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# Constitutional Law--Elections--Voting Machines

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failed to do so in the instant case. Where the very clause creating the estate contains words providing for termination of the estate in the event of remarriage, an intent to devise an estate less than a fee simple seems evident, and the principal case appears to be of this type. This question has been much litigated,<sup>4</sup> and the weight of authority is that a devise to a person so long as he or she remains unmarried, with a limitation over in case of marriage, gives, in the absence of language clearly indicating a contrary intent, a determinable life estate.<sup>5</sup>

STEVE WHITE.

### CONSTITUTIONAL LAW—ELECTIONS—VOTING MACHINES.

The Kentucky legislature passed an act<sup>1</sup> authorizing counties, municipalities, and other voting districts to purchase, rent, or lease voting machines for use in elections. In a suit to test the constitutionality of the act, held unconstitutional as repugnant to sec. 147 of the Kentucky constitution which provides ". . . all elections by the people shall be by secret official ballot . . . marked by each voter in private at the polls and then and there deposited." *Jefferson County v. Jefferson County Fiscal Court*, 273 Ky. 674, 117 S. W. (2) 918 (1938).

The court, after conceding that voting machines may be used when the constitutional provision requires that all elections shall be "by ballot",<sup>2</sup> reasons that this is prevented by the provision that the Kentucky ballot be marked and deposited by the voter. The court thinks that is not the effect of the use of the voting machine. It also bases

1832); *Best v. Best*, 88 Ky. 569, 11 S. W. 600 (1889); *McKensey v. McKensey*, 16 K. L. R. 474, 28 S. W. 782 (1894); *Morgan v. Christian*, 142 Ky. 14, 133 S. W. 982 (1911); *Mason v. Tuell*, 161 Ky. 392, 170 S. W. 950 (1914).

The cases of *Hinkle v. Hinkle*, 168 Ky. 286, 181 S. W. 1116 (1916), and *Riner v. Fallis*, 176 Ky. 575, 195 S. W. 1102 (1917), seem to be in conflict both with earlier Kentucky decisions, and with the weight of authority.

<sup>4</sup> *Staaak, et al. v. Detterding, et al.*, 182 Ia. 582, 161 N. W. 44 (1917), L. R. A. 1918C, 856; *Fidelity Trust Co. v. Bobloski*, 228 Pa. 52, 76 Atl. 720 (1910), 28 L. R. A. (N. S.), 1093.

<sup>5</sup> *Maddox v. Yoe*, 121 Md. 288, 88 Atl. 225 (1913), Ann. Cas. 1915B, 1235; 1 *Tiffany on Real Property*, p. 79; see cases cited *supra*, note 3 (b).

<sup>1</sup> Kentucky Stat. (Supp., May, 1938), Sec. 1596d-1, et seq.

<sup>2</sup> "All elections shall be by ballot" held to authorize the use of voting machines: *Lynch v. Malley*, 215 Ill. 574, 74 N. E. 732 (1905); *Speckerman v. Goddard*, 182 Ind. 523, 107 N. E. 2 (1905); *U. S. Standard Voting Machine Co. v. Hobson*, 132 Ia. 38, 109 N. W. 458 (1906); *Norris v. Mayor and City Council of Baltimore*, 172 Md. 667, 192 Atl. 531 (1937); *Detroit v. Inspectors of Elections*, 139 Mich. 548, 102 N. W. 1029 (1905); *Elwell v. Comstock*, 99 Minn. 261, 109 N. W. 113 (1906); *State ex rel. Fenner v. Keating*, 53 Mont. 371, 163 Pac. 1156 (1917); *State ex rel. Automatic Registering Machine Co. v. Green*, 121 Ohio St. 301, 168 N. E. 131 (1929); *Of.*, *People v. Wintermute*, 194 N. Y. 99, 86 N. E. 818 (1909); *Re Voting Machine*, 19 R. I. 729, 36 Atl. 716 (1897); *State ex rel. Empire Voting Machine Co. v. Carrol*, 78 Wash. 83, 138 Pac. 306 (1914).

its decision on the fact that the founding fathers intended the use of the paper ballot.

The case which the court cites to sustain its position is *Nicholas v. Minton*,<sup>3</sup> in which the Massachusetts court held a similar act invalid. The constitutional requirements were that officers "shall be chosen by written votes" and that those commissioned to conduct the election shall "sort and count the votes, and form a list of the persons voted for, with the number for each person against his name" and "make a fair record of the same" and "a public declaration thereof."

It is submitted that it is possible to distinguish the two cases because of the difference in the two constitutional provisions. A marked vote is not a written one; a deposited vote is not one to be sorted and counted. There may be sufficient compliance with the Kentucky constitution without a paper ballot which is marked. The same result required by the constitution, a secret ballot, is reached by the use of the machine. The word "marked" is defined by Webster's New International Dictionary as "indicated". The same authority defines "deposited" as "put" or "lay down". When a voter operates a voting machine, he indicates his choice and puts it down on the recording apparatus in much the same manner as if he had marked a ballot and deposited it in a ballot box. Bearing in mind the definitions of the words given and the principle of construction which the court recognizes in the case, that language of the constitution which is capable of expansion will be so interpreted and held adaptable to the conditions of present day society,<sup>4</sup> it is submitted that the Kentucky Constitution should be held to authorize the use of voting machines.

JOHN PAUL CURBY, JR.

#### HOMICIDE—AIDING AND ABETTING—MORAL DUTY TO ACT.

Defendant became engaged in a roadside fight with deceased at a dance. W entered the fight to aid defendant. Defendant thereupon withdrew from the fight and ordered the crowd which had gathered to stand back. Deceased died from knife wounds inflicted by W, and the trial court convicted both defendant and W of voluntary manslaughter. Upon appeal the decision of the trial court was affirmed with the following comment: "He (defendant) stood by and looked on and saw his large, strong companion stab (deceased) to death and did nothing to prevent it and commanded the crowd to stand back and nobody bother them, thereby aiding and encouraging W in stabbing (deceased) and deterring bystanders from interfering and preventing W from killing (deceased)." *Wright v. Commonwealth*, 272 Ky. 77 (1938).

This case is illustrative of the extent to which our law has

<sup>3</sup> 196 Mass. 410, 82 N. E. 50 (1907); *Contra*, Opinion of the Justices, 178 Mass. 605, 60 N. E. 129 (1901).

<sup>4</sup> 117 S. W. (2) 918, 920.