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Case Comments

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ANIMALS—OWNER OF RABID DOG LIABLE FOR DAMAGE TO SHEEP.—Defendant was the owner of a dog which became diseased with rabies, and attacked the plaintiff's flock of sheep, biting them and transmitting to them the disease from which they afterwards died. Held, defendant was liable. *Mastin* v. *McLain*, 204 Ky. 404.

The plaintiff based his action on section 68 of the Kentucky Statutes, which says: "Every person having, owning or keeping any dog shall be liable to the party injured for all damages done by such dog." A subsequent clause excepts liability where the party injured is on the owner's premises at night or is doing some unlawful act in the daytime.

At common law the owner of a dog was not liable for damages inflicted on sheep or other animals in the absence of proof that the owner had knowledge of the dog's disposition and propensity to commit such attacks (*Murray* v. *Young*, 12 Bush 337), but section 68 has changed that rule. Defendant, however, claims that the statute does not aply to rabid dogs. This seems to be the view of the Michigan court (*Elliott* v. *Herz*, 29 Mich. 202), in which decision Justice Cooley says: "The injury from the bite of a rabid dog must be classed with those from inevitable accident, which the law always leaves to rest where they chance to fall, because, as no one was in fault, there is no basis for an assessment of damages against any one." A New York decision, *Van Etten* v. *Noyes*, 112 N. Y. S. 888, cites this case and upholds this rule, but the weight of authority is that such a statute imposes absolute liability on the owner of the dog

The defendant is willing to assume liability for the dog when he is in his least dangerous state, but is trying to except any liability for him when he is in his most dangerous state. He is trying to defeat the very purpose for which such statutes were enacted. This purpose, as voiced in a decision handed down by the Massachusetts court, in *Blair* v. *Forehand*, 100 Mass. 136, is to eradicate such evils as "sudden assaults upon persons . . . distressing evils from canine madness, and other injuries occasioned by dogs."

This point has never been directly up before the Kentucky Court, and there is no authority in point in this state, but there need be no confusion on the question. The language of our statute is clear and explicit. It simply states that the owner is liable for "all damage done by such dog." In plain langauge it excepts liability in two cases only, when the injured party is on the owner's premises at night or when he is doing some unlawful act in the day time.

The court stated that the clarity of the statute prevented any assumption that the condition of the dog would take it out of he

statute, and that it could not, without invading the province of the legislature, allow such an exception to be written into the statute.

—E. B. C.

ARREST—OFFICER CANNOT ARREST ON MERE SUSPICION.—Defendant was convicted for unlawfully transporting intoxicating liquors. The facts show that a town marshal, learning that defendant had gone to the country for some whiskey, without procuring a warrant, went out and met defendant with the intention of arresting him. When the officer undertook to stop the horse, it became frightened and threw defendant's buggy over an embankment, causing an exposure of the liquor, for which defendant was arrested and charged with unlawfully transporting. Defendant appealed on the ground that an officer cannot make an arrest on mere suspicion, without a warrant. Decision reversed. *Catching* v. *Commonwealth*, 204 Ky. 439.

The Kentucky Criminal Code, section 36, says: "A peace officer may make an arrest without a warrant when a public offense is committed in his presence or when he has reasonable grounds for believing that the person arrested has committed a felony."

A peace officer may arrest any person whom he, upon reasonable grounds, believes has committed a felony, although it afterwards appears that no felony was actually perpetrated. Numerous decisions uphold this practice. *Leger* v. *Warren*, 51 L. R. A. (note) 203; *Cunningham* v. *Baker*, 104 Ala. 160, 16 So. 68; *Cook* v. *Hastings*, 150 Mich. 289, 114 N. W. 71; *Grau* v. *Forge*, 183 Ky. 521, 209 S. W. 369; *Lewis* v. *Commonwealth*, 197 Ky. 449, 247 S. W. 749.

The case turns on the question of what are reasonable grounds for believing that a felony has been committed In *Rowland* v. *Commonwealth*, 202 Ky. 92, 259 S. W. 33, the court held that the officers properly seized a car without a warrant for arrest of defendant, after they had turned a spotlight on the car, exposing to view one keg of liquor. Also in *Campbell* v. *Commonwealth*, 203 Ky. 151, 261 S. W. 1107, the bulkiness of women's apparel, a wet spot, and admission in inquiry that they had liquor, was held to be reasonable grounds for arrest without a warrant.

Forcible arrest, without warrant, on suspicion that defendant was transporting liquor, was held unlawful in *United States* v. *Snyder*, 278 Federal 650. An arrest by an officer without a warrant is not justified by the fact that the officer had information leading him to believe that an offense was being committed. *Hughes* v. *State*, 145 Tenn. 544, 238 S. W. 588. A peace officer is not authorized to arrest, on the mere authority of a telegram, a person who is not shown to be guilty of a felony. *Glazer* v. *Hubbard*, 102 Ky. 68, 42 S. W. 1114. When an officer has reasonable grounds for believing that a person has committed a felony, he may arrest without a warrant and take possession of the unlawful things on the person arrested, but he has

no lawful right to search on suspicion. *Youman* v. *Commonwealth*, 189 Ky. 152.

