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Case Comments

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CASE COMMENTS

AUTOMOBILES—LIABILITY FOR INJURY TO GUEST.—An action was brought by a guest for injuries alleged due to the defendant's negligent operation of her automobile. The defendant invited the plaintiff to ride with her to a distant town, and on the return trip the accident occurred. Held, judgment for the plaintiff affirmed; it was proper for the court to instruct the jury that the defendant was under duty to drive at a reasonable rate of speed, considering condition of the road at the time and place of the accident. Lally v. Cochran, 231 Ky. 211, 21 S. W. (2nd) 273.

Where the owner of an automobile invites another to ride with him, the duty of the owner to his guest is to use ordinary care not to increase the danger of the guest or to create any new danger. Beard v. Klusmeier, 158 Ky. 153, 164 S. W. 319. "A person invited to ride in an automobile is a licensee and the duty of the person extending such invitation is to use 'ordinary care' not to increase the danger of the guest or to create a new danger." Berry, on Automobiles. See also Pigeon v. Lane, 80 Conn. 888; Mayberry v. Sivey. 18 Kan. 291; Hemington v. Hemington, 221 Mich. 206, 190 N. W. 633; and Gr. Southern Lumber Co. v. Hamilton, 137 Miss. 55, 101 So. 787.

In Georgia and Massachusetts it has been held that the owner is liable to a guest riding gratuitously only for gross negligence. Massatoletti v. Fitzroy, 223 Mass. 487, 118 N. E. 168; and Epps v. Parish, 26 Ga. App. 299, 116 S. E. 297.

Among the problems arising from such cases as the one at bar is that of the duty owed by the owner or driver of an automobile to a guest at sufferance, or to one whom such driver has consented to carry on request to do so, as contrasted with his duty to a guest of his own invitation.

A person carried for his accommodation is a licensee, to whom the owner owes the duty not to injure wantonly or intentionally. Cridde v. Y. Coal, etc., Co., 206 Ala. 71, 89 So. 285; and Rose v. Squire, (N. J.) 128 Atl. 888 (1926). So we see that the guest is termed a licensee in such cases regardless of his solicitation for the ride, but some jurisdictions make a distinction as to the duty owed by the driver or owner to such licensee. On the other hand the distinction has met considerable opposition, as in Mitchell v. Raymond, 131 Wis. 591, 195 N. W. 855, where the Wisconsin Supreme Court expressly declined "to recognize any such possible distinction as is spoken of in several decisions between the guest who asks for the favor and the guest who is first invited by the host." Also Munson v. Rupker (Ind. App.), 143 N. E. 169, 28 Mich. L. R. 57 (Nov., 1929).

Another question which may arise in cases similar to the one at bar is whether the protection of the court shall be given to the injured
guest where he and the nominal defendant are in accord against the defendant's insurer? It is held that where the plaintiff is a joint adventurer then the defendant is acting as his agent and his negligence is imputed to the plaintiff or the risk is assumed. Krueger v. Krueger, 222 N. W. 784 (Wis.). Along this line of decision the defense of contributory negligence is adopted to defeat claims against insurance companies.

A. J. A.

CORPORATIONS—STOCKHOLDER'S SUIT—RIGHT TO COMPLAIN AS TO ACTS PRIOR TO PURCHASE OF STOCK—Plaintiff purchased stock in the defendant corporation in 1926. He subsequently brought action against the corporation and others, alleging that in 1921 and 1922 a director of C. D. Corporation fraudulently deprived preferred stockholders of large sums of money. Held: As plaintiff did not acquire his preferred stock until year 1926, he could not sue for himself or for those who were preferred stockholders in 1921 and 1922, as he was not a fair representative of the class affected. Neff v. Gas and Elect. Shop, 22 S. W. (2nd) 265, Part 4.

This decision is directly in line with the federal courts on this proposition, as they uniformly hold that a stockholder cannot sue to set aside or enjoin an ultra vires transaction or redress a misappropriation of corporate assets, or to enjoin or obtain release for fraud or negligence on the part of the director or other shareholder, unless he was a stockholder at the time of the transaction complained of or his shares have devolved upon him since by operation of law. Foote v. Cunard Min. Co., 5 McCray 251, 17 Fed. 46; Haines v. Oakland, 104 U. S. 461, 26 U. S. (L. ed.) 827; Dinfell v. Ohio, etc., R. Co., 110 U. S. 209, 28 U. S. (L. ed.) 121; Taylor v. Holmes, 127 U. S. 489, 32 U. S. (L. ed.) 179. The same rule has been asserted in a few states upon the authority of the decisions of the Supreme Court of the United States. Alexander v. Searsey, 8 S. E. (Ga.) 630; Boldenweck v. Bulkin, 90 Pac. (Colo.) 634; Clark v. American Coal Co., 53 N. W. (Iowa) 291; Home Fire Ins. Co. v. Barber, 93 N. W. (Neb.) 1024.

The decisions in the federal courts are not based upon any general principle, but upon Equity Rule 94 (New Equity Rule 27), which was adopted only for purpose of guarding against collusion of parties for the purpose of bringing cases within jurisdiction of federal courts. Merely a rule of practice.

By the weight of authority, in the absence of such a rule of practice, a stockholder is not precluded from suing on behalf of himself and other stockholders by the mere fact that he purchased his shares after the transaction complained of, even though he may have made the purchase for the purpose of acquiring a standing to sue, provided neither he nor his transferror is otherwise estopped. See Ballentine, Private Corporations, pages 624, 625, 629, 630; 7 R. C. L. sec. 294; note vol. 25 Ann. Cas. 1912D at page 1102; Just v. Idaho Canal, etc., Co., 102 Pac. (Idaho) 381; Parsons v. Joseph, 8 So. (Ala) 788; Erny v. G.
W. Schmidt Co., 47 Atl. (Pa.) 877; Appleton v. American Malting Co., 54 Atl. (N. J. Eq.) 375; Chicago v. Camerón, 22 Ill. App. 104. Practically all English courts are in accord with this view. See 21 H. L. R. 197. Machen in his work on the Modern Law of Corporations, sec. 1169, states that “The general rule is that a shareholder is not debarred from suing because he purchased his shares after the transaction complained of, and even for the purpose of qualifying himself to bring the suit.” Stated further, “that the foregoing principles with regard to the law generally are modified as to suits in the federal courts by a rule of practice in equity promulgated by the Supreme Court under statutory authority.”

