and additional works at: https://uknowledge.uky.edu/klj
Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Kentucky Law Journal (1928) "Case Comments," Kentucky Law Journal: Vol. 16 : Iss. 3 , Article 7. Available at: https://uknowledge.uky.edu/klj/vol16/iss3/7

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
CASE COMMENTS

CARRIERS—EVIDENCE OF TRAINMAN'S NEGLIGENCE IN FAILING TO ANTICIPATE THAT PASSENGER WOULD SHOOT FELLOW PASSENGER, HELD INSUFFICIENT FOR JURY.—The appellant was a passenger of the defendant carrier. While the train was slowing down for a stop and when the trainmen were at the other end of the train, appellant was shot by an intoxicated passenger. It was not shown that the passenger had created any disturbance before this, other than that he had talked garrulously, and tipped over a few of the passengers' hats. He had not given the conductor any cause for quieting him before the shooting. At the time of the shooting, he had suddenly risen from his seat, drawn his revolver, fatally shot one passenger, wounded another, and then shot appellant who was attempting to make his escape. Held, that from the conduct of the fellow passenger, there was not enough evidence to submit to the jury that carrier had been negligent in failing to anticipate that the passenger would shoot the appellant. Peak v. Louisville & N. Ry Co., 221 Ky. 97, 297 S. W. 1107.

The Court of Appeals in its opinion discussed the general doctrine that carriers are not insurers of the absolute safety of their passengers, or of their entire immunity from the misconduct of fellow passengers, though there is an implied obligation growing out of the contract between the carrier and the passenger that the former shall afford the latter reasonable protection and immunity from the insults, violence and wanton interference of fellow passengers, intruders, or the carrier's servants, and where a carrier fails to perform this duty it is responsible. Kinney v. Louisville and N. Ry. Co., 99 Ky. 59, 343 S. W. 1066; Louisville Ry. Co. v. Wellington, 137 Ky. 719, 126 S. W. 370, but if a passenger has been assaulted under circumstances that could not have been reasonably anticipated by the carrier in time to prevent the assault, the carrier is not responsible. Louisville R. Co. v. Brewer, 147 Ky. 166, 143 S. W. 1074, 39 L. R. A. (N. S.) 647; Payne, Agent v. Moor, 196 Ky. 454, 244 S. W. 869. In the last mentioned case the circumstances are identically the same as in the principal case, with the exception that in the latter a lunatic was dealt with instead of an intoxicant.

The court does not appear to lay any particular stress on the carrier's knowledge of the passenger's intoxicated condition, as evidence of the carrier's neglect to take precautions toward safeguarding the other passengers from any possible injury, which might have resulted from the intoxicant's condition. Other jurisdictions do not appear to be quite as tolerant of a carrier's not anticipating what acts or injury an intoxicated passenger might do to fellow passengers. In Oklahoma, the falling of an intoxicated passenger was evidence enough to submit to the jury that carrier should have foreseen that the passenger might do injury to other passengers. Montgomery Traction Co. v. Whitley, 152 Ala. 101, 44 So. 538. In Missouri the carrier's negligence, in allowing
an intoxicated person to crowd into a coach and injure a fellow passenger, was held to be a question for the jury. *Abernathy v. Missouri Pac. R. Co.*, 217 S. W. 568. In Texas the court held that there was evidence enough of carrier's negligence to go to the jury, where smoking and drinking male passengers were allowed to crowd up against a fellow passenger and injure her. *Texas & Pac. Ry. v. Bratcher*, 78 S. W. 531. A Pennsylvania ruling conforms to the Kentucky view, however. There it was held that there was not sufficient evidence to go to the jury of carrier's negligence in allowing an intoxicated passenger to enter a coach, where he injured a fellow passenger. *Brehony v. Pottsville Union Traction Co.*, 218 Pa. 123, 66 A. 1066.

Some question might be raised as to the soundness of the court's holding in drawing no distinction between a carrier's negligence in regard to a lunatic, and as regards its negligence toward an intoxicant. Had the court held otherwise, however, it would have laid down what would seem to be a severe and unfair rule, in requiring the carrier to anticipate and be responsible for the acts of an intoxicant, when his conduct prior to the acts committed did not warrant any suspicion of what he might do.

H. C. C.

**CARRIERS—Passenger Carelessly or Mistakenly Taking the Wrong Train May Properly Be Ejected, Though, if He Has Been Misled by Carrier's Agents, He Can Recover for Subsequent Ejection.**—Appellee, just out of a hospital where he had undergone an operation for appendicitis, purchased a ticket to a station on appellant's line at its depot and, on showing his ticket to the guard at the gate, was told to take the train on track 3 and on presenting his ticket to the agent in charge of loading passengers on that train, he was told by him to get aboard. When the conductor saw his ticket, shortly after the train started, he told appellee he was on the wrong train, and though informed of his weakened and ill condition, the conductor ejected appellee from the train in the yards about a mile from the depot. It was raining and appellee was forced to walk through the yards to the depot, causing him great anxiety and pain and irritating his wound so that he was obliged to return to the hospital to have the incision treated for some time further. Held, that while the passenger under the general rule must inform himself as to whether or not the train which he is about to take will stop at his destination before boarding it and is without remedy if he afterwards learns that it will not stop at his destination, the rule does not apply to a passenger who has boarded the train pursuant to the directions of the company's agents who have examined his ticket in the course of their duties, and if he is thereafter ejected the rule allows him to recover. *Louisville & N. R. Co. v. Hawkins*, 219 Ky. 400, 293 S. W. 972.

The theory for the exception here is that the railroad, through its authorized agents, has made a special contract with the passenger to stop its train at his destination and must fulfill it. *Dillman v. Chicago,*
Practically all authorities agree in this holding in the absence of statutes to the contrary, the divergence of opinion being due to a different conception of the power of the agent to make the special contract. Thus, where a ticket agent informs a passenger that a train will stop at a station which is not on its schedule, some courts hold that the purchaser may rely on the agent’s statement and the carrier is bound by it, as in Olsen v. Northern Pac. R. Co., 49 Wash. 626, 96 Pac. 150, 18 L. R. A. (N. S.) 209, in which the court said: “While there is some conflict in the authorities bearing on this question, the better rule is that a passenger has a right to rely on a ticket agent, and is not bound, as a matter of law, to read or examine his transportation before taking the train.” “It is for the jury to say whether the passenger is guilty of negligence in not discovering the mistake of the agent before taking the train,” etc. The New Jersey courts are flatly opposed to this view for the reason given in Shelton v. Erie R. Co., 73 N. J. Law 558, 66 Atl. 403, that the scope of the ticket agent’s authority is notoriously limited to selling tickets and “by no rule of the law of agency or of evidence can the acts or statements of a ticket agent beyond the scope of his limited authority be erected into a contract binding upon the railroad company.” The Kentucky court in L. & N. Ry. v. Scott, 141 Ky. 538, 133 S. W. 800, holds that the giving of information regarding trains is within the scope of the ticket agent’s employment; that the public has a right to rely on such statements and that the company is bound by the contracts made by him in its behalf by such statements. The principal case follows the ruling in L. & N. R. Co. v. Summers, 133 Ky. 684, 118 S. W. 926, cited in the opinion, which is in accord with the weight of authority. The cases cited above show that all jurisdictions agree in holding the carrier liable where a special contract with the passenger can be made out, but that courts differ as to the power of certain agents to make such contracts. G. L. B.

