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The American Law Institute's Restatement of the Law of Torts with Annotations to the Kentucky Decisions

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**THE AMERICAN LAW INSTITUTE'S RESTATEMENT OF
THE LAW OF TORTS WITH ANNOTATIONS TO
THE KENTUCKY DECISIONS***

By ANDREW J. RUSSELL**

Chapter V.

**CONSENT TO INTENTIONAL INVASIONS OF INTERESTS
OF PERSONALITY.**

Section 66. The consent to an intentional invasion of one's interest of personality which prevents liability must be

(a) an actual or apparent assent to the particular invasion suffered

(b) given

(i) to the person invading the interest.

(ii) by one who is capable of giving an effective consent thereto, and whose assent has neither been procured by such duress as makes it inoperative as a consent nor given under a mistake as to the validity of an asserted legal authority.

Comment:

The word "assent" is used to describe an actual or apparent willingness to suffer a particular invasion. The word "consent" is used as indicating an assent given under such conditions as make it operative to prevent liability.

Annotation:

The Kentucky cases on consent seem to be very scarce.

Section 67. Consent may be given:

*Note.—This is the third installment prepared by the author and published in the Kentucky Law Journal. Others will follow in subsequent editions of this Journal.

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- (a) by words or conduct or both which are intended to express assent to the particular invasion and are so understood by the person invading the interest, or
- (b) by words or conduct or both which, while not intended to express assent, would be understood by a reasonable man and are understood by the person invading the interest as so intended.

Illustrations:

(a) A goes to a dentist who takes an X-ray of his teeth. The X-ray shows pyorrhœac pockets at the roots of two of the teeth. The dentist advises A to have the two teeth extracted and sends him to B, who specializes in extracting teeth. By mistake, the dentist's assistant gives A an X-ray photograph of C's teeth, which A gives to B, telling him to extract the teeth indicated therein. B does so. B is not liable to A.

(b) A's right wisdom tooth has a small abscess at its root. He goes to B, who specializes in extracting teeth, and, by a slip of the tongue, tells him that he wishes to have his right eye tooth removed. B administers gas and extracts the eye tooth. B is not liable to A.

(c) A desires to have a decayed wisdom tooth extracted. He goes to B, a dentist, and by a slip of the tongue tells him that he wishes B to extract his right eye tooth, which he describes as badly decayed. B administers gas to A and, though on examination he discovers that the eye tooth shows no signs of decay and that the wisdom tooth is decayed, extracts the eye tooth. B is liable to A.

(d) A proposes to kiss B. B neither resists nor protests by word or gesture. A kisses B. B has given A reason to believe that she has consented. A is not liable to B.

(e) A is injured in a railway accident. B, a surgeon, who is also a passenger, paints a cut received by A with a painful disinfectant. A, though conscious, does not object or resist. B is not liable to A.

(f) A says to B: "I am going to knock you down," and raises his hand to strike. B stands his ground, makes no protest and does not attempt to defend himself. A knocks B down. A is liable to B.

(g) A, a member of a football team, tackles B, a player on

the opposing side. A's conduct is within the rules of the game. A is not liable to B.

(h) A, a member of a football team, tackles B, an opposing player, while he, A, is "offside." The tackle is made with no greater violence than would be permissible by the rules and usages of football were he "onside." A has not subjected B to a violence greater than, or different from, that permitted by the rules, although he is guilty of a breach of a rule. A is not liable to B.

(i) A, while tackling B, deliberately knees him. A is liable to B, whether the tackle was or was not otherwise within the rules and usages of football.

Annotation:

In an action against defendant for performing an operation on plaintiff negligently and without her consent, the court reversed a judgment in favor of the plaintiff with directions to instruct the jury on the question of consent as follows: "If the defendant understood and had reasonable ground to understand, from the words or conduct of the plaintiff, that she was willing for the operation to be performed while she was under the anesthetic if upon his examination of her he found it necessary, and upon the examination he found the operation to be necessary and he so performed it, then he had the right to perform the operation as by her consent. Reasonable grounds are such grounds as would warrant a man of ordinary prudence to so understand under the circumstances." *Van Meter v. Crews* (1912), 149 Ky. 335, 148 S. W. 40.

Section 68. The assent must be given by the person whose interest is invaded or by one having power to give consent for him.