The test, relating to an officer having reasonable grounds for believing that a felony has been committed, is whether the facts or circumstances are such as would actuate a man of ordinary reason and prudence in the officer's situation, acting in good faith in the discharge of the officer's duties. *Bushardt* v. *United Inv. Co.*, 121 S. C. 324, 113 S. E. 637; *Grau* v. *Forge*, 183 Ky. 521, 209 S. W. 369.

Whether an officer has reasonable grounds for believing that a felony has been committed, so as to be entitled to make an arrest without a warrant, is often a question of fact, and when the facts are mixed, it is the duty of the court to submit the question to the jury. *Commonwealth* v. *Bollinger*, 198 Ky. 646, 249 S. W. 786; *Klotz* v. *Cook*, 184 Ky. 735, 212 S. W. 917; *Miles* v. *Brown*, 143 Ky. 537, 136 S. W. 1001.

In deciding the present case, the court held that an officer cannot arrest on mere suspicion, without knowledge of facts. —W. F. S.

ARREST—CRIMINAL LAW—PERSONS HAVING WHISKEY IN AUTOMOBILE PROPERLY ARRESTED WITHOHT SEARCH WARRANT—ADMISSIBILITY OF EVIDENCE.—The sheriff was informed by telephone that a strange car, curtained and covered with mud, was standing on a lane four miles from town. Immediately the sheriff and a deputy went to the spot where he found it, and on approaching it, the defendant from the inside opened the door exposing to the view of the sheriff kegs of liquor and releasing the fumes of moonshine. Thereupon the officer placed the occupants of the car under arrest. Held, arrest was proper. *Ferrell* v. *Commonwealth*, 204 Ky. 548.

Now the defendant claims that the evidence obtained against him was incompetent because he was improperly arrested without a search warrant. In *Rowland* v. *Commonwealth*, 295 S. W. 33, this court held that officers who arrested defendant after throwing a spotlight on defendant's car exposing to their view kegs of liquor, were justified in doing so without a search warrant. But in *Helton* v. *Com.*, 195 Ky. 678, it was held that an officer could not, without warrant, force defendant to uncover a quart of liquor which he was carrying wrapped up in an apron. Evidence obtained by this arrest was held incompetent as it was discovered by an illegal search. The officer did not know what it was until after his search. In *Commonwealth* v. *Warner and Honer*, 198 Ky. 784, defendants raced thru town in their car, disobeying the sheriff's order to stop, but finally had to stop on account of a barricade erected in the road pursuant to an order of the sheriff telephoned ahead. When the sheriff came up he smelled whiskey and saw several bottles lying around near the car. He saw further that the occupants of the car were drinking and had passed whiskey around to the bystanders. The court held that he arrested them properly without a warrant.

The rule laid down by these cases seems to be that when the object of the search is in plain sight of the officer, so that any reasonable man could have seen the liquor and smelled the fumes, then no search warrant is necessary, and all evidence obtained by a search is competent. Here the defendant opened the door and exposed the liquor so that the officer saw it and smelled it. He had all the evidence at a glance. But if the defendant had not opened the door, the sheriff would not have been justified in searching the car without a warrant.

The decision of the court that this was a legal search and that the evidence is competent falls right in line with the hereinbefore cited cases, and all the authority in this state. —E. B. C.

COERCION OF WIFE BY HUSBAND—NO PRESUMPTION OF COERCION IF WIFE COMMITTED CRIME CONJOINTLY WITH, OR IN PRESENCE OF, HUSBAND. —Appellant was convicted of unlawful possession of intoxicating liquors. The prosecuting witness stated that he stopped at appellant's home to get a drink of whiskey. Appellant stated that she did not have any, but as he started out of the door the appellant's husband called him back. He then saw a half gallon jar on the table and poured out two drinks. Appellant said the whiskey was not hers, but on cross-examination she was asked whose whiskey it was, and said, "It was mine." Judgment affirmed. Held, the whiskey being her property, she was guilty of the charge, regardless of the fact that the sale was made in the presence of her husband. *Bevins* v. *Commonwealth*, 204 Ky. 444.

It was a rule of the common law that where a crime, with some exceptions, was committed by a married woman, conjointly with, or in the presence of her husband, *prima facie* she was not criminally liable, as it was presumed that she acted in obedience to his commands or under his coercion. In the case of *Commonwealth* v. *Neal*, 10 Mass. 152, this rule was strictly applied, and in *Commonwealth* v. *Burke*, 11 Gray 437, it was held that a married woman cannot be punished for a sale of intoxicating liquors, either as principal or as agent of her husband, if he is near enough for her to be under his influence and control, even if he is not in the same room with her. But such courts did not hold that a wife is excused from crime when that crime was committed in the absence of her husband. *Commonwealth* v. *Murphy*, 2 Gray 510; *State* v. *Nelson*, 29 Me. 329. Still later cases have held that the presumption of law that the wife committed an offense by the coercion of her husband when he was present, is very slight, and may be rebutted by very slight circumstances. *State* v. *Cleaves*, 59 Me. 298; *Nolan* v. *Traber*, 49 Md. 460; *State* v. *Miller*, 162 Mo. 253.