Chattel Mortgages—Mortgage to be Recorded Must be Deposited in Proper Office With Someone Having Authority to Receive It and Recording Fees Must be Paid.—A, the purchaser of an automobile, executed his promissory note for the unpaid purchase price. At the same time he executed a chattel mortgage to secure the payment of the note. The note and mortgage were sold, transferred, and assigned to the appellant. The appellant later mailed the mortgage with the check to cover the recording charges to the clerk of the county court. The check, bearing the indorsement of the clerk of the court, was returned. Later it appeared that A had misappropriated funds of the appellee and, to recover the funds so misappropriated, the appellee caused an attachment to issue which was levied on the automobile. The appellant contended its mortgage lien was superior to that created by the attachment. The mortgage assigned to appellants did not appear on the records of the county court. Held, it is a sufficient recording if the mortgage be deposited in the proper office with a person having author-
ity to receive it and the recording fees have been paid. *Carter Guaranty Co. v. Cumberland & Manchester Railroad Co.*, 219 Ky. 207, 292 S. W. 812.

The Kentucky Statute, section 496, providing that an unrecorded mortgage shall not be valid against a purchaser for a valuable consideration without notice, or against creditors, does not require that the mortgagee personally supervise recording of the instrument, but the mortgage must be deposited in the proper office with some one having authority to receive it and the recording fees must be paid. When it is delivered in the proper office and the fees paid and directions given to record it, it then becomes notice to all persons of the lien set out therein. *Kentucky River Coal Corporations v. Sumner*, 195 Ky. 119, 241 S. W. 820; *Herndon v. Ogg*, 27 Kentucky Law Reports 268, 84 S. W. 754; *Webb v. Austin*, 22 Kentucky Law Reports 764, 53 S. W. 808; *Great Western Petroleum Co. v. Samson*, 192 Ky. 814, 234 S. W. 712; *Cain v. Gray*, 146 Ky. 402, 142 S. W. 715.

To constitute a valid filing for record, the instrument must be delivered at the office where it is required to be filed. In *Day and Congleton Lumber Co. v. Mack*, 139 Ky. 587, 69 S. W. 712, it was so held.

An instrument is ordinarily deemed to be recorded when it is left by its holder with the proper officer for the purpose of having it recorded. If after a deed is left with a clerk to be recorded he delivers it to the grantor without recording it, it does not vitiate the deed. It is sufficient filing if proved to have been acknowledged and lodged with the clerk to be recorded. *Commonwealth Bank v. Haggin*, 1 A. K. Marsh. (Ky.) 306.

A clerk's indorsement on an instrument to the effect that it has been lodged for record is conclusive that this was done. A mortgage is valid against a purchaser for a valuable consideration without notice where it has been acknowledged and lodged for record although it has not been actually recorded, and the clerk's indorsement on the mortgage that it has been so acknowledged and lodged for record is conclusive of that fact. *Webb v. Austin*, supra.

It is obvious then that the duty of a mortgagee ends when he deposits the instrument to be recorded with the proper officer in his accustomed place of doing business, and the recording fees provided for by statute have been paid. It follows that if the mortgagee has deposited the instrument for recording, and for some reason it is not spread upon the pages of the proper book, the mortgagee will be relieved of any responsibilities incident to such failure. A. K. R.

**Corporations—Illegality of Ultra Viros Notes Affected Only Corporation and Not Bank Taking Them Without Notice of Illegality.**—Notes were issued by a corporation in excess of its charter-prescribed limit of corporate indebtedness. Held, that the corporation only was affected by the ultra vires character of the notes and not the bank taking the notes, as the bank was taking the notes without knowledge.

The case in which the rule of law quoted above is enunciated is of chief importance in its decision as to the personal liabilities of the directors of a corporation under Kentucky Statutes, section 550. While the subject of this comment was of only secondary importance to the final issues of the case, it raises problems of quite general importance in the field of ultra vires transactions.

Although the bank had no actual knowledge of the facts, we may wonder that the bank was not affected with constructive notice of the charter limitations. To be sure the stricter and more technical rule as to constructive notice of charter limitations of corporate power, such as the debt limit, appears quite inconsistent with the result reached in the present case. Such a view of the case is heightened when we consider that the bank was one of the original parties to the note rather than an innocent purchaser. The stricter rule was stated by Mitchell, J., in *Kraniger v. People's Building Society*, 60 Minn. 94, 61 N. W. 904: "... the transaction was one which in and of itself assumed to create an indebtedness on the part of the society in excess of the limit fixed by its articles. The plaintiff was chargeable with notice of this latter fact, for it is a settled rule that a person who deals with a corporation must, at his peril, take notice of its charter or articles of association."

It has been pointed out, however, that such a strict adherence to the earlier view as typified by the Kraniger case is neither just nor practicable. Ballantine on Private Corporations, page 279. All of the mandates of present-day business require a more lenient rule. "It would seem that the courts ought not to require persons contracting with corporations to ascertain at their peril the line between *intra vires* and *ultra vires*, but merely to take reasonable notice of the nature of the corporation and the customary scope of its business." Ballantine, *supra*. The present decision appears to follow the predicated trend of the law in this regard.

An analogous distinction, and one quite fundamental to the one here drawn, has been drawn by the courts between transactions wholly without the scope of the corporate powers and transactions apparently within the corporate powers. *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24.

While the result reached by the court in the present case deserves only commendation, there may be those who would quarrel with the use of the term *illegal* in describing the *ultra vires* character of the transaction. The use of the term would seem to indicate that the transaction was wholly without the scope of the corporate powers at the very least. Even in such an event the use of the term appears ill-advised. Compare the opinions of Comstock, Ch. J., and Selden, J., in *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258, with comments thereon in Ballantine, 242ff. At best it appears a bit out of harmony with the ultra-modern tone of the present decision to term the transaction illegal.

G. R.
COUNTIES—FISCAL COURT, ACTING IN GOOD FAITH, MAY SETTLE CLAIMS AGAINST SHERIFFS DURING PENDENCY OF TAXPAYERS' SUITS THEREON.—Appellant brought an action against two former sheriffs alleging that they had received compensation from their office far in excess of the maximum salary designated by law. After a number of suits the county court compromised the claim against the former officers. The appellant contended that the county court had no authority to compromise the claims as he, having brought the taxpayers' suit, was entitled to manage and control the course of the litigation until the end. Held, that the fiscal court, acting in good faith, had the power and authority to enter into the compromise agreement settling the claims growing out of the litigation. Shipp, for Use of Fayette County, et al. v. Rodes, et al., 219 Ky. 349, 293 S. W. 542.