Illustration:

(a) A goes to a hospital to be operated upon for appendicitis. He is taken to the operating room. By a mistake of the hospital force, B, the surgeon who is to operate upon him, is given the record of C instead of the record of A. C's record calls for an operation upon a tumor in his back. Misled by this error, B makes an incision in A's back before the error is discovered. B is liable to A.

Annotation:

No Kentucky authorities.

Section 69. The assent must be given to the person who invades the interest.

Annotation:

No Kentucky authorities.

Section 70. (1) To be consent the assent must be to the invasion and not merely to the conduct which causes it.

(2) If the conduct is such that a reasonable man would know (a) that it amounts to an invasion, or (b) that the invasion would necessarily result from it, assent to the conduct is apparent assent to the invasion and, if so understood by the person inflicting it, is consent.

Illustrations:

(a) A is going to a fancy dress ball. He permits B to stain his face with walnut juice. B assumes that A knows that walnut juice produces a lasting stain. Though this is a matter of common knowledge, A is in fact ignorant of it. B is not liable to A.

(b) A takes liberties with B's person. B submits thereto in the mistaken belief that A is her husband. B's submission is not consent and A is liable to B if A knows, or has reason to know, of B's mistake, or has impersonated B's husband.

(c) A, a physician, induces B to consent to an operation upon her sexual organs. A violates B, who submits not realizing that A is having intercourse with her, but believing that his act is part of the operation. A is liable to B.

(d) A assents to B's touching him with a piece of metal which is heavily charged with electricity. B knows that it is so charged and that A is ignorant thereof. A sustains a severe and painful shock. B is liable to A.

(e) A, knowing that his wife is alive, goes through a bigamous form of marriage with B. A and B live together as man and wife. A is liable to B.

(f) A, a physician, called to attend B in childbirth, takes C, a layman, with him. B believing, as C knows, that he is a physician, permits him to attend her during her confinement. C, under A's direction, holds B's hands. C is liable to B.

(g) A, a physician, induces B to unnecessarily expose her

person by telling her that this is necessary for a thorough diagnosis and assists her in taking off her clothing. A is liable to B.

Annotation:

No Kentucky authorities.

Section 71. (1) To be consent the assent must be to an invasion substantially the same as that which is inflicted.

Illustrations:

(a) A consents to have his eyes examined by B, an oculist. B intentionally makes an incision in A's eye, which is not a part of the examination. B is liable to A.

(b) A, a surgeon, advises B that it is necessary to have a part of his shin bone removed because of its diseased condition. B submits to anesthesia for that purpose. During the course of the operation A discovers that it is not necessary to remove the bone and that a curettage is all that is necessary. A performs the curettage. A is not liable to B.

(c) A goes to a hospital for observation. His attending physician, B, recommends an operation. A consents to be operated upon by C, but by C only. A is taken into the operating room and put under anesthetics. C is suddenly called away and is unable to perform the operation, which is performed by D, a surgeon of equal ability to C. D knows all the circumstances. The operation is successful. D is liable to A.

Annotation:

No Kentucky authorities.

(2) If one whose interest of personality is invaded under an asserted legal authority, submits to the invasion under a mistake, whether of law or fact, as to its validity, his submission is not a consent to the invasion.

Illustration:

(d) A exhibits to B a paper purporting to be a warrant for B's arrest, and says: "You are under arrest." B, believing it to be a valid warrant, submits to arrest and permits A to handcuff him. The warrant is invalid. A's submission is not a consent.

Annotation:

No Kentucky decisions.

Section 72. Assent to an invasion substantially the same as that inflicted is consent and prevents liability for the invasion of any interest of personality, other than the interest in freedom from bodily harm, although it is given under a mistake as to any collateral matter, induced by the fraudulent misrepresentations of the person inflicting it or otherwise known to him.

Illustration:

(a) A, a surgeon, induces B to submit to a treatment of his eye by false representations that the treatment will cure his vision. A's sole purpose is to obtain a fee. The treatment involves a trifling touching of the eye, but does no substantial harm. A is not liable to B.

Annotation:

No Kentucky authorities.

Section 73. (1) An assent to an invasion of an interest of personality is not operative as a consent if it is procured by duress.

(2) The duress which renders an assent inoperative as consent may be by imprisonment of or threats to immediately imprison the other or a member of his immediate family, or the application of physical force or threats thereof to the person of the other or a member of his immediate family.

