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Case Comments

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CASE COMMENTS

ADVERSE POSSESSION—POSSESSION OF VENDEE UNDER EXECUTORY CONTRACT OF SALE NOT ADVERSE UNTIL CONDITIONS THEREOF ARE PERFORMED OR VENDOR'S TITLE REPUDIATED.—In 1887 A sold B a tract of land containing forty-seven acres. B gave his notes in payment, secured by a vendor's lien. These notes were assigned to C, who foreclosed and bought the land at a commissioner's sale, but died before the deed was made to him, leaving as his heirs six children, five of whom were minors. These heirs were given a deed in 1896 and contracted to sell the land to D, brother of B's wife, and the court approved the contract as to the infant heirs. The deed was to be given D when he should pay one-sixth of the price to the heir who had reached his majority, one-sixth to each guardian of the five infant heirs. D entered into possession but never paid these minor heirs anything. Several times, up until as late as 1911, D attempted to have the deed executed to him, and once even went so far as to prepare the deed himself. He remained in possession until his death in 1917. The plaintiffs, heirs of D, claimed the land against defendants, heirs of C, based on the assumption that the possession of D was adverse to the defendants. The possession was held not to be adverse. Collins v. Brown, 209 Ky. 77, 272 S. W. 44.

A possession commenced under a contract of sale is not an adverse possession in any sense, nor can the purchaser, or any one going in under him, whether with or without knowledge of the contract of sale, ever acquire title to the land by the Statute of Limitations, until he has by some unequivocal act repudiated the contract. But even then the vendor must have knowledge of the repudiation and that the vendee intends to hold adversely to him. This principle is amply sustained by the authorities. Lewis v. Hawkins, 23 Wall. 119, 23 U. S. (L. Ed.) 113; Seabury v. Doe, 23 Ala 207, 58 Am. Dec, 254; Relfe v. Relfe, 34 Ala, 500, 73 Am. Dec. 467; Chapman v. Chapman, 91 Va. 397, 21 S. E. 813; Creech v. Creech, 186 Ky. 149, 216 S. W. 127; Bergere v. Chanes, 14 N. M. 352, 93 Pac. 762.

The case of Lewis v. Hawkins, decided by the U. S. Supreme Court in 1875, was a suit by a vendor, who had previously obtained a judgment against his vendee on notes given in payment for the land, to enforce the judgment against the land. The vendee had assigned his interest and set up his discharge in bankruptcy as a defense, and his assignee relied upon the Statute of Limitations. The court held that in equity a vendor, from the time the contract of sale is made until the conveyance is executed, is a trustee of the land for the vendee, and that the vendee is trustee of the purchase money for the vendor; that as between the trustee and the cestui que trust the Statute of Limitations has no application and no length of time is a bar; that the relation
and privity between the parties is such that the possession of one is the possession of the other, and there can be no adverse possession during the continuance of the relation; that the same principle applied where the cestui que trust is in possession, he being regarded as tenant at will of the trustee that until the tenancy is determined there can be no adverse possession between the parties; and finally, that once the relation is established it is presumed to continue, unless a distinct denial or acts, or a possession inconsistent with it are clearly shown.

In *Relfe v. Relfe*, supra, in a suit by vendor to enforce his lien, the court said: "The vendor of lands stands precisely as a mortgagee. We have decided, after careful consideration, that the possession of mortgagor is not adverse to mortgagee; and that mortgagor cannot invoke the analogy of the Statute of Limitations, in the absence of a holding positively hostile to the mortgagee, to defeat a bill to foreclose his lien. If the vendee is regarded as holding under the vendor—if his possession is that of the vendor—it would be a violation of all precedent and principle to allow the acquisition of title by the lapse of time."

In *Creech v. Creech*, supra, a case directly in point, the court said: "The possession of vendee under an executory contract of sale is not adverse to that of his vendor until he has performed the conditions thereof or repudiated the latter's title, and this is true whether the contract is in writing or in parol. Hence, if any portion of the purchase money remains unpaid, the holding of the vendee is not adverse unless he repudiates the vendor's title."

It will be noticed that all of these cases support the proposition that there must be a positive repudiation of the contract by the vendee before the possession is adverse, and that the vendor must have knowledge of this repudiation, or, at least such a constructive notice that he would not be able to close his eyes to it.

In the present case, can it be said that D, the vendee, ever repudiated the contract? Or, assuming that he did, did the vendors have notice of it? It does not seem that there was any act or statement that, even by the most liberal interpretation, could have been so construed. Some of vendee's witnesses testified that he intended to hold adversely, but a mere intent, unaccompanied by any external acts indicative of such intent, would not be enough, for it is one of the elements of adverse possession that it shall be notorious. On the other hand, it seems that the vendee's acts in attempting to have the deed executed, and in going so far as to prepare the deed, were a recognition, rather than a repudiation, of the fact that the title was still rightly in the vendors and that he still owed money on the contract.

E. M. N.
Attorney and Client—Disbarment Authorized in Common Law Proceedings for Failure to Pay Over Funds Notwithstanding Prescribed Statutory Remedy.—An attorney failed to account for funds collected for his client. Held, that he may be disbarred in a common law proceeding, and that the proceeding authorized by Kentucky Statutes, section 104, is not exclusive. Duffin v. Commonwealth, 208 Ky. 452, 271 S. W. 555.

Section 104 is as follows: "If any attorney at law shall collect the money of his client, and, on demand, wrongfully neglect or refuse to pay over the same, the circuit court of the county in which the money may be collected, shall, after notifying the attorney to show cause against the same, suspend him from practice in any court for twelve months, and until the money shall be paid. Before any such motion shall be entertained, a demand of the money shall be made of such attorney in the county of his residence."