While it is said that the reason for the common law rule is not quite clear, it is evident that it must have had its foundation in the peculiar relation which existed between husband and wife in the earlier days. Such a rule is explained by the fact that the wife had

no will of her own and her legal existence was merged into that of her husband so that they were termed and regarded as one in law, "the husband being that one." Courts do not now regard the fiction that husband and wife are one because of the many individual rights that have been given the wife. Even courts of equity at an early day had disregarded the fiction that husband and wife were one. *Winebrinner* v. *Weisiger*, 3 T. B. Monroe 32.

Kentucky has entirely disregarded the old rule by the passing of an act on March 15, 1894, which act is now sections 2127 and 2128 of the Kentucky Statutes. Under that act, the husband has no estate or interest in his wife's property. Also, by virtue of that act, the wife may make contracts, sue or be sued, collect her rent, and may sell and dispose of her personal property. *Lane* v. *Bryant*, 100 Ky. 138, was one of the first cases in which the court declined to follow the common law rule. In that case the husband was not liable for slanderous words spoken by his wife, because sections 2127 and 2128 of the Kentucky Statutes had given the wife a legal being, separate and apart from that of her husband. It is conclusive that the one person idea of husband and wife is no longer in effect. *Nagel* v. *Tieperman*, 74 Kan. 32. —A. H. T.

CRIMINAL LAW—BURGLARY STATUTE HELD NOT INVALID AS IMPOSING CRUEL AND INHUMAN PUNISHMENT.—Under section 1159 of the Kentucky Statutes, as amended by chapter 97 of the Acts of 1922, the appellant was convicted of burglary and his punishment fixed at death. Conviction sustained. *Gibson* v. *Commonwealth*, 204 Ky. 748.

This section is as follows: "Every person guilty of burglary shall be punished with death, or confinement in the penitentiary for life, in the discretion of the jury." Appellant insists that the law under which he was convicted and his punishment fixed is unconstitutional because it violates Article 8 of the Federal Constitution; and he further insists that it is unconstitutional because it violates section 17 of the Constitution of Kentucky, which is as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted."

The appellant cannot avail himself of Article 8 of the Federal Constitution. This applies only to acts of Congress and the federal courts, *Barker* v. *People*, 3 Cow. (N. Y.) 686, and does not apply to the states. *O'Neil* v. *Vermont*, 144 U. S. 323.

Punishments are cruel when they involve torture or a lingering death. What punishment is suited to a specified offense must in general be determined by the legislature. At the time of Blackstone one hundred and sixty actions had been declared by acts of Parliament to be felonies without benefit of clergy, and, therefore, punishable with instant death. 4 Bl. 18. All persons guilty of larceny above the value of twelve pence were directed to be hanged. 4 Bl. 237.

In the case of *Cornelison* v. *Commonwealth*, 84 Ky. 583, a fine of one cent and imprisonment for three years for an assault with a cane and a cowhide was not cruel or excessive punishment; nor sentence for a term not exceeding that prescribed by statute was not regarded as cruel nor unusual punishment. *Jackson* v. *U. S.*, 102 Fed. 473; nor a verdict of thirty years' imprisonment was not cruel or unusual punishment where the Code provided that the punishment for burglary of a private residence should be imprisonment in the penitentiary for any term not less than five years. *Handy* v. *State*, 80 S. W. 526 (Tex.).

The court said in *Whitten* v. *State*, 47 Ga. 297: "It would be an interference with matters left by the Constitution to the legislative department of government for us to undertake to weigh the propriety of this or that penalty fixed by the legislature for specific offenses. So long as they do not provide cruel and unusual punishment, such as disgraced the civilization of former ages, and make one shudder with horror to read of them, as drawing, quartering, burning, etc., the Constitution does not put any limit upon legislative discretion."

Burglary is a heinous offense. There is always a possibility that homicide will be the culmination. The sanctity of the home is violated by the intruder. Legislatures and courts guard the home with jealousy equal to that of the trial by jury. The statute was properly sustained. —H. H. G.

DESCENT AND DISTRIBUTION—ADVANCEMENT TO CHILD—Intestate left two sons who qualified as administrators. They filed their final settlement with the county judge showing that they had distributed the estate equally among the distributees, without any consideration of advancements. This suit was brought by the heir of a daughter of the deceased, seeking to surcharge the settlement of the administrators, claiming that each of the other children had received large advancements which should have been charged to them, and that before they received anything further out of the personalty the other distributees should have been made equal to them.

The court held that an advancement to a child does not constitute a debt to the parent and if the advancement is more than the child's part of the estate he cannot be required to bring the excess into a hotchpot, but if advancements, varying in size, have been made to children, those receiving less are entitled to be made equal before any further distribution of the estate is made. *Edwards* v. *Livesay*, 203 Ky. 53.