After quoting section 1834, Kentucky Statutes, and in referring to section 1840, the court held that by these two sections of the statute all right of action for and on behalf of the county is in the fiscal court; and that until that court refuses to institute a suit no one else may do so. Commonwealth v. Tilton, 20 Ky. L. Rep. 1056, 48 S. W. 148.

It has been held that Kentucky Statutes, Sections 1834, 1839, and 1840, made the fiscal court the agency to look after the financial affairs of the county and lodges with the county judges and county attorneys the primary right to institute and conduct all such cases and proceedings looking to the preservation of the fiscal rights of the county. Williams v. Stallard et al., 185 Ky. 10, 213 S. W. 197.

In Iowa, the validity of a tax having been determined in an action against a board of supervisors, who were the managing agents of the county, it was held that an action to enjoin the collection of the tax could not be brought by a taxpayer inasmuch as the board of supervisors represented all the taxpayers of the county in the defense which they made to the former action on the same ground. Lyman v. Faris, 53 Ia. 498, 5 N. W. 621. That a city may compromise a suit by taxpayers against the city officials was held in the Minnesota case of Oakman v. City of Eveleth, 163 Minn. 100, 203 N. W. 514.

Thus it will be seen, as consistently maintained, that the suit of a single taxpayer will not prevail over the rights of a governing board, county court, or other governing body which has as its legal function the furthering of the rights of the taxpayers.

CRIMINAL LAW—REFUSING NEW TRIAL AFTER CONVICTION, IN DEFENDANT'S ABSENCE, HELD ERROR, WHERE DEFENDANT HAD DEFENSE, AND PUNISHMENT FOR NONAPPEARANCE WAS UNFAIR UNDER CIRCUMSTANCES.—Appellant was convicted of violation of a Kentucky Statute, Section 3748, concerning misfeasance in office or willful neglect of duty by county officials. Appellant was a constable of a magisterial district and was informed by the prosecuting witness in this action that a moonshine still was located at or near the residence of the appellant, and that he failed to seize or capture such still or to take any steps to
CASE COMMENTS

effect the seizure of the still or of the owners and operators thereof. The case had been continued at three terms of the court, the appellant being present and ready for a trial each time the case was continued. The appellant was tried and convicted, he being absent from the county at the time, and his punishment fixed at a fine of $1,000.00, the maximum provided under the statute. His counsel filed a motion for a new trial, together with uncontroverted affidavits showing that appellant was not guilty, which motion was overruled. Held, that the court abused its discretion in refusing to grant appellant a new trial. Short v. Commonwealth, 221 Ky. 181, 298 S. W. 381.

When a motion is made to set aside a default judgment during the term at which it was rendered, a rule prevails different from the one when a new trial is sought after the term at which it was rendered on the grounds of casualty or misfortune or where both litigants have participated. The power of the court to set aside a default judgment at the term at which it was rendered is inherent, and not dependent upon sections of the Code regulating the granting of new trials. It is a judicial discretion and depends upon whether or not the ends of justice will be furthered thereby, and, in a measure, upon whether or not the complainant has been guilty of laches. Southern Insurance Co. v. Johnson, 140 Ky. 485, 131 S. W. 270; Stewart v. Commonwealth, 197 Ky. 501, 247 S. W. 357; Thompson v. First National Bank's Receiver, 183 Ky. 69, 203 S. W. 320; Union Gas & Oil Co. v. Kelly, 194 Ky. 153, 238 S. W. 384. Where a trial was had between eight and nine o'clock in the morning in defendant's absence, due to motor trouble in going to the court house, where he arrived about nine o'clock a.m., and at once moved for a new trial while the witnesses were still present, and filed an affidavit that he had a defense, it was held that the court abused its discretion in denying the motion. Varney v. Commonwealth, 201 Ky. 548, 275 S. W. 713. Where appellant, who was absent from the court when the case was called on account of his being ill and unable to be in court and default judgment was entered against him, appeared in court three days later and filed a motion for a new trial, together with an uncontroverted affidavit showing that he had a good defense and was not guilty of the offense charged in the indictment, the court vacated the judgment and granted him a new trial. Baker v. Commonwealth, 195 Ky. 847, 243 S. W. 1049. Where a refusal of court to vacate a default judgment and grant a new trial, on uncontradicted affidavit of accused that train was late, it was held an abuse of the trial court's discretion. Combs v. Commonwealth, 216 Ky. 200, 287 S. W. 565. A new trial was granted, where failure of appellant to be present at the trial was due to a misleading statement of a deputy sheriff and a Commonwealth's witness as to the day set for the trial of the case. Davis v. Commonwealth, 204 Ky. 765, 265 S. W. 338.

It is impossible to conceive of how the ends of justice would have been furthered, by requiring appellant to pay a sum out of all proportion to the offense committed, which was in effect an absence from court
when trial was had. Such a punishment was certainly unfair. Under the circumstances, the ends of justice demanded a new trial, where appellant would have been permitted to make his defense, and a rendition of a judgment in conformity to the facts on the merits of the case.

From the authoritative cases cited, it seems that the holding is correct. It is both logical and just. B. C.

DEDICATION—ANYTHING INDICATING OWNER'S INTENTION AND ACCEPTANCE BY PUBLIC AMOUNTS TO "DEDICATION" IRRESPECTIVE OF WRITING.—Appellant had formed two blocks out of certain property which he owned just across the boundary from a small village in the adjacent state. He divided the two blocks into thirty-six lots each. The plat was made so that a street separated the two blocks, and another small alley intersected the two blocks at right angles to the street. Appellee filed a map of the plat with the county clerk, and with it a dedication to the public of the use of the streets and alleys as designated on the plat. The lots were sold at public sale to different purchasers. Appellants subsequently became the owners of all the lots. They then inclosed the entire subdivision, including the street, by a fence. In the subsequent suit to have the fence removed the court held, that anything which fully indicates the intention of the donor to dedicate, and the acceptance thereof by the public will amount to "dedication," and may be either with or without writing. Hedge, et al. v. Avender, 221 Ky. 524, 290 S. W. 342.

The court in its holding reaffirmed the well established rule in this and other jurisdictions. Kentucky has consistently held that anything that fully indicates the intention of the donor to dedicate and the acceptance by the public will amount to a dedication. James v. City of Louisville, 19 Ky. Law Rep. 447, 40 S. W. 912; Kentucky Refining Co. v. Salvage, 19 Ky. Law Rep. 1071, 41 S. W. 238; South Covington & C. St. Ry. v. Newport L. & A. Turnpike Co., 23 Ky. Law Rep. 68, 110 Ky. 691, 628 S. W. 657; City of Bloomfield v. Allen, 146 Ky. 34, 141 S. W. 400; City of Louisville v. Botts & Adams', 151 Ky. 578, 152 S. W. 529. Throughout the other jurisdictions generally no formal acts of the owner, or formal acceptance by the public is necessary to dedicate. An intention on the part of the owner and some use made by the public is sufficient. The intention of the owner with a use for the purpose intended was the only requirement to dedicate a cemetery. Wormley v. Wormley, 207 Ill. 411, 69 N. E. 855. An intention implied from the acts of the owner sufficient to dedicate. Biddinger v. Bishop, 70 Ind. 244. Other jurisdictions that follow: Brooks v. City of Topeka, 34 Kan. 277, 8 Pa. 352; Tracy v. Bittle, 213 Mo. 302, 121 S. W. 45; Herrington v. Booth & Flynn, 252 Pa. 70, 97 A. 178; State v. Frank W. Carey Real Estate Co., 117 A. 432; Atlantic & W. R. R. Co. v. City of Atlanta, 119 S. E. 712; Draper v. Conner C. Walter Co., 121 S. E. 29.