It was held in Wilson v. Popham, 91 Ky. 327, 15 S. W. 359, that an action was properly brought in the name of the client under this section. In Commonwealth v. Roe, 129 Ky. 650, 112 S. W. 683, it was contended by the defense that the action could be brought only in the name of the client and under the statute. But the court there expressly held that the remedy against the attorney was not thus limited, saying that if such were the law, there would be no way to punish an attorney if the client did not wish to prosecute. The court also said that the statute did not change the rule, but only fixed a definite suspension, and was intended to afford the client a speedy and effectual remedy for the collection of his money wrongfully withheld; and that it was intended more for the benefit of the client than to purify and elevate the profession by removing from its ranks one who had shown himself unworthy to be a member of it.

Similar decisions have been made in other states. Thus, in Illinois, where there was a statute authorizing "any person interested" to institute proceedings, the court held that "The exercise of this power (to disbar) cannot be made to depend upon the inclination to prosecute by the particular client who may happen to be the victim of an attorney's misconduct." People v. Chamberlain, 89 N. E. 994.

The right of the court to disbar attorneys for proper cause has been recognized from time immemorial. Rice v. Commonwealth, 18 B. Mon. 472; Commonwealth v. Ritchie, 114 Ky. 366, 70 S. W. 1054; Bradley v. Fisher, 80 U. S. 335. So essentially is a disbarment proceeding the province of the court, it has been held that it does not lie within the legislative power to change it. In Danforth v. Eagan, 119 N. W. 1021, the court said: "It is a serious question whether it lies within the power of the legislature to more than regulate this right of the court." And it was held in Ex Parte Wall, 107 U. S. 265, that disbarment proceedings by the court did not violate the constitutional provision which requires an indictment and trial by jury in criminal
cases; that it is not a criminal proceeding and not intended for punish-
ishment, but to protect the court from the official ministration of
persons unfit to practice as attorneys therein.

It seems, therefore, that there is abundant authority to support
the decision in Duffin v. Commonwealth, supra; and that it is a correct
holding both in reason and in principle; correct in reason because by
a contrary decision, the court would have to be dependent for its protec-
tion upon the inclination of the injured client to prosecute; and cor-
rect in principle because it is the inherent right of the court to protect
itself from persons unfit to practice therein.

L. H. S.

CORPORATIONS—FOREIGN CORPORATIONS HELD NOT DOING BUSINESS
WITHIN STATE SO AS TO REQUIRE FILING STATEMENT WITH SECRETARY OF
STATE TO MAINTAIN ACTION.—The plaintiff, an Ohio corporation, in an
effort to extend its trade of selling phonographs in Kentucky, put on
an advertising campaign in Owensboro. This advertising was to be
done at the expense of the local agent, the defendant. In payment for
the advertising the plaintiff took a note of the defendant covering the
total cost and finally brought suit on it. The defense set up was the
non-compliance of the plaintiff with Kentucky Statutes, section 571,
requiring foreign corporations entering the state to do business to
file with the Secretary of State a statement of the names of the agents
in the state upon whom process might be served. The court held that
the mere putting on of an advertising campaign during which the re-
presentatives took no orders for goods was not such a doing business that
would require a filing of a statement with the Secretary of State.

As to the general rule as to what constitutes doing business within
a state, the courts have adopted the principle that, "The mere solic-
titation of business by agents of a foreign corporation is not doing

The Kentucky cases are in accord with this general rule and have
laid down in Larkin Co. v. Commonwealth, 172 Ky. 106, that an agent
of the defendant company who had been in the state some thirty days
advertising and displaying soaps, etc., where the orders were sent di-
rect to the factory, was not doing business within the state to warrant
compliance with the statute. Also in Ichenhauer v. Landrum's As-
signee, 153 Ky. 316, it was held that a foreign corporation having a debt
in this state may collect its debt or take a mortgage to secure it and
not be held doing business within the state. In Three States Buggy Co.
v. Commonwealth, 32 Ky. Law Rep. 385, 105 S. W. 971, the court ex-
tended the rule and held that an agreement whereby the corporation
was to ship goods to an agent who was to sell such goods as he was
able and that the company, at the end of the season, would take back
all the unsold goods, was not such a doing business that would require
a filing and compliance with the statute. The principle case seems to
be in line with these decisions.

W. B.
Deeds—Deed Need Not Have Names of Grantors Recited Therein.

—Appellant brought an action in equity to quiet his title to a tract of land, alleging that he was the owner and in possession by virtue of the following deed: "Know all men by these presents, that we, the heirs of Whitmill Stephens, for and in consideration of one hundred dollars, paid by James Stephens to Whitmill Stephens, we, the heirs of Whitmill Stephens, do hereby assign, convey and deliver our right, title and interest to the within described land, etc." Appellee insisted that this deed is void for the reason that the names of the grantors are not inserted in it. From a judgment of the lower court holding that the deed was void, this appeal was brought. Stephens v. Perkins, et al., 209 Ky. 651, 273 S. W. 545.

Where a deed is formally drawn, the parties of the first part and the parties of the second part being set out, the name or names of the grantor must be set out as one of the parties. The signature of the grantor to the deed, without any mention of his name in the body of the instrument, renders the deed void. Parsons v. Justice, 163 Ky. 740, 174 S. W. 725; Farley v. Stacey, 177 Ky. 115, 137 S. W. 638, 1 A. L. R. 1181. It is not essential that the grantors be described by name, where they are otherwise so described as to be identified. Thus "We the heirs and devisees of S," but not naming them, is valid. Blaisdell v. Morse, 75 M. E. 542. Even the omission of all or any of the formal parts of a deed does not destroy its validity, where enough appears on its face to show that those having an interest intend to convey it, and they join in sealing the instrument, it being sufficient if the matter written is legally set forth in an orderly manner by words which clearly specify the agreement and meaning of the parties and bind them. Jamison v. Jamison, 3 Whart. (Pa.) 457, 31 Am. Dec. 536; Peabody v. Hewett, 52 Me. 33, 83 Am. Dec. 436; Riggs v. New Castle, 229 Pa. St. 490, 78 Atl. 1037. One who signs a deed as a grantor should appear on the face of the deed as a party thereto, but it is not necessary that he should so appear by name. Texas Pac. Coal and Oil Co. v. Patton, 238 S. W. 202. In Blake v. Hedrick (W. Va.), 120 S. E. 908, and in Berry v. Richmond Cedar Works (N. C.), 113 S. E. 772, the courts held that it is not essential that the grantor or grantee be formally named in the granting clause of a deed, if by taking the whole instrument together they be sufficiently designated or described to distinguish them from the rest of the world, and there is no uncertainty as to the identity of either party.