If a parent allows a child a certain sum for education or necessaries, it is not considered an advancement; but where lands were deeded to sons as gifts they were treated as advancements to them by their father who later died intestate. *Nichols* v. *King*, 24 K. L. R. 124, 68 S. W. 133. A son, having collected a sum due his father, was directed by him to use it in building a house on the son's property.

This was regarded as an advancement. *Blackerby* v. *Holton*, 35 Ky. 520.

If money is given as an advancement, it cannot afterwards be made a debt. *Bobbett* v. *Barlow*, 26 Ky. L. R. 1076, 83 S. W. 145. After settlement of the estate it was discovered that one of the heirs had received advancements in excess of the others. It was held that the excess did not constitute a debt from the heirs to his co-heirs and co-distributees. *Eckler* v. *Galbraith*, 12 Bush 71; *Farley* v. *Stacey*, 177 Ky. 109, 197 S. W. 636.

Some states follow the hotchpot rule, that is, a child who receives an advancement has, at the donor's death intestate, to elect whether he will keep the property and relinquish his distributive share in the donor's estate, or will account to the other distributees for the value of the property and receive his distributive portion. He cannot be required to pay back to the estate any part of the advancement, and if he has received an equal share or more than his share, he can only be excluded from participation in the distribution of the estate. *McCoy* v. *McCoy*, 105 Va. 829, 54 S. W. 995; *Wilson* v. *Wilson*, 18 Ala. 176. An early Kentucky case, in 1833, held that advancements in land or slaves or both should be brought into hotchpot in division of either or both. *Stone's Administrator* v. *Halley*, 31 Ky. 197. But, in 1893, a statute was enacted providing that any personal or real estate or money given by a parent or grandparent to descendant shall be charged to the descendant in the distribution of the undevised estate of the parent; such party shall receive nothing further therefrom until other descendants are made equal with him. Kentucky Statutes, 1407.

Where a father gives to one of his children by deed or will certain property, declaring in the instrument that it is all he intends that child to have of his estate, he does not exclude that child from participation in his undevised estate; the child will be charged with what he has received as advancement and when equalized will receive part of the undevised estate. *Phillips* v. *Phillips*, 93 Ky. 498; *Duff* v. *Duff*, 146 Ky. 201. Three devisees were to receive equal shares in the estate of testator; it was found that the son had received $506 more than his third; he was required to execute a note for that amount to his mother who had received that much less than her third. *Montgomery's Trustees* v. *Brown*, 134 Ky. 592.

The hotchpot rule applies to cases of intestacy only, but there are no decisions handed down in Kentucky directly in point. However, the cases cited above dealing with partial intestacy tend to show that children who have received advancements are required to account for the amount received before they may come in for a division of the undevised estate. —B. K. M.

HOMICIDE—RIGHT TO KILL IN DEFENDING AGAINST ROBBERY DOES NOT END AS SOON AS THERE IS CHANGE OF POSSESSION OF PROPERTY—

ROBBERY, WARRANTING KILLING, NEED NOT BE TAKING PROPERTY DIRECTLY FROM THE PERSON.—The deceased, knowing the appellant had a large sum of money in his trunk, went to the appellant's room to ask for change. While the appellant was making change, the deceased seized the appellant by the throat, took the money from the trunk, and left the room, followed by the appellant, who called for help. Appellant secured a pistol, demanded the money, whereupon the deceasd struck him, and the appellant shot. The lower court convicted him of manslaughter. Reversed. *Flynn* v. *Commonwealth*, 204 Ky. 572.

"If a man attempts to set fire to my dwelling house by surprise, and I can only prevent it by killing him, I may do so; but the reason is because I may and must prevent the felony, and not because if I do not kill him I will lose my property." Clark, Criminal Law, section 65.

Homicide in protection of property, where there is no element of personal danger is not excusable, since the law does not impose the death penalty for any crime affecting property only. *Pierce* v. *Commonwealth*, 115 S. E. 686. In a recent Georgia case it was held that an owner may pursue a robber who has taken his property and may use such force as is necessary to recover the property, but he could not shoot in revenge. *Drew* v. *State*, 136 Ga. 658, 71 S. E. 1108. There are a number of Kentucky cases holding with this case. The owner has no right to shoot to prevent taking away of property unless he has been put in fear of bodily harm to himself or another. *Grigsby* v. *Commonwealth*, 151 Ky. 496, 152 S. W. 580; *Stacey* v. *Commonwealth*, 189 Ky. 402, 225 S. W. 37; *Chapman* v. *Commonwealth*, 12 Ky. Law Rep. 704, 15 S. W. 50.

The upper court based its decision on the earlier Georgia case, which holds that the right of an owner to kill the robber extends to the prevention of his carrying off the property which he has thus gotten from the owner. *Crawford* v. *State*, 90 Ga. 701, 17 S. E. 628. One giving chase to another who has stolen his money is justified in trying to recover his money and may go to the extent of shooting the person who has taken it. *Johnson* v. *State* (Texas), 218 S. W. 496.

