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Case Comments

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CASE COMMENTS

AGRICULTURE—MEMBER OF CO-OPERATIVE ASSOCIATION HELD TO VIOLATE AGREEMENT BY FAILURE TO SEE THAT TOBACCO RAISED ON LAND LEASED TO ANOTHER IS MARKETED ACCORDING TO AGREEMENT.—Defendant, a landowner and tobacco grower, joined plaintiff association in 1922. For two years thereafter he raised and delivered tobacco in accordance with his agreement with the association. In 1924 he leased his farm without restriction or limitation as to the kind or quantity of crops to be grown thereon and moved out of the state. The tenant agreed to pay $300 as rent but did not agree to pay any part of the crops. Nothing was said about growing tobacco on the farm and the tenant was not a member of the pool. The tenant planted a crop of tobacco and raised about 4,775 pounds which he sold on the loose leaf market without the consent of plaintiff association. This suit was brought by plaintiff association to recover five cents per pound as liquidated damages, and costs in accordance with the provisions of the association agreement.

Held, defendant violated the agreement by failing to see that tobacco raised on land leased to another was marketed according to the agreement. Dark Tobacco Growers’ Co-operative Association v. Daniels, 215 Ky. 399, 284 S. W. 399.

Defendant in becoming a member of the association agreed that “If he produces any tobacco or acquires or owns any interest in tobacco as landlord or lessor during the term thereof, it shall be included under the terms of this agreement and must be sold only to the association.” Also, that “He shall deliver all the tobacco produced by or for him, . . . and all tobacco owned or produced by him, . . . or that he has the legal right to exercise any control over or any commercial tobacco or any interest therein as producer or landlord during the term of this contract.” The foregoing quotations are parts of sections 11 and 13a of the marketing agreement. Section 12 of the agreement provides, in part, that: “This agreement shall be binding upon the grower as long as he produces tobacco directly or indirectly, or has the legal right to exercise control over or any interest therein as producer or landlord during the terms of his contract.”

Defendant relied upon these sections of the marketing agreement to show that his contract with the association only required him to deliver to it such tobacco as he produced or acquired or owned any interest in as landlord or lessor, and did not require him to deliver or cause to be delivered tobacco raised by a tenant paying money rent upon land owned by defendant where he had no interest in the tobacco as grower or landlord by purchase or otherwise. The plaintiff contends that section 18c of the Bingham Co-operative Marketing Act enters into and becomes one of the terms of the contract. This section of the Bingham Act provides, in substance, that a landlord is conclusively presumed to have the power to control delivery of crops grown on his land. In construing this section of the Bingham Act the court
in the case of Feagain v. Dark Tobacco Growers' Co-operative Association, 202 Ky. 802, 261 S. W. 607, said: “The purpose of the statute was to afford the growers an opportunity to avail themselves of the advantages of a co-operative market. To this end it provides that the association and its members may make and execute marketing contracts, requiring the members to sell for any period of time, not over ten years, all or any specified part of their agricultural products exclusively to or through the association, or any facilities to be created by the association. It further provides that in any action upon such marketing agreement it shall be conclusively presumed that a landowner as landlord or lessor is able to control the delivery of products produced on his land by tenants or others whose tenancy or possession or work on such land, or the term of whose tenancy or possession or labor thereon, were created or change after execution by the landowner or landlord or lessor of such a marketing agreement. It was within the power of the legislature to provide a rule of conclusive presumption on the question of the landlord's power to control the delivery of the products and as a conclusive presumption can not be overcome by contrary proof, the effect of the provision is to put it out of the power of either the landlord or the tenant to plead or prove any fact tending to show that the landlord did not have such control.”

This is the leading case in Kentucky on the point. It was decided January 19, 1924, and undoubtedly represents the law on the point in this state. We may well expect the courts to follow it in all later cases based on the particular section of the Bingham Act which it construes.

The Supreme Court of North Carolina reached an opposite result in the case of Tobacco Growers' Co-operative Association v. Bissett, 187 N. C. 180, 121 S. E. 446. The action in this case was based on a contract substantially the same in it provisions as the contract in the Kentucky case cited supra and in the principal case. But an opposite conclusion was reached in construing the North Carolina statute, chapter 87, laws, 1921. The North Carolina Court said in part: “It is significant that, though the act on its face has been carefully and skillfully drawn, it is nowhere stated in it that the landlord shall be compelled to deliver all tobacco produced upon his lands by non-member tenants. Such provision was made in the Kentucky statute and is the basis upon which was decided the case in the circuit court of McCracken County of Tobacco Growers' Co-operative Association v. Feagain, decided January 19, 1924, and which is cited by plaintiff.”

Thus we have two cases, one in Kentucky and one in North Carolina, that reach opposite results although based on practically the same agreement. The difference in the cases is attributable to the particular statute in each case. The Bingham Act is more skillfully drawn than the Marketing Act of North Carolina. This accounts for the difference in the result reached in the two cases.

W. D. S.
Without warrant and without search of person, held competent, as offense may be deemed as in officer’s presence—A warrant of arrest charging A with breach of peace was issued and given to policeman X. Policeman Y, who was under orders to arrest A upon sight, arrested him without the warrant. A bottle of whiskey was discovered by policeman Y in A’s pocket before the arrest and without search of his person. On the hearing before the court the warrant charging A with breach of peace was filed away and he was held on the charge of unlawfully having in possession intoxicating liquors, as a second offense, which was made a felony under the statute. Held, A’s possession of liquor, discovered before his arrest for breach of peace without a warrant, was competent evidence on the charge of unlawfully possessing intoxicating liquor, as the offense might be deemed to be in officer’s presence, and the subsequent arrest was authorized. Scott v. Commonwealth, 215 Ky. 766, 286 S. W. 1038.

The weight of authority takes the view in the case of arrest without warrant, that is expressed in Cabell v. Arnold, 86 Texas 102, 23 S. W. 645, as follows: “A warrant in the hands of a marshall or sheriff will not justify a deputy who does not have possession of it, in making an arrest, where the statute requires the warrant to be exhibited on request to the person arrested.” It was held in Town of Blacksburg v. Beam, 104 S. C. 196, 38 S. E. 441, “A citizen may not be arrested and have his person searched without process to secure evidence against him.” However, this position is dispensed with in the present case by the committing of a felony in the officer’s presence, proceeding the arrest. The Kentucky courts, following the general rule, hold that officers are justified in arresting without a warrant in cases of felony and breach of peace. Tilman v. Beard, 121 Mich. 475, 80 N. W. 248; Stevens v. Com., —, 124 Ky. 32, 98 S. W. 284. Following the arrest, according to Ex Parte Hum, 92 Ala. 102, 9 South. 515, “An officer may search a prisoner, and remove from him anything connected with the offense, and which may be used as evidence against him.” This statement seems to be the general rule.

In State v. Sutter, 71 W. Va. 371, 76 S. E. 811, it was held, “That a bottle of cocaine was obtained from the accused by an officer, who, when he saw the accused in the act of selling the same, rushed into his presence with a pistol, and searched him, and found on his person the bottle of cocaine, does not render the bottle of cocaine inadmissible in evidence on the ground that it was obtained by unlawful search of the person.” This case also laid down the following principle: “An arresting officer may search the prisoner and remove from his person, for evidence, articles found.” This appears to be the weight of authority, and is firm support for the decision in the case in question. Here, the committing of the felony in the officer’s presence validates the arrest, and the arrest authorized the removal of the whiskey and its introduction as evidence. The principles governing the decision herein are well established in statutory law and in the law of the land.

E. C. M.
Automobile—Defendant Blinded by Approaching Light, was Under Duty to Slacken Speed of Automobile and Give Warning (Ky. Stats., Sec. 2739g-47)—Where Defendant Meeting Two Other Cars was Blinded by Their Lights He was Under Duty to Slacken Speed of Car and Give Warning of Approach Under Ky. Stats., Sec 2739g-47.

—As A was crossing the street at an intersection he was struck and killed by C's automobile. Just about the time of the accident C met two cars, and he says he was blinded by the lights of these machines and did not see A until it was too late to avoid hitting him. The evidence did not show any negligence on the part of A. A's wife brought an action to recover for his death. Held, under such conditions C should have slackened his speed and given warning of his car's approach. Having failed to do so, in the absence of proof that A was negligent C must be held liable. Downing v. Baucom's Adm'r, 216 Ky. 108, 287 S. W. 362.

Section 2937g-47 Ky. Stats., provides: "Every operator of an automobile or bicycle, when approaching a curve or an obstruction to the view on a public highway which prevents a clear view for a distance ahead of one hundred and fifty feet, shall hold said automobile or bicycle under control and shall give warning by horn or other sound device of his approach." Applying section No. 2739g, Ky. Stats., the court in National Casket Co. v. Powar, 137 Ky. 156, 125 S. W. 279, said, it "is declaratory of the common law of negligence, adding certain specific standards for motor vehicles on highways. A violation thereof is negligence per se . . . . The provision in regard to control at intersecting roads is for the benefit of anyone who may be there."

The doctrine that the violation of such statutes is negligence per se is adhered to in Schell v. Du Bois, 14 Ohio St. 93, 113 N. E. 664, and in decisions in many other states. It was decided in Campbell v. St. Louis Transit Co., 121 Mo. App. 406, 99 S. W. 58, a failure to observe the rules as laid down for the governing of oneself and vehicle upon public highways is of itself negligent. Nookes v. New York Cent., etc., R. Co., 121 N. Y. App. Div. 716, 106 N. Y. Suppl. 552.

The court in Barnes & Bros. v. Eastin, 190 Ky. 392, 227, S. W. 573, laid down the rule that a driver of a motor car who runs into a cloud of dust so dense he cannot see the road or other vehicles approaching should bring his car to a standstill and sound a warning notifying persons of his presence; and if he continues to speed ahead he is guilty of gross negligence. The result of this case is also reached in Budnick v. Peterson, 25 Mich. 678, 184 N. W. 493, in the following terms: "If his (automobilist's) vision was obscured by the glaring lights of the approaching car, it was his duty to slacken his speed and have his car under such control that he might stop it immediately, if necessary." The same conclusion was reached in Jacquith v. Warden, 73 Wash. 349, 132 P. 33, in which case it was held that it was negligence for the driver of an automobile to continue driving along the streets when he was so blinded by a street car head-light that he could not see ahead of him.
There it was reasoned, "he was required to anticipate that others might be using the street."

However, it was decided in Cumberland Tel. & Tel. Co. v. Yeiser, 141 Ky. 15, 131 S. W. 1049, that a failure to give the statutory warning will not warrant a recovery in damages from an injury to which that failure did not in any way contribute.

In this case, the defendant failing in the duty to slacken the speed of his car and give warning was guilty of gross negligence and was consequently held liable. In view of the increasing traffic the reasons underlying the Kentucky Statute and its present application are sound.