Causes of action belonging to the corporation increase the value of the corporate estate and must be treated like any other assets, according to Morawetz on Private Corporations (2nd ed.), vol. 1, page 253, and when enforced they inure to the benefit of all the shareholders without distinction. It is plain, therefore, that a shareholder has an interest in all causes of action belonging to the corporation, whether they arose before or after he purchased his shares.

It seems rather unfortunate that the Court of Appeals in the principal case has given its approval to a rule which is clearly in disfavor among a majority of the courts and text-writers. W. B. G.

EVIDENCE—PRELIMINARY QUESTIONS—HOW DECIDED.—The defendant was arrested for operating an automobile in the night time without lights. Upon arrest, the arresting officer noticed several gallons of moonshine whiskey in the car. The defendant was indicted for the illegal possession of intoxicating liquor and at the trial, there having been much conflict and contradiction in the evidence on the question of the operation of the machine without lights, and hence much question of the officer’s right to arrest, the defendant objected to the admission of the testimony of the arresting officer as to the whiskey. Held, that the officer’s evidence relative to seeing the whiskey when he arrested the defendant, should have been admitted, but the jury should have been instructed to acquit the defendant, unless they should, from the evidence, believe that the defendant was operating this automobile without lights turned on. Morris v. Commonwealth, 231 Ky. 838, 22 S. W. (2nd) 295.

The broad general rule that preliminary questions of fact are for the judge is no longer questioned. But when the preliminary question is of such importance that it is equal to and decisive of the main issue, as in the principal case, the authorities are divided. Some courts allow the question of admissibility to go to the jury with instructions to disregard altogether the evidence if it is proved inadmissible. Respublica v. Hevice, 3 Wheeler Cr. Cas. 505 (Pa.); Stowe v. Querner, L. R. 5 Exch. 155; Billings v. Commonwealth, 223 Ky. 381, 3 S. W. (2nd) 770. Other courts hold that in such circumstances the judge should pass upon the preliminary question. Hitchins v. Bardley, L. R. 2, P. and D.
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248; State v. Lee, 127 La. 1077, 54 So. 356; Laird v. State, 184 S. W. 810 (Tex.).

Proponents of the first rule above say the later rule would amount to a practical deprivation of the defendant's rights to a trial by jury. There is some weight to this argument, but it melts away in light of the fact that the ultimate decision rests with the jury, who have the power of disregarding the admitted evidence. Serious objections are pointed out in (40 Harv. L. Rev. 392) in an article by Professor Maguire and Professor Epstein of the Harvard Law School, to allowing the jury to decide all preliminary questions (Wigmore, 2nd Ed., sec. 2550). While the rule in the principal case seems to be unquestionably the law in Kentucky, it is submitted that, in order to avoid these patent dangers, it should be strictly limited and confined to cases (1) where there is only one preliminary question of fact; (2) where such fact is determinative of the case, and (3) where a reasonable man could decide the case either way.

M. P. W.

INFANTS—ESTOPPEL TO DISAFFIRM CONTRACTS.—D purchased an automobile from defendant and defendant took D's old automobile in part payment and his notes payable monthly for the balance. D paid three of the notes but did not pay the last two, whereupon the defendant took the automobile from D. D sued through his next friend for the return of the old car and the amount of the three notes. Defendant contended that since D falsely represented to it that he was twenty-one he should be estopped to disaffirm the contract. Held, the circumstances were not sufficient to bring the case under the rule of estoppel which is applied by the Kentucky courts where infants falsely represent or fraudulently conceal their correct age. Pinnacle Motor Co. v. Daughterty, 231 Ky. 626, 21 S. W. (2nd) 1001.

It is a well recognized rule that a minor who makes a contract may disaffirm it on arriving at the age of majority. No question as to such a disaffirmance can be raised where the other contracting party knew of his minority at the time of the making of the contract. In Kentucky as set forth in the dicta of the instant case it is the rule that a fraudulent misrepresentation or concealment of age which has misled the other party will thereafter estop the infant from avoiding the contract. Damron v. Commonwealth, 110 Ky. 268, 61 S. W. 459; Asher v. Bennett, 143 Ky. 361, 136 S. W. 879; County Board of Education v. Hensley, 147 Ky. 441, 144 S. W. 83. The court, however, will not hold in all cases that, if an infant testified that he was twenty-one, the party who dealt with him by reason of that fact will be protected. The rule properly stated is: "that personal appearance, family surroundings, and business activities coupled with a misrepresentation or fraudulent concealment by the infant leading one who deals with him in good faith and not knowing of his infancy to believe he is of age, will estop him from thereafter maintaining an action to avoid an executed contract." Young v. Daniel, 201 Ky. 65, 255 S. W. 854. Kentucky makes
no distinction between executed and partly executed contracts. Some jurisdictions do. See 14 Kentucky Law Journal 258. The facts of the instant case failed to warrant the application of the above rule. It was, however, expressly stated verbatim in the body of the case. The rule applies equally to false representations and fraudulent concealments. The rule is only an application of the equitable doctrine that he who misleads another will not be allowed to assert the contrary thereby perpetrating a fraud upon him. Such a principle is applied only when necessary to protect a grantee from a fraud. Asher v. Bennett, supra; Bailey v. Barnberger, 11 B. M. (Ky.) 113; Ingram v. Ison, 26 Ky. L. R. 48.