(3) The imprisonment or violence must be imposed, applied or threatened for the purpose of overcoming the other's will and coercing him into assenting to the invasion and must have caused the other to assent thereto.

No decision has held that duress, other than that stated in Section 73(2) renders assent to an invasion of an interest of personality inoperative. This section states the effect of the decided cases and is not intended to express any opinion as to the advisability or inadvisability of recognizing other forms of duress as rendering consent procured thereby inoperative.

Illustration:

(a) A points a revolver which B believes to be loaded at C, B's child, and threatens to shoot C if B does not submit to degrading familiarities. B submits thereto to save her child. A is liable to B.

Annotation:

No Kentucky authorities.

Section 74. If a person whose interest is invaded is at the time, by reason of his youth or permanently or temporarily defective mental condition, incapable of understanding or appreciating the consequences of the invasion:

(a) his assent to the invasion is not consent thereto;

(b) the consent of a parent, guardian or other person standing in like relation to him, if it is within his power to give it, has the same effect as his own assent would have if he had the capacity to give consent.

Illustrations:

(a) A, a boy of seven, consents to an operation, the serious character of which a child of his age could not appreciate. B, the surgeon performing the operation, is liable to A.

(b) A induces B to drink whiskey in such quantities as to cause him a serious illness. B is already so drunk as to be incapable of appreciating the consequences of what he is doing. A is liable to B.

(c) A, a boy of seven, engages in a friendly fight with his schoolmate, B, in the course of which B slaps A's face. A's guardian has expressly forbidden A to fight with B. B is not liable to A.

(d) A, a girl of fifteen, permits B to kiss her. A's parents have expressly forbidden A to associate with B. B is not liable to A.

(e) A, a boy of seven, is bitten by a mad dog. His guardian, B, takes him to C, a physician, who with B's consent but against the strenuous objections of A, cauterizes the wound. C is not liable to A.

Annotation:

No Kentucky decisions.

Section 75. Except as stated in Section 76, consent prevents an invasion from being actionable although the invasion consented to is a crime.

NOTE: This section states the view of a numerical minority of the American jurisdictions before which the question has been presented for decision. The reasons for preferring the minority view are stated in the Treatise.

Illustrations:

(a) A and B engage in a boxing match which is illegal because the required license has not been obtained. Each is guilty of a breach of the peace, but neither is liable to the other.

(b) A and B after an altercation agree to a fist fight. A gives B a black eye. A is not liable to B.

(c) A and B agree to fight a duel with pistols. A fires at B and his bullet strikes and breaks B's arm. A is not liable to B.

(d) A, at B's solicitation, performs a criminal abortion upon her. The operation is skilfully performed. A is not liable to B.

Annotation:

Where two engage in voluntary mutual combat neither can recover. *McNeil v. Choate* (1923), 197 Ky. 682, 247 S. W. 955; *Lykins v. Hammick* (1911), 144 Ky. 80, 137 S. W. 852.

The defendant induced the plaintiff to submit to an abortion. Defendant was not the physician. There was no recovery. *Goldmanner v. O'Brien* (1896), 98 Ky. 569, 33 S. W. 831, 56 Am. L. R. 378, 36 L. R. A. 715.

Where one sought and brought on the difficulty he could not recover. *Chandler v. Newton* (1892), 13 Ky. L. R. 927.

Section 76. Where it is a crime to inflict a particular invasion of an interest of personality upon a particular class of persons, irrespective of their assent, and the policy of the law is primarily to protect the interests of such a class of persons from their inability to appreciate the consequences of such an invasion and is not solely to protect the interests of the public, the assent of such a person to such an invasion is not consent.

Illustrations:

(a) A statute makes it rape to have intercourse with a

girl under the age of eighteen even with her assent. The principal purpose of the statute is to protect young girls of immature judgment from the consequences of their folly. A is seventeen years of age. B, with A's assent (or at her solicitation), has intercourse with her. A's consent does not prevent B from being liable to her.

(b) A statute makes adultery a crime. The purpose of the statute is to protect the interest of the state in the marriage relation and of the innocent spouse in the marital fidelity of his consort. A commits adultery with B. Neither is liable to the other for the contacts inseparable from their crime.