E. C. M.

CHAMPERTY AND MAINTENANCE—RECONVEYANCE TO CARRY OUT RECISSION OF CHAMPERTOUS DEED IS VALID FOR THAT PURPOSE, THOUGH MADE WHILE LAND IS HELD ADVERSARY.—The appellees brought this action to quiet title to a tract of land in Perry county. They had conveyed the land, while it was in the adverse possession of the appellants. However, when the appellees' grantees discovered that the land was adversely held, they by written agreement, before this action was brought, rescinded their contract with the appellees, and reconveyed the land to the appellees.

The court held that since the law in Kentucky requires the champertous contract to be rescinded before the grantor can maintain an action for the possession, a reconveyance to carry out the contract of rescission though made while the land was adversely held by another, must be regarded valid for that purpose. 

Section 210 of the Kentucky Statutes provides, "All sales, or conveyances, including those made under execution, of any lands, or the pretended right or title to same, of which any other person, at the time of such sale, has adverse possession, shall be null and void." The grantee takes nothing under such a conveyance. However, section 212 of the Kentucky Statutes gives the party in possession, his heirs, and assigns a right to set up the champertous contract in an action by the grantor for the possession. The statute was passed for the protection of the possession, and unless the contract between the grantor and grantee is rescinded before the action is brought the paper title is considered as being in the grantee, and the plaintiff cannot disturb the party in adverse possession by showing title in a third person. Crowlew v. Vaughan, 11 Bush 517; Harman v. Brewster, 7 Bush 355; Luen v. Wilson, 85 Ky. 503, 3 S. W. 911; Hobson v. Hendrich, 7 K. L. R. 362; and Doyle v. Cornett, 187 Ky. 586; 219 S. W. 1059.

In Luen v. Wilson, supra, the court said, "The law of champerty was intended as a shield to the possession and not as a weapon of offense, as a defense to the remedy sought by a plaintiff, and a grantor after he has conveyed land adversely held cannot, without first rescinding or abandoning the contract in good faith, be heard to say that it was champertous, and it cannot therefore affect him." That case was under
It naturally follows that if the law requires the parties to a chancypertous contract, concerning land in adverse possession, to rescind the contract and place themselves in status quo, before an action can be maintained by the grantor for the possession, it would be inconsistent to hold reasonable means to bring about the requirements of law invalid. If the law requires the parties to rescind, it would be against all justice to hold that the steps toward rescission are void. It seems that from principle the holding of the court in the principal case must be considered well decided.

J. S. F.

Criminal Law—A Petit Jury is Not Required to Have a Foreman, and Whether its Member Who Signed the Verdict Designated Himself as Foreman or Not is Immaterial.—In a prosecution for grand larceny a member of the jury signed the verdict, designating himself as "one of the jury," and it did not appear that the jury had a foreman. It was contended for the defendant that it was necessary to the validity of the verdict that there should have been a foreman, and that the verdict should have been signed by the foreman. Held, that a petit jury is not required to have a foreman, and that whether or not its member who signed the verdict designated himself as foreman makes no difference. Crump v. Commonwealth, 215 Ky. 827, 287 S. W. 23.

Carroll's Kentucky Criminal Code, sixth edition, section 255, provides that . . . "their foreman must declare their verdict." But it was decided in the case of Thomas v. Commonwealth, 12 Ky. L. Rep. 903, 15 S. W. 861, that failure of a member of the jury, who signs the verdict, to designate himself foreman is immaterial. The same rule prevails in civil cases. It has been held that section 324, 325, Carroll's Kentucky Civil Code, sixth edition, which requires the verdict to be read by the foreman, are merely directory, and are no ground for reversal unless it clearly appears that the party complaining has been injured by the omission. Berry v. Pusey, 80 Ky. 166, 3 Ky. L. Rep. 656. There are very few cases in the books on this point, but the principal case is in accord with the universal holding. Bryan v. State, 260 S. W. 846 (Tex. Cr. App.).

B. D.

Descent and Distribution—Advancements Operate Only on Undevised Property and are Ineffective Where Entire Estate has Been Devised Without Any Mention of Them.—Prior to 1880 testator executed four several deeds of conveyance to certain of his daughters. In each conveyance the transaction was referred to as an advancement. No other consideration was paid. The value of the property was fixed in each deed. Later, testator advanced to his son $900.00 in cash. In 1900 testator died. By the terms of his will he gave his entire estate to his widow for life, remainder to their children or their childrens'
survivors, except his son to whom testator gave a legacy of five dollars with the explanation that this was all testator wanted him to have. No mention was made of the advancements. The lower court adjudged an equalization and held that there was a lien on each tract to the extent that the value fixed in the deed exceeded the owner's distributable share in the estate and ordered that enough of the land be sold to satisfy the liens. Held, the doctrine of advancements applies only to undivided estates. *McPherson, et ux. v. Black, et al.*, 215 Ky. 92, 284 S. W. 413.

In the principal case the conveyances were made prior to 1880 and were specifically denominated as advancements in the instruments of transfer. No other consideration was paid. The only thing that defeats them is a lack of property upon which to operate as advancements. *Green v. Hathaway*, 36 N. J. Eq. 471, 52 Ohio St. 470, 40 N. E. 165; *Jones v. Jones*, 6 N. C. 150; *West v. Book*, 95 Ia. 520, 64 N. W. 599; *Nichols v. King*, 24 K. L. R. 124, 68 S. W. 133. But in determining the specific property upon which advancements can operate the courts are continually confronted by the rule that the doctrine of advancements applies only to intestate property. *Owsley v. Owsley*, 25 K. L. R. 1194; *In re Lear*, 146 Mo. App. 624, 124 S. W. 592; *Biedler v. Biedler*, 87 Va. 300, 12 S. E. 753.


This rule is also applicable where a will is inoperative or invalid or ineffective for any other reason at the time of testator's death, as well as where he never made a will at all. *Hartwell v. Rice*, 1 Gray (Mass.) 587; *Douglas v. Rice*, 25 S. C. Eq. 322.

However, in a few states it has been expressly provided by statute that the doctrine of advancements shall apply in the case of partial intestacy as well as in the case of absolute intestacy. Tennessee, Virginia and Kentucky have this statutory provision. *Perry v. High*, 3 Head (Tenn.) 349; *Gold v. Vaughan*, 4 Sneed (Tenn.) 245; *Farnsworth v. Dinsmore*, 2 Swan (Tenn.) 38; *Pearce v. Gievees*, 10 Yerg. (Tenn.) 359; *Sturdevant v. Goodrich*, 3 Yerg (Tenn.) 95; *Vance v. Huling*, 2 Yerg. (Tenn.) 135; *Biedler v. Biedler*, 87 Va. 300, 12 S. E. 753; *Bawles v. Winchester*, 13 Bush (Ky.) 1; *Clarkson v. Clarkson*, 8 Bush (Ky.) 655. But this rule is applicable only to the extent of the undisposed part of the testator's estate and not to any part thereof that has been effectually disposed of by his will. *Cole v. Palmer*, 1 Bush (Ky.) 371.

It is clear that the ruling of the lower court in the principal case does not come within any rule of law applicable to advancements or within any exception thereto. Therefore, the upper court, in reversing
the lower court, followed the settled rule in this and other states in holding that the doctrine of advancements is applicable only to intestate property.

W. D. S.

**Divorce—Wife of Insane Husband May Sue for Divorce, Alleging Cruel and Inhuman Treatment Previous to the Husband’s Confinement in the Asylum.**—The plaintiff filed a petition asking for a divorce from the defendant, her husband. The suit was filed after the defendant had been adjudged a lunatic and committed to the asylum. She alleged cruel and inhuman treatment previous to defendant’s confinement in the asylum. Held, that the wife of an insane husband may sue for divorce, showing cruel and inhuman treatment prior to husband’s confinement in the asylum. *King v. King*, 214 Ky. 171, 283 S. W. 73.

*Huston v. Huston*, 150 Ky. 353, 150 S. W. 386, it was decided that a divorce may be obtained for acts accruing prior to the insanity and that the mere subsequent insanity of the defendant will not defeat the husband’s right to a divorce. In the case of *Jordan v. Jordan*, 257 S. W. 569, Tex. Civ. Ap. 1923, the court was of the opinion that an action for divorce may be obtained against an insane defendant, represented by guardian ad litem, where the acts constituting the grounds for the divorce were committed by such defendant prior to becoming insane. It was held in *Gains v. Miller*, 185 N. W. 478 (Iowa), that where a cause of action for divorce on the ground of cruelty was complete prior to wife’s insanity, a divorce might be granted the husband, notwithstanding, the wife’s insanity.

In the case of *Lewis v. Lewis*, 60 Okla. 60, 158 Pac. 368, the defense was that an action for divorce could not be maintained, on account of defendant’s insanity. The acts complained of, however, were committed before defendant’s insanity. The court there said that an action for divorce, or alimony alone for any of the causes for which divorce may be granted may be maintained against an insane person, represented by guardian, where it appears that the acts constituting the ground of divorce were committed by such defendant, prior to his becoming insane.

Section 2120, Kentucky Statutes, provides: “An action for divorce must be brought within five years next after the doing of the act complained of.” Section 423, subsection 3, of the Civil Code provides: “That plaintiff to obtain a divorce, must allege and prove, in addition to a legal cause of divorce, that the cause of divorce accrued or existed within five years next before the commencement of the action.”

In 2 Bishop on “Marriage, Divorce and Separation,” section 518 the author says that “divorce being a civil proceeding, there can be no just ground for excepting it, for it has always been the practice in the civil department of the law to maintain suits against insane parties the same as against sane ones. To deny the law’s justice to the sane one because of the other’s insanity would be to cast in part on the former the burden which God had laid wholly on the latter.” His or her subsequent insanity is not, under the modern law regarded a bar
to such proceeding. This is on the reasoning that an action for divorce or separation is a civil action, and not a criminal suit, a proceeding which cannot be instituted or carried on while the accused is a lunatic. The conflict on this point is confined, practically, to a few earlier English cases, which, have since been either reversed or overruled. 83 Am. Dec. 200, 19 Am. Rep. 371, 34 L. R. A. 166. An action for divorce should not, however, be tried against one whose reason has been dethroned and who is thus rendered incapable of making answer to a charge or aiding counsel in the conduct of his or her defense, until at least a reasonable time is allowed for recovery and restoration to capacity. The fact that insanity may preclude an effectual defense in an action for a divorce or separation must be regarded as a misfortune resulting from the respondent's condition, and not as affecting the petitioner's right to sue.

By reason of the foregoing authorities it seems to be a well established rule that a proceeding for divorce or separation may be instituted against an insane spouse for a cause of divorce accruing while he or she was sane. M. W. M.