The courts are not agreed upon the principle under discussion, but it seems that the weight of authority is decidedly against the Kentucky rule of estoppel. The weight of authority allows a disaffirmance even though the infant fraudulently misrepresented or concealed his age. Merriam v. Unningham, 11 Cushing (Mass.) 40; Conore v. Birdsall, 1 Johns. (N. Y.) 127; Geer v. Hovey, 1 Root (Conn.) 179 (1790); Utterstrom v. Kidder, 124 Me. 10, 124 A. 725; Greer v. Active Auto. Exch., 99 Conn. 266, 121 A. 888; Godfrey v. Mutual Finance Corp., 242 Mass. 197, 136 N. E. 178.


Some states have enacted statutes providing that infants shall not be allowed to disaffirm contracts which they have induced by a fraudulent misrepresentation or concealment of their age. Dillon v. Burnham, 43 Kan. 77, 22 P. 1016; Prouty v. Edgar, 6 Ia. 353; Lee v. Hibernia Sav. & L. Soc., 177 Cal. 656, 171 P. 677.

It seems to the writer that the Kentucky view is more logical and just than the majority. How can it be said that infants are privileged to practice frauds upon innocent parties with whom they deal? Lord Mansfield in Abbott v. Parsons, 3 Burr. 1794, 97 Eng. Rep. 1103, and Judge Miller in The County Board of Education v. Hensley, supra, stated the strongest argument for the minority rule and against the majority rule when they said: "The privilege of infancy is a shield for the protection of the infant, and not a weapon of attack; nor is it to be used as a means of defrauding others." It seems that this is sounder than the argument in Sims v. Everhardt, supra, where it was said: "An estoppel in pais is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity."

W. C. W.

JUDGMENT—PROPER PARTIES TO ACTION ON ASSIGNMENT OF JUDGMENT.—The assignee of a judgment sued in his own name to recover
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on the same. Held, in an action of this kind by the assignee, who is the real owner of the chose, the assignor must be made a party. Shaw v. MoKnight-Keaton Grocery Co., 231 Ky. 223, 21 S. W. (2nd) 269.

The court in handing down the decision in the present case unquestionably followed the settled Kentucky rule, as shown by several cases directly in point. Elliott v. Waring, 5 T. B. Mon (Ky.) 338, 17 Am. Dec. 69; Allen v. Crockett and Patton, 4 Bibb (Ky.) 240; Young v. Rodes, 5 T. B. Mon. (Ky.) 500; Lytle v. Lytle, 2 Mete. (Ky.) 127. The case of Allen v. Crockett and Patton, supra, decided in 1815, seems to show, however, that section 19 of the Civil Code of Practice is not a formulation of a new rule but merely a restatement of the law as it existed before the code. In that case the court said, "As the obligation was not assignable by law, it is plain that the assignors were necessary parties to a suit brought for the purpose of enforcing its execution. The rule recognized by this decision is not one recently recognized by the court. On the contrary, it is as old as the institution of the Court of Chancery, and the principles upon which it is founded is consonant to the dictates of common sense and coeval with reason itself."

The common law rule based on the doctrine that the assignment of a judgment does not pass a legal title, fully accords with the Kentucky decisions. Sharp v. Moore, 3 N. J. L. 844; Heard v. Turner, 224 Mass. 526, 125 N. E. 596; Adams v. Connelly, 118 Ill. A. 441; Moore v. Ireland, 1 Ind. 531; Wolfe v. Ederlein, 74 Ala. 59, 49 Am. R. 809; Robinson v. Schly, 6 Ga. 515; Sweet Springs Chemical Bank v. Buckley, 68 Mo. A. 327. At the present time, however, the common law rule has been abrogated by statute in almost all of the states, so that by a decided weight of authority the assignee of a judgment can now sue thereon in his own name and without joining that of his assignor. Moore v. Nowell, 94 N. C. 265; Bamberger v. American Surety Company, 48 Misc. 221, 96 N. Y. Supp. 665; Wet in v. Davenport, 11 Iowa 49, 77 Am. Dec. 132; Wallburn v. Chenault, 31 Fla. 45, 12 S. 536; Hamilton v. New Haven, 52 Conn. 208, 73 Atl. 1; Curtin v. Kowalsky, 145 Cal. 431, 78 P. 962. This rule works no hardship against the judgment debtor, since the assignee of such judgment takes it subject to all the defenses which the judgment debtor might have had against the original assignor. Parker v. Reid, 273 P. 334.

It is submitted that the ruling of the present case is wrong on principle since it tends to encumber the record, slow down legal procedure by bringing in third parties, and in case of failure to maintain the action on the judgment, the assignor, who has been made a party to the suit, may be made liable for a portion of the costs. The modern rule allows a more simple and speedy recovery and at the same time allows the judgment debtor the same defenses he would have had as against the original assignor. The remedy is an amendment to the so-called "real party in interest" section of the code, which is certainly misnamed in Kentucky.

E. E. A.
Municipal Corporations—Liability for Injuries to Person Occasioned by a Hole in the Sidewalk.—Plaintiff stepped into what she designated a "rough, rugged hole" in a sidewalk while she was exercising ordinary care for her own safety, with the result that she was painfully injured. She brought an action against the owner of the abutting lot, the tenant of the property, and the oil company which installed and removed the gasoline pump. The court held that since the landlord received no benefit from the pump, and a landlord is not generally liable for the negligence of the tenant in the use of the premises, and the further fact that the property owner is ordinarily under no duty to repair a sidewalk adjoining his property, that plaintiff could not recover. *J. E. M. Milling Company v. Gaines*, 231 Ky. 779, 22 S. W. (2nd) 274.

To recover on account of a defective sidewalk these elemental facts must be established: First, that while using the sidewalk properly the injury was suffered by reason of the defect; second, that the sidewalk was not reasonably safe on account of the defect, with specifications; third, that the defect had existed a sufficient length of time for the municipal corporation, in the exercise of a reasonable care, to have known of its existence in time to have repaired it had reasonable diligence been exercised. *Barnes v. St. Joseph*, 151 Mo. App. 523, 528, 132 S. W. 318.