In the principal case, the words, "We the heirs of Whitmill Stephens," show clearly who conveyed the property, and the meaning of the deed may be determined from its terms without doubt. In line with the weight of authority, the court held that a deed by the heirs of a person named, was not void for failure to have the names of the grantors inserted therein; "we, the heirs" of person named showing sufficiently who conveyed the property.

W. F. S.
Descent and Distribution—Designation of Testator’s Children as Beneficiaries in Life Insurance Policy Held “Advancement.”—
T died intestate, survived by six children who are his only heirs at law. A short time before his death he assigned to five of his children a life insurance policy, which was payable to his estate. The beneficiaries collected and distributed the proceeds of the policy, amounting to $600.00 each. The sixth child, a daughter, who was not included as a beneficiary under the policy, sought to have each of the other children charged with $600.00, as an advancement and to have $600.00 for herself set out of the distributable assets of the estate before settlement. The court held that in view of Kentucky Statutes, section 1407, which says that any such gift or payment shall be considered as advancement and that the law aims at equality in distribution, the amount received by each of the beneficiaries was considered an advancement and that the plaintiff was allowed $600.00 before settlement. Thompson v. Latimer, 209 Ky. 491, 273 S. W. 65.

There has been very little litigation as to the subject of whether an assignment of an insurance policy can be held an advancement, but the general rule seems to be that such an assignment is an advancement. Kentucky Statutes, section 1407 provides that any real or personal property or money given shall constitute an advancement. In the Tennessee case, Cazassa v. Cazassa, 92 Tenn. 573, 22 S. W. 560, the court, in interpreting a similar statute, held that insurance by a father on his life in name of his son or In his own name and later transferred to his son is, in the absence of evidence showing a different intention, to be treated as an advancement.

The Arkansas court in Culberhouse v. Culberhouse, 68 Ark. 405, 59 S. W. 38, held that a child receiving a horse and an insurance policy from her father which were not clearly shown to have been gifts, they will be treated as advancements to the child.

Explosives—Negligence of Grocer Selling Mixture of Gasoline and Kerosene Delivered by Defendant Does Not Absolve Defendant from Liability.—The defendants were dealers in oils which they sold to retail dealers. One of these had three tanks in which only kerosene was used. He was not present when the tanks were filled by the driver of the defendant who, by mistake, put twenty gallons of gasoline in one. The dealer did not know of this until the driver entered into the store to receive his pay. He then demanded that the mistake be corrected. The driver then took out twenty gallons from the tank and finished filling it with kerosene. He then told the dealer that it was all right. The dealer then sold some of the mixture to the plaintiff’s decedent as kerosene. The decedent was burned to death by an explosion that occurred while starting a fire with the mixture. On later test the mixture was found to be dangerous.

Some of the dealer’s customers told him the day before the death of the decedent that the mixture was acting in a strange manner and
he did not sell any more of it and tried to warn those to whom he had sold but did not warn the decedent. *Kentucky Independent Oil Company v. Schnitzler, Admr.*, 208 Ky. 507, 271 S. W. 570.

It is the general rule that a manufacturer or seller of a defective article is not liable for injuries to the person of the ultimate consumer who has purchased from such middleman. See *Peaulee-Gault v. McMath's Admr.*, 148 Ky. 285, 146 S. W. 770. But among the exceptions to the general rule is where the manufacturer knows the article he has made and which is not inherently or intrinsically dangerous to life, is nevertheless dangerous due to defects, and either conceals the defects or represents the article to be safe and sound, in which case he is liable to the ultimate consumer who may be injured due to such defect. *Old's Motor Works v. Shaffer*, 145 Ky. 616, 140 S. W. 1047. It is plain that the case made out in the facts comes under this rule.

Sales of oils have given rise to the most numerous class of cases in which a manufacturer or vendor has been held liable to the strangers to the contract of sale. A leading case is *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64. Recovery was allowed against a manufacturer where he sold a mixture to a retail dealer to be resold, which he knew to be explosive and dangerous to life. A federal case directly in point is *Riggs v. Standard Oil Co.*, 130 Fed. 199, in which it was held that if a manufacturer sold to a retail dealer a mixture of kerosene and gasoline under the name of kerosene that he was liable for injury to any person who might be injured by it while using it in the manner that was to be expected. In two Iowa cases, *Ellis v. Republic Oil Co.*, 133 Iowa 11, and *Nelson v. Republic Oil Co.*, (Iowa) 110 N. W. 24, the manufacturer was held liable for injury caused by selling to a retail dealer gasoline with which kerosene was mixed. Also in *Catlin v. Union Oil Co.*, 31 Cal. App. 597, it was held that the mislabeling of gasoline and kerosene as coal oil was an act that would make manufacturers responsible to persons who bought from the dealer.

The defendant assigns as error the rejection of testimony that the seller made no effort to warn decedent after he had discovered the true character of the mixture. In this there was no error as the mere omission of a third person to interrupt the result of the defendant's acts will not amount to an intervening efficient cause so as to relieve such defendant from liability. *Wiley v. West Jersey R. Co.*, 44 N. J. L. 247.