**Ejectment—Evidence of Special Master's Deed Held Not to Trace Title to Land Sought to be Recovered in Ejectment to Common Source or to Relieve Plaintiff of the Necessity of Tracing Title to the Commonwealth.**—An ejectment action was brought by appellee against appellant. Appellant asked for peremptory instructions in his favor because appellee had failed to trace title to the commonwealth. Appellee admitted this but insisted that both he and appellant traced their respective titles to a common source. The trial court refused to give peremptory instructions in favor of the appellant and this refusal is one of the grounds of the appeal. Held: that had the proof in the case shown that appellee and appellant acquired their respective titles from a common source, then appellee would have been relieved of the necessity of tracing title to the commonwealth; but that inasmuch as the proof did not show that the alleged common source of title ever owned, or even if it did own, ever became divested of the title now claimed by appellee, the appellee must trace title to the commonwealth. *Ellis v. Sparks*, 215 Ky. 316, 285 S. W. 199.

The great weight of authority, both of the Kentucky court and of courts generally, is that a plaintiff in ejectment will be relieved of the necessity of tracing title to the commonwealth, provided he alleges, and if it is denied, proves, that both he and defendant in ejectment derive their respective titles from a common source. *Turner v. Liebel*, 185 Ky. 313, 215 S. W. 70; *Branstetter v. McGuire*, 194 Ky. 720, 240 S. W. 354; *Collins v. Zella Mining Co.*, 198 Ky. 770, 250 S. W. 96; *Pineland Club v. Roberts*, 130 C. C. A. 125, 213 F. 545; *Rogers v. Vanderburg*, 168 Mo. 430, 68 S. W. 340. Of course, plaintiff in ejectment must show a better title than that of defendant, even where title is derived from a common source; but such better title need not be traced to the commonwealth. *Harrison v. Gallegos*, 79 P. 300.
With such a rule clearly laid down it is evident that the decision of the court in the instant case concerned chiefly the sufficiency of the evidence introduced by the appellee to establish his contention that his source of title was common to that of the appellant. The efficacy of a decision under such circumstances depends very largely upon the discretion and judgment displayed by the court in weighing the peculiar facts of the individual case with certain well-defined standards as the scale. In such a case if the proper standards are selected by the court we may well expect a consistent ruling. The rule most apt here, and the one evidently in the mind of the court, is that when a plaintiff in ejectment claims title from a common source and the defendant denies such common source, the effect of such denial is to leave on the plaintiff the burden of proof. 


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**ESTOPPEL.—AFTER ACQUIRED TITLE TO CHURCH PROPERTY NOT MENTIONED OR RESERVED IN DEED, IMMEDIATELY PASSES TO PURCHASER OF LAND.**

—The ancestor of the assignors of the plaintiff sold and conveyed to the assignor of the defendant by general warranty deed a tract of land which included in its bounds the property claimed by the plaintiff. Before this grant was made the grantor had conveyed the lands in dispute to certain parties, their heirs and assigns, so long as the lands should be used for church purposes; then to revert to the grantor. The land ceased to be used for church purposes, and the plaintiff claimed as grantee of the heirs of the original grantor. The defendant contended that the original grantor, or his heirs and assigns, were estopped from setting up the lack of title in the original grantor at the time of his conveyance to the assignor of the defendant. Held, that any title acquired by the vendor or his heirs after the conveyance to the defendant's assignors passed immediately to the defendant, or his assignors then in possession, by way of estoppel. _Crider v. Kentinia-Corton Corporation_, 214 Ky. 353, 283 S. W. 117.

Where a vendor, having no title, a defective title, or an estate less than that which he assumed to grant, conveys with warranty or covenants of like import, and subsequently acquires the title or estate which he purported to convey, or perfects his title, the universal rule is that such after acquired or perfected title inures to the grantee or his assignees, by way of estoppel. _Jenkins v. Collard_, 145 U. S. 546, 36 L. Ed. 313; _Doe v. Oliver_, 10 B. & C. 181, 109 Reprint 418; _Weir v. Weir_, 138 Ky. 788, 129 S. W. 108. The reason for the rule is that it would be unjust to permit one, after he had asserted ownership, and made a deed conveying it to another, to obtain by deed or otherwise an outstanding title and hold it against his grantee. _War Fork Land Co. v. Marcum_, 182 Ky. 352, 202 S. W. 668.
There are certain exceptions to the rule. The rule applies, "only where there is an effort to convey a present interest and title to specific property, and to vest the vendee with such present interest; and it does not apply in cases . . . where the thing attempted to be conveyed is a mere expectancy only." Burton v. Campbell, 176 Ky. 495, 195 S. W. 1091. Accordingly it does not apply in the case of an heir making a conveyance of an estate which he expects to inherit from an owner then living, since the thing attempted to be conveyed has no potential existence, and is a fraud upon the owner and against public policy, Spacey v. Close, 184 Ky. 523, 212 S. W. 127. It has been held that this is no exception. Prichard v. Fox, 154 S. W. 105 (Tex.), where the grantor conveys land held adversely by another, and later acquires title, he is not estopped, for Kentucky Statutes, sections 210, 216, state that conveyances of land held adversely by another are null and void, Artemus v. Nickell, 115 Ky. 506, 74 S. W. 221. The rule does not depend upon how the title was subsequently acquired. Gardner v. Gardner, 117 Miss. 694, 78 So. 623, except that the rule has no application where the property was afterwards acquired by adverse possession. Jones v. Miller, 3 Fed. 384, 1 McCrady, 535. The rule does not apply in case of a quit-claim deed, except where the grantor has only the equitable title, and subsequently acquires the legal title. Johnson v. Johnson, 173 Ky. 701, 191 S. W. 672. The principal case clearly does not fall within any of these exceptions, and is in accord with the general rule. Whether title vested in the original grantor upon the holder's ceasing to use it for church purposes, or whether an entry was necessary, presents a more serious question. In keeping with some American cases the court assumed that the title reverted to the grantor in such a case. Mott v. Danville Seminary, et al., 129 Ill. 403, 21 N. E. 327. B. D.

Explosives—Generally One Leaving Explosive Exposed and Unguarded on His Premises Is Liable for Injuries to Trespassing Children Therefrom.—On A's premises were stored in a two-room building steel drums containing gasoline and a container holding about twelve pounds of powder. The powder was kept on a shelf seven feet from the floor. The rules of A, a manufacturing company, forbade children to play there, and the servants of A sought to enforce the rules. B, a child eight years old, who had frequently been warned to keep off the grounds, entered the building and filled his pockets with the powder. While he and other children were throwing powder in a fire, the powder in his pocket was ignited and caused his death. Held, A had not left the explosive "exposed and unguarded" so as to come within the general rule that "a person leaving exposed and unguarded on his premises an explosive which is found by trespassing children is liable for any injuries resulting from its explosion." Eastern Carbon Black Co. v. Stephen's Admr, 216 Ky. 85, 287 S. W. 215.

The court followed the general rule laid down in Stephens v. Stephens, 172 Ky. 780, 189 S. W. 1143. It is amply supported by decisions of the Kentucky courts and those of other states. Miller v. Chand-
The following statement is made in Mattson v. Minn. & N. W. R. Co., 95 Minn. 477, 104 N. W. 443: "The degree of care required of persons having control of dangerous explosives, to prevent harm to others, is greater and more exacting as respects young children." Treating of cases within the general rule governing the duty of a person to use care in dealing with explosives, the court in Ball v. Middlesboro Town & Lands Co., 24 Ky. L. R. 114, 65 S. W. 6, said: "The ground of liability in this class of cases is that the defendant failed to exercise such care as might reasonably be expected of a person of ordinary prudence under the circumstances."

But there must have been negligence or a failure to use such care to give cause of action for damages. "Negligence in the keeping of gunpowder or in the manner of its keeping is requisite to impose a liability for damages resulting to another by an accidental explosion or fire." Kenny v. Koopmann, 116 Ala. 310, 22 So. 593. In the light of this case and Jacobs v. New York, N. H. & H. R. Co., 212 Mass. 96, 98 N. E. 688, the court herein reached a proper conclusion. In the latter case it was decided that a railroad company is not liable for the death of a boy, whose companion, while with him at the station, had picked up a torpedo carelessly dropped from a train, and later with his assistance exploded it, with a fatal result to him, since it was not bound to anticipate such a result of its carelessness.

In the present case no actionable negligence was found. It appeared to the court that there was no sufficient reason to anticipate any meddling with the gunpowder in the place where it was stored. The present holding finds further support in the cases of Louisville, etc., Ry. Co. v. Hurt, 24 Ky. 1123, 70 S. W. 830; Kidder v. Studier, 117 Maine 194, 103 A. 159, in which lies the following principle: "No liabilities arise for injuries to children where the explosives have been guarded with reasonable care, or left where there was no reason to anticipate meddling."

E. C. M.

GAMING—CONDUCTING DOG RACES WITHIN INCLOSED TRACK AND PERMITTING WAGERS AND CONDUCTING POOLS THEREIN ABATABLE AS A NUISANCE IN VIEW OF STATUTES.—The appellants rented certain premises which in former years had been used as a fair ground and a race course. The grounds were abandoned for that purpose and the race track within it is which was no longer used for horse races. At the beginning of the lease the appellants constructed thereon a circular track, equipped with an apparatus by means of which an "electrical hare" could be run on a single rail in the center of the track so as to cause dogs to chase it. Great crowds assembled to witness the races and the appellant sold pools on the races, charging for each ticket from two to ten dollars. When the race was over, the owners of the tickets on the dog winning the race divided the entire amount of money so bet, less the commission charged by the appellant. Warrants were issued and the appellants executed bonds to appear in court but did not desist from conducting the races. Appellee then filed their bill in equity alleg-
CASE

COMMENTS

ing the foregoing facts and prayed an injunction restraining the continuation of such practice. Held, the appellants were engaged in unlawful conduct which might be prevented by the injunctive remedy sought by the appellee. *Erlanger Kennel Club, et al. v. Daugherty, Attorney General, et al.,* 213 Ky. 648, 281 S. W. 526.

Upon appeal the appellants' contention was that they do not come within any of the provisions of Kentucky Stats., sections 1328a, 1960, 1961, 3914b-1, 3914b-6, 3990a-1, 3990a-4, since they run the races herein described on a regular race track organized for that purpose and are thereby excluded from the provision of section 1960 by the exemption contained in sec. 1961. The court declared that such reasoning, however, is specious illogical and entirely unconvincing. "Dog racing, such as here involved, was an unknown thing beyond fifteen or twenty years ago, since the electrical apparatus by which the dogs could be induced to run was not invented until that time. Therefore at the time of the enactment of sections 1960 and 1961 the legislature could not have had in mind dog racing as one of the things excluded from the operation of the latter section wherein regular races were run on inclosed tracks." The court further said, "A well known rule for the interpretation of statutes is that the terms employed may be given meaning and application in light of the circumstances and conditions existing at the time of their enactment and the purpose the legislature had in view in enacting them."