That an intention must be clearly manifest, either by words or implied from acts of the owner is particularly stressed. Hall v. McLeod.
2 Metc. 98, 74 Am. D. 400. The court in that case said, "The doctrine is well established that dedication of real estate to public use may be made by mere verbal declarations, accompanied with such acts as are necessary for that purpose. But to make a valid dedication, an intention to appropriate the right to the general use of the public must exist." This requirement is upheld very rigidly. City of San Antonio v. Sullivan, 23 Tex. Civil App. 219, 57 S. W. 42; Spier v. Town of New Utrecht, 2 N. Y. S. 426, 24 N. E. 692; Vance v. Village of Pewana, 126 N. W. 978, 161 Mich. 523; Champ v. Nichole's County Court, 72 W. Va. 475, 785 N. E. 361; City of Norfolk v. Southern R. Y. Co., 117 Va. 101, 87 S. E. 1085; Lynbrook Homes v. Tracy, 216 N. Y. S. 351, 217 App. Div. 164; Bomar v. City of Baton Rouge, 4 La. App. 232, 110 S. 497.

There can be no question of the donor's intention in the principal case. Not only was a plat filed with the court clerk showing the streets intended for the public use, but a written dedication also made. H. C. C.

**Deeds—Grantee's Recording of Deed Signed and Acknowledged by Wife Only is Merely Evidence of Acceptance of Complete Delivery.**

—A wife, who was the owner of a tract of land, signed and acknowledged a deed, which was delivered to grantee, who accepted it and caused it to be recorded. Her husband had not signed or acknowledged it. About three months later, the deed was withdrawn from the office of the county court clerk by the grantee, and he presented it to the husband, who signed and acknowledged it. The wife knew nothing of this. The grantee then had the deed recorded again. The deed, as prepared, contained a provision that it was subject to an oil lease made by the grantors. Later the lease being canceled, the question arose as to who had the title to the oil and gas under the tract of land. The whole case turned on the question of the delivery and acceptance of the deed as executed by the wife. Held, that there was not a complete delivery and the deed was void. Brandenbrug et al. v. Botner et al., 221 Ky. 7, 297 S. W. 702.

It would seem that under Section 506 of the Kentucky Statutes, which provides that a married woman may convey real property either by joint deed of herself and husband, or by a separate instrument, and if by the latter, the husband must convey first, the holding in this case could not be otherwise, when the deed was not joint at the time it was delivered to the grantee and since it could not be revived and made joint by the subsequent signing and acknowledging by the husband, and if it were possible to call it a separate instrument, still it would be void for failure of the husband to convey first. It does not follow that there has been a delivery of the deed from the fact that at some time it may have been in the possession of the grantee without any intention on the part of the grantor to make a delivery. Dunbar v. Meadows, 165 Ky. 275, 176 S. W. 1167. Where there is no delivery, there cannot be an acceptance either in fact or law. Kirby v. Hulette, 174 Ky. 257,
In the case of *Justice v. Peters*, 168 Ky. 583, 182 S. W. 611, the court said: "The delivery may be actual, or it may be a constructive delivery, but in either case, the intent of the grantor to transfer the title to the grantee is essential and necessary to constitute delivery. This intention to transfer the title must, however, be accompanied with some act of the grantor, by which he parts with power and control over the deed for the benefit of the grantee, for intention alone will not constitute delivery." A deed must be delivered and accepted by the grantee before it becomes a valid deed. There seems to be no universal test, applicable to all cases, whereby the sufficiency of delivery can be determined, and it is impossible to state in exact terms what shall or shall not constitute a delivery of a deed. A deed will not be regarded as delivered while anything remains to be done by the parties who propose to deliver it. In the instant case the court said: "If at the time the wife signed and acknowledged this deed she delivered it to the grantee with the understanding between them that it was to be signed by her husband before the title passed, it was not a complete delivery nor a complete acceptance by the grantee. The fact that the grantee had it recorded is only a circumstance showing that it was accepted by him as a complete delivery, but that may be refuted by evidence to the contrary." This same view is taken by the courts in the following jurisdictions. Where one undertakes to prove a deed, depending on it as a valid instrument, and the delivery is denied by substantial evidence the grantee is under the necessity of proving more than the mere record. *Piper v. Queeney*, 127 Atl. 474 (Pa.). The presumption of the delivery of a deed arising from the fact of its being recorded, is one that may be rebutted and destroyed by counter evidence. *Boardman v. Dean*, 34 Pa. 252. The recording of a deed is prima facie evidence of its delivery but such can be rebutted by counter evidence. *Simon et ux. v. Le Bar*, 220 N. Y. S. 763, 219 App. Div. 624. The record of a deed is only evidence of delivery. *J. I. Case Threshing Machine Co. et al. v. Parker*, 254 Pac. 779 (Colo.). As delivery is a necessary part of the execution of a deed, it follows that registration is only prima facie evidence of delivery. *Bryan v. Eason*, 147 N. C. 284, 61 S. E. 71.

There can be no doubt that the court in its holding in the instant case was controlled to a considerable extent by Section 506 of the Kentucky Statutes, but the same holding without a statute would not have been without authority from the cases cited.

**B. C.**

**EVIDENCE—PRESUMED THAT CITY PUBLISHED ORDINANCE IN CITY NEWSPAPER AS REQUIRED BY STATUTE—Plaintiff, after a favorable vote of its citizens, decided to improve its streets and sewers at the expense of abutting property owners. Accordingly an ordinance to this effect was passed and the street improvements made. The defendant, an abutting property owner, found no fault with the improvements except his having to pay for them. He refused to pay the assessment against his**
property and attacked the validity of the ordinance by questioning its adoption and advertisement. Held, since the statute required the city to publish its ordinances in the city newspaper, the presumption was that the city officials did their duty. Wallace v. City of Louisa, 217 Ky. 419, 273 S. W. 720.