The jury were required to find that before the defendant could be held liable, that the decedent was using due care such as used by prudent persons in starting the fire and that there was no contributory negligence in the way he used the mixture to start the fire. J. F. T

**INTOXICATING LIQUOR.—TAKING DRINK AND HANDLING BOTTLE NOT UNLAWFUL POSSESSION.—**Appeal from a judgment which found the appellant guilty of having in his possession intoxicating liquor. As to
the appellant the judgment was affirmed, but another question was raised in the case, whether or not A, who took a drink from the appellant’s bottle, was guilty of having in his possession intoxicating liquors?

The witness for the Commonwealth testified that he saw the appellant take from his pocket and hand to A a bottle of whiskey, from which the latter took a drink and returned the bottle to the appellant. The witness further testified that he knew the liquid that A drank from the bottle was whiskey because he smelled it and could see the liquid and the persons drinking it. Held, that the receiving of a drink will not support conviction of possession. Tooley v. Commonwealth, 208 Ky. 527, 271 S. W. 563.

The manual act of handling a bottle while taking a drink does not of itself constitute the unlawful possession denounced by the statute, where one so doing does not claim ownership or control. Sizemore v. Commonwealth, 204 Ky. 451. And so it was held in French v. Commonwealth, 198 Ky. 512, that the mere act of taking a drink of intoxicating liquor was not of itself a violation of the law. There must be actual possession and control of the intoxicating liquors to sustain such a charge under section 2554a-1 of the Kentucky Statutes, which provides that it shall be unlawful to manufacture, sell, barter, give away, or keep for sale, or unlawfully have in possession or transport intoxicating liquors in the Commonwealth of Kentucky. Then, by possession is meant the having, holding, or detention of the intoxicating liquors in one’s own power or command. In the present case the party taking the drink did not have such actual possession of the liquor as to come within the meaning of any provision of the liquor prohibition enforcement statute of this state. Brooks & Minton v. Commonwealth, 206 Ky. 720; Skidmore v. Commonwealth, 204 Ky. 451. A. H. T.

JURY—TRIAL FOR FELONY BY SEVEN JURORS BY AGREEMENT HELD UNAUTHORIZED AND UNCONSTITUTIONAL.—Plaintiff was indicted, tried and convicted for unlawfully and feloniously detaining a female against her will. He was given two years in the penitentiary and has appealed because he was convicted by a jury of seven instead of twelve. The court on appeal reversed their former opinion. Branham v. Commonwealth, 209 Ky. 734, 273 S. W. 489.

Some courts have held that the right to waive the number of jurors exists generally; among them are Massachusetts, Pennsylvania, Minnesota Iowa and Louisiana. Then Kentucky courts qualify this generally by saying that the number of jurors cannot be waived in trials for felonies. The case of State v. Sanders, 299 Mo. 192, 243 S. W. 771, is very much like the present case as to facts. The Missouri court held that the right to a trial by twelve jurors cannot be waived in trial for felony in a court of record.

The Constitution of the United States, article 2, section 23, provides that the right of trial by jury shall remain inviolate; therefore, the
right to a jury of twelve men cannot be waived in a trial for felony in a court of record, and a verdict of a less number, though with the consent of all parties, is a nullity, and will not support a conviction. *State v. Mansfield*, 41 Mo. 470. The case of *United States v. Shaw*, 59 Fed., held that attorneys for a defendant could not make a binding agreement for the defendant to be tried by a jury of less than twelve. *Tyra v. Commonwealth*, 2 Metc (Ky.), 1, says that a case of felony cannot, by consent of the accused and the Commonwealth's attorney, be tried by eleven jurors.

The right of trial by jury is constitutional; therefore, the right of a jury trial in criminal cases cannot be waived by one indicted for a felony so as to make valid a trial by less than twelve jurors. *Territory v. Ortiz*, 8 N. Mex. 154, 42 Pac. 87. Judge Cooley is against a jury of less than twelve. He says in his Constitutional Limitations, 6th Ed., page 391: 'A jury of less than twelve men is a tribunal unknown to the law, and would amount to a mere arbitration, which is not allowable.'

The general principle is, that in criminal cases the accused can neither waive his right to a trial by jury of twelve nor be deprived of it by the legislature. *State v. Carman*, 63 Ia. 130, 18 N. W. 691.

R. C. S.

**Libel and Slander—Accusations Concerning Morality of School Teacher Held Prima Facie Slanderous per se Making Allegation or Proof of Special Damage Unnecessary.**—Plaintiff was a teacher in the colored high school of Princeton and assisted in supervising the colored schools of Caldwell county. Defendants and others organized a parent-teachers' association of the colored schools in question, principally to investigate the conduct of plaintiff. At a meeting of this association the defendants made direct accusations concerning the morality of plaintiff. The court held that these accusations were prima facie slanderous per se, since they tended to show appellant's unfitness and to discredit his standing in his profession of a teacher, and being slanderous per se it was not necessary to allege or prove special damage in order to sustain this action for slander. *Thompson v. Bridges*, 209 Ky. 710, 273 S. W. 549.

Actionable words are of two kinds: Those that are actionable in themselves without proof of special damage or injury, and those that are actionable only by reason of some actual or special damage or injury sustained by the party slandered. *Williams v. Riddle*, 145 Ky. 459, 140 S. W. 661. No special damages are alleged in this case. Therefore, the question presented turns on whether the words are actionable per se. Words are slanderous or actionable per se only in cases where they are falsely spoken and (1) impute the commission of a crime involving moral turpitude, for which the party might be indicted and punished; or (2) impute an infectious disease likely to exclude him from society; or (3) impute unfitness to perform the duties of an office
or employment; or (4) prejudice him in his profession or trade; or (5) tend to disinherit him. In all other cases spoken words are either (a) not actionable at all or are only actionable (b) on proof of special damage. *Williams v. Riddle*, 145 Ky. 469, 140 S. W. 661, 36 L. R. A. (N. S.) 974; *Pollard v. Lyon*, 91 U. S. 225, 23 L. Ed. 308.

