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# Guest Act of 1930 Unconstitutional

Richard C. Stoll
*Fayette Circuit Court*

# NOTES

## GUEST ACT OF 1930 UNCONSTITUTIONAL*

Fayette Circuit Court

MOLLIE GREEN ..... *Plaintiff*

VS. OPINION

CLARENCE WALKER ..... *Defendant*

1. MOTOR VEHICLES.—Guest Act of 1930 is unconstitutional.
2. CONSTITUTIONAL LAW.—Section 241 and Section 54 of the Constitution construed.

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The question submitted in this action involves the constitutionality of Chapter 85 of the Acts of 1930, which was approved March 21, 1930, and will be found on Page 253 of the Acts.

That act, including its title, is as follows:

"AN ACT releasing owners of motor vehicles from responsibility for injuries to passengers therein. Be it enacted by the General Assembly of the Commonwealth of Kentuky: First: No person transported by the owner or operator of a motor vehicle, as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for any injuries received, death, or any loss sustained, in case of accident, unless such accident shall have resulted from an intentional act on the part of said owner or operator."

Section 241 of the Constitution of Kentucky says, in part: "Whenever the death of a person shall result from injury inflicted by negligence or wrongful act, then, in every case, damages may be recovered for such death from the corporation or person so causing the same."

This Section was evidently inserted in the Constitution because of the possible uncertainty of the common law and the general statutes, and to relieve the uncertainty in the law as to the person who had the right to institute an action for death caused by the negligence or wrongful act of another.

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*This is the first of a series of certain of Judge Richard C. Stoll's opinions rendered while Judge of the Fayette Circuit Court. In many instances they discuss the constitutionality of statutes and questions of law not as yet passed upon by the Court of Appeals of Kentucky. The Kentucky Law Journal is indebted to Mr. Gayle Mohney who has assisted in selecting and editing them. The opinion in the case of *Green* v. *Walker*, holding the Guest Act passed by the 1930 Legislature to be unconstitutional, is an excellent one with which to begin the series.

Under the common law, no recovery could be had for death, and a full discussion of the common law will be found in an opinion of this Court in the case of *Ballard* v. *Coe,* which opinion is referred to and made a part of this opinion, and the clerk will copy it and attach it hereto as a part hereof.

It will be noticed that the Constitution gives a right of action when the death results from the negligence or wrongful act of another party, whereas the act in question says that no right of action shall accrue unless the accident results from the intentional act of the owner or operator of the motor vehicle.

It is a universal rule that where the constitutionality of a statute is assailed the Court should adopt such a construction, if possible, without doing violence to its language as will cause the act to square with the constitution, and an act should be held constitutional if it can be done by any legitimate rules of construction, but Courts cannot give a forced construction to make it constitutional—6 R. C. L., Sec. 77, and the cases therein cited. This is so because the act has been enacted by a coordinate branch of government—the Legislature—and was approved or permitted to become a law by the Governor who represents the Executive Department of the government, and so the Courts are reluctant to say that each of two coordinate branches of the government have done that which the Constitution forbids them to do.

As illustrating this, the Supreme Court of the United States, since the adoption of the Constitution, has only declared 43 or 44 acts of Congress unconstitutional, out of the great mass of laws which have been enacted. The Court must keep these principles in mind when it considers the constitutionality of the act in question.

One of the questions which must be considered is whether an intentional act is a negligent act. Negligence is the failure to discharge a duty. When there is no duty, there can be no negligence—*C. N. O. & T. P. Railway Co.* v. *Harrod's Admr.,* 132 Ky. 452; *Helm* v. *C. N. O. & T. P. Ry. Co.,* 156 Ky. 240. "Negligence is the antithesis of duty. Where there is no duty there can be no negligence." *Thomas* v. *Cincinnati Ry. Co.,* 127 Ky. 163, *Franklin* v. *Tracy,* 117 Ky. 274. "The doctrine as to actionable negligence is that it must be a failure to discharge some duty devolved on the railroad company to the individual

entitled to the right and not for failure or duty to others than himself." *Brown's Admr.* v. *L. & N.,* 97 Ky. 236.

If the act could then be construed to mean that one owes no duty of any kind to a guest, except to refrain from intentionally injuring him, then, it might be argued that the principles announced in the foregoing cases might apply, but I do not think the act can be so construed.