The court in the case of *Bailey v. Commonwealth,* 74 Ky. (11 Bush) 691, after recognizing the rule of construction that words in a statute are to be taken according to the approved meaning of language, said, "But there are other rules of construction of equal dignity and importance which must not be overlooked, and which though not incorporated in our statute are as binding upon the court as if embodied in it. One of these rules is that every statute ought to be expounded not according to the letter but according to the meaning, and another, that every interpretation that leads to an absurdity ought to be rejected, and still another, that a law 'ought to be interpreted in such a manner as that it may have effect and not be found vain and illusive.'"

The rule of construction followed by the principle case falls directly in line with the rule applied by the court when Ky. St. secs. 1960 and 1961 were before it for the first time. The court upon that occasion said, "An act of the legislature like any other instrument must be construed so as to carry into effect the intention of the makers. The exception in the statute in favor of combination or French pools sold on any race track during the races thereon was not in the previous statutes, and we must presume that the legislature had some purpose in inserting this exception in the present act. Under the former constitution special legislation was allowed. The different racing associations operated under special charters which conferred upon them privilege more or less broad. When the new constitution came into effect and special legislation was prohibited, it was perceived by the legislature that some general provision must be made if these special privileges
which these racing associations then enjoyed were to continue. The raising of horses had been a favored industry in a large part of the state and much capital was invested in it. The legislature evidently had in mind granting a privilege to the regular race tracks during the races thereon." Grinstead, et al. v. Kirby, Judge, 110 S. W. 247 (Ky).


HOMICIDE—In Homicide Case, Instruction to Find Both Defendants Guilty If Either of Them Aided or Abetted the Actual Killing Held Erroneous—Each Defendant's Guilt or Innocence Being Dependant Only on His Own Participation.—A and B were indicted together with C for the murder of D. On the trial the court directed that if the jury should believe from the evidence beyond a reasonable doubt "that D was unlawfully, etc., . . . shot and killed by C, A or B, when it was not necessary, etc. . . . and that defendants A and B were present at the time and did unlawfully, wilfully and feloniously aid, abet, advise, counsel or encourage C or the one of them who did said killing, they should find A and B guilty, etc. . . . " Held: That under the facts of the case this instruction was clearly erroneous and prejudicial, as each defendant's guilt or innocence is dependent only on his own participation. Barnett v. Commonwealth, 215 Ky. 786, 287 S. W. 12.

An instruction is erroneous which authorizes the jury to convict a defendant because of his presence or because of his mere mental approval or consent, without requiring that he shall have aided in or encouraged the commission of the crime. True v. Commonwealth, 30 Ky. 651, 14 S. W. 684; Plummer v. Commonwealth, 1 Bush (Ky.) 76; Chapman v. State, 43 Tex. Cr. App. 328, 65 S. W. 1098; Faulkner v. State, 43 Tex. Cr. App. 311, 65 S. W. 1093. An instruction is erroneous which ignores or tends to exclude some material element or some material part of the evidence. Collins v. Commonwealth, 192 Ky. 412, 233 S. W. 896; State v. Nargashian, 26 R. I. 299, 58 Atl. 953, 106 Am. S. R. 715. An instruction as to the law of principles and accessories must be applicable to and supported by the issues and evidence in the case. Early v. Commonwealth, 24 Ky. L. 1181, 70 S. W. 1061.

The instruction in the principal case expressly directed the jury to find both appellants guilty if either of them aided or abetted C to kill D under such circumstances as would require the homicide to be
found to be either murder or manslaughter. In Sullivan v. State, 85 Miss. 149, 37 So. 1006, the court said, "the instruction did not correctly state the law as it permitted the conviction of each for the act of the other, when in fact defendant was not guilty if there was no preconcerted plan between him and his son to commit any unlawful act whatsoever against deceased."

It is evident that the trial court in the instant case was attempting to give a conspiracy instruction, which was clearly unwarranted by the evidence. The Court of Appeals after a careful analysis of the facts found such to be the case. Where evidence does not show a conspiracy such an instruction is not proper. Lockard v. Commonwealth, 193 Ky. 619, 237 S. W. 2d. The instruction should have been worded so as not to be misleading and so as to make the jury clearly understand that the guilt or innocence of each is dependent upon his own participation in the homicide and that neither can be convicted for what the other did.

The court in rendering its decision has based it primarily upon the facts of the case. It is clearly correct, both on principles and authority.

R. R. R.

Husband and Wife—Mortgage of a Married Woman, Though Subscribed and Acknowledged by Husband, is Void, Where His Name Does Not Appear in the Body Thereof, and He Has Not Previously Made a Separate Conveyance (Ky. Stats., Section 506).—Plaintiff sold and conveyed to the defendant a tract of land. No part of the purchase money was paid in cash, but the defendant and her husband executed notes, secured by a lien on the land conveyed, and also by a mortgage on other land owned by the defendant. The mortgage was properly executed by the defendant and her husband but his name did not appear in the body of the mortgage. The defendant and husband having defaulted in the payment of the notes, the plaintiff brought this suit to enforce his lien and to reform the mortgage on ground of mistake. It was mutually agreed between the parties that the notes given for the purchase price should be secured by a lien on the land and by a mortgage on the other land. For these reasons the chancellor was asked to correct the mistake and make the mortgage conform to the agreement and intention of the parties. Held, that a court of equity cannot modify a contract so as to make it legal where it does not comply with the provisions of the statute. Duncan v. Jenkins, et al., 215 Ky. 543, 286 S. W. 783.

Section 506, Ky. Stats., provides that "The conveyance may be by the joint deed of husband and wife, or by separate instrument; but in the latter case the husband must first convey, or theretofore conveyed. The deed as to both husband and wife may be acknowledged or proven and recorded as heretofore, or by this act, provided."

In the case of Simpson v. Smith, 142 Ky. 608, 134 S. W. 1166, the court in its construction of the statute, held that "A married woman cannot sell and convey her real estate without her husband joins with
her and when she attempts to do so in an action by her and her husband to recover it, its possession will be adjudged to her.” A conveyance of lands by a married woman during the absence of her husband in another state was of no effect under the statute requiring the husband to unite in the conveyance, since the antenuptial contract between the husband and wife did not, clearly authorize a conveyance of the land by the wife.  *Brady v. Grady*, 17 Ky. Law Rep. 512, 31 S. W. 734.

The rule is applicable to a mortgage as well as a deed.  *Beverly v. Walker*, 115 Ky. 600, 74 S. W. 264. In the case of *Hellard v. Rockcastle Mining, Lumber and Oil*, 153 Ky. 259, 154 S. W. 172, it was held that a deed made by a married woman in which her husband did not join, is void although she made it when she and her husband supposed they had been divorced, no judgment of divorce having been entered.

Although the cases and authorities are few in which the validity of mortgages is the point in controversy, yet the rule is peculiarly applicable to any contract of a married woman not made in conformity with statutes enacted for protection of married women, and the majority of the authorities hold that where there is an omission of some statutory requirement in the deed of a married woman essential to its validity the mistake cannot be corrected.  *Jewett v. Davis*, 10 Allen (Mass.) 68; *Dickinson v. Glenney*, 27 Conn. 104; *Grapenether v. Pefervary*, 9 Iowa 163; *Lane v. McKeen*, 15 Maine 304; *Purcell v. Goshorn*, 17 Ohio 105.

Therefore, as a general rule, the deed of a married woman will not be reformed by a court of equity to correct matters of substance where the statutes have not placed them, as regards their conveyances, on the same footing as a *feme sole*.  *Bowden v. Bland*, 53 Ark. 53; *Snell v. Snell*, 123 Ill. 403; *McReynolds v. Grubb*, 150 Mo. 352; *Garr v. Williams*, 10 Ohio 305. Statutes are as binding on courts of equity as on courts of law, and where a contract is void because not in compliance with express statutory provisions a court of equity cannot modify it so as to make it legal and then enforce it.  *Hedges v. Dixon County*, 150 U. S. 182; *Brazoria County v. Youngstown Bridge Co.*, 80 Fed. 10.

It is to be seen that the court in rendering this decision has followed the rule as clearly set out in the courts of this state as well as in the majority of the courts in other jurisdictions.  M. W. M.

**Insurance—Note for Insurance Premiums, Given When Policy was Issued, Held Part of the Transaction, and Provision Therein for Suspension of Insurance on Failure to Promptly Pay Any Premium Installment is Binding, Though Not in Policy.**—In October, 1922, defendant issued plaintiff a policy of tornado insurance. The premiums were to be paid in installments and the first installment was paid at time policy was issued. Each yearly installment was to be paid the first of November. At time of tornado loss in November, 1925, the yearly installment due November 1, 1924, had not been paid. The policy itself contained no provision suspending the insurance upon failure to promptly pay the installments; but on the same day a fire
Insurance policy was issued on the same personal property for the same length of time. An installment note was given by the plaintiff for the full amount of the premiums payable on both policies. The fire policy contained a suspension provision and the note contained the same provision. Held: That the note formed a part of the transaction and the suspension provision for failure to pay any premium installment was binding though not in the policy. *Continental Ins. Co. v. Brown*, 216 Ky. 19, 287 S. W. 16.

A provision in a policy of insurance that provides for the suspension of the insurance while any premium note remains due and unpaid is reasonable and enforceable. This rule is accepted in most all jurisdictions. *Michigan Mutual Life Ins. Co. v. Custer*, 128 Ind. 25, 27 N. E. 124; *National Life Ins. Co. v. Peppard*, 100 Tex. 519, 101 S. W. 786; *Crafton v. Home Ins. Co.*, 199 Ky. 517, 251 S. W. 992. A majority of the courts are also agreed on the proposition that where the policy and note given for the premium, both contain a provision for suspension of the insurance upon non-payment of deferred premium installments, the failure to pay such note avoids the policy. *Houston v. Farmers & Merchants Ins. Co.*, 64 Neb. 138, 89 N. W. 635; *Continental Ins. Co. v. Stratton*, 185 Ky. 523, 215 S. W. 416; *American Ins. Co. v. Hornbarger*, 85 Ark. 337, 108 S. W. 213.

The hard case and the one upon which the authorities are in conflict is one such as the instant case, where the suspension provision is contained in the premium note but not in the policy. Does failure to pay any premium installment when due render the policy void? To say that it does we must hold the note to be a part of the contract of insurance. This is the position taken by the Kentucky court in the case at hand. Under the authority of *Continental Ins. Co. v. Harris*, 131 Ky. 837, 116 S. W. 256, the Kentucky court seems committed to the view that such provision in the note alone is valid. A like rule has been laid down by other courts. *Ressler v. Fidelity Mutual Life Ins. Co.*, 110 Tenn. 411, 75 S. W. 735; *North American Acc. Ins. Co. v. Bowen*, 102 S. W. (Tex. Civ. App.) 163; *Home Life & Accident Ins. Co. v. Haskins*, 156 Ark. 77, 245 S. W. 181; *French v. Columbia Life & Trust Co.*, 80 Or. 412, 156 Pac. 1042; *Sexton v. Greensboro Life Ins. Co.*, 157 N. C. 142, 72 S. E. 863.