Annotation:

There are no authorities in civil cases in this jurisdiction. But see the following criminal cases:

A female under 16 years of age is incapable of giving consent to either intercourse or attempted intercourse. *Nider v. Commonwealth* (1910), 140 Ky. 684, 131 S. W. 1024, Ann. Cas. 1913, E. 1246.

An idiot is incapable of consenting to intercourse. *Jones v. Commonwealth* (1876), 9 Ky. Opin. 204.

In an indictment for carnally knowing a girl under 16 years of age it is not necessary to allege her lack of consent. *Morgan v. Commonwealth* (1928), 222 Ky. 742, 2 S. W. (2d) 370.

Consent of the female is no defense to an indictment for incest. *Burdue v. Commonwealth* (1911), 144 Ky. 428, 138 S. W. 296.

Section 77. An invasion of an interest of personality of another who has not consented thereto does not create liability, if:

- (a) the other is at the time physically or otherwise incapable of giving consent or his consent or the consent of one having power to consent for him for any other reason cannot be obtained, and
- (b) an emergency has arisen which makes it actually or apparently necessary to invade his interest of personality before there is an opportunity to obtain his consent, and
- (c) the invasion is, or is reasonably believed by the actor to be, so manifestly to the other's advantage that a reasonable man would give his consent to it if he had the opportunity to do so, and

- (d) the actor neither knows nor has reason to know that the other would not give his consent were there an opportunity to ask it.

Illustrations:

(a) A is delirious and in his delirium threatens to throw himself from the window or otherwise commit suicide. B locks the door and windows to prevent him from carrying out his delirious purpose. B is not liable to A.

(b) A in delirium attempts to do violence to himself. B, his attendant, binds his hands and feet to prevent his doing so. B is not liable to A.

(c) A pushes B, a blind man, out of the path of an approaching automobile, throwing him to the ground. A is not liable to B.

(d) A is run over by a railway train and is carried unconscious to a hospital in which B is the resident physician. His foot apparently requires immediate amputation to save his life. B amputates his leg before A regains consciousness. B is not liable to A.

(e) A consents to a particular operation and for that purpose places himself in the hands of B, a surgeon, and submits to anesthesia. Upon opening A's body B discovers conditions which make it necessary to extend the operation or to perform a different operation from that consented to. The conditions apparently require the new or extended operation to save A's life or to accomplish the cure desired by him, and its postponement would involve pain and distress to A out of proportion to the risk of the new operation. A reasonable man would consent to the operation if he knew of the conditions discovered by B. B performs the operation. B is not liable to A.

(f) If, in addition to the facts supposed in the previous illustration (e), B knows that A would not consent to the new or extended operation, B is liable to A.

Annotation:

No Kentucky authorities.

TOPIC B. DEFENSE OF THIRD PERSONS*

Section 95. The intentional invasion of any of another's interests of personality by means not intended or likely to cause death or serious bodily injury, when inflicted for the purpose of preventing an invasion of any such interest of a third person, is privileged if

- (a) the third person is privileged, or the actor, because of a reasonable mistake of fact, believes him to be privileged to inflict in his own defense a like invasion of the other's interest of personality, and
- (b) the actor's intervention is necessary, or the actor, because of a reasonable mistake of fact, believes it to be necessary, to protect the third person, and
- (c) the third person is:
 - (i) a member of the actor's immediate family or household, or
 - (ii) a person whom the actor is under a legal duty to protect, or
 - (iii) a person whom the actor reasonably believes to require his protection.

Illustrations:

(a) A, seeing B apparently about to subject A's daughter C to insulting familiarities, is privileged to use any reasonable means to prevent B from doing so.

(b) A sees B about to strike his son C. B is in fact privileged to do so to defend himself against an attack made upon him by C. A, who has just come upon the scene, has no reason to believe that his son is the aggressor. A is privileged to use reasonable force to prevent B from striking C.