It may be stated as a general rule that oral words which injuriously affect the profession, business or employment of another by imputing to him a want of capacity or fitness for engaging in the same are actionable per se, without proof of special damages. *Spence v. Johnson*, 142 Ga. 267, 82 S. E. 646; *Morasse v. Brochu*, 151 Mass. 567, 25 N. E. 74, 8 L. R. A. 524 *Dellavo v. Snider*, 143 Mich. 542, 107 N. W. 271, 4 L. R. A. (N. S.) 973. Accusations imputing to a school teacher want of professional capacity, immorality or unprofessional conduct are clearly actionable per se. *Darling v. Clement*, 69 Vt. 692, 37 Atl. 779. Charges of immorality or insinuations of misconduct by a teacher with the pupils of the school in which he teaches are actionable per se as inflicting injury upon him in his profession. *Spears v. McCoy*, 135 Ky. 1, 159 S. W. 610, 49 L. R. A. (N. S.) 1033. This is one of the leading cases in this state. Defendant said that plaintiff, who was a school teacher, kept the girls in after dismissing the boys, gave them candy and courted them. The court held that these words were actionable per se and that allegation and proof of special damage was not necessary in order for plaintiff to recover. Other jurisdictions follow the same rule. Thus, in *Barth v. Hanna*, 158 Ill. App. 20, 49 L. R. A. (N. S.) 1033, it was held that statements made by one who was a school director and president of the board, of and concerning a school teacher in the district, which imputed immoral conduct with boy pupils, were slanderous per se because they tended to injure him in his profession.

Thus it is seen that the principal case is in accord with an unbroken line of decisions in this state and follows the leading decisions of other jurisdictions.

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her own. Another of the children objected and brought this action for her part thereof basing her claim on the theory that the mother had only a constructive trust which was barred to her because she did not bring action within five years from the time she learned of her husband's act to have it set aside for her. The court held this to be a continuing and subsisting trust against which the Statute of Limitations would not run until repudiated, and that, in any event, the statute did not run against a cestui que trust in possession. 


Section 2353 of the Kentucky Statutes provides: "When a deed shall be made to one person and the consideration shall be paid by another, no use or trust shall result in favor of the latter, but this shall not extend to any case in which grantee shall have taken a deed in his own name without the knowledge or consent of the person paying the consideration, or where grantee in violation of some trust, shall have purchased the lands deeded with the effects of another." Section 2543 provides, "The provisions of this chapter (Limitation of Actions) shall not apply in the case of a subsisting and continuing trust. . . ."

Constructive trusts are such as are raised by equity in respect to property which has been acquired by fraud, or where, though originally acquired without fraud, it is against equity that it should be retained by him who holds it. They arise purely by construction of equity, independently of any actual or presumed intention of the parties to create a trust. 

Arnston v. Sheldon National Bank, 167 N. W. 760; Robinson v. Pierce, 118 Ala. 273, 24 So. 934. Prior to the passing of the English Statute of Frauds, 1676, a trust in both real and personal property could be created by a simple declaration of the legal owner of the property that he held it in trust for another, but this statute required trusts in real property to be created by an instrument in writing signed by the party to be charged. 

Floyd v. Duffy, 63 W. Va. 339, 69 S. E. 993. But this principle has no application to constructive trusts. 

Parker v. Catron, 120 Ky. 145, 85 S. W. 740.

In this case the husband was manifestly a constructive trustee for his wife, for he purchased the land with her money and took the title in his own name without her knowledge or consent—a state of affairs that brings the case directly within section 2353, supra. Further, there was a confidential or fiduciary relation existing between the parties because of the marital bonds, so that each party is held to the utmost good faith in dealing with the other, which makes the case stronger.

By the most liberal interpretation, this could not be construed to be an express trust, for such a trust cannot be created by a simple parol declaration of the legal owner that he holds the land in trust for another. Sherley v. Sherley, 97 Ky. 512; Spears v. Sewell, 67 Ky. 239. But the continual declarations of the husband that the land
belonged to the wife constituted a continuing and subsisting trust against which the statute would not run until repudiated. Section 2543, supra. This was not an attempt of the legal owner to create an express trust, but a formal recognition of a subsisting trust by a constructive trustee. Nor does the statute run against a cestui in possession whether such possession is held singly or jointly with the trustee. Lakin v. Sierra Buttes Gold Mining Co., 25 Fed. 337. Here the wife, the cestui, was jointly in possession with her husband, the constructive trustee, from the time the land was bought until the death of the husband, and singly during the short interval between his death and the date of the sale of the land.

E. M. N.

MASTER AND SERVANT—REASONABLE TIME AFTER SALE OF BUSINESS WITHOUT KNOWLEDGE OF SERVANT—OLD EMPLOYER HELD LIABLE UNDER COMPENSATION ACT ON SALE OF BUSINESS WITHOUT KNOWLEDGE OF SERVANT.—Prior to September 2, 1924, P. was the owner of a certain building in Louisville, and M. was in his employ as janitor. Both had accepted the provisions of the Workmen's Compensation Act. On the above date P. sold and conveyed the building to one H., who continued to operate it as an office building. On September 17 the manager of the building sent M. out into the city on an errand and while on his way was struck by an automobile and received injuries from which he later died. The widow of the decedent filed with the Workmen's Compensation Board a claim for compensation against both P. and H. Held, that she could recover from P. but could not recover from H. Palmer v. Main, et al; Main v. Hait, et al., 209 Ky. 226, 272 S. W. 736.