It is the duty of a person or a railroad company not to kill another by negligence, but at common law there could be no recovery for death, but merely because there could be no recovery did not relieve a person of the duty of not killing another through negligence—so I do not think the act can be so construed.

In *K. & T. Railway Company* v. *Minton,* 167 Ky. 516, the Court quotes with approval Sherman & Redfield on Negligence, Sixth Edition, Section 1-(a), where it is said: "Negligence in law in its widest aspect, having relation to the non-fulfillment of duties, involves the presentation of the entire body of substantive law, excepting only wrongs unintentionally inflicted . . . but the term 'negligence' as used in this work and as uniformly used by courts and text writers, where actionable negligence is intended, is meant the action of tort for injury *unintentionally* inflicted on another, in his person or estate, by the failure to perform a legal duty owing him."

In *Schulte* v. *L. & N. Railway Co.,* 128 Ky. 627, the Court says: "Negligence generally speaking, whether it be ordinary or gross, is merely the omission to perform a duty, although there may be instances where gross negligence is of an affirmative character and amounts to an intentional wrong or a reckless disregard of the rights of others."

In *L. & P. Canal Co.* v. *Murphy,* 9 Bush 525, it is said: "Willful negligence is equivalent to an intentional wrong." The words "willfully" and intentionally are synonymous, and sometimes "willful negligence" is synonymous with "gross negligence". *Jones* v. *M. & O. Railway Co.,* 127 S. W. 144, *E. T. & T. Co.* v. *Sims,* 99 Ky. 404. But willful negligence is a creature of the statutes, being unknown to the common law, and it means *intentional* negligence.

*C. & O.* v. *Yost,* 16 Ky. L. Rep. 834.

It is very doubtful whether the words "intentional act", as used in the act in question, may be considered as embracing any degree of negligence, but for the sake of this opinion the Court will assume, but not decide, that the words "intentional act" mean gross negligence. The question then arises—can the Legislature limit the word "negligence" to a particular degree of negligence? The word "negligence", at common law, means every degree of negligence; it is inclusive, and means everything from the failure to exercise slight care up to the failure to exercise the utmost care. There are no words limiting the meaning of the word "negligence" in the Constitution, and so the word must be given its ordinary meaning and the Legislature has no power to narrow the meaning of this word and make it apply only to gross negligence, for, if it could, the Legislature could, by a simple act, amend the Constitution, which it cannot do.

An intentional act, to be actionable, must be a wrongful act, and if it is not wrongful it cannot be actionable.

In the case of *Howard's Admr.* v. *Hunter,* 126 Ky. 685, the Court says: "It was the manifest intention of the constitutional provision (ref. to Section 241) to allow an action to be maintained whenever the death of a person was caused by the negligent or wrongful act of another, and it is not within the power of the Legislature to deny this right of action." The Section is as comprehensive as language can make it. The words "negligent" and "wrongful act" are sufficiently broad to embrace every degree of tort that can be committed against the person. ". . . A wrongful act may be criminal, willful, wanton, or reckless. In short, every injury inflicted upon the person without legal right or excuse is a wrongful act without reference to the relation existing between the perpetrator and his victim." See also *Randolph's Admr.* v. *Snyder,* 139 Ky. 159; *Britton's Admr.* v. *Samuels,* 143 Ky. 129.

The act in question takes away the right to recover for death resulting from the negligence or wrongful act, and so the Court is compelled to hold that the act, insofar as it takes away the right of action for death, is unconstitutional. It has been suggested, however, that even though the act is unconstitutional, insofar as it takes away the right of action for death, yet it is constitutional insofar as it applies to injuries.