The contrary view is expressed by the Georgia court in *Arnold v. Empire Mut. Annuity & Life Ins. Co.*, 3 Ga. App. 685, 60, 470. The court held that failure to pay the premium note, would not forfeit the policy, though it was so stipulated in the note, where there was no suspension provision in the policy. A similar position has been taken by other jurisdictions. *Coughlin v. Reliance Life Ins. Co.*, 201 N. W. (Minn.) 920; *Manhattan Life Ins. Co. v. Parker*, 204 Ala. 313, 85 So. 298.

The conclusion reached by the court in the principal case is logical and seems in line with the rule as established by the majority of jurisdictions in this country.

R. R. R.
JUDGMENT—STATE OR MUNICIPALITY IS BOUND BY JUDGMENT AGAINST ADMINISTRATIVE OFFICERS INVOLVING GENERAL PUBLIC QUESTION AFFECTING DELEGATED DUTIES OF OFFICERS, AND OFFICERS ARE BOUND BY JUDGMENT AGAINST STATE OR MUNICIPALITY INVOLVING SAME QUESTION.—The appellee was prosecuting attorney of the city of Ashland at the time the class of the city was changed from third to second. Before the change of the class of the city, the appellee brought an action against the city to recover a thirty per cent commission on all fines, etc., collected under section 3373 of Carroll's 1922 Edition of Kentucky Statutes, which was then in force as a part of the charters of cities of the third class. The city set up section 246 of the State constitution, limiting the salaries of public officials to $5,000 yearly. The court held that the appellee was not an officer within the meaning of the constitution, and a verdict was returned for him. The act transferring the class of the city provided that all officers should hold over until the expiration of their terms with the same duties and rights; and after the change the appellee brought this action against appellants, proper officers of the city, to recover a thirty per cent commission on all fines collected, for the period subsequent to that involved in the first case. As no appeal in the first case was taken within the period prescribed by law, the judgment remained in full force and effect. The appellants contended that, although the two cases turned on the question of whether or not the appellee was an officer within the meaning of the constitution, they were not bound by the former judgment since they were not parties to the action, and that the city since it had changed its class was a different city and was not a party to the other suit.

The court held that the city did not lose its identity by the change of class; that the appellants were bound by the former judgment, no matter how erroneous, no correction having been made; that a state or municipality is bound by a judgment against its proper administrative officers involving a general public question affecting the delegated duties of such officers, and also that the latter are bound by a judgment against the state or municipality involving the same question. 


The proposition laid down in the principal case does not arise from the nature of a municipality, but arises from the nature of our government in all its divisions; state, county, municipality, etc. The ground upon which a municipality is held bound by a judgment against certain of its officers is that these are its legal representatives, who are by law authorized to speak for it and control its affairs. 


In Stone v. Winn, 165 Ky. 9, 176 S. W. 933, the court said "But the fiscal court, the county judge, and the county attorney, are the parties upon whom the law imposed the duty of looking after the business of the county Kentucky Constitution, section 144: Kentucky Statutes, sections 1834, 1840, et seq. That the taxpayers of a county are bound
by a judgment against the county is not only well settled, but would seem to be such a plain proposition as to need little argument. If a judgment against a county in its corporate capacity does not bind the taxpayers composing the county, then it would be difficult to imagine what efficiency could be given such a judgment."

Kentucky authority on this question can be traced best through the case of Bank of Kentucky v. Commonwealth, 29 K. L. R. 643, 94 S. W. 620. The defendant banks in what is known as the "Bank Tax Cases," 97 Ky. 590, 31 S. W. 1013 contended that they had an irrevocable contract and that taxes could only be collected from them under the Hewitt law; that they were not liable in taxes under the new bank tax law of 1892, which provided also for a municipal and county tax. The contention was upheld. Later the court of appeals reversed the decision of the "Bank Tax Cases" and the appellant company obtained an injunction from a federal court against state, county, and municipal officers enjoining them from collecting taxes under the new tax act. The federal court held that the bank company did not have an irrevocable contract but as to them the matter was res adjudicata, no matter how erroneous the decision of the Kentucky Court of Appeals in the first case might be. Bank of Kentucky v. Stone, et al., 88 F. 383, affirmed at 174 U. S. 408.

A very recent case in Louisiana has been decided in favor of the rule stated in the principal case. The court held that judgment from which no appeal had been taken, ordering a city inspector to issue building permits in the name of a property owner, despite the fact that a suit to compel issuance of permits was brought by his lessee, was a bar to an injunction suit by the property owners and the city to restrain construction of buildings authorized by permits so issued; Robinson v. Weiner, 105 S. 35, 158 La. 979. But as to cases where an officer sues for an individual right the rule is different. Where the plaintiff was mayor and sued to compel a landowner to remove obstructions from a space delineated on a plot of the city as a street, and in such action it was adjudged that the city had never acquired any easement in the street shown, such adjudication involving a controversy as to a public right is no bar to a subsequent action by the plaintiff as an individual, seeking to enforce a private right in such street. Rahr v. Wittman, 147 Wis. 195, 132 N. W. 1107. For similar cases in other jurisdictions see: Ward v. Field Museum of Natural History, 241 Ill. 496, 89 N. E. 731; Jonestown v. Ganong, 97 Miss. 67, 52 S. 572; Ransom v. Pierce, 101 F. 665, 41 C. C. A. 585; Lyons v. Cooledge, 59 Ill. 529; Millikan v. Lafayette, 118 Ind. 323, 20 N. E. 847; Woodworth v. Tennessee, 22 Okl. 267, 122 P. 224; Whiddon v. Fletcher, 150 Ga. 39, 102 S. E. 350; City of Palenstine v. City of Houston, 262 S. W. (Texas) 215; Floersheim v. Board of Commissioners of Hardin County, 28 N. M. 330, 212 P. 451; City of Richmond v. Davies, 135 Va. 313, 116 S. E. 492.

J. S. F.
LIMITATION OF ACTION—Statute of Limitation Does Not Run Against Any of Heirs to Whom Right of Entry Descends Who Are All Under Disability at That Time Until the Disability is Removed From All.—Appellants and appellees both claim the land of S. who died intestate in 1897. Appellants are the children and the heirs at law of H., who was the adopted child of S. and who died in 1895. The appellees are children and grandchildren of S. Upon the death of the widow of S. in 1901 his land was partitioned among the appellees, his three children. Deeds were executed for their respective parts and recorded. The appellees took possession and have remained in open, notorious, and continuous adverse possession ever since. At the time of this proceeding for the partition of the land, however, two of the appellants were infants and one was a married woman. In 1920 the appellants brought their action for a partition and an accounting for waste, rents, etc. Held, the appellants right of action was not barred by the Statute of Limitations. Wilcox, et al. v. Sams, et al., 213 Ky. 696, 281 S. W. 832.

In construing section 2506 Ky. Stats. which exempts the operation of the Statutes of Limitations as to those who were under a disability at the time the right of action accrued, the court said, "The rule has long been established and consistently followed in this state that, when the right of entry descends to heirs who are all under a disability at the time their right of action accrues, the limitation does not begin to run against any of them until it is removed from all. But if a part of them are not then under a disability, the disability of the others does not prevent the statute from running against all. Moore v. Calvert, 6 Bush 356; Henderson v. Fielder, 185 Ky. 482; 215 S. W. 187."

May's Heirs v. Bennett, 14 Ky. (4 Bush) 311, was an action in which the heirs of a prior patentee claimed land against the grantee of a subsequent patentee. At the time of the death of the plaintiff's predecessor, the first patentee, two of the plaintiffs were feme coverts and one was an infant. It appeared from the agreed facts that only a part of the heirs were under a disability at the time of the accrual of the action. The court held, nevertheless, that the infancy of only one of the children of the first patentee was sufficient to prevent the statute from running and the plaintiffs were entitled to maintain their action.

The reasons for that decision were founded by analogy upon the construction of the act of 1796 limiting the time of prosecuting writs of error. Act of 1796-7, p. 71, sec. 13. That act was brought before the court in a case the plaintiffs in which held an estate as co-heirs and devisees, cast upon them by act of law. A joint decree was pronounced against them divesting them of their title. At the time the decree was pronounced some of the plaintiffs were feme coverts. The court declared that the plaintiffs were bound by the rules of law to prosecute a joint writ of error for the reversal of that decree and that their rights were not barred by the statute. The court upon that occasion said, "It seems to us that the provisions in the act that, 'where a per-
son thinking himself aggrieved by any decree or judgment, which may
be reversed in the court of appeals, shall be an infant, *feme coevert, non
compos mentis*, or imprisoned when the same was passed, the time of
such disability shall be excluded from the computation of the said five
years,' embraces all those who from the rules of law must of necessity
join in the same writ of error; as they make but one party in con-
sideration of law." *Kennedy's Heirs v. Duncan, 3 Ky. (Hardin) 373.*

The opposite result reached by the principal case and that of *May's
Heirs v. Bennett, supra,* may be distinguished upon the two rules which
apply to the respective cases: One in case of general adverse possession
the other to cases of adverse possession in which the party holds under
a title of record. The distinction as stated by some text writers is:
"There is a difference in Kentucky between the general limitation law
and the seven year limitation as to adverse possession. The latter
saves the right which descends to heirs, if any of them are under dis-
ability, differing from the general law that all must be under a dis-
ability to save the right of any. *Harlan v. Seaton, 18 B. Mon. 312; Ash-
brook v. Quorles, 15 B. Mon. 20; Whington v. Taylor, 8 Dana 403; South
v. Thomas, 7 T. B. Mon. 59; McIntyre v. Funk, 5 Litell (Ky.) 33.*"

It seems that the facts of the principal case would have warranted
the court in following the rule applicable to the construction of Sec.
2513 Ky. Stats. inasmuch as the appellees in this case entered by a par-
tition proceeding and held their lands by deeds duly recorded. Its
practical effects, however, are the same, since at the time of the accrual
of the action to the appellants all were under disability. The rule that
was followed by the court was indeed far more favorable to the cause
of the appellees than the rule suggested would have been. C. P. R.

**Mines and Minerals—Strict Performance of a Contract in
Matter of Making Payment Held Waived, and Hence Agreement to
Accept Tardy Payment, Provided Additional Payment was Without
Consideration.**—Plaintiff entered into an escrow agreement with de-
fendants relative to the sale of an oil and gas lease. The payments
were to be made on the first of each month at noon. The agreement
contained a provision that if the payments were not made at the time
named plaintiff could treat the contract null and void and retain pre-
vious payments. The second payment came due on August first. One
of defendants met plaintiff on the street at 11 a. m. and informed him
that the money for the payment had not arrived at the bank. Plaintiff
replied that "he would not be contentious about a few hours delay." The
money not being paid on the morning of the third, plaintiff was
going to treat the lease void. He then entered into an agreement
whereby he agreed to accept that payment two days late, providing an
additional payment was made on December first. This additional pay-
ment was never made and plaintiff sues to collect it. Held: That plain-
tiff's statement was a waiver of strict performance and his agreement
to accept payment two days late providing additional payment be made
was without consideration. *Davenport v. Anderson*, 216 Ky. 22, 287 S. W. 25.