By Kentucky Statutes, section 3638, all city ordinances are required to be published in the city newspaper. The copy of the ordinance filed with the petition in the above case was a newspaper copy, and from this copy there was nothing which imputed any irregularity in the adoption or advertisement of the ordinance. The court in handing down this decision has merely reiterated a well established legal precedent, in Kentucky, that where the record of the proceedings of the council, in the adoption of a city ordinance, shows no irregularity on its face it will be presumed that the council, in the adoption of such ordinance, has complied with the provisions of the law. And it is incumbent upon the one denying its validity to show affirmatively, by facts other than the record, that there has been some irregularity in its passage. Baker, Mayor v. Combs, 194 Ky. 260, 239 S. W. 56; Nevin v. Roach, 36 Ky. 498, 5 S. W. 546; Lexington v. Headley, 5 Bush 508; Bates v. Monticello, 173 Ky. 244, 190 S. W. 1074; Muir v. Bardstown, 120 Ky. 739, 87 S. W. 1096, 27 Ky. Law Rep. 1150.

The Federal Court goes even further and says, that the power exercised in passing an ordinance is presumed to be reasonable and the one seeking to invalidate the ordinance must show affirmatively that the city council acted wantonly, maliciously, through bribery, or without authority, otherwise the presumption is in favor of the legality of the action. Grand Trunk Western Railway Company v. City of South Bend, 33 S. Ct. 303, 227 U. S. 544, 57 L. Ed. 633.

The state courts likewise are practically unanimous in holding that in the absence of proof to the contrary public officials are presumed to do their duty, in a legal manner. Miles v. Baley, 170 Cal. 151, 149 P. 45; People v. Schenck, 252 Ill. 451, 96 N. E. 864; Sloan v. City of Cedar Rapids, 161 Iowa 307, 142 N. W. 970; City of Rome v. Whites-town Waterworks Company, 187 N. Y. 542, 80 N. E. 1106; Pendleton v. Briggs, 37 R. I. 471, 92 A. 1024.

From the above mentioned cases it is evident that the case now under consideration merely adds emphasis to a well settled legal presumption, that in the absence of evidence to the contrary, the acts of public officials and assemblies are strictly in accord with the provisions of the law.

J. C. B.

EXECUTION—EXECUTION SALE CANNOT BE SET ASIDE FOR INADEQUACY OF CONSIDERATION, WHERE LAND BROUGHT MORE THAN TWO-THIRDS OF APPRAISED VALUE AND FRAUD OR MISTAKE OF APPRAISER IS NOT ALLEGED.

An attempt was made to set aside an execution sale on the ground of inadequacy of consideration. The evidence was that the land brought $1,262 whereas the appraised valuation was $1,400. While the weight
of the evidence was that the land was in fact worth $2,500 there was no allegation of fraud or mistake on the part of the appraisers. Held, the execution sale could not be set aside under such circumstances - Runyon et al. v. Bevins et al., 218 Ky. 589, 291 S. W. 1033.

The law in regard to inadequacy of consideration in an execution sale when not coupled with other objections has been so well settled by the earlier Kentucky cases that until the instant case the point has not arisen for some thirty-five years in Kentucky. The rule of the Kentucky Court of Appeals has been without exception that inadequacy of consideration is not of itself ground for setting aside an execution sale - Hansford v. Barbour, 10 Ky. 515; Waller v. Tate, 43 Ky. 519; Robb v. Hannah's Executor, 12 Ky. Law Rep. 361, 14 S. W. 360.

In the case last cited above the court applied the same general rule as to when the consideration was beyond all objection as to its adequacy, namely, when the sale price is two-thirds of the appraised value. The same rule had been applied earlier in the case of Vallandingham v. Worthington, 85 Ky. 32, 2 S. W. 772. In that case as in the present the sale price was two-thirds of the appraised value but less than two-thirds of the true value. In that case as in the present the appraised valuation controlled.

While the two-thirds rule appears equitable, may we not ask whether or not it is conclusive as to the exact line between the unobjectionable and the objectionable. Might not the price be less than two-thirds of the appraised value and yet be unobjectionable as to adequacy? The origin of the two-thirds rule seems traceable to General Statutes, chapter 38, article 12, sections 2, 4, which provided that before a sale of land under execution the proper officer should have it valued, and, if it failed to sell for two-thirds of such valuation the owner might redeem within a year. See the Vallandingham case, supra. A like provision obtains at present in Kentucky Statutes, section 1648. While the statute applies only to redemption, its influence upon direct proceedings to set aside an execution sale is quite patent. It appears quite unlikely that when the proper case arises any hard and fast rule such as the two-thirds rule should be applied. The more likely rule would be as in other jurisdictions, namely, that the sale will be set aside when and only when "the inadequacy is so great as to shock the conscience of a chancellor," Wagener v. Yetter, 280 Pa. 229, 124 A. 487. The facts of the present case do not require, however, that the court go beyond the unquestioned two-thirds rule in its statement of the law.

G. R.

HOMICIDE—ADMITTING DYING DECLARATION THAT DEFENDANT SHOT DECEASED HELD PREJUDICIAL ERROR WHERE EVIDENCE AGAINST DEFENDANT WAS CIRCUMSTANTIAL.—Appellant was convicted of murder. The dying declaration of the deceased, shown conclusively to be mere opinion and conclusion and therefore incompetent, was admitted in evidence against appellant. All the other evidence tending to show the latter's guilt was
entirely circumstantial, and there was some evidence tending to establish an alibi. On appeal the state contended that the admission of the dying declaration under the circumstances was not prejudicial error. Held, that the admission of the dying declaration was prejudicial error when all the other evidence against appellant was entirely circumstantial. *Stevens v. Commonwealth*, 221 Ky. 222, 298 S. W. 678.

Sections 340 and 353 of the Kentucky Criminal Code provide that a judgment shall be reversed for any errors of law when it appears upon the consideration of the whole case that the rights of the defendant have been prejudiced thereby. Under these sections of the Code the Kentucky Court of Appeals has repeatedly held that where the verdict in a homicide case is supported by other competent evidence, the admission of an improper dying declaration does not constitute prejudicial error, and is not grounds for reversal. *Winstead v. Commonwealth*, 195 Ky. 484, 243 S. W. 40; *Cavanaugh v. Commonwealth*, 172 Ky. 799, 190 S. W. 123. It must appear that the verdict could not be supported in the minds of the jury but for the dying declaration in order to be prejudicial. *Farley v. Commonwealth*, 218 Ky. 35, 291 S. W. 734.

This seems to be the general rule throughout the majority of state jurisdictions. *People v. Sarzano*, 212 N. Y. 231, 106 N. E. 87; *Turner v. State*, 89 Tenn. 547, 15 S. W. 833.

This rule of law was particularly urged by the state on appeal in the instant case as grounds for sustaining the verdict, but the court based the reversal on the fact that all the other evidence of guilt was circumstantial, therefore the right of the defendant must have been prejudiced in the eyes of the jury. Logically this seems sound and is in accord with former Kentucky decisions. *Green v. Commonwealth*, 13 Ky. Law Rep. 897, 18 S. W. 515. In that case the court said: "... In a case where the conviction must depend greatly on evidence of a circumstantial character, this court cannot well adjudge that incompetent testimony (dying declaration) was not prejudicial to his substantial rights."