Ordinarily, a property owner is under no duty to repair a sidewalk adjoining his property. *Newport v. Schmit*, 231 S. W. 54. So also the occupant is not liable for defects in a sidewalk which he did not create nor for failure to repair a sidewalk if he did not cause the necessity thereof. *City of Newport v. Schmit*, 231 S. W. 54, 191 Ky. 585. The fact that the defect or obstruction in a street is the result of an act of a third person, other than employees of the municipality, does not relieve the municipality from liability therefor. *Colburn v. Wilmington*, 4 Penn. (Del.) 443, 56 Atl. 605. Where the defect is caused by a third person, the negligence for which the municipality is liable is not the creation of the defect but instead the negligence in failing to remove the defect after actual or constructive notice thereof. *Brown v. Louisville*, 126 N. C. 701, 36 S. E. 166, 78 Am. St. Rep. 677.

Whether the defect in question is of such character that the municipality is negligent in permitting it to continue is always a question for the jury to determine in the light of all the circumstances of the case. *Welsh v. City of Des Moines*, 170 N. W. 369. Ordinarily, the city is not liable for small breaks in the sidewalk as it is not an insurer of the personal safety of everyone who uses its public walks. It owes no duty to keep them in such repair that accident cannot possibly occur. *Gross v. Seattle*, 100 Wash. 542, 171 Pac. 533.

Even where the sidewalk is used for some unlawful purpose or a permit is not obtained, the city is not released from its obligation. *Boyle v. Hazleton*, 171 Pa. 167, 33 Atl. 142. In some states, where the act of changing the sidewalk is entirely proper and but for the negli-
gence of the person making the change no injury could result, the municipality is not liable. *Von Longerke v. N. Y.*, 134 N. Y. S. 332, 837, 150 App. Div. 98, 103.

The duty of the municipality to use ordinary care to keep the streets and sidewalks reasonably safe for the customary uses inures to the benefit of every person lawfully using the streets, *Powers v. Boston*, 154 Mass. 60, 27 N. E. 995, and even a child has a right of action for injury sustained because of a defect in the sidewalk. *Townley v. Huntington*, 68 W. Va. 574, 70 S. E. 368.

The law is fairly well settled that it is the duty of the municipality to exercise reasonable care to keep its sidewalks and footways in a reasonably safe condition for the passage of the public, *Goodwyn v. Shreveport*, 134 La. 820, 64 So. 762, and a pedestrian on a sidewalk within the limits of a municipal corporation has a right to assume that it is safe for travel. *City of Louisville v. Vaughn*, 203 S. W. 546.

**OFFICER—FORCE ALLOWABLE IN RECAPTURING PERSON FOR MISDEMEANOR WHO MERELY FLEES.**—The appellant committed a misdemeanor in the presence of a police officer and then fled. The officer pursued and opened fire on appellant with his gun, and appellant in return fired on the officer, killing him. He was charged with murder. Held, that the officer had the right only to pursue appellant for the purpose of arresting or recapturing him, but that he had no right to shoot at or otherwise imperil the life or limb of appellant, and that if he did so, the latter had the right to defend himself in the exercise of his ordinary right of self-defense. *Anderson v. Commonwealth*, 232 Ky. 159, 22 S. W. (2nd) 599.

Beyond section 43 of the Criminal Code, which provides that no unnecessary violence shall be used, the statute is silent as to the force allowable to an officer making an arrest. Under the Common Law in the case of a misdemeanor, it was not lawful to kill the party accused if he fled from arrest, though he could not otherwise be overtaken, and though there was a warrant for his arrest. 2 Hale Pleas of the Crown, 302. Unless the offender resisted to such an extent as to place the officer in danger of his life or great bodily harm, the latter could not kill him. Human life is too sacred to admit of a more severe rule. *Stevens v. Commonwealth*, 124 Ky. 32. As stated by Brown, J., in *U. S. v. Clark*, 31 Federal 713, "the general rule is well settled by elementary writers upon criminal law, that an officer having custody of a person charged with felony may take his life, if it becomes absolutely necessary to do so to prevent his escape; but he may not do this if he is charged simply with a misdemeanor; the theory of the law being that it is better that a misdemeanor escape than that human life be taken." However, as is suggested in the case of *Head v. Martin*, 55 Ky. 433, the law need not go unenforced—the officer may summon a posse and take the prisoner.
It is also held that an officer cannot kill to prevent the escape of one in custody for a misdemeanor, as this is virtually a rearrest. *Reneau v. State*, 2 Lea, 720; *Head v. Martin*, 85 Ky. 483; *Thomas v. Kinkead*, 55 Ark. 502. The rule is otherwise where the attempted escape is made a felony by statute. *State v. Turlington*, 102 Mo. 642.

A case most directly in point with the instant case was that of *Hardin v. State*, 40 Texas Cr. Reports, 208. It was held that where the accused was not resisting an officer attempting to arrest him for a misdemeanor, but was attempting to escape, the officer had no right to kill him; and if he drew his pistol, and shot at the accused to kill him to prevent his escape, the right of self-defense would be complete.

It is the general rule, therefore, that in misdemeanor cases, where a person sought to be arrested does not assault the officer and forcibly resist the attempt to arrest, but flees, the officer cannot kill him in pursuit, but must rather suffer him to escape. *Clark Crim. Prac.*, p. 52; *Head v. Martin*, 85 Ky. 483; *Thomas v. Kinkead*, 502; *State v. Moore*, 39 Conn. 244. The only recourse left for the officer to effect the arrest of a fleeing misdemeanant is for him to either overtake the offender and use such physical force as is necessary to restrain him or to call a posse to assist him to do so.

**Pleading—Negative Pregnant.**—A borrowed money from the plaintiff and executed therefor his promissory note. *A died and after his death the defendant, his widow and executrix, renewed the note several times. At the last renewal she executed a note which she signed both as Executrix and in her individual capacity. The plaintiff filed suit to recover the amount of this note. In the first paragraph of the defendant's answer, she denied the execution of the renewal note sued on, or that she signed her name thereto as surety "except as and under and by reason of the circumstances and facts hereinafter set out." In subsequent paragraphs she alleged certain facts and circumstances by way of defense. The plaintiff demurred to the first paragraph of the answer. Held, that answer denying execution of the renewal note sued on "except as and under and by reason of the circumstances and facts hereinafter set out," was a negative pregnant, admitting in effect the execution of the note and therefore bad on demurrer. *Citizens National Bank v. Dodson*, 23 S. W. (2nd) 1019.