To constitute robbery it is not necessary that the taking shall be directly from the person of the owner, but it is sufficient if done in his presence, against his will, by violence or putting him in fear, *Crawford* v. *State*, 90 Ga. 701, 17 S. E. 628.

The upper court follows these decisions and lays down an entirely new rule for Kentucky. The right to kill in defending against robbery does not end as soon as there is such a change of possession of property as will render the crime technically complete, but remains with the owner as long as his property is in his immediate presence, and the killing of the robber will prevent it from being carried away. To constitute robbery, to prevent which killing may be justified, it is not necessary that the taking of the property shall be directly from one's person; it is sufficient if it is taken while in his possession and immediate presence. —B. K. M.

HUSBAND AND WIFE—CONTRACT BY WIFE ALONE TO SELL HER LAND UNENFORCEABLE, THOUGH DIVORCE OBTAINED BEFORE TIME FOR PERFORMANCE.—Plaintiff was a married woman who owned a farm. She was not living with her husband. On March 1, 1923, plaintiff contracted in writing to sell said farm to defendant, one provision being that if plaintiff was not able to convey said farm to defendant within twelve months, the defendant might treat the contract as one of rental. January 19, 1924, a divorce was granted to the husband of plaintiff. Being thus freed of her disability as a married woman, plaintiff tendered the deed to said land to defendant within the twelve months, though defendant had notified plaintiff in writing prior to the decree of divorce that he would not take the land and elected to treat the contract as one of rental only. Plaintiff brought suit for specific performance after the divorce had been handed down. A contract to sell her land by a married woman without her husband joining was void and unenforceable, though she obtained a divorce before date of performance, and she could not obtain specific performance, in view of Kentucky Statutes, sections 506, 2128, there being no mutuality. *Brown* v. *Allen*, 204 Ky. 76.

Among states having statutes on this point similar to the Kentucky Statutes, sections 506, 2128, there is a difference of opinion as to the validity of a married woman's power to make a binding executory agreement to sell her land without her husband joining. Under Rev. St. 1911, section 6864, giving a married woman power to contract with regard to her property, a married woman's contract to convey land is not void for want of power, though her husband is still required to join her in the deed. *Davis* v. *Watson*, 89 Mo. App. 15. A married woman, if living separate and apart from her husband, may sell and convey her real estate without her husband's joining in the contract or conveyance. *Radford* v. *Carlisle*, 13 W. Va. 572. A written contract by a married woman for the sale of her land, unless living separate and apart from her husband, cannot be specifically enforced unless acknowledged and joined by her husband. *Rosenour* v. *Rosenour*, 47 W. Va. 554. Under Burns' Rev. St., 1901, section 6961, a married woman has no power to encumber and convey her lands, except by deed in which her husband joins. Her individual contract to sell and to execute a bond for a deed is void and furnishes no consideration for notes for the purchase money. *Shirk* v. *Stafford*, 31 Ind. App. 246. A contract of a married woman to sell her land is an executory contract, which is void, unless her husband joins in it, a part of its execution involving the making of a conveyance and the deed not being executed. As a contract for the sale of real property is required by Burns' Ann. St. 1908, section 7462, subd. 4, to be in writing the joining of the husband of a married woman in her executory contract to sell her real estate, necessary, under section 7853, to its validity, requires his signing it. *Knepper* v. *Eggiman*, 177 Ind. 56. Under Rev. St., 1911, section 1114, a married woman is held to have no authority

to contract to convey her separate real estate, so that her contract would not be specifically enforced. *Blakely* v. *Kanaman*, 107 Tex. 206.

Kentucky follows the rule upheld by the majority and supported by the better reasoning. A deed of a married woman is invalid where her husband fails to unite with her or where he has not previously made a separate conveyance of his interest to the purchaser. *Syck* v. *Hellier*, 140 Ky. 388; *Bohannon* v. *Travis*, 94 Ky. 59; *Mueller* v. *Ragsdale*, 158 Ky. 142. It is provided in sections 505-507, Kentucky Statutes, how a married woman may convey her real estate, and it has been written by this court in a number of cases following these statutes that the conveyance by a married woman of her real estate, unless her husband is a party to the conveyance or has not theretofore conveyed, is void as to the wife. Where a married woman, by a contract to which her husband is not a party, sells trees growing on her land, the contract is not binding on her unless it contemplates the immediate severance of the trees from the ground. Where it appears that the trees were not to be cut from the land immediately, a written contract by which the wife sells the trees growing on her land, will not be binding on her unless it is executed in the manner provided in sections 505 and 506 of Kentucky Statutes, providing how a married woman may convey her real estate. *Farmers' Bank* v. *Richardson*, 171 Ky. 340, 142 S. W. 608. Since, at the time of the making of the contract which plaintiff now seeks to enforce, she was disqualified by statute to enter into an executory contract for the sale of her lands and was not bound thereby, it follows that the party with whom she contracted was not bound, for it is elementary that if one party is not bound, neither is bound. —L. C.