In a case directly in point, the New York court agrees with the instant case. *People v. Mikulec*, 202 N. Y. S. 551. There the court distinguished the leading case of *People v. Sarzano*, supra. In pointing out the distinction the court was of the opinion that in the Sarzano case the admission of the dying declaration played no part, or should have played no part at enabling the jury to reach a verdict of guilty, while in the case under consideration, in view of the circumstantial evidence "... it may well have been the pivotal point in the case, and certainly may have had a potential influence on the minds of the jury."

W. C. S.

**Larceny—Check May be Subject of Larceny.**—C and G were indicted by the grand jury, and accused of grand larceny, the stolen property being a check for $30.00. They were tried and convicted. Their motion for a new trial was overruled and they appealed, urging as one
ground for reversal, the insufficiency of the indictment and error of the court in overruling the demurrer filed thereto. One question thus presented was: Whether a check is a proper subject of larceny? Held: That under Kentucky Statutes, section 1161, providing that larceny of bills of exchange shall be felony and Negotiable Instruments Act (Kentucky Statutes 1922, section 3720b-185), providing that a check is a bill of exchange, a check may be the subject of larceny. Clines v. Commonwealth. 221 Ky. 461, 293 S. W. 1107.

Bonds, bills and notes and other written instruments promising or directing the payment of money were not subjects of larceny at common law, for the reason that such instruments were only evidence of a right and a mere right was not such a thing as could be stolen. United States v. Davis, 25 Fed. Cas. No. 14930, 5 Mason 356; Cuip v. State, 1 Port. (Ala.) 33, 26 Am. Dec. 357; Young v. People, 193 Ill. 236, 61 N. E. 1104. But the rule that instruments evidencing pecuniary obligations are not subjects of larceny has been almost entirely abrogated by statutes. People v. Silbertrust, 236 Ill. 144, 86 N. E. 203; People v. Gregg, 70 Mich. 168, 135 N. W. 970; State v. McClellan, 82 Vt. 361, 73 Atl. 933.

The statute in this state which modifies the common law rule is section 1161, Carroll's Kentucky Statutes, which says, "Robbery or larceny of obligations, bonds, deeds, wills, bills obligatory, or bills of exchange, promissory notes for the payment of money, paper bills of credit, certificates of deposit of money with any bank or other person or certificates or obligations granted by the authority of this Commonwealth, that of the United States, or any of them, or of account books or receipts, shall be felony; and any person guilty of such felony shall be punished by confinement in the penitentiary for not less than two nor more than ten years." It will be noted that the statute does not mention checks as a subject of larceny. The court in the principal case did not find it necessary to determine whether a check might be classified as an "obligation" or included under one of the other choses in action mentioned in the statute. The Negotiable Instruments Act was adopted in Kentucky in 1904. Section 3720b-185 Kentucky Statutes, which is part of the Negotiable Instruments Act, says: "A check is a bill of exchange drawn on a bank, payable on demand." Thus the court concluded that section 1161 Kentucky Statutes enlarging the common law so as to include theft of choses in action, as aided by the definition contained in the Negotiable Instruments Act, makes it larceny to steal a check.

A check was held the subject of larceny under statute in the following jurisdictions. State v. Wegener, 180 Iowa 102, 162 N. W. 1040; People v. Lovejoy, 37 App. Div. 52, 55 N. Y. S. 543; Fulshear v. State, 59 Tex. Cr. 376, 123 S. W. 134; State v. Levine, 79 Conn. 714, 66 Atl. 529. Although there are no funds in a bank to meet a check it is the subject of larceny. Roberts v. State, 181 Ind. 520, 104 N. E. 970. Though the check be unindorsed it may still be subject of larceny under statute. State v. Hinton, 56 Ore. 428, 109 Pac. 24.
It is submitted that the decision of the Kentucky Court is clearly correct under the statute, and in accord with the prevailing rule in this country. R. R. R.

**MASTER AND SERVANT.—WIFE HELD NOT LIABLE UNDER “FAMILY PURPOSE” DOCTRINE, FOR INJURY BY HER AUTOMOBILE DRIVEN BY HUSBAND IN HIS BUSINESS.—**Appellant was injured by a car driven by appellee’s husband. The car was owned by the appellee, and used by her for purely family purposes, principally for pleasure. The husband had a general permission to use the car, and occasionally did so. On the morning of the accident he had driven his wife’s daughter to school, but when the accident itself occurred he was using the car in his own private business, having left the child at school several hours before. Appellant sued appellee and her husband jointly and severally. Held, that when the head of the family is using a motor car belonging to another member of the family, the owner is not liable for negligence under the family purpose doctrine. *Kennedy v. Wolfe*, 221 Ky. 111, 298 S. W. 188.

The family purpose doctrine was adopted by Kentucky in 1912. *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52. The court at that time expressed the view that if a father purchased an automobile for the pleasure of his family and a child used the car, the father was liable for the child’s negligence upon the grounds of implied agency. The courts throughout the country, however, are in hopeless conflict upon this doctrine. *Crittenden v. Murphy*, 36 Cal. App. 803, 173 Pac. 595. *Van Blaricom v. Dodgson*, 220 N. Y. 111, 115 N. E. 443.

In the instant case the Kentucky Court of Appeals has sought to limit in extent what it considers to be a dangerous rule of law. It is called “at best a harsh doctrine.” The court followed closely the logic applied to similar facts in *Rauckhorst v. Kraut*, 216 Ky. 323, 287 S. W. 895. There the car belonged to the mother, and it was sought to hold the mother liable for the negligence of her twenty-three-year-old son in driving the car upon his own business. The court refused to hold the mother liable, holding that the son’s use of the car did not fall within the family purpose doctrine.

There is much conflict in other jurisdictions. In *Smith v. Weaver*, 124 N. E. (Ind. App.) 503, it was held that the wife was not liable where the husband was using the machine for his own purposes. The wife was held liable in *Allen v. Holter*, 199 App. Div. 750, 192 N. Y. Supp. 351, but the evidence showed that the husband was driving his wife at the time, and that the errand upon which they were going was of mutual concern to both.

It would seem therefore that most courts adhering to the family purpose doctrine attempt to justify it upon the grounds of agency. See *Hutchins v. Hafner*, 63 Col. 365, 167 Pac. 966. The Kentucky courts take this view. *Stowe v. Morris*, supra. Assuming that agency is the proper criterion upon which to establish liability it would logically
follow that where one spouse is using the other's car for his or her own private business, as in the instant case, there can be no relation of principal and agent, and hence no liability.

Where the object of the spouse when driving is purely one of pleasure the courts in states adhering to the doctrine more readily hold the owner of the car liable. Plasch v. Fass, 144 Minn. 44, 174 N. W. 438.

A large number of jurisdictions reject the entire doctrine. Van Blaricom v. Dodgson, supra; Watkins v. Clark, 103 Kan. 629, 176 Pac. 631. Certainly the Kentucky court would have been greatly extending the doctrine as already applied had it held the defendant liable in the instant case.