While the Court holds this to be negative pregnant, it was probably intended to be in the nature of a confession and a voidance, if the entire answer is considered, but the first paragraph containing nothing but the express admission, though in negative form, is worthless. The court cited the case of *Boeckley v. Central Saving Bank & Trust Co.*, 205 Ky. 508; 266 S. W. 15, which is directly in point and in which Chief Justice Sampson laid down *verbatim* the rule of this case, and which is direct authority for holding this type of denial a negative pregnant.

In Stephen on Pleading, 380, it is said: "A negative pregnant is
such a form of negative expression as may imply or carry with it an affirmative." Obviously a traverse concluding with "except as hereinafter stated," falls within the definition. The law refuses the pleading of negative pregnant because "it does inveigle and does not settle" or bring to issue a particular point.—Lord Hobart in State v. Drake, Hob. 295. That ambiguity is the fault with negative pregnant seems to be fundamental. Stephen on Pleading, 419; Thurman v. Wild, 11 A. & E. 453; P. & D. 289; Gwynne v. Burnell, 6 Bing N. C. 530.

The argument has also been advanced that a negative pregnant could not be tolerated in a jurisdiction where pleadings are required to be verified because no one could be convicted of perjury for such a denial, because it is uncertain what he intended to deny. White v. East Side Mill Co., 31 Ore. 107, 158 Pac. 173, 527.

A very small minority of jurisdictions do not recognize the doctrine of such strict and literal construction of pleadings as result in finding negative pregnant. Cooper v. Am. Cent. Ins. Co., 139 Mo. App. 570, 123 S. W. 497; Wynn v. Cory, 43 Mo. 301; and under Code provisions in O'Brien v. Seattle Ice Co., 43 Wash. 217, 86 Pac. 399, where intention to deny is apparent; Clark on Code Pleading, 399. However, see Breckinridge v. Am. Cent. Ins. Co., 37 Mo. 62, and Emory v. Phillips, 22 Mo. 499, two Missouri cases which are decided on grounds of negative pregnant.

Negative pregnant generally arises from a too literal denial of the allegations of the declaration. Clark on Code Pleading, 399; Welch v. Bigger, 24 Idaho 169, 133 Pac. 381; Campbell v. Daniell, 68 Fla. 232, 67 So. 89; Gahren, Dodge & Maltby v. Farmers Bank of Estill County, 156 Ky. 717; 161 S. W. 1127. The denial in the answer in the instant case however, is equally pregnant with the admission of the fact that it purports to deny.

Where it clearly appears from other parts of the answer that allegations technically admitted by negative pregnant, are in fact denied, the answer will be held good. Hershey v. O'Neill, 36 Fed. 168; Kennedy v. Dickie, 27 Mont. 70, 69 Pac. 672. For this reason, as a general denial puts in issue every allegation of the complaint there can be no negative pregnant in such a case. German American Bank v. White, 38 Minn. 471, 38 N. W. 361; Thompson v. Erie R. Co., 45 N. Y. 463. Obviously therefore negatives pregnant have become less frequent under modern Code Pleading in jurisdictions permitting the general traverse. This problem does not arise in Kentucky however, because the general traverse is not allowed. Carroll Civil Code, Sec. 126.

The whole idea back of the negative pregnant doctrine is not in harmony with the spirit of modern Code Pleading, but is a survival of the days when the rules of the contest were more important than judgments on substantive rights. O'Brien v. Seattle Ice Co., supra; Wall v. Buffalo Water Works Co. 18 N. Y. 119; Clark on Code Pleading 399.

In Kentucky the general denial not being permitted, the practice of denying in the words of the complaint has become standard as the
substitute therefor. Under this practice negative pregnant under a strict construction would flourish, but the Courts for expedience are getting away from the old strict construction and taking a more liberal view of pleadings. 

R. M. G.

**Statute of Frauds—Oral Agreement to Devise—Recovery of Value of Services.**—The plaintiff entered into an oral agreement with the testator that the plaintiff would run the testator's show in Mississippi and send all the net proceeds to the testator, who lived in Paducah. The testator was to invest the money in real estate and was to devise the same to the plaintiff. The plaintiff conducted the show for several years according to the agreement, but the testator in his will made other disposition of the property. Held, that the plaintiff is not entitled to real estate, but is entitled to damages to the amount of the value of his services. *Harlambo's Executor v. Christopher*, 231 Ky. 550, 21 S. W. (2nd) 983.

Kentucky Statutes Section 470 provides that no action shall be brought to charge any person upon any contract for the sale of real estate unless the contract or some memorandum or note thereof be in writing and signed by the party to be charged. A parol agreement to devise land has been uniformly held to be within this section of the Statute in this State. *Drake v. Crump*, 185 Ky. 325, 215 S. W. 41; *Bobbitt v. James*, 148 Ky. 244, 146 S. W. 431; *Boone v. Coe*, 153 Ky. 233, 154 S. W. 900, all cited by the Court. See also *Waters v. Cline*, 121 Ky. 611, 85 S. W. 209; *McDaniel v. Hutcherson*, 136 Ky. 412, 124 S. W. 384. *Benge v. Hiatt*, 82 Ky. 666, 56 Am. Rep. 912; Notes to 14 L. R. A. 362.

In Oregon it has been held that an agreement to devise is not an agreement for the sale of land, and therefore not under the rule of the Statute. *Woods v. Dunn*, 81 Ore. 457, 159 Pac. 1153. This is the decided minority view, but is followed in *Brown v. Webster*, 90 Neb. 591, 134 S. W. 155; and *Turnipseed v. Sirrine*, 57 S. C. 559, 35 S. E. 757. In the South Carolina case no real estate was involved, so it is not directly in point. Similarly in Kentucky an agreement to leave a legacy is not within the Statute of Frauds. *Sturgeon's Admr. v. McCorkle*, 163 Ky. 8, 173 S. W. 149; *King v. Hanna*, 48 Ky. 369; *Chitty on Contracts*, 68 note 2.