Special Note: There is a conflict of authority upon the principles stated in Clause (a) of this Section. The view stated therein is preferred to the view that the actor who intervenes to

*Note.—This section follows the question of self-defense in the restatement. The convenience occasioned by the length of the sections involved is the reason for moving this section forward.

protect a third person puts himself in the place of the third person and acts in the vicarious exercise of his privilege of self-defense and so is privileged only to the same extent as the third party. Under the latter view the actor stands, as it were, in the shoes of the third party and takes the risk that he for any reason may have no privilege to defend himself even though the actor reasonably believes in the existence of facts which if true would make the third party privileged to do so. The actor's mistaken belief that self-defense is necessary is sufficient, if induced by a reasonable mistake of fact, to give him the privilege to defend himself; and there is no reason to put the risk of reasonable error upon the actor because he is acting for the protection of the limited class of third persons for whose protection he is entitled to intervene rather than for his own protection. In both situations the test of the existence of the privilege of self-defense should be either objective or subjective—its existence should depend upon the actual situation or upon what the actor reasonably believes to be the situation. It should not be objective in the one and subjective in the other.

Annotation:

Accord with illustration (a) *Givens v. Berkley* (1900), 108 Ky. 236, 56 S. W. 158; *Graus v. Weller* (1872), 4 Ky. Op. 535; *Shields v. Neal* (1914), 158 Ky. 695, 166 S. W. 211.

There seems to be some conflict in Kentucky on illustration (b). See *Brown v. Bowen* (1904), 26 Ky. L. R. 291, holding that the law court should have instructed the jury "That the other defendants had a right to do for their father what he had a right to do for his own self-defense." (The father was in the combat and the defendant's sons came to his aid.) The court stated further that the sons' right of self-defense was dependent upon his father having the same right. But see *Downs v. Jackson* (Ky. 1910), 128 S. W. 339. The court sent the case back for a new trial with directions to give the following instructions: "If you believe from the evidence that at the time the defendant assaulted and beat the plaintiff the defendant in good faith believed, and had reasonable ground to believe that either his son Roy, or Joe, was then and there in danger of bodily harm about to be inflicted upon him by the plaintiff, and the defendant used no more force than was necessary, or offered to him in the exercise of a reasonable judgment to be necessary, to protect either of his said sons from injury at the hands of the plaintiff you will find for the defendant."

Illustration:

(c) A, who is ignorant that his son B is rehearsing for a play, enters the room in which the rehearsal is taking place and sees C pointing a revolver at B and announcing his intention to shoot B. A knocks C down. A is not liable to C, although C's actions were merely part of the play and the revolver was, as B knew, unloaded.

Special Note: Here, as in Clause (a), there is a conflict of decision. The view here stated is adopted for substantially the same reason which is stated as requiring the adoption of the view stated in Clause (a).

Annotation:

No Kentucky authorities.

Comment to Clause (c):

The actor may intervene to protect a third person if the conditions stated in Clauses (a and b) exist *and the third party is (i) a member of the actor's immediate family or household, or (ii) a person whom the actor is under a legal duty to protect, or (iii) a person whom the actor reasonably believes to require his protection.*

Special Note: The privilege to intervene to protect third persons from invasions of their interests of personality which involve no danger of death or serious injury was originally held to exist only where the actor and the third person were members of the same family or household, including in the latter terms master and domestic servants. In the earliest cases the privilege is said to be based upon the husband's or master's interest in the services of his wife or servant, and so was analogous to the privilege of an owner to protect his property from injury. But the privilege was soon extended to cases in which the actor had no semblance of property interest in the person whom he protected, as in the case of a wife or servant going to the protection of a husband or master. Where such relationship existed the cases seem to go further than to permit intervention to protect a member of the family or household from injury. They seem to be based upon the feudal concept that the head of the household and his family and servants were one group who, as

such, were not only entitled but were even bound to assist one another in any difficulty, whether it threatened injury or not.

The restriction of the privilege to intervene on behalf of third persons to those who are members of the actor's family or household, founded, as it is, upon conditions long since past, should not be rigidly insisted upon. Indeed, such a restriction is inconsistent with the duties which the law imposes upon persons standing in many relations to others and which require them to protect such others from the invasion of their rights of personality. Obviously it is impossible that liability should be imposed as a penalty for doing that which there is a legal duty to do. It would be an absurdity to hold the actor liable to another to whom he owed a duty of protection if he failed to perform that duty and at the same time to hold him liable to any third person whose interests he invaded in the performance of that duty.