W. C. S.

NEGLIGENCE—Passenger Held Not Guilty of Contributory Negligence, as a Matter of Law, in Riding in Automobile With Known Fast Driver.—The appellant had moved before the trial court for peremptory instruction and was overruled. The appellee was suing the appellant for an injury sustained through the negligence of the appellant in driving an automobile in which the appellee was riding. The appellant made his motion on the ground that the appellee, knowing that the appellant was a fast and reckless driver, was guilty of contributory negligence. The court overruled the motion on the ground that as a matter of law it is sufficient for the judge to decide and thereby give peremptory instruction. Held, affirmed, motion was properly overruled. New York Indemnity Co. v. Ewen, 221 Ky. 114, 298 S. W. 182.

The Kentucky court was correct in its holding according to the great weight of authority. What constitutes negligence is a matter of law to be decided by the court, but as to whether negligence exists as a matter of fact in a particular case is a matter for the jury to decide. Wilmington City Ry. Co. v. White, 66 A. 1009; Short v. Philadelphia B. & W. Ry., 76 A. 363.

Negligence whether contributory or otherwise is a mixed question of law and fact to be decided by the court only when the facts are undisputed or conclusively proved: C. C. C. & St. L. Ry. Co. v. Houghland, 85 N. E. 369, 74 Ind. App. 73; Cardwell v. N. & W. Ry. Co., 114 Va. 500; C. & A. Ry. Co. v. Paris Adm., 68 S. E. 398, 111 Va. 41. In the case at hand the appellee did know that the appellant was a fast driver, but there was also evidence to show that the appellant never before had had an accident and that the appellee had requested appellant to drive carefully. The trial court was correct in refusing the appellant's motion and referring the facts to the jury. The court must determine whether any facts have been established from which negligence may be inferred reasonably but the jury must determine whether from those facts negligence should be inferred. Baltimore Refrigeration & Heating Co. v. Kreiner, 71 A. 1066, 109 Md. 361; Turbyfill v. Atlanta, C. Airline Ry. Co., 65 S. E. 278, 83 S. C. 325. For the court to decide as a matter of law the inferences must all lead to but one conclusion. Virgin v. Lake Erie & W. Ry. Co., 101 N. E. 50, 55 Ind. App. 216.
The Kentucky Court was right in refusing the appellant's motion for peremptory instructions because according to the weight of authority it was not a matter of law for the court to decide. R. B. B.

**Taxation.—Discrimination Against Taxpayer Will Not Authorize Relief, Unless It Is Tantamount to Intentional Discrimination by Taxing Authorities.**—Plaintiff who owned shares of stock in two grocery companies assessed the stock on a basis of 70 per cent. of its actual value. The board of supervisors of the county increased his assessment to the full value. He alleges that the supervisors could not legally do this because "the uniform valuation of property in that county for district, county and state taxation for that year was not in excess of a sum equal to 70 per cent. of its value and hence plaintiff's property for taxation for that year should be valued at not exceeding 70 per cent. of its actual value, estimated at the price it would bring at a fair voluntary sale." Held: That plaintiff was not entitled to relief if his property was overvalued by mere chance or without his showing that there had been such discrimination against him as was tantamount to an intentional discrimination on the part of the taxing authorities *Siler v. Board of Supervisors of Whitley City*, 221 Ky. 100, 298 S. W. 189.

An arbitrary or capricious valuation by the board of equalization is objectionable and may be set aside. *Allen v. Emery Independent School District*, 233 S. W. (Tex. Civ. App.) 674. The general rule has been stated thus: Fraud, capriciousness or want of the exercise of an honest judgment by tax officers is ground for interfering with their action, if the assessment made is grossly disproportionate to the property's value, or unequal when compared with the assessment of other like property. *German-American Lumber Co. v. Barbee*, 59 Fla. 493, 52 So. 292; *Northern Pacific Ry. Co. v. Pierce County*, 55 Wash. 108, 104 Pac. 178. In the former case the court said, "a tax assessor has a wide discretion in valuing property for taxation, and the courts will not in general control such discretion in the absence of a clear showing of fraud, illegal act or an abuse of discretion rendering an assessment authorized by law so arbitrary and discriminating as to amount to fraud upon the taxpayer or a denial of the equal protection of the law." If the assessment be based on an overvaluation so excessive as to require the conclusion that it did not arise from error in judgment, but was arbitrarily and intentionally made, the court will grant relief. *People v. St. Louis Electric Bridge Co.*, 290 Ill. 307, 125 N. E. 280.

On the other hand, mere overvaluation in the absence of improper conduct, or unless the excess is so gross as to impute fraud to the assessor is not ground for interference with the valuation fixed by the board of equalization. *Allen v. Emery Independent School District*, supra; *Northern Pacific Ry. Co. v. Pierce County*, supra; *People v. Hibernian Banking Association*, 245 Ill. 522, 92 N. E. 365. The latter case expressed the view, that while circumstances in connection with
the overvaluation of property for taxation may be sufficient to establish the fraudulent character of an assessment, so as to warrant intervention by the courts, overvaluation alone is insufficient. The minority view, that overvaluation alone is sufficient to entitle taxpayer to relief seems to be taken by only one state. Iowa Cent. Ry. Co. v. Board of Review of Eliot Township of Louisa County, 176 Iowa 131, 187 N. W. 731, where it was held that though property of taxpayer is assessed at less than its true value, yet if it is assessed higher proportionately than other property he has a just cause for complaint. Barz v. Board of Equalization of Town of Klemme, 133 Iowa 563, 111 N. W. 41.

A case of unlawful discrimination may be made out in a proper state of case, but more must be shown than mere overvaluation. The work done by the taxing officers, through the machinery provided by the General Assembly cannot be so easily set aside. The principal case, where nothing more than overvaluation is shown is not one where relief should be granted. The decision of the Kentucky court seems sound and is supported by the overwhelming weight of authority.

R. R. R.

WHERE DEFENDANT DID NOT KNOW THAT JUROR HAD SERVED ON GRAND JURY WHICH FOUND THE INDICTMENT AND FACT WAS NOT DISCLOSED ON EXAMINATION, DEFENDANT WAS ENTITLED TO NEW TRIAL.—The appellant was convicted in the trial court and brought this appeal on the ground that the trial court had erred in overruling a motion for a new trial. It was contended and proved by the appellant that after the verdict had been returned he discovered that one of the jurors of the trial panel had served on the grand jury which had returned the indictment. Upon this ground the appellant made his motion for a new trial, which was overruled by the trial court. Held: The appellant was entitled to a new trial. Murphy v. Commonwealth, 221 Ky. 217, 298 S. W. 671.

By section 210 of the Criminal Code of Kentucky, the appellant was entitled to challenge the juror on the ground of implied bias, "If the juror has served on the grand jury which found the indictment." In the case at hand the appellant was deprived of that right and it can not be said that appellant had a trial by a fair and impartial jury to which he is unquestionably entitled.