The promise to pay is implied not only from the performance on the part of the promisee, but also from the benefits which have accrued to the promisor. For this reason, where there has been such performance, but the promisor has received no benefits, the action on a quantum meruit will not lie. *Fabian v. Wasatch Orchard Co.*, 41 Utah 404, 125
It appears from the proof in this case that the promisee deducted his pay from the net earnings of the business before he sent the money to the promisor. This being true it is submitted that the promisee having already received pay for his services cannot recover again on quantum meruit.

R. M. O.

STATUTE OF FRAUDS—NECESSITY OF PLEADING.—Action for specific performance of an alleged contract for the purchase of land. There were two written proposals to purchase put in evidence, but no written acceptance was made to plaintiff on such. Parol evidence was admitted showing acceptance of the second proposal. The question is whether the second proposal constituted an enforceable contract? Held, petition dismissed. Although the Statute of Frauds is not expressly pleaded, it is a rule in this state that a defendant may take advantage of the statute, not only by demurrer to a petition which shows a parol contract, but by a general denial of the contract made in response. Nugent v. Humpich et al., 231 Ky. 122, 21 S. W. (2nd) 153.


On consideration of the question at bar, it is found that although there appear to be many differences in the various jurisdictions as to when the Statute of Frauds must be pleaded in order to be available as a defense, yet there is a decided tendency toward a more lenient requirement.

It is seen that in a great many jurisdictions only a few years past the defense of the statute of frauds was required to be specially pleaded in order to be available. Tolleson v. Henson, 93 So. 458, 207 Ala. 529. The statute could not even be raised by demurrer. However, in other cases we see a getting away from this strict rule, and the defense of the statute is allowed by demurrer where the petition affirmatively shows that the contract sued on is oral. Kinney v. Kinney, 93 S. E. 496, 20 Go. App. 816.

However, there are a few jurisdictions that still require that the statute must be strictly pleaded in order to be available as a defense, as is seen in the more recent cases of Clayton v. Lemen, 233 Ill. 435; and Christopher v. Davis, 284 S. W. 253 (Tex. Civ. App.).

Upon the question of raising the defense of the statute of frauds by a demurrer the general rule and the decided weight of authority may be stated, that when it appears from the declaration, or bill, that
the representations alleged are oral, when by statute of frauds they must be in writing, demurrer will lie. Bank of Comm. & Tr. Co. v. Schooner, 160 N. E. 790 (Mass.); Barnsfield v. Dykes, 26 Fed. (2nd) 696 (Okla.).

As to the possibility of raising the defense of the statute of frauds by general denial of the contract there appears to be no unanimity of decisions, yet the tendency is in the direction of allowing the statute as a defense being raised in this manner. This contention is sustained in the case of Healy v. O'bear, 157 Pac. 570, 29 Cal. App. 696, wherein it was decided that "one seeking the protection of the Statute of Frauds against the enforcement of a contract need not specially insist upon the statute in his pleadings further than to deny the execution of the contract." Also in Stanford v. Sager, 217 S. W. 458, 141 Ark. 458.

A. J. A.

TORTS—PROXIMATE CAUSE—"But For" RULE—Plaintiff was injured in a train wreck which was caused by the train running into the switch which had been opened by would-be robbers. It was contended that defendant railway company was negligent, and the court in its decision sanctioned the following rule: If the injury is the result of concurring causes, one for which the defendant is responsible—the one guilty of the negligence will be held liable for the consequences if the injury could have been reasonably anticipated and the injury would not have happened but for his negligence; that is, if his negligence was the proximate cause. Riley v. The L. & N. Railway Co., 231 Ky. 564, 21 S. W. (2nd) 390.

The rule in the above case raises the question of the "but for" causa sine qua non test of proximate cause. If the following elements are present, negligence on the part of the defendant, accident, or criminal act of another, or act of God together with the fact that they could have been anticipated in the light of the attending circumstances, the courts of this state adopt the "but for" test of proximate cause and consequent liability. City of Louisville v. Bridwell, 150 Ky. 533, 150 S. W. 672; Cohen & Stryck v. Home Telephone Co., 179 Ky. 107, 200 S. W. 344; L. & N. v. O'Brien, 163 Ky. 533, 174 S. W. 31. The rule has a substantial following in other states. Kenney v. Kansas City P. & G. R. Co., 74 Mo. App. 310; Chicago B. & Q. Ry. v. Shaffer, 26 Ill. App. 230; Frederick v. Hale, 42 Mon. 153, 112 P. 70; Brown v. West River Side Coal Co., 143 Iowa 662, 120 N. W. 732; Mo. K. & T. Ry. Co. v. Johnson, 34 Okla. 582, 126 P. 567. The rule is based upon the idea that the act of God, accident, or criminal act was a condition which it was the duty of the defendant to foresee and guard against.

The "but for" requirement is generally one of the elements necessary to make out legal cause, but it is not the only requisite element; it is not per se an all-sufficient element. The fact that the damage would not have happened but for the commission of the defendant's tort does not invariably justify the conclusion that the tort was the
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legal cause of the injury in the legal sense of damages. Jerimiah
Smith, Legal Cause, 25 H. L. R. 103 at 109. If the "but for which"
statement is turned around and put in the negative form it can usually
be applied as a test of what is not the cause of an event; that is, defend-
ant would not be liable if the accident would have happened anyway.
Sowlers v. Moore, 65 Vt. 322, 26 A. 629. Stated affirmatively it is erro-
nese when taken alone. That one event would not have happened
but for the happening of some other event goes somewhat to establish-
ing a relation between the two as to cause and effect, but no rule as
to remoteness can be based on that circumstance alone; for the same
thing may be true as to many other antecedent events. Gilman v.
Noyes, 57 N. H. 627.