Wherever time is made essential to the performance of an agreement either by the nature of the subject matter or by express stipulation, the party entitled to insist upon such performance may waive his right thereto, either expressly or by conduct inconsistent with the purpose on his part to regard the contract as still subsisting. *American Mortgage Co. v. Williams*, 103 Ark. 434, 145 S. W. 234.

The rule is stated even stronger by the Illinois court. Where before the expiration of the time originally fixed for performance the time is extended, though without consideration, performance within the extended time is sufficient. *Thayer v. Meeker*, 98 Ill. 470. This rule is followed in other jurisdictions. *New American Oil & Mining Co. v. Troyer*, 166 Ind. 402, 76 N. E. 253; *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151. This seems especially applicable to the present case since there was no consideration for plaintiff's statement.

There can be no doubt that plaintiff by his statement waived payment on the lease by noon. Defendant had another hour in which to act and might have made other arrangements for the payment of the sum by noon. He certainly had a right to rely on plaintiff's statement that he would not be contentious about a few hours delay. Plaintiff, having thus waived his right to a punctual performance and his right to forfeiture for tardy performance, had nothing to offer or give defendant for the latter's promise to make an additional payment.

The decision of the court seems correct on principles of justice and is in accord with the rule as expressed by the courts of other jurisdictions.

R. R. R.

**MINES AND MINERALS—UNDER COAL LEASE GRANTING ALL NECESSARY RIGHTS TO SUCCESSFUL MINING OF "THIS COAL" HELD THAT LESSEES WERE NOT ENTITLED TO BRING COAL TO SURFACE FROM ADJOINING LEASE AND USE STRUCTURES AND EQUIPMENT ON LESSOR'S PROPERTY TO PREPARE IT FOR MARKET.—Plaintiff's predecessor in title and his wife executed to defendant a coal lease covering 100 acres of land owned by him, known as the Hays lease, which was adjacent to another lease owned by defendant. Defendant connected the two leases by underground passages. The grantors in the lease died and plaintiffs, their children, inherited and now own the tract of land and the benefits arising in favor of the grantors under the Hays lease. By the terms of the lease in question, the Hays lease, the lessors granted to the lessees "all the necessary rights and privileges to the successful mining of this coal." Defendant claims the right under the Hays lease to bring the coal from its adjoining lease to the surface through the shafts and openings on the Hays lease and there by means of its structures and equipment on the Hays lease to clean, screen and load it for market. This suit was brought to enjoin defendant from so doing. Held, lessees were not entitled to bring coal to the surface through shaft on leased premises

The doctrine is well established that one who owns the fee in coal or one who merely removes it as lessee or licensee has the right during the time that he may under his deed or lease mine coal from a given tract of land to use the underground passages or gangways made by removing the coal from the chamber containing it for transporting coal from other lands owned by or under lease to him. *Consolidated Coal Company v. Schmisseur*, 135 Ill. 371, 25 N. E. 795; *Lillibridge v. Tuckawanna Coal Company*, 143 Pa. 293, 22 Atl. 1035; *Wadsworth Coal Company v. Silver Creek Mineral Railroad Company*, 40 Ohio St. 559; *New York Coal Company v. Hillside Iron Company*, 225 Pa. 211, 74 Atl. 26. But this doctrine is limited in its application to the respective rights of the parties as regards the underground passages made by removing the coal. *Westerman v. Pa. Salt Mfg. Co.*, 260 Pa. 140, 103 Atl. 539, 15 A. L. R. 943; *Moore v. Indian Camp Coal Co.*, 75 Ohio St. 493, 80 N. E. 6.

But there is a marked distinction between the use of the underground passages made in removing coal, whether owned or under lease, and the use of the surface. The principles governing the two cases are different in origin and application. The extent of the right to use the surface of leased premises in connection with adjacent mining operations is determined in only two ways: First, by express grant. *Wadsworth Coal Co. v. Silver Creek Mining Co.*, 40 Ohio St. 559. Second, by necessary implication. *Madison v. Garfield Coal Co.*, 114 Ia. 56, 86 N. W. 41; *Blue Grass Corp. v. Combs*, 168 Ky. 437, 182 S. W. 207. Therefore, unless expressly granted or necessarily implied, a mining lessee can not use his surface rights and privileges on one lease in taking out and marketing the minerals on an adjoining lease owned by him. *Brasfield v. Burwell Coal Co.*, 135, 60 Southern 382. On the other hand, the lessee of mineral rights has the privilege by virtue of his ownership thereof to use the gangways and passageways cut through the mineral lying under the leased premises for the purpose of going to and removing mineral owned by the lessee under adjacent lands. *St. Louis Consolidated Coal Co. v. Schmisseur*, 135 Ill. 371, 25 N. E. 795; *Pruett v. O'Gara Coal Co.*, 165 Ill. App. 470. Thus it is evident that the right to use the passageways made by removing the mineral is based on the ownership of the space it occupies while the right to use the surface is based on express or necessarily implied grant in the instrument under which the lessee claims. This is the only logical conclusion to be drawn from the decision on this point.

The distinction between surface rights and the right to use underground passages and gangways made by removing coal from the space originally containing it is decisive of the principal case. This question has not been considered by the Kentucky court before. However, the result is in accord with the leading cases of other jurisdictions. In
the future we may expect the Kentucky court to follow the doctrine laid down therein in its entirety and without modification or limitation.

W. D. S.

**Municipal Corporations—Liability of City for Damages to Land by Flow of Water Caused by Cleaning Out Drain** A Question for the Jury.—Before the city of Fort Thomas became a municipality, a private land company laid out a subdivision, and built catch-basins and drains in and across the two streets on which the appellant's two adjoining lots are located. The evidence showed that at the time the appellant purchased the lots the drain on her premises was covered by grass and not functioning; that no water had flowed through it for twenty years. A workman for the appellee while repairing the city streets and sewers found the drain and cleaned it out, thereby causing water from surrounding territory to flow on and damage the appellant's property. The city contended that it had not adopted the drains laid by the private company as a part of its sewerage, but merely cleaned out the drain. The lower court directed a verdict for the city.

The Court of Appeals held that the case disclosed by the evidence was not one where the city left the drainage as it was, but one where no injury would have resulted had it not been for the independent and affirmative action taken by the city; that the question of the city's liability should have been left to the jury. *Hewling v. City of Fort Thomas*, 213 Ky. 734, 281 S. W. 981.

It has been held that a municipality is liable for misfeasance or nonfeasance in the performance of its duty to exercise reasonable care in the maintenance of its sewers, drains, and watercourses and to keep them in reasonable repair and free from obstruction. *City of Louisville v. Gimpell*, 22 K. L. R. 1110, 59 S. W. 1096; *Sprangler v. San Francisco*, 84 Cal. 12, 23 P. 1091; *Burnside v. Everett*, 186 Mass. 4, 71 N. E. 82. In *Tate v. City of St. Paul*, 56 Minn. 527, 58 N. W. 158 the court said that if a sewer, whatever its plan, is so constructed as to cause a positive and direct invasion of private property, as by collecting and throwing upon it, to its damage, water or sewage which would not otherwise have flowed or found its way there, the corporation is liable. Here in the principal case the appellee has not only done an independent act not necessary in the cleaning of its sewers, but has caused water that otherwise would have escaped the appellant's premises to be thrown thereon. It seems that the modern view is that where the damage is called by a direct invasion on the plaintiff's property that the municipality will be liable. (Dillion on Municipality Corporations, sections 1087-1092). From the modern trend it appears that the court was correct in holding that the evidence in the principal case was sufficient to have allowed the question of the city's liability to have gone to the jury. J. S. F.

**Negligence—Infant Chasing Guinea, Released by Store for Advertising Purposes, Assumed the Risk of Injury.—** Appellant owned
and operated a department store. For the purpose of advertising his store he announced through the press that he would conduct a guinea race in which the successful participants were to receive the fowls which were to be the subject of the chase together with certain money prizes. The appellee was a minor, being sixteen years and eleven months of age, and was possessed of ordinary intelligence and physique. Upon the day of the chase a great crowd assembled to participate therein. Among the more active participants was the appellee, and who during the rush and excitement of the chase tripped to the sidewalk and was painfully and seriously injured. He brought his action against the owner of the store for the injuries that he had sustained by reason of the appellant's negligent conduct. Held, that the appellee assumed the risks of the undertaking and was thereby barred from recovery. *McLeod Store v. Vinson*, 213 Ky. 667, 281 S. W. 799.

On appeal the court declared that "an excited crowd chasing guineas for a series of prizes upon a congested street would obstruct the street and cause inconvenience and some danger to travelers and this would render one causing such commotion liable to a traveler exercising due care in the proper use of the street for any injuries inflicted upon him by the racers. It may also be assumed that the appellee was not guilty of any contributory negligence *per se* while engaged in the race. But a serious question to be considered is whether under the facts stated it should be held as a matter of law that he assumed the dangers ordinarily attendant upon the race in which he entered. In this he was a voluntary participant. There was no danger to him whatever while standing in the courthouse yard and aside from joining in the race he had no occasion to go upon the street or pavement. The anticipated danger was as obvious to him as it was to the appellant. It is clear that in entering the race he assumed the ordinary risks incident thereto and is thereby barred from recovery in this action."

*Conrad v. Springfield Consolidated Ry. Co.*, 240 Ill. 12, 88 N. E. 180, 130 Am. St. Rep. 241, was an action brought by an employee of a telephone company against a street railway company for injuries received while in the telephone company's employment. A wire which the plaintiff was mending came in contact with a high voltage electric wire of the railway company. It served as a conductor for the electricity from which he suffered severe burns and injuries. There was a city ordinance which required that the defendant should maintain guard wires over its trolley line at all junctions with wires of other companies. The railway company had failed to maintain its wires at this point. The court held that the plaintiff could recover damages for the injuries sustained. Upon the defendants' contention that the plaintiff assumed the risks of the danger the court ruled that the doctrine of assumption of risks applied only to cases arising between master and servant.

The case of *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685, was an action by a servant under the employers' liability act of 1880 (43 & 44 Vict. c. 42), S 1 sub-s. 1 to recover for injuries received while in the defendant's employment. The plaintiff was employed in a cooling room
of the defendants' brewery. In the room there was a boiling vat and a cooling vat and between them there was a passage about three feet wide. The cooling vat had a rim about two feet high, but there was no fencing around it. The plaintiff, while attempting to remove a board from beneath the heating vat, lost his balance and fell into the cooling vat and was severely scalded. The court held that, although the employers' liability act had deprived the defendant of one of his common law defenses, the assumption of risk by the servant by virtue of his contractual relation to the defendant, the defense arising from the maxim "violenti non fit injuria" had not been affected by the act, and applied in the present case. Therefore, there was no evidence of negligence arising out of a breach of duty on the part of defendant towards the plaintiff and for that reason the plaintiff could not recover.