In the case of U. S. v. Christensen, 7 Utah 26, 5 Pac. 543, it was held that where a juror on his voir dire answers that he has formed no opinion as to the guilt or innocence of the accused and it is discovered after the verdict that he has formed such opinion, the party convicted is entitled to a new trial. In Bennet v. State, 24 Wis. 57, and People v. Lewis, 4 Utah 42, 5 Pac. 543, the same principle has been adopted. Kentucky courts have followed this doctrine in cases where negative answers have been falsely given. Mansfield v. Commonwealth, 163 Ky. 488, 174 S. W. 16; Leadingham v. Com., 180 Ky. 38, 201 S. W. 600. The lower court would likely have been affirmed had the appellant through some negligence of his counsel failed to get the proper informa-
tion concerning the qualifications of the juror or had he known of the disqualifications of the juror and failed to disclose such knowledge until the verdict was returned, such failure serving as a waiver to his right. However those are not the facts in this case and the upper court was correct in its decision according to the weight of authority.

R. B. B.

WILLS.—Daughter to Whom Testator Devised Property Including Insurance Wherein She was Beneficiary, Had Duty of Electing to Accept Will or Retain Insurance and Forefeit Rights Under the Will.—Testator set out in his will that his estate, valued at $60,000.00, be sold and the proceeds placed in trust with a policy for $11,000.00 on his life in which the daughter was beneficiary; the daughter, an only child then 16 years old, was to receive the income from this combined fund until she reached the age of 25, when the trust fund was to be distributed to her in stated annual installments. In case she died without issue and before the time of distribution, testator bequeathed the fund, after certain specific legacies, to be divided equally among his surviving relatives. The daughter died testate, aged 21, unmarried, and there were claims against her estate amounting to $4,000.00 for expenses of her last illness, funeral, etc., in excess of income. Held, that testator's devise of insurance, to which he had no title, in trust with his own estate, was sufficiently clear to require an election by the daughter either to accept under the will, or to take the insurance policy which was entirely hers; that from the evidence, she fully appreciated the situation and by implication of law elected to accept under the will. It follows, then, that the corpus of the estate, including the insurance, passes by the will to the testator's donees and that the daughter's maternal relatives have no claim on the insurance. Wooten's Trustee v. Hardy, 221 Ky. 338, 298 S. W. 963.

The doctrine of election as exemplified by the principal case is well established in England and the United States. Dillon v. Parker, 1 Swanst. 396 (36 Eng. Reprints 443); Pitman v. Ewing, 1911 A. C. 217, Morath v. Weber, 124 Ky. 128, 98 S. W. 321, 30 Ky. L. R. 284, and a host of other authorities. To require election it must be shown that there was a clear intention on testator's part to dispose of property over whose disposition he has not, as against the party put to his election, the power of disposal, and in compensation the testator gives property he absolutely owns, so that the will shows an intention on testator's part that the beneficiary shall choose whether he will keep what is already his or renounce it and take what testator gives him. Jackson v. Bevins, 74 Conn. 96. Conditions requiring donees to release property rights of their own are valid. If the gift is accepted, it must be taken subject to the burden. One cannot claim under the will and against it at the same time. Rood on Wills, sec. 625 (1926).

The Roman rule was much simpler and possibly more logical. Where a testator bequeathed something which did not belong to him
It was the duty of the heir to go out and buy it for the beneficiary, on the theory that as it appeared in the will, it was the testator's intention that he should have it. Where this was impossible, as in a bequest of the Campus Martius or a temple, the whole bequest failed. If it were not possible from the will to discern the intention of the testator regarding the res aliena, the bequest also failed for the reason as given in the Institutes; Forsitan enim, si scisset alienam, non legasset. *Pitman v. Ewing* (1911) A. C. 217.

“In order that an act may amount to an election, two things are essential: first, it must be clear that the person alleged to have elected was aware of the nature and extent of his rights; second, it must be shown that, having that knowledge, he intended to elect. 11 Am. & Eng. Enc. of Law, 2d ed. 97. Both these requisites are satisfied in the principal case, which is in line with practically all of the authorities, both in this country and in England.

G. L. B.

**Witnesses—Injured Passenger Held Not Disqualified to Testify as to Acts of Deceased Engineer; Railroad Having Been Constructively Present at the Accident in the Person of the Conductor.**—Plaintiff, a passenger on defendant’s train, was severely injured by falling from the train while it was in motion. Plaintiff stated at the trial that a sudden jerk of the train caused by some manipulation of the engineer hurled him from the train thereby causing the injury. At the time this evidence was offered the engineer was dead and the defendant relying on the “act done or omitted to be done” clause of section 606 of the Civil Code of Kentucky contended that plaintiff’s testimony was not admissible. Held: The railroad was constructively present in the person of the conductor and therefore the death of the engineer did not disqualify plaintiff’s testimony concerning the accident. *Burk v. Louisville and Nashville Railroad Company*, 218 Ky. 163, 292 S. W. 486.

Section 605 of the Civil Code of Kentucky seeks by one broad sweep to abolish in Kentucky that fear and distrust of juries which Anglo-Saxon jurisprudence had built up under the reign of the common law. *Walton v. Shelley*, 1 T. R. 300. Consequently all disqualifications of witnesses were swept away except those preserved in section 606.

The Kentucky Code seems unique in including “acts done or omitted to be done,” but the Kentucky Court is in full accord with the great majority of courts in giving similar provisions a very wide and comprehensive meaning. *Morris v. Norton*, 75 Fed. 912, 21 C. C. A. 553; *Holcomb v. Holcomb*, 95 N. Y. 316; *North American Accident Insurance Company v. Caskey’s Administrator*, 218 Ky. 756, 292 S. W. 297.

In construing statutes the courts, in so far as it is feasible, are guided by the intention of the legislative bodies enacting them. From a survey of the judicial interpretation given similar statutes in other jurisdictions it appears that they are intended to apply only to suits
against the administrator or executor of the deceased's estate or where
one of the parties sues or defends as the representative of the decedent
or incompetent. Fitzsimmons v. Southwick, 38 Vt. 509; Knox v. Bige-
low, 15 Wis. 455; Jones v. Subra, 25 S. W. 223.

Since the primary purpose of such statutes is to prevent perjury
and the perpetration of fraud, it seems that the defendant in the present
case, was seeking to defeat the purpose of the statute by giving it a
perverted judicial interpretation and the court was quick to perceive
that the defendant, being a corporation, was an artificial person and
consequently could not be present in body. As such it was construc-
tively present in the person of its several agents at the time of the
accident and therefore it cannot affect the plaintiff's testimony that one
of its agents, who perhaps was responsible for the accident, was dead.
These agents could have testified concerning the disputed "jerk" of the
train and even the engineer's testimony at a former trial of the case
could have been introduced.

The essence of this provision of the Code was taken from the New
York Code. Dembitz's, Kentucky Jurisprudence, ch. 1. And the New
York Court has held that the statute in that state is to apply in actions
against the estate of the deceased. Heyne v. Dorfler, 57 Hun. 591,
10 N. Y. Supp. 908.

Under all the circumstances and in the light of what must clearly
have been the intention of the legislature in passing such a statute it
is submitted that this decision of the court is based on legal logic,
common justice, and fair play in preventing the defeat of the purpose
of this statute by giving it an extra-intentional interpretation.

J. C. B.