TRUSTS—CONTROL OF TRUSTEE'S DISCRETION—The testator, father
of the plaintiff, created a spendthrift trust providing that in case the
beneficiary sold, conveyed, or encumbered his interest in real estate,
it would thereupon vest in his children. The wife of the beneficiary
procured a divorce and judgment for alimony against him, and had an
execution issued in her favor for both temporary and permanent al-
mony. The beneficiary, plaintiff, seeks to enjoin the sheriff from selling
or attempting to sell any of his property. Held, the chancellor may
under the will as well as under his general control of trust estates,
take jurisdiction of the matter and direct the trustee what to do, unless
he is invested with an absolute discretion. Ford v. Ford, 18 S. W.
(2nd) 859.

When the powers of the trustee are discretionary, equity will not
intervene unless the trustee acts in bad faith, or in abuse of his powers,
Woodard v. Dain et al. (Me. 1913), 85 Atl. 660; Baer v. Kahn (Md.
1917), 101 Atl. 596, or unreasonably. Viall v. Rhode Island Hospital
Trust Co., 123 Atl. 570.

But in the principal case there was interference by the court and
no bad faith or unreasonableness on the part of the trustee was shown.
However, here the court seemed to intimate it would not have done so
had the trustee been invested with an "absolute discretion." In Keyser
v. Mitchell, 67 Pa. 473, there is also an indication, a negative inference,
however, of such a rule. So, while the idea is not entirely new, it
would seem the limitations on a trustee are added to by the principal
case and the last mentioned case, so that equity will not interfere if
the trustee acts in good faith, acts reasonably, and has an absolute
discretion.

Altho this is a limitation upon the powers of a discretionary trus-
see, it is submitted that this is a good addition to the rule. It gives
opportunity to the testator to state more carefully the extent of the
power he wishes the trustee to exercise, but at the same time broadens
the testator's power. There are many things that a trustee might do
that a court of equity would say were done by the trustee in good faith
and were reasonable, but which, had the court been exercising its dis-
cretion in the place of the trustee, it would not have done itself. The court could conceivably say, "we think the trustee is acting in good faith and is acting reasonably, but in our judgment is pursuing a wrong policy for the best interests of the beneficiary," if it had such power. But if the testator gives "absolute discretion" to the trustee, as the testator should have the power to do where he has great faith in the judgment of a certain trustee, the trustee’s discretion could be controlled only when he acted in bad faith or unreasonably. If a testator wanted such power given he could so state, but if he wanted more court supervision over the trustee he could omit it, hence the testator's testamentary power is broadened.

M. P. W.

TRUSTS—TERMINATION BY CONSENT OF PARTIES.—R left a will dividing his property in four shares and leaving one share each to his three children and one to the children of a deceased child. One of the children died leaving a will whereby all of his property (personalty) left by R was given to his widow. The other children and the guardian of the minor grandchildren threatened to contest the latter will. A compromise was effected creating a trust. The widow, the cestui que trust, was to get the dividends from the personalty for her life and on her death the corpus of the estate was to go to the other children and minor grandchildren. Later by consent of all of the parties the trust was terminated. Held, the agreement to terminate was valid and proper. Reidlin's Executor v. Cobb, 222 Ky. 654, 1 (2nd) S. W. 1071.

It has long been recognized in Kentucky that the power of revocation is not a necessary incident of a voluntary settlement for the benefit of the settlor for life and such power will not be implied from the absence of an express provision against revocation. Krankel's Ex'rs v. Krankel, 104 Ky. 745; Anderson v. Kemper, 116 Ky. 339, 76 S. W. 122. It is a well recognized rule that "where all the parties interested in a trust fund are sui juris they may consent to a termination of the trust and a distribution of the fund." Anderson v. Williams, 262 Ill. 308, 104 N. E. 659; In re Harrar's Estate, 244 Pa. 542, 91 A. 503. The trust estate must not be subject to any future contingencies and the purposes for which the trust was created must have been substantially fulfilled. Browning v. Fulk, 26 Ky. L. R. 470, 13 S. W. 714; Langley v. Conlan, 212 Mass. 135, 98 N. E. 1064; Brown v. Owsley, 198 Ky. 344, 24 S. W. 889; Miller's Ex'rs v. Miller's Heirs, 172 Ky. 519, 189 S. W. 417; Wood v. Gridley, 217 I1l. App. 579. It is necessary that the beneficiaries be sui juris before they can consent to a termination of the trust. At first blush it would seem that the instant case is wrong. However, the minor grandchildren have a regularly appointed guardian through whom they can consent. The power to consent to the termination of trusts by guardians is to be inferred from Kentucky Statutes, sections 2031, 2032, and 2039. These sections give them the power to sell personalty and to lease real estate but not for a longer term than seven years. Guardians in the manage-
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ment of the ward's estate must act with the same good faith and
discretion that an ordinarily prudent man would exercise in the man-
age of his own affairs. Layne v. Clark, 152 Ky. 310, 153 S. W. 487;
In re Wood's Estate & Guardianship, 159 Cal. 466, 114 P. 992; In re
Stude's Estate, 179 Iowa 785, 162 N. W. 10; Simes v. Ward, 103 A.
(N. H.) 310. The trust res in the case at bar was personality and, since
the guardian has the right to control the personality and the cancel-
ation of the trust was to the ward's interest, no objection can be urged
against the instant case.

The desire of the beneficiaries alone is not sufficient to cause a
termination. The caprice and whim of one only of the interested par-
ties should not prevail. The consent of the trustee and the beneficiaries
is not enough. The law recognizes as interested parties the settlor
and the cestui. The consent of the trustee is not necessary. Fidelity
& Columbia Trust Co., Trustee v. Gwynn, 206 Ky. 823, 268 S. W. 537;
Eakle v. Ingram, 142 Cal. 15, 75 P. 566. The fact that a trust is to run
for the life of the cestui will not prevent the termination by consent
of all those interested which includes the cestui.

The doctrine of the instant case has no application to a case where
there is a reservation of the power to revoke in the settlor. Termina-
tion can in such a case be had only in the manner prescribed.