INJUNCTION—CONTEMPT—PROCEEDINGS FOR VIOLATION OF INJUNCTION UNDER CLAYTON ACT.—The petitioners were striking employes of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and were preceeded against by bill in equity for combining and conspiring to interfere with interstate commerce. After a hearing a preliminary injunction was granted. Subsequently the railway company instituted proceedings charging the petitioners with sundry violations of the injunction. Under section 22 of the Clayton Act, the petitioners applied for a jury trial, but the District Court denied the application and proceeded without a jury.

Section 22 of the Clayton Act provides that the "trial may be by the court, or upon demand of the accused by a jury." The question presented is whether Congress may require a trial by jury upon the demand of the accused in an independent proceeding at law for a criminal contempt. Such a requirement was held valid. *Michaelson, et al.* v. *U. S., ex rel.* 45 Sup. Ct. Rep. 18.

Contempt proceedings have their origin in the common law. "Contempt has relation solely to an offense against the court itself, its dig-

nity and authority." *Drody* v. *District Court of Polk County*, 102 N. W. (Ia.) 115.

The power to punish for contempt exists in all courts independently of the statute, *Clark* v. *People*, 12 Am. Dec. 177; *Shiff* v. *State*, 2 Iowa 350, except inferior courts that have no power to punish for contempt save that granted by statute. *State* v. *Galloway*, 5 Cold. (Tenn.) 326; *Rutherford* v. *Holmes*, 66 N. Y. 368. The power to punish for contempt may be limited or regulated by statute. *People* v. *Wilson*, 64 Ill. 195. From these and a large number of other decisions it can be seen with little difficulty that in the absence of statute contempt proceedings are governed by the court; that the legislature or Congress may grant power to inferior courts to punish for contempt; or that they may limit the power of superior as well as inferior courts in this matter.

Another important point of contention in the case under consideration relates to the construction to be placed on the words "the trial may be by the court, or upon the demand of the accused, by a jury." Is this merely permissive or is it mandatory? In *Supervisors* v. *U. S.*, 4 Wall 435, where a statute provided that the board of supervisors "may, if deemed advisable, levy a special tax," for a payment of a fine against the county, the court ruled that though this was permissive in form, it was in fact mandatory and further said, "In all cases it is held that the intent of the legislature, which is the test, was not to devolve a mere direction, but to impose a positive and absolute duty." In *Rex* v. *Regina*, 2 Salk. 609, the court said, "When a statute directs the doing of a thing for the sake of justice or the public good the word 'may' is the same as the word 'shall.'" —H. H. G.

INSANE PERSON—ADJUDICATION OF INSANITY ONLY PRIMA FACIE EVIDENCE OF THAT CONDITION AT SUBSEQUENT TIME.—On June 6, 1919, F. was judicially declared insane. He was confined in an asylum for two months and then released as of sound mind by the superintendent of the asylum. F. has been in active management of his affairs since that time. On August 4, 1921, he executed a mortgage deed of his property to W, the latter agreeing to reconvey the property to F. if a debt of $1,000.00 were paid by January 1, 1922. On October 4, 1921 F. was judicially declared of sound mind. W. seeks to enforce the deed on F.'s failure to pay the debt. F. defends on the ground that the deed was invalid because of its being executed at a time when he was insane. Defense held insufficient. *Fugate* v. *Walker*, 204 Ky. 768.

The question in this case is whether by the adjudication of F. as insane the court, on the evidence presented, could have found him insane at the time of the making of the deed.

Generally, an adjudication of insanity is admissible as evidence at a later time, although not conclusive. Ordinarily it substitutes for the general presumption of sanity, a presumption of insanity, and ac-

cordingly the party's subsequent civil acts are *prima facie* invalid. This presumption is rebuttable at common law and the strength of such presumption is lessened in proportion to the remoteness of the adjudication. *Hale* v. *Harris*, 134 N. W. (Mich.) 1111; *Huffaker* v. *Brammer*, 193 Ky. 267; *Clark* v. *Trail*, 1 Metc. 35.

In some states, by force of statute, the finding of insanity is conclusive as to the existence of insanity during the continuance of the adjudication. *Cockrill* v. *Cockrill*, 79 Fed. (Mo.) 143; *Carter* v. *Beckwith*, 28 N. E. (N. Y.) 582; *Knox* v. *Haug*, 50 N. W. (Minn.) 934.

Kentucky follows the general rule, the courts of this state holding that prior adjudication of insanity is only *prima facie* evidence of that condition existing at the time of the execution of a subsequent conveyance. *Rath* v. *Smith*, 180 Ky. 326; *Wathen* v. *Skaggs*, 161 Ky. 600; *Johnson* v. *Mitchell*, 146 Ky. 382.