The rule in the principal case follows the weight of authority that one can avail himself of the defense expressed in the maxim violenti non fit injuria. "One who knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger." O'Malley v. South Boston Gaslight Co., 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161.

Negligence—Manufacturer of Inherently Dangerous Article is Liable to Ultimate Consumer for Injury from Negligence in Manufacturing, Packing or Marketing Article Without Due Warning.—On July 7, 1924, A, an infant, engaged in cooling bottles of soft drinks in a tank of ice water, sustained severe injuries to her wrist and the extensor tendons of the four fingers of her right hand were severed, when a bottle of coco-cola exploded. In a suit by her next friend against the coco-cola company, she recovered a judgment. The defendant company appealed and insisted that the court erred in not directing a verdict in its favor. Held, plaintiff could recover. Coco-Cola Bottling Works v. Shelton, 214 Ky. 118, 282 S. W. 778.

The general rule is that the manufacturer and seller of an article which is essentially dangerous to a person or property owes a duty to the public to use care in its manufacture, that it shall not be unnecessarily dangerous; but with respect to articles not of such dangerous nature his only liability for negligence is to the party with whom he contracts. Standard Oil Co. v. Murray, 119 Federal 572; Peaslee-Gaulbert Co. v. McMath's Admr., 148 Ky. 265, 146 S. W. 770.

However, there are exceptions to the general rule. Where the article manufactured is inherently or intrinsically dangerous to life or limb a manufacturer is liable to the ultimate consumer for the injuries which result from the manufacturer's negligence in manufacturing or packing or putting upon the market without due warning. The liability here does not arise out of contract or deceit, but is based upon the fundamental proposition that where a person sustains such relations to society that danger to others will result from a failure to use due care in his activities he owes a legal duty of such care to that class
of persons likely to be injured by his failure to exercise it. *Huset v. J. I. Case Threshing Machine Co.*, 120 Federal 685. One who puts on the market inherently or intrinsically dangerous to life owes a duty of care to all persons who ought reasonably to have been foreseen as likely to use them. *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159.

Another exception to the general proposition is where the manufacturer is liable to third parties when he is negligent in the manufacture of an article inherently or intrinsically dangerous to health, life or limb, or when he sells an article for general use which he knows to be dangerous and unsafe and conceals from the purchaser defects in its construction from which injury that might reasonably be expected to happen to persons using it. *Olds Motor Works v. Shaffer*, 145 Ky. 616, 140 S. W. 1047.

The Kentucky courts have followed the exceptions to the general rule stated by several leading cases and the results reached in its decisions was undoubtedly correct. S. G. C.

**New Trial—Taking Judgment Against Pooled, After Leading Him to Believe There Would Be Settlement of Claim for Breach of Pooling Agreement Without Litigation, Held Fraud Entitling Him to New Trial.**—Appellee had breached a pooling contract with appellant, and appellant brought an action for the breach. Before judgment in the case, the attorney for appellant had, in discussing the possibility of a compromise and settlement, led appellee to believe the matter could be settled without litigation. Notwithstanding this, the attorney for appellant took judgment against appellee before the parties had even met and discussed the proposed compromise. Held, that appellee is entitled to a new trial as provided by Civil Code of Practice, section 518, subdivision 4, regardless of whether he alleged in terms that attorneys' conduct was fraudulent. *Dark Tobacco Growers' Co-Operative Association v. Bevins*, 216 Ky. 121, 187 S. W. 355.

The attitude of the Kentucky Court of Appeals in regard to the granting of a new trial on such grounds is unequivocally expressed in *Stamper v. Forman-Earle Co.*, 158 Ky. 324, 164 S. W. 937. In that case the court said: "This court has been very liberal in granting new trials where a party has been misled by statement or conduct of the opposing party or his counsel, and on that account failed to make a defense." But it may well be noted that the court, in that case, held that there must be a definite agreement on the part of both parties to settle out of court; the expressed wish of the complaining party to settle out of court was held not to be sufficient. Was there any "definite agreement" in the instant case? Possibly there is a nearer approach to an agreement in that the appellee, after a conference between himself and appellants' attorney in which the latter informed the former that he would notify him as soon as the representative of the co-operative association came, and after the attorney had so notified him of the arrival of the representative, went at once to the office of the association to meet the representative. Appellee was told that the representative
had left but would return. This affirmative act on the part of the appellee in acting on the attorneys' notification makes a nearer approach to an agreement than is found in the earlier case in which there was no assurance other than silence given that the plaintiff's proposal to attempt to settle would be agreeable. But in neither case can there be said to be a "definite agreement." The attitude of the Kentucky court is further illustrated in Hayden v. Moore, 4 Bush 107, and Winkler v. Peters, 142 Ky. 83, 133 S. W. 1144.

Courts in other jurisdictions where there are statutes almost identical with the one in this state have evidenced a like attitude; State v. Omaha Country Club, 78 Neb. 178, 110 N. W. 693; Lanier v. Nunnally & Co., 128 Ga. 328, 57 S. E. 659; Young v. Lindquist, 126 Minn. 414, 148 N. W. 455. Taking into consideration both the facts of this case and the general tendency of the Kentucky court to give effect to the manifest intent of a statute we may well say that the decision is correct. To this may be added as a further proof of the correctness of the decision the fact that courts generally are apt to search for some ground whereby a party may be relieved of a judgment procured by fraud, whether there is a statute or not. Chamberlain v. Lindsay, 1 Hun. 231, G. R.

**RAILROADS—ONE ABOUT TO CROSS RAILROAD MAY RELY ON WARNING SIGNAL REQUIRED TO BE GIVEN WITHOUT STOPPING, LOOKING AND LISTENING.**—Appellee recovered a judgment in the lower court against the railroad company for personal injuries received in a collision between one of defendants' passenger trains and a truck which appellee was driving. The railroad contended that it was entitled to a directed verdict at the close of the testimony on the ground "that one about to cross the tracks of a railroad company at grade on a public highway must 'stop, look and listen.'" The court refused the directed verdict and appellant appealed. Judgment was given for appellee. Louisville & N. R. Co. v. Johnson, 214 Ky. 189, 282 S. W. 1087.

It is the common law duty of those in charge of trains, for a non-performance of which the railroad company is responsible, when approaching a public crossing to give notice of their approach by all reasonable warnings, such as blowing a whistle, ringing a bell, signal lights, or by such other devices as may be sufficient to give timely warning to travelers of their approach, so as to afford time for all approaching to stop in a place of safety or if on the track to get out of danger. Louisville R. Co. v. Morris, 14 Ky. Law Rep. 466, 20 S. W. 539.

In accord with the above general rule it is the duty of those in charge of a train to give due and proper warnings of its approach, that those in crossing its track may know and avoid the danger; and when passing great thoroughfares thronged with travel, the speed of the train should be checked, or other means devised to insure the safety of those on the highway, and a failure to give such warning, or to use such precaution, must be regarded as negligence. Paducah and Memphis
CASE COMMENTS

Railroad Co. v. Hoehl, 12 Bush 45; Clasins' Admr. v. Lexington and Big Sandy Railroad, 13 Bush 642.

In the case of L. & N. R. Co. v. Commonwealth, 13 Bush 388, the court said: "It is the duty of a railroad company to cause signals to be given where the safety of travelers on intersecting roads demands that a warning should be given of approaching trains." Where a street crossing over railroad tracks is used by many persons, and is more than ordinarily dangerous to such persons, the company, in addition to the usual signals, must provide such signals as are reasonably necessary to give notice of a train's approach to the crossing. Southern Ry. Co. v. Winchester, 32 Ky. L. R. 19, 105 S. W. 167. It is the duty of a railroad company to use reasonable care and give proper signals on the approach of its trains, in passing through a populated portion of a city. Louisville R. Co. 19 Ky. L. R. 1900, 44 S. W. 1112.

Heretofore, where the railroad company has failed to give such warnings at its crossings, the above decisions have deemed the railroad company negligent and gave the injured parties a right to recover. However, the last General Assembly enacted the following statute, section 4353h-I, which provides: "UNSAFE GRADE CROSSINGS; DUTIES OF DRIVERS.—That whenever in this state the main track or tracks of any railroad or interurban railway shall cross at grade a public highway, the State Highway Commission may designate such crossing as 'unsafe,' and it shall be unlawful for the driver of any vehicle to cross such crossing without first bringing such vehicle to a full stop at not less than ten (10) feet, nor more than thirty (30) feet from the nearest rail of such track or tracks. The phrase 'main track or tracks,' as used in this section, shall mean any railroad or interurban track or tracks over which regularly scheduled trains or cars are operated." (March 19, 1926, c. 114, p. 388, I.)

It is worthy of note that the Kentucky statute varies from the usual statute of this type in that it limits the "stop, look and listen" rule to crossings designated as "unsafe" by the highway commission. There is no evidence in the instant case that the highway on which the accident occurred had been so designated by the highway commission. But even if the highway had been so designated, the statute would not be applicable to a case arising before its passage. The statute was passed March 19, 1926, while the decision in this case was rendered by the Court of Appeals April 27, 1926. While the date on which the injury was incurred is not given in the case, it is evident that it was prior to the passage of the statute.

S. G. C.

STATUTES—Statute Prohibiting Employment of Minors in Street Occupations in Cities of Second and Third Class Held Not Unconstitutional as Local or Special Legislation.—Defendants are agents of daily newspapers circulating in the city of Covington. Defendants sold newspapers for cash to two boys under fourteen years of age with the understanding that the boys intended to sell the same for profit, and that the boys did actually sell the papers at a profit to themselves.
The boys attended school regularly and the papers were sold after school hours. In a prosecution by the Commonwealth for violation of section 331a-15, Kentucky Statutes, the defendants contended that the statute is unconstitutional in that it contravenes section 59 of the Constitution. Held, that the statute is not unconstitutional as contravening section 59 of the Constitution. Commonwealth v. Jarrett, 213 Ky. 618, 281 S. W. 805.

It is to be noted that the constitutional provision invoked by the defendants concerns the limitations upon the state legislature in passing local and special legislation on some twenty-odd specifically named subjects. One of these subjects is labor, "to regulate labor, trade, mining or manufacturing," is denied the legislature in attempting local or special legislation. The statute under question is a part of the recently enacted Child Labor Laws of the state. The subsection specifically attacked prohibits street trades by boys in cities of the second and third class.