W. C. W.

Usury—Methods of Avoiding Statute.—In order to procure a loan,
the borrower contracted to pay six per cent interest on the same plus
certain other expenses which the lender had to incur to secure the
loan. The certain other expenses contracted to be paid for included an
attorney's fee for examining the title of the land offered as security
for the loan, the cost of the appraisal of the property and survey, fire
and tornado insurance premiums, the cost of guaranties and compensa-
tion for services incidental to the loan. Held, the agreement not
usurious even though the borrower agreed to pay the lender a
sum
greater than the legal rate of interest. Ashland National Bank v.
Conley, 231 Ky. 844, 22 S. W. (2nd) 270.

The court starts out with the rule of law that "where the borrower
agrees to pay the lender a sum greater than the legal rate of interest,
if the consideration for this agreement is the use of the money loaned,
it constitutes usury." The court seems to evade this rule, however, by
stating that where the consideration is for services or expenses inci-
dental to the procuring of the loan, it is not usury and such agreement
will be enforced. Union Central Life Insurance Company v. Edwards,
70, 11 S. W. (2nd) 985. In Lassman v. Jacobson, 125 Minn. 218, 51
L. R. A. (N. S.) 465, 146 N. W. 350, the rule is stated thus: "Expenses
incident to making the loan and furnishing the lender satisfactory
security for its repayment can in no sense be considered compensation
for the use of the money loaned."
According to the great weight of authority the payment by the borrower of all reasonable expenses incident to the loan and reasonable compensation for services necessitated by such loan, is not usury even though this make the cost of the transaction to the borrower exceed the maximum legal rate. *Iowa Savings and L. Ass'n v. Heidt*, 107 Iowa 297, 43 L. R. A. 639, 70 Am. St. Rep. 197; Southern Bank for Brashears, 12 Ohio Dec. Reprint 578; *Brown v. Robinson*, 224 N. Y. 301, 120 N. E. 694; *Shattuck v. Byford*, 62 Ark. 431, 35 S. W. 1107; *Matthews v. Georgia State Savings Ass'n*, 132 Ark. 219, 200 S. W. 130, 21 A. L. R. 789; *Atlanta Min. & Rolling Mill Company v. Gwyer*, 43 Ga. 9. The services actually rendered the borrower or the expenses incurred in securing the loan must be in good faith and not as a cloak to conceal usury. Excessive interest cannot be hidden under pretended charges for expense of drawing papers, examining security, and the like. *Sanders v. Nicolson*, 101 Ga. 739, 28 S. E. 976; *First National Bank v. Phares*, 174 P. 519; *Kidwell v. White*, 44 App. D. C. 600; *Horgan v. Nesbitt*, 58 Minn. 487.

An occasional case may be found where the strict rule was followed and a different result reached. *Jackson v. May*, 28 Ill. App. 305; *Hine v. Handy*, 1 Johns. Ch. 6.

It is submitted that while the rule of the instant case may prove good public policy in that it makes loans more easy to negotiate, yet it is a question as to whether this doctrine is not a serious inroad on the law of usury, affording to the loan shark an indirect means of exacting an excessive rate of interest in direct contravention to the statute. The rule of the principal case represents the great weight and trend of modern authority.

WILLS—REQUEST.—The testator bequeathed to his wife his estate “to be used for her comfort and for the education of his granddaughter.” In a subsequent clause of his will he labelled these words “a request.” Held, not a mere request, but the creation of a binding trust. *Ogilive et al. v. Bryant et al.*, 21 S. W. (2nd) 433 (Ky.).

The problem raised is whether the use of the word “request” shall supplant the imperative words used by the testator in the preceding paragraph so as to make it read: “I request that you use this property for your own comfort and in educating my granddaughter,” or shall the previous paragraph be held to be the clear expression of the testator’s intention and to be of such an imperative, directing and commanding nature as to explain away the non-imperative word “request?” If the former—then we have the problem of "precatory words."

The word “request” does not naturally impart an obligation. However, the early view was that the use of the word was a soft and courteous means of creating duties enforceable by the courts. *Malm v. Keightley*, 2 Ves. Jr. 333; *Knight v. Knight*, 3 Beav. 148. Since the beginning of the nineteenth century the English courts have held that the natural significance of precatory words is not a trust, but that such
an obligation may be shown by the other portion of the instrument. *Hill v. Hill* (1897) 1 Q. B. 483, at 486. See Bogert on Trusts, p. 47-51. The American Courts have adopted this natural construction of preca-
tory expressions. *In re Pennock's Estate*, 20 Pa. 263; 59 Am. Dec. 718; *Hughes v. Fitzgerald*, 78 Conn. 4, 60 Atl. 694; *McAndy v. McCallum*, 186 Mass. 644, 72 N. E. 75. Thus the modern rule in U. S. and Eng. in order that a trust may arise from the use of preca-
tory words is that the court must be satisfied from the words themselves, taken in con-
nection with all the other terms of the disposition, that the testator's intention to create an express trust was as full, complete, settled and sure as though he had given the property to hold upon a trust declared in the ordinary manner. *Pom. Eq. Jur.*, sec. 1016; *Eaton Equity*, 369.

The Kentucky courts have uniformly held that the use of the words "I request" or the equivalent are insufficient to raise or create a preca-

The only ground on which preca-
tory words can ever be construed to create a trust is that the testator intended them to be mandatory upon the devisee or legatee, that he used the words to express some-
thing different from their natural and ordinary meaning. See Perry on Trusts (7th edition), vol. 1, sec. 112, and following: *Gardner on Wills* at page 478.

The peculiar situation involved in the instant case gave the court the opportunity to dodge the issue as to whether or not there was a preca-
tory trust formed by the delayed or subsequent use of the word "request" in the will, and in its stead to set up the fundamental rule that the intention of the testator prevails at all times—that the tes-
tator's intention here was to create an absolute trust in his wife and not a mere request that she create the trust. If the court had decided this case squarely upon the preca-
tory trust issue then the result would have been different as shown by the foregoing cases and authorities. The court, however, reached a just result in this case, as it was obviously the testator's intention that a trust be formed for the benefit of his granddaughter.

W. B. G.