In the present case the evidence as to the insanity of F. was only *prima facie*, and from the facts that were produced to rebut the presumption of insanity the court properly reached the conclusion that F.'s defense was unsupportable. The facts show that F. was confined in the asylum for only two months; that he transacted business for a long time afterwards and was adjudicated sane a short time after the deed in question was executed. Facts of similar nature have been held sufficient to rebut a presumption of insanity. *Miller* v. *Rutledge*, 82 Va. 863, 1 S. E. 202; *Jones* v. *Schaffner*, 188 N. W. (Ia.) 787; *Eagle* v. *Peterson*, 206 S. W. (Ark.) 55; *Witty* v. *State*, 153 S. W. (Tex.) 1146

—M. F.

MASTER AND SERVANT—COURT MAY REVIEW DECISION OF SINGLE MEMBER OF COMPENSATION BOARD.—While in the employment of appellant company appellee was injured. He had not yet accepted the provisions of the compensation act, under which the company was operating, but later signed his agreement thereto and was paid a weekly sum by the company's insurance carrier for nine months, when it discontinued such payments. Appellee then filed claim for compensation with the compensation board. Upon hearing before a single member of the board, his application was denied, solely because appellee had not accepted the provisions of the act at the time of the injury. Within twenty days he filed his action in the circuit court for review of the board's order, and the court set aside the order and allowed the claim. Appellant contends that there can be no appeal to the courts for a review of the award, unless within seven days thereafter application is made for review by the entire board. The decision of the circuit court was affirmed. *Junior Oil Co.* v. *Byrd*, 204 Ky. 375.

Up to the present time there appears to have been no case decided in Kentucky which involved the question whether an employe working under the compensation act is required to ask for a review by the full board after his claim for compensation has been heard by a single

member of the board, before he can appeal to the court for review of the award. Failure of such a case to have arisen in this state is due probably to two reasons: (1) An employe, after having received an award by one member of the board will, in the ordinary case, ask for a rehearing by the full board; (2) the provision in the Workmen's Compensation Act of Kentucky regarding rehearing by the board before an appeal to court is permissible, differs from that of other states in that by provisions of other jurisdictions such procedure is compulsory, while in Kentucky the statute is so worded as not to make a review by the board of its award necessary before there can be an appeal. *Klemer* v. *District Court*, 155 N. W. 1057; *Union Sanitary Mfg. Co.* v. *Davis*, 114 N. E. 872. The case of *Carroll* v. *Industrial Commission*, 69 Colo. 473, 195 Pac. 1097, clearly indicates that by provision of the Colorado act, rehearing by the board is necessary before review by the court. That case decided that "under a provision there shall be a rehearing by the commission before a review by the court where, after the first petition, the order denying compensation was opened and further taken, after which another adverse holding was entered."

An observation of the statutes of this state, however, indicates plainly that Kentucky does not follow the rule that obtains in other jurisdictions regarding appeal to the court of an award by the board.

Section 4933, Kentucky Statutes, provides that an application may be heard and determined by the board or any of its members.

Section 4934 provides: "If an application for review is made to the board within seven days from the date of the award, the full board, if the first hearing was not held before the full board, shall review the evidence, or, if deemed advisable, as soon as practicable, hear the parties at issue," etc.

Section 4935 provides: "An award or order of the board as provided in section 4933, if application for review be not filed as therein provided, or an order or award of the board upon review as provided in section 4934, shall be binding . . . as to all questions of fact, but either party may, within twenty days after the rendition of such award, . . . by petition appeal to the circuit court that would have jurisdiction," etc.

In none of these sections is there an express provision or intimation that a rehearing by the board is necessary before there can be a review of the award by the court. On the contrary, section 4933 plainly declares that there can be a hearing of the application by the board *or any of its members;* and section 4935 recognizes an award or order made under either sections 4933 or 4934, the latter being the provision regarding rehearing by the full board.

The Court of Appeals correctly construed the provisions of the Kentucky Statutes by determining, in the case at hand, that the review by the full board was unnecessary for appeal to the court. —M. F.

TIME OF ESSENCE OF OIL LEASE—ACTION TO QUIET TITLE TO LAND.—On February 15, 1923, plaintiff obtained from one Bryant an oil and gas lease on eighty-two and one-half acres of land in Warren county, the lease providing that a well should be commenced by April 16, 1923, and the lease should terminate unless the lessee should pay the lessor the sum of eighty-two dollars for every three months the commencement of a well was delayed. Plaintiff contracted with Lafferty, a well driller, to drill a well on the land. Lafferty installed his drilling apparatus and drilled a hole to a depth of six feet. This operation is known as a "spud in." No further progress in the drilling of the well can be made until casings are furnished. At this time plaintiff was called out of town and did not return for six months, and during this interval paid no rentals to the lessor, who thereupon executed another lease to defendant. Counsel for plaintiff contend that the provision as to a commencement of a well had been complied with by the digging of the "spud in." Judgment for defendant. *Flanigan* v. *Stern*, 204 Ky. 814.