This opinion reaffirms the position taken by the same court in the case of Commonwealth v. Linginski, 212 Ky. 366, 279 S. W. 339, in which the court said: "Street occupations, such as the selling of newspapers, are confined to populous centers in big cities. There is, therefore, a natural and reasonable distinction to be made between such occupations in such places like callings in the country and small towns. The General Assembly had a right to make such classification based upon natural and reasonable distinctions." The court merely applied, in that case, the general law as worked out clearly by a long line of Kentucky cases to a different set of facts from any previously presented. Hodge v. Bryan, 149 Ky. 110, 14 S. W. 21; City of Louisville v. Coulter, 177 Ky. 242, 197 S. W. 819; Commonwealth v. Ward, 136 Ky. 155, 123 S. W. 673; Lakes v. Goodloe, 195 Ky. 240, 242 S. W. 632. Courts of other jurisdictions have likewise recognized the right of the legislature to make such classification based upon natural and reasonable distinctions. Hyvonen v. Hector Iron Co., 103 Minn. 331, 115 N. W. 167; Patstone v. Pennsylvania, 232 U. S. 138. Text writers also have recognized the practical importance of allowing this province to the legislatures. In Sutherlands' Statutory Construction, 2d edition, section 203, it is said: "It is agreed on all hands that the constitution does not forbid a reasonable and proper classification of the objects of legislation." It takes no great amount of insight to see that such a holding is salutary as well as founded upon authority.

G. R.

**TAXATION—Where Property is Listed and Sold in Name of Trustee Not Real Party in Interest, Purchaser at Tax Sale Does Not Acquire Title, but Merely Lien for Amount of Taxes, Interest and Penalties.**—The appellee, having purchased lands at a tax sale, instituted this action against the appellants, trustees, to obtain possession of the land so purchased, claiming to be owner of the fee simple by reason of the sheriff's tax deed. The appellants denied the ownership and right of possession of the appellee upon the ground that the land sold for tax-
ation was never properly listed for taxation in the name of the true owners; that the property was listed in the name of the trustees while the ownership was in others, and that the sale was void because made for more than the true amount of the taxes, penalty and cost. Held, that did not acquire title but merely a lien for the amount of the taxes, interest and penalties. *Shawler v. Carter*, 215 Ky. 601, 286 S. W. 779.

In the case of *Spaulding v. Thompson*, 16 Ky. Law Rep. 836, the property of the wife was sold for the taxes of the husband, and the court held that land owned by the wife should be listed for taxation in her name and not in that of the husband; and where it was assessed and sold for taxation as the property of the husband, the purchaser did not acquire the title of the wife.

"Reasonable diligence should be required of the assessor in listing, or causing to be listed, land in the name of the proper person, and where land is listed in the name of a person who is neither owner nor agent, the sheriff cannot sell it for taxes and pass a valid title to the purchaser." *Wheeler v. Bramel*, 10 Ky. Law Rep. 301. In *Smith v. Ryan*, 88 Ky. 636, the court said: "A tax sale for anything more than is lawfully chargeable is a sale without jurisdiction, and therefore void. If more than is due, it is an excess of jurisdiction." This same doctrine was followed in *Fish v. Genett*, 22 Ky. Law Rep. 177; *Husbands v. Politick*, 123 Ky. 652; *Kentucky Lands Investment Co. v. Lowery*, 146 Ky. 537.

"As the tax sale at which the appellant became the purchaser was void because the land was sold for more than was due as taxes, penalty and costs, it follows that the appellant did not acquire any title to the land, either by the certificate of purchase given him by the sheriff or by the tax deed made by the sheriff; all that she became entitled to by virtue of her purchase was a lien upon the land for the amount paid at the tax sale." *Collins v. Lane*, 151 Ky. 8.

It is manifest that the court has followed the well established rule in this state in rendering this decision. M. W. M.

**Trusts—Enforcement of Parol Agreement, in Consideration for Conveyance to Sell and Divide Proceeds Among Others Is Not Prevented by Statute of Frauds.**—A deed by which the defendant's father conveyed land to the defendant purported to be an absolute grant for valuable consideration. No consideration was in fact paid, the conveyance having been made pursuant to an agreement between the defendant and his father that the defendant would hold the land in trust for his father, and would, upon the death of his father, sell the land and divide the proceeds among his brothers and sisters. This bill is brought by the fathers' administrator and the defendants' brothers and sisters to compel specific performance of this oral agreement to sell and convey. Held, that the Statute of Frauds is no bar to enforcement of this parol agreement. *Newton v. Newton's Administrator, et al.*, 214 Ky. 278, 283 S. W. 83.
If A convey to B by a deed absolute on its face and recites that consideration has been paid, the real and only consideration being an oral agreement that B shall convey to C, the almost universal rule is that C cannot enforce the parol agreement, since the action is barred by the Statute of Frauds. Stout v. Stout, 165 Iowa 552, 146 N. W. 474; Ohesser v. Motes, 180 Ala. 563, 61 So. 267; Kinley v. Thelen, 158 Cal. 175, 110 Pac. 513. Most courts also hold that the statute is a bar to an action by A to recover the land from B, and refuse to give relief either upon the express trust or upon grounds of a constructive trust. Crawford v. Workman, 64 W. Va. 19, 61 S. E. 322; Nicholas v. Capen, 79 Wash. 120, 139 Pac. 868; Woodford v. Tarnham, 44 Minn. 159, 46 N. W. 295.

In a few jurisdictions A is allowed to recover the land from B. Such an action is clearly not upon an express agreement, but proceeds upon the theory that B is unjustly enriched, and to prevent a fraud the courts restore the statu quo ante.

Doll v. Doll, 96 Neb. 155, 147 N. W. 471; Lang v. Lang, 131 N. Y. S. 891; Hal v. Linn, 8 Col. 264, 5 Pac. 641. This rule is supported by both justice and logic, while the rule which allows C to enforce the trust seems to be an invasion of the Statute of Frauds. For to allow C to recover is clearly upon an express oral contract to convey, for C not having parted with anything is not injured, and for this reason the law will not raise a constructive trust in his favor. The theory of the constructive trust is to prevent a party suffering injury by the fraud of another. This is the theory set out in the English courts in denying C an action, but restoring to A the property fraudulently taken or withheld from him. Haigh v. Kayne, L. R. 7 Ch. 469; Booth v. Turle, L. R. 16 Eq. 182. The Massachusetts court allows A to recover the value of the land, but not the land itself. Twomey v. Crawford, 137 Mass. 284.

In the case of a devise to B upon an oral agreement that B would transfer to C, many courts have gone further than they would in the case of gifts inter vivos, and allow C to enforce the oral agreement. Campbell v. Brown, 129 Mass. 23. But see contra, Moore v. Campbell, 102 Ala. 445. A small minority view is to extend this rule to apply to transfer inter vivos, provided that the grantor is dead. For then, as in the case of a devise, the grantor cannot carry out his purpose to aid the intended beneficiary. Dieckman v. Merkh, 20 Cal. App. 655, 130 Pac. 27; Ahrens v. Jones, 169 N. Y. 555, 62 N. E. 666; Becker v. Neurath, 149 Ky. 421, 149 S. W. 857.

The early Kentucky rule was to refuse to enforce such an oral agreement. It was then held that a parol agreement could not operate to make an absolute deed have the effect of a mortgage. Harper v. Harper, 5 Bush 176. Such a transaction is in close analogy to the present situation, being a transfer to B upon an oral agreement that he will reconvey when his grantor should pay an existing debt. But a parol agreement is now competent to show that an absolute deed was intended only as a mortgage. Brown v. Spradlin, 136 Ky. 703, 125 S. W. 150. This is authority for the proposition that one who makes a grant with-
out consideration may recover against his grantee upon an oral agreement to reconvey, but is no authority for the proposition that a third person for whose benefit the agreement was made can sue upon it. The reason has been pointed out above. Again, in the case of *Usher v. Flood*, 83 Ky. 552, the court refused to go the extent of the principal case, holding that there was no action upon an express oral agreement, but that remedy would be by way of constructive trust to restore the parties to their original status. This rule was followed in the case of *Ramey v. Stone*, 23 Ky. L. Rep. 301. But in the case of *Becker v. Neurath*, *supra*, the court laid down the rule which is followed in the principal case.

The fact that the seventh section of the English statute of frauds has never been enacted in this state cannot affect the rule as to agreements to sell and reconvey lands, for this is covered by the sixth section of the English statute, which has been copied into our statutes. *Gaylor v. Gaylor*, 150 N. C. 222, 63 S. E. 1028; *Neill v. McClung*, 76 S. E. 878, 71 W. Va. 458.

**WILLS—UNDEU INFLUENCE IS SUCH AS DESTROYS FREE AGENCY OF THE TESTATOR, AND DOES NOT INCLUDE THAT OBTAINED BY KINDNESS OR APPEAL TO FEELINGS, UNDERSTANDING OR AFFECTION WHICH DOES NOT DESTROY FREE AGENCY.—*A* died November 3, 1922. She left no issue and under the statute her estate would have been divided among surviving brothers and sisters and their heirs. By an instrument dated July 23, 1913, she devised practically all her estate to her niece. The instrument was admitted to probate, and thereafter the brothers and sisters of the testator instituted this action.

The instructions which the court gave to the jury were: "Undue influence, as used in these instructions, is such an influence as obtains dominion over the mind of the testator to such an extent that it destroys free agency on his part in the disposal of his estate and constrains him in respect thereto to do that which he would not have done if left to the free exercise of his own judgment. But any reasonable influence obtained by acts of kindness, or that appeal to the feelings, or to the understanding, or to the affections, and not destroying free agency, is not undue influence." To these instructions contestants objected and offered others which were refused. Because of this refusal the contestants appealed. Held, that the instructions given were correct. *Clore, et al. v. Argue, et al.*, 213 Ky. 644, 281 S. W. 1005.

Undue influence is not that influence which is obtained by modest persuasion or by arguments addressed to the understanding, or by mere appeal to the affections; it must be an influence obtained either by flattery, excessive importunity, or threats, or in some other mode by which a dominion is acquired over the will of the testator, destroying his free agency, and constraining him to do, against his free will, what he is unable to refuse. 2 Greenleaf 688, Harrisons' Case, 1 B. Monroe 351.
In the case of *Lucas v. Cannon*, 13 Bush 650, facts similar to those in the principal case appeared and the court on the question of undue influence said: "It is such an influence as is exercised by coercion, imposition, or fraud; not such as merely arises from the influence of gratitude, affection or esteem. It must be the ascendancy of another will over that of the testator by reason of coercion, imposition or fraud."

Undue influence cannot be inferred from the fact that a will is partial or unjust in its operations. *Broaddus v. Broaddus*, 10 Bush 304. To invalidate a will because of undue influence it is not necessary that the influence be exerted at the time of making the will; it is sufficient that a controlling influence previously put in operation is still controlling the testator to the extent of destroying his free agency. *Overall v. Bland*, 11 Ky. Law Rep. 371, 12 S. W. 273. S. G. G.