The propriety of the award against P. is challenged on the ground that the relation of master and servant is essential to liability under the Workmen's Compensation Act and at the time of the accident M. was not in the employ of P. But it was found that M. continued to work without notice of the sale of the building and as the relation of employer and employe had not ended at the time of the accident, and as P. had not then withdrawn his election to operate under the Workmen's Compensation Act, it follows that he continued liable under the provisions of the act. And as neither H. nor M. at the time had elected to operate under its provisions, there can be no recovery as against H.

Where there is no actual change in the management of the business, and it is continued in the same general way after the sale by the same servants and employees, and the servants are in no way expressly or otherwise informed of the transfer and consequent change of proprietors, the relation is presumed to continue for a reasonable time and the master remains liable to them to the same extent as though no sale or transfer had taken place, and the burden of proof of showing such knowledge on the part of the servant is upon the master. Benson v. Lehigh Valley Coal Co., 124 Minn. 222, 114 N. W. 774.
Another point in the case is the contention that the accident to M. did not arise out of his employment. But the court in deciding this point reached the conclusion that an accident arises out of the employment within the meaning of the Workmen's Compensation Act if it was the direct and natural result of a risk reasonably incident to the employment in which the injured party was engaged, and since the service which M. was required to perform necessarily exposed him to the danger of being struck by an automobile while on the street, it follows that the injury was the direct and natural result of a risk reasonably incident to the employment, and he can recover. Many other courts take the same view of the question. *Thomas v. Proctor & Gamble Mfg. Co.* 104 Kan. 432, 179 Pac. 372; *Katz v. Kadans & Co.*, 222 N. Y. 420, 134 N. E. 330; *Oandler v. Industrial Commission*, 55 Utah 213, 134 Pac. 1020; *Dennis v. A. J. White & Co.*, 15 N. C. C. A. 294.

**Negligence—Merchant Required to Keep Safe Only Part of Premises to Which Customers Are Invited—Merchant Not Liable for Injuries to Customer Falling Down Stairway Not Set Apart for Customers.**—Plaintiff entered defendant's store for the purpose of buying a clothes line. She found the article at the back of the store, to which she had never been, and it was tangled in racks above the counter. Intending to help the saleslady untangle it, she entered a small gate at the end of the counter and not seeing a stairway two and one-half feet from the gate she fell downstairs, sustaining injuries for which she seeks to make defendant liable. Held, plaintiff was a mere licensee as to this part of the store and defendant owed her no duty to keep safe a part to which she was not invited. *Wall v. F. W. Woolworth Company*, 209 Ky. 258, 272 S. W. 730.

"An invitation may be inferred where there is a common interest or mutual advantage, a license where the object is the mere pleasure or benefit of the person using it," an apt statement of the difference between the invitee and the licensee, found in 2 Cooley on Torts, 1264.

Was the plaintiff an invitee, or a mere licensee? From the foregoing rule from Cooley, it will be deduced that the storekeeper, keeping his place of business open to the visits of customers for their benefit as well as his own, extends an implied invitation to all who would purchase to enter and do so. The law, therefore, imposes on such person a duty to keep the premises reasonably safe for the use of these invitees. *Ryerson v. Bathgate*, 67 N. J. L. 357, 51 Atl. 708; *Holbrook v. Aldrich*, 168 Mass. 15, 46 N. E. 115.

There is not, however, an invitation to enter all parts of his store. Some sections are for his use alone, and customers are barred therefrom by the use of doors, gates, railings, etc. For this purpose was installed the gate involved in the case at hand. When the plaintiff went through this gate she exceeded the extent of her invitation. She

L. J.—6
then became a mere licensee. See *Ryerson v. Bathgate*, *supra*, in which case defendant storekeeper opened a door wide enough to permit plaintiff to insert her arms and release a cat which she was holding, at the same time saying, "Put her in here." But plaintiff sought to enter the door, and fell down steps which she could not see in the dark. The court held that in entering the door she exceeded the extent of her invitation, thus becoming a mere licensee, to whom the storekeeper owed no duty to keep the premises in a safe condition. See also *Holbrook v. Aldrich*, *supra*. A child who came to the store with her father put her hand up a coffee grinder spout and lost her fingers. The court stated that she had exceeded the scope of the defendant's invitation and had become a mere licensee.

In the present case there was no express invitation, and the presence of salesladies behind the counters to wait on the customers certainly negatives the idea of an implied invitation to the plaintiff to wait on herself, or assist the saleslady in waiting on her. Further, the gates were put there for the express purpose of excluding customers from behind that counter. Plaintiff had no right to go through the gate. By doing so she exceeded the extent of her invitation and became a mere licensee. "The general rule is that the owner or occupant of premises owes no duty to licensees except to refrain from wilful acts of injury." *2 Cooley 1268.*


The plaintiff here failed to establish any duty on defendant's part to keep this particular portion of the store safe for her and, therefore, is not entitled to recover.

E. B. C.

**NEGLIGENCE—RAILROAD STATION PLATFORM, ON WHICH BOYS ARE ACQUAINTED TO SKATE, NOT ATTRACTIVE NUISANCE—BOYS SKATING ON RAILROAD STATION PLATFORM NOT LICENSEES OR INVITEES.** Defendant operated a transfer company. His employee was delivering freight to the freight depot. In connection with the depot there was a concrete platform four feet above and extending to within eighteen feet of the sidewalk. The platform was built in the usual and ordinary fashion of material universally recognized as suitable for the purpose. The driver of defendant's truck backed it across the sidewalk to the platform to unload freight. Deceased, a boy nine years old, with some other boys, had started to get upon the platform to skate. They were accustomed to skate on the station platform, and were chased away and admonished whenever the employees of the company saw them. Deceased attempted to mount the platform immediately behind the
truck as it was backing. One of his legs was caught between the truck and the platform. It was badly mashed and his hip joint was dislocated. He was taken to the hospital to reduce the dislocation and died while under the effect of the anesthetic. The court held that decedent's administrator could not recover for his death. *Louisville Trust Co., Admr. v. Horn, etc.,* 209 Ky. 827, 273 S. W. 549. The doctrine of *Sioux City and Pacific Railroad Co. v. Stout,* 17 Wall. 657, 21 L. Ed. 745, and *Union Pacific Railroad Co. v. McDonald,* 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, the turntable cases, is inapplicable to depot platforms. *Ling v. Great Northern Railroad Co.,* 165 Fed. 813. A railroad depot platform which is built in the usual and ordinary fashion of material universally recognized as suitable and appropriate for the purpose is not an attractive nuisance, for a depot is not a place which allures children of tender years, or which a railroad company holds out to them as an implied invitation or special attraction to visit. *Ling v. Great Northern Railroad Co.,* 165 Fed. 813.