The Courts have gone a long way in eliminating portions of acts as unconstitutional, and in sustaining the remainder of the acts. Perhaps the latest case is that of *State Board of Election Commissioners* v. *Coleman,* 235 Ky. 24. In that case the Court had before it the constitutionality of the election law of 1930. Section 2 of the act fills almost one printed page of the Acts. At the end of the second sentence in the act, which provides for the depositing of the ballots in the box, appears this language, after a semicolon: "Provided that the failure of the voter to detach the secondary stub shall not invalidate his ballot". The Court held that this language was unconstitutional, but sustained the constitutionality of the remaining portion of section 2, and the Court said: "That it is competent to declare certain parts of an act unconstitutional, without affecting the remainder of it, is no longer an open question, when the discarded, invalid portion would leave the act in such form and shape as to carry out its central idea and purpose, and it can be reasonably presumed that the Legislature would have enacted it with the invalid portion omitted". See *Neutzel, Clerk, Etc.,* v. *Williams,* 191 Ky. 351; *State Insurance Board* v. *Green,* 185 Ky. 190; *Commonwealth* v. *Hatfield Coal Co.,* 186 Ky. 411, and the cases cited therein; also the text in 36 Cyc. 976, Section 3, and in 6 R. C. L. Section 121.

Assuming, but not deciding, that the word "death" can be eliminated, is the remainder of the act constitutional? Section 54 of the Constitution says "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death or for injuries to persons or property".

In the case of *State Journal Company* v. *Workmen's Compensation Board,* 161 Ky. 562, the Court had before it the question of the constitutionality of the first Workmen's Compensation act. In that case it was contended that the act was unconstitutional because it violated Section 54 of the Constitution. The Court said: "Under this section the compensation of the injured man is limited to the amount specified in the schedule of the act. This constitutes a limitation upon the amount of his recovery under Section 54 of the Constitution, providing that the Legislature 'shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property'. But we think it is within the power and

right of an employee to waive this limit of recovery for injury, by contract, if such contract is freely and voluntarily made.

"There may never have been a word or a syllable between the employer and the employee in regard to a contract for employment to labor, yet the act provides that such contract shall be conclusively presumed to have been made between the employer and employee, if the employee continues to work for the employer after the employer has posted notices in some conspicuous places about his place of business, to the effect that he has paid his premiums into the fund and accepted the provisions of the act.

"We will go a little further and examine the provisions of Section 32 of this act. Suppose the employee, desiring to rely upon the causes of action given him by the Constitution and laws of this State, does not accept the so-called benefits of this act, then, in that event, under Section 32 of this act, the employee, prior to receiving an injury, is compelled to give notice to his employer and to the board that he will not accept the provisions of this act. This notice must be served as provided by the Civil Code for serving notices.

"So, if, after this notice has been served, the employee should be injured or killed while in the service of the employer, he or his personal representative may sue his employer to recover damages, then his right to recover is barred by the provisions of this act, if his injury was caused by or contributed to by the negligence of any other employee of said employer, or if the injury was due to any of the ordinary hazards or risks of the employment, or if due to any defect in the tools, machinery, appliances, instrumentality or place of work, if the defect was known or could have been discovered by the employer by the exercise of ordinary care in time to have prevented the injury, nor in any event if the negligence of the injured employee contributed to such injuries.

"Now, when his right to recover is restricted by such qualifications and conditions as these, we think these qualifications and conditions constitute, within the meaning of Section 54 of the Constitution, not only a limitation upon the amount to be recovered, but practically destroy his right to recovery."

It will be noticed that the Court held that the act violated Section 54 of the Constitution, not only because it is a limitation

on the right to recover for injuries, but practically destroys the right to recover. In the act in question a recovery is denied, no matter what the negligence, unless the injury was intentionally caused. In other words, the act not only limits the recovery but destroys the right to recover, and if a right to recover is destroyed it certainly constitutes a limitation on the amount that can be recovered, for it says you can recover nothing.

The Court is aware that since the introduction of automobiles many actions have been instituted by guests against the owner of the motor vehicle, and it seems to be a harsh rule that if a person asks another to ride, or if a person asks the owner of the automobile for a ride, in the event of an accident or injury the owner is liable to a suit by the guest, and the Legislature evidently sought to remedy this ever-growing litigation.

But whatever may have been the reason for the enactment of the law, a Court cannot declare an act valid if it is contrary to the Constitution. However reluctant the Court is to declare an act of the Legislature unconstitutional, yet a Court must never hesitate to do so, when, in its opinion, it is so.

Chapter 85 of the Acts of 1930 is unconstitutional in its entirety, as violative of Sections 54 and 241 of the Constitution of Kentucky.

Counsel will prepare an order and the clerk will make this opinion a part of the record.

RICHARD C. STOLL.

Judge.