In ordinary contracts the rule is well established that courts of equity as a general rule do not regard time of the essence of the contract. *Vance* v. *Newman*, 72 Arkansas 359; *Falls* v. *Carpenter*, 21 North Carolina 237; *Tyler* v. *Onzts*, 93 Kentucky 331. These cases show that courts of equity abhor all forfeitures and will not enforce them unless necessary to carry out the intention of the parties. On the other hand, it is generally the law both in the United States and in England that time can be made of the essence of the contract by the stipulation of the parties, and such a provision will be enforced even by the equity courts unless there is conduct amounting to a waiver. *Jones* v. *Robbins*, 29 Maine 351; *Sowles* v. *Hall*, 62 Vt. 247; *Falls* v. *Carpenter*, 21 N. C. 237. In this situation the parties have by express stipulation made time an essential part of their agreement and should the courts fail to give effect to such a provision it would amount to a judicial execution of a contract for the parties. But in oil and gas leases, owing to the nature of these minerals, the courts generally construe the lease in the light most favorable to the lessor, and practically all courts hold that in these leases time is of the essence of the contract, and that it is the duty of the lessee to begin his operations within the time specified in the lease and to promote it with reasonable diligence. Thornton on Oil and Gas 23; *Edwards* v. *Iola Oil & Gas Company*, 65 Kansas 362; *American Window Glass Co.* v. *Williams*, 30 Indiana 685; *Bell* v. *Kilburn*, 192 Ky. 809; *Jenkins* v. *Williams*, 191 Ky. 165; *Niles v. Meade*, 189 Ky. 243. The object of the rule is to promote development and prevent delay and unproductiveness, and this is regarded as the real intent of the lessor even if there are no express words of forfeiture. An opposite holding would deprive the lessor of valuable royalties and grant to the lessee the use of land at a mere nominal rental. —J. H.

WILLS—TEST IN DETERMINING "TESTAMENTARY CAPACITY."—By his will testator, a physician, devised property to relatives, friends and charities. He was nearly eighty years old when he made the will and died two years later. His only child contested the will on the ground of mental incapacity, relying on the following facts to show such incapacity: Testator's belief that the negro was a soulless brute; that the Catholic church would destroy the republic; that all tobacco poolers should receive the same price for their tobacco; that the germ theory of disease was false; and the fact that testator's resorting to osteopathy the last two years of his life, although he was a general practitioner. Testator was of high temper, strong prejudices, and had an inclination to debate. All the witnesses, however, admited that he was a good business man, knew what property he had and understood how to make trades. The court upheld a peremptory instruction that the will be sustained, deciding that such evidence was irrelevant to show testamentary capacity. *Newman* v. *Dixon Bank & Trust Co., Exor., et al.*, 205 Ky. 31.

The test in determining "testamentary capacity," while being discusesd and defined by the authorities in varied language, is in effect the same in the numerous jurisdictions and has been well expressed by Gardner in his treatise on "Wills," p. 87, as follows: "A testator has a sound mind for testamentary purposes only when he can understand and carry in mind, in a general way, the nature and situation of his property and his relations to the persons around him. He must understand the act which he is doing, the disposition which he wishes to make of his property, and the relation in which he stands to the objects of his bounty and to those who ought to be in his mind on the occasion of making his will." This rule for determining capacity obtanis in Kentucky. *Newcomb's Exor.* v. *Newcomb*, 96 Ky. 120; *King* v. *King* (Ky.) 42 S. W. 347; *Dunaway* v. *Smoot* (Ky.) 67 S. W. 62.

in the case under consideration testator's eccentricities denote racial and religious projudices and personal opinions on the theory of medicine, all guided by a high temper and a turn for argument. Such peculiarities have been declared by the settled weight of the law to be insufficient evidence to invalidate a will unless it is shown that these singularities have had something to do with the disposition of testator's property. Gardner on Wills, p. 100: "Perverse opinions and unreasonable prejudices do not constitute moral depravity." 33 N. Y. 619 4 Grat. (Va.) 106; *Turner* v. *Hand*, Fed, Cas. No. 14,257 (3 Wall. Jr. 88); *Williams' Exor.* v. *Williams*, 23 S. W. 789, 15 Ky. L. R. 432.

There was nothing in the will as drawn up by the present testator to indicate that his opinions and prejudices had influenced him in the making of his testamentary paper In fact, his will was commended by the court as comparing favorably in point of clearness with the average will prepared by members of the legal profession.

Furthermore, even though these opinions would have played a part in the provisions made in the will by the testator, the court would not appear to err in declaring the instrument valid, for opinions on racial, religious and medical questions are almost universally, if not entirely, indulged in by the people of today. Although the testator could not have been commended for indulging in such prejudices and thereby aligning himself with the great masses who still persist in assailing the bidding that each should love his fellow-man, he must be considered as one element in a world which is still far from that point when racial and religious prejudice will be so condemned that but to exercise such will be deemed a violation of sound mental action.

The court was correct both as to principle and authority in admitting the will. 69 Ga. 82; 10 S. W. (Ky.) 373. —M. F.