1935

Torts--Libel *per se*

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or devise of property to a devisee or legatee, subsequent precatory words will not be construed to show an intent to create a trust, as this would be inconsistent and repugnant to the prior expression of the testator. Bogert, Trusts, p. 50; and Perry, Trusts, Sec. 115. This rule was recognized and followed in two recent Kentucky cases. Gross v. Smart, 189 Ky. 338, 224 S. W. 871 (1920); and Igo v. Irvine, supra. In the latter case the testator devised lands to his son absolutely, and by a subsequent provision, he requested all of his children, if they should die without issue, to will the property received from his estate, to the testator's surviving children or the issue of those dead. This subsequent provision was held insufficient to create a trust, and thus limit the fee simple title previously devised. This rule was also adopted and followed in the case of Hess v. Singler, 114 Mass. 56 (1873).

Therefore in conclusion the writer submits that by virtue of this first provision in the will granting his property to his wife absolutely, the testator created a fee simple interest in the property in his wife, which interest cannot properly be said to be in any way affected or changed by the subsequent use of precatory words in the instrument.

W. R. Jones.

TORTS—LIBEL PER SE.

Conditions obtaining in the late prohibition era gave rise to many a good newspaper yarn. But out of such conditions also flowered many a well founded suit in libel. A typical case is the late one of Courier-Journal Co. v. Noble, 251 Ky. 527 (1933).

The plaintiff, the owner and operator of a rooming house, sued the paper because of a published news dispatch which stated that A was killed "during a liquor raid on the home of Mrs. Lizzie Noble."

The officers had entered Mrs. Noble's home, not for the purpose of searching it for liquor, but for the purpose of arresting some men who had entered it. A trial before a jury resulted in a verdict and judgment of $3,100 for the plaintiff. The defendant appealed on the ground "that an innuendo cannot extend the words beyond their natural import, and that the words, 'during a liquor raid,' do not necessarily mean that the owner of the house raided was an unlawful dealer in whiskey, and that a person may be an unlawful possessor of liquor and still not be 'an unlawful dealer in whiskey.'" Held, the words carried with them the imputation that the plaintiff was violating the Prohibition Act in her home, and, being not only such as to injure her in her reputation and expose her to shame and disgrace, but such as to prejudice her in her business, they are libelous per se, and therefore susceptible to the meaning given them by the innuendo.

The language of the court is confusing. A publication cannot be libelous per se, and yet need an innuendo with which to explain the meaning of the words used. If the words in question are actionable
per se, no innuendo is required. But where the words used are not libelous per se, it is necessary to allege that they were understood in a libelous sense. This is the function of the innuendo. 17 R. C. L. 396, Sec. 150. If, then, as we apprehend, the court meant to say that the innuendo fulfilled any function in this case, such a conclusion must be rejected as wrong.

The decision appears otherwise sound. Thus, before its unfortunate reference to the innuendo, the court states that "while spoken words are slanderous per se only if they impute crime, infectious disease, or unfitness to perform duties of office, or prejudice one in his profession or trade, or tend to disinherit him, written or printed publications which are false and tend to injure one in his reputation or to expose him to public hatred, contempt, scorn, obloquy, or shame, are libelous per se." Ripley v. Lee, 88 Ky. 603, 11 S. W. 713 (1889); Axton-Fisher Tobacco Co. v. Evening Post Co., 169 Ky. 64, 183 S. W. 269 (1916). The court might well have stopped here. For the proper conclusion is that the words were actionable per se, and therefore the innuendo should have been rejected as surplusage. 17 R. C. L. 397, Sec. 151; 37 C. J., Section 332.

The point we have tried to make seems worth stressing when it is remembered that the jury in the principal case assumed a needless burden if it attempted to pass upon the truth of the innuendo, namely, whether the words, "during a liquor raid," meant that the owner of the house raided was an unlawful dealer in whiskey. It was sufficient that the words were false, that they were written, and that they tended to injure the plaintiff in her reputation, or to expose her to public hatred, contempt, scorn, obloquy, or shame. 17 R. C. L. 398, Sec. 152.

Byron Pumphehey.