The boys who were accustomed to skate on the railroad station platform, and were chased away and admonished whenever the company's employees saw them, were not licensees or invitees. *Pastorello v. Stone,* 89 Conn. 236, 83 Atl. 529; *Hayes v. Southern Power Co.,* 95 S. C. 730, 78 S. E. 956. Neither silence, acquiescence nor permission is sufficient to establish an invitation to come upon the premises, whether the person be an adult or an infant *Bottum's Admr. v. Hawks,* 84 Vt. 370, 79 Atl. 858, 35 L. R. A. (N. S.) 440. The owner or occupier of property is not bound to exercise care to make it safe for children who come upon it without invitation or license. *Wheeling and Lake Erie Railroad Co. v. Harvey,* 77 Ohio St. 235, 86 N. E. 66, 19 L. R. A. (N. S.) 1136, 122 Am. St. Rep. 503. In the case of *Elie v. Lewiston, Augusta, and Waterville Street Railway,* 112 Me. 178, 91 Atl. 786, 178 L. R. A. 1916C 104, an action to recover damages for injuries sustained by plaintiff, a child four years old, in alighting from the moving car of defendant, the Supreme Judicial Court of Maine denied plaintiff recovery on the doctrine that the infant was not an invitee or licensee, but a mere trespasser, and as such was entitled to no more rights than an adult. A visitor, a child or an adult, in order to come under an invitation or a license, must come for a purpose connected with the business in which the owner or occupant of the property is engaged, or which he permits to be carried on there; there must at least be some mutuality of interest in the subject to which the visitor's business relates. *Stanwood v. Chaney,* 106 Me. 72, 75 Atl. 293; *Plummer v. Dill,* 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463.

It is clearly evident that the principal case is correct both on principle and authority. It follows the leading cases of other jurisdictions in holding that this case is not within the doctrine of the turntable cases or the doctrine of attractive nuisance, and in treating deceased as a trespasser and not as an invitee or a licensee. W. D. S.
NUISANCE—UNDERTAKING ESTABLISHMENT IN RESIDENCE DISTRICT NOT ENJOINED, THOUGH DEPRECIATING PROPERTY AND CAUSING MENTAL ANNOYANCE.—Defendants, undertakers, bought a large residence in an exclusive residential section of Louisville. Their purpose was to conduct a complete undertaking establishment and to use the upstairs for living quarters. Plaintiffs are residents of the immediate neighborhood who have filed a bill for an injunction against the use of the property in the manner proposed upon the ground that it would depress the value of their property and cause mental annoyance. The lower court enjoined the defendants, but upon appeal the decision was reversed. L. D. Peerson & Son, et al. v. Bonnie, et al., 209 Ky. 307.

The business of undertaking has been carried on from the earliest times where the most refined as well as the most unpretentious abide, yet from no class has any one testified as to any bodily or mental injury or suffering because an undertaker was carrying on his vocation in his neighborhood. 43 N. J. Eq. 478, 11 Atl. 490. Brannon in his treatise on the Fourteenth Amendment, says: “The question of nuisance or no nuisance is one for judicial review.” The court in this case has given the facts a judicial review and they have found that they do not constitute a nuisance. The business of an undertaker is not a nuisance per se; therefore, an injunction should not be granted though other establishments of the same kind may have been nuisances. Pfingst v. Senn, 94 Ky. 556, 23 S. W. 358.

The plaintiffs did right in raising their complaints early, for a long acquiescence is sufficient reason for denying an injunction. Louisville Coffin Co. v. Warren, 78 Ky. 406. However, the Court of Appeals was right in refusing to enjoin in this case, for it had not been legally ascertained that the undertaking establishment was a nuisance. Albany Christian Church v. Wilburn, 112 Ky. 507, 66 S. W. 285. The fact that the undertaking establishment was a mental annoyance is not enough to give an injunction. The discomforts must be physical; not such as depend on taste or imagination. Cleveland v. Gas Light Co., 20 N. J. Eq. 202.

Since the court in this case has decided that the undertaking establishment was not a nuisance we may compare it to Woodstock Burial Ground Association v. Hager, 68 Vt. 488, 35 Atl. 431, and say that property is not a nuisance merely because the property of another is rendered less valuable. No fanciful notions are recognized. The law does not cater to men's tastes, nor consult their convenience merely.

R. C. S.

STATUTES—INVALIDITY OF PORTION OF STATUTE ON WHICH OTHER PORTIONS ARE DEPENDENT, FATAL TO WHOLE STATUTE—BURGLARY STATUTE CONTAINING INVALID ATTEMPT TO RE-ENACT ROBBERY STATUTE, INVALID IN WHOLE.—A burglary was committed and defendant convicted under an act of the legislature enacted in 1922, imposing the death penalty upon persons convicted of burglary. He appealed his case on several grounds,
the most important of which was that the penalty was "cruel and inhuman," in contravention of section 17 of the Constitution of Kentucky. But the court held that the words "cruel and inhuman" referred to the manner in which the punishment was inflicted and not to the punishment itself. This opinion will be found at 204 Ky. 748, 265 S. W. 339. Upon a petition for rehearing the defendant attacked the constitutionality of the statute, claiming that the section relating to robbery, being an attempt to enact by reference to a previous statute, was invalid, and, therefore, the whole statute was invalid. The court so held, and the conviction was set aside. Gibson v. Commonwealth, 209 Ky. 101.