But even though there is no relation which imposes a legal duty to act for the protection of another, the restriction of the privilege to intervene for the protection of third persons, even from harm less than death or serious injury, to members of the same family or household is opposed to the settled usages of modern society. There are many situations where one person so far comes under another's protection that the other is universally recognized as being under a moral and social, though not a legal, duty to protect him or her. Not only would any man in such a situation feel it obligatory upon him to act for the protection of such a person but his failure to do so would be regarded by the community as socially disgraceful. The force of such moral and social duties is recognized in that branch of the law of Torts which determines the conditions under which the publication of defamatory matter is privileged. And it would seem that there is equal reason to recognize the force of such duties in creating a privilege to intervene for the protection of one whom the actor, in accordance with the general opinion of society, regards as requiring his protection and that here as in the privilege to publish defamation, the fact that the third person asks assistance should create a privilege under circumstances which might not otherwise justify the actor in regarding such person as requiring protection. The more precise definition of the situations in which a reasonable man would

regard third persons as requiring his protection, must be left to the good sense and discretion of the courts before whom cases of this sort may come in the future.

Illustrations:

(d) A intervenes to prevent B from striking his son, C. C was in fact the aggressor and as such was not entitled to use force to prevent the self-defensive touching by B. A's act is excused unless he knew or should have known that C was the aggressor.

(e) A is the conductor of a railroad train in which B and C are passengers. D and E, who are also passengers, become disorderly. D attempts to kiss B and E attempts to knock C down. A is privileged to apply any reasonable force to D and E which does not threaten death or serious injury to them and which is necessary to protect B and C.

(f) A takes his wife, B, and her friend, Miss C, to the theatre. On their return, D attempts to take liberties with B, and E attempts to take liberties with C. A knocks them both down with his cane, inflicting painful but not serious injuries upon them. A is not liable to either D or E.

(g) A sees B, while drunk, attempt to put his arms around C, a woman who is a stranger to both. A is privileged to use reasonable force to prevent B from carrying out his purpose, if C appeals to him for protection.

Annotation:

See cases cited *supra*, note 15.

Illustrations:

(h) A in joke is about to point an unloaded pistol at B who has no reason to know that it is unloaded. C, B's husband, seizes A and takes the pistol from him. C is not liable to A.

(i) A enters a room where B is lying, desperately ill and takes from a drawer a pistol which B believes to be loaded. A is about to point it at B when C, B's father, who knows that the pistol is unloaded, sees from the next room what A is doing. C shoots A, seriously injuring him. C is not liable to A if he reasonably believed that he could not otherwise prevent A from

pointing the pistol at B and so causing B a fright which might seriously endanger his life.

Annotation:

No Kentucky authorities.

Section 96. The intentional invasion of any of another's interest of personality is privileged when inflicted for the purpose of protecting any third person from death or serious bodily injury if

- (a) the third person is privileged, or the actor, because of a reasonable mistake of fact, believes him to be privileged to inflict in his own defense a like invasion of personality, and
- (b) the actor's intervention is necessary, or the actor, because of a reasonable mistake of facts, believes it to be necessary, to protect the third person from death or serious bodily injury.

Comment:

This Section states only the condition under which the use of force intended or likely to cause death or serious injury to another is privileged for the purpose of defending a third person from bodily harm. The use of such force may be privileged for other purposes. Indeed, it is rare that a situation arises in which the privilege stated in this section is needed. In the majority of cases in which force is intended or likely to cause death or serious injury is applied, the third person's bodily security is imperiled by an act which is actually or apparently not only a crime, but a crime of such a sort that the actor is privileged to kill or inflict serious bodily injury if necessary to prevent its commission.

Illustrations:

(a) A sees B apparently about to intentionally shoot C, a stranger to B. A forcibly disarms B and in so doing injures B's arm. A is not liable to B.

(b) Under circumstances identical with those given in Illustration (a) except that A shoots and kills B, A is not liable

under a "death statute" not only because his act was necessary to protect C's life but also because it was necessary to prevent B from committing what reasonably appeared to A to be murder.

Annotation:

No Kentucky authorities.

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IN MEMORIAM

Judge T. E. King, of Cynthiana, Kentucky, died on the 25th day of July, last. He was serving his second term as Commonwealth's Attorney, of the eighteenth Judicial District. He had served 3 terms as County Judge of Harrison County, Kentucky. Judge King attended the University of Kentucky and read law with Judge W. T. Lafferty, who was the Dean of the College of Law at the time of his death.

Judge King was an able lawyer and possessed a fine law library.