The whole statute as amended and finally passed consists of two sentences, and reads:

"Every person guilty of burglary shall be punished with death, or confinement in the penitentiary for life, in the discretion of the jury.

"This act shall not affect the statute or law of the state denouncing any penalty for robbery not accompanied by an act of burglary."

The second sentence is invalid, being contrary to section 51 of the Constitution, which provides: "... and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length."

Now what was the purpose of the legislature in adding this last sentence? The effect was this: The existing law as to robbery was repealed and no new enactment concerning it was made. Section 51 of the Constitution, according to the case of Board of Penitentiary Commissioners v. Spencer, 159 Ky. 255, 166 S. W. 1017, requires that in order to amend or revoke any section of a law or leave in force any section of that law, such sections to be revised or amended or continued in force must be set forth, and the whole law be made to read as when so revised and amended. See Purnell v. Mann, 105 Ky. 87; Commonwealth v. Reineche Coal Mining Co., 117 Ky. 885 Commonwealth v. McNutt, 133 Ky. 702.

There is no doubt that the invalid portions of a statute may be eliminated and the remainder given effect. Neutzel v. Williams, 191 Ky. 351, 230 S. W. 942; State Insurance Board of Ky. v. Greene, 185 Ky. 190, 213 S. W. 218; I. O. R. R. v. Commonwealth, 154 Ky. 332, 157 S. W. 687. But if the portions are so connected and mutually dependent on each other as to indicate that the intention of the legislature was that the whole should not have been enacted without the invalid portions, then the whole statute must fail. Commonwealth v. Hatfield, 186 Ky. 423; I. O. R. R. v. Commonwealth, 154 Ky. 332; Pollock v. Farmers' Loan and Trust Co., 158 U. S. 601; Sprague v. Thompson, 113 U. S. 90; Poindexter v. Greenhow, 114 U. S. 270.

It is certain that the legislature did not intend to repeal the existing law as to robbery and leave the Commonwealth without any protection from that crime. That law they intended to continue in force.
Thus the attempt to re-enact it. They would not have passed the statute without inserting the provision as to robbery, leaving the state without any law concerning that crime.

It is apparent that the sections are mutually dependent and so connected with each other that to separate them would be to defy the intent of the legislature in enacting the law. The whole law, therefore, was declared unconstitutional.

E. B. C.

TRIAL—RULE AS TO INSTRUCTION ON RATE OF SPEED, WHERE DEFENDANT OFFERS INCORRECT INSTRUCTION THEREON, STATED.—Defendant's automobile struck the truck in which plaintiff was riding. The accident occurred at the intersection of Market and Forty-second streets in the city of Louisville. There was evidence that the driver of the truck in which plaintiff was riding was operating at a speed greater than twenty miles an hour. The court refused to give an instruction offered by defendant that the driver of the truck was operating it at an improper rate of speed if he was driving it at a greater rate of speed than twenty miles an hour. The court held that it was error not to cover the point in the instructions given, even though the offered instructions could not be given because not correct in form. Wight v. Rose, 209 Ky. 803, 273 S. W. 473.

Section 2739g-51 of the Kentucky Statutes provides that, "No operator of a vehicle on a public highway shall drive at a greater speed than is reasonable and proper, having regard for the traffic and the use of the highway." This section of the statute does not fix any speed limit other than to make it unlawful to operate a motor vehicle upon any public highway, whether in the city or country, at "a greater speed than is reasonable and proper, having regard for the traffic and the use of the highway." Falls City Ice and Beverage Co. v. Scanlon Coal Co., 208 Ky. 820, 271 S. W. 1097. But there is a proviso to the above mentioned section of the statutes to the effect that, where a highway passes through the residential portions of a city, if the rate of speed of a truck thereon exceed twenty miles an hour, it shall be prima facie evidence of unreasonable and improper driving, and where a highway passes outside the residential portions of a city, if the speed of a truck thereon exceed twenty miles an hour, it shall be prima facie evidence of unreasonable and improper driving. This latter provision, therefore, specifically limits the speed within the stated territorial limits, and affects the burden of proof so as to make it incumbent upon one who is operating his car in excess of such speed to show that this did not produce the injury. Moore v. Hart, 171 Ky. 726, 188 S. W. 861; Kappa v. Brewer, 207 Ky. 61, 268 S. W. 831. There was evidence that, at the time of the accident, the truck was being operated in excess of twenty miles an hour, and the offered instruction, though incorrect in form, incorporated that idea. Therefore, according to the practice in this state, the court should have eliminated the ob-
jectionable features and have given a correct instruction on the sub-
ject. *Davis v. Antol*, 203 Ky. 273, 262 S. W. 278; *Western Union Tele-
graph Co. v. Sisson*, 155 Ky. 624, 160 S. W. 168

The case of *Fall City Ice and Beverage Co. v. Scanlon Coal Co.*, 208 Ky. 820, 271 S. W. 1097, arose under the same section of the statutes as the principal case. Defendant's truck struck plaintiff's truck at the intersection of Eighth street with Broadway, in the city of Louis-
ville. Plaintiffs' truck was going from four to six miles an hour. Witnesses estimated the speed of defendant's truck from twenty-five to thirty-five miles per hour. The proviso to section 2739-51 of the statutes provides that, where a highway passes through the residential portions of a city or town, the speed of a truck shall not exceed fourteen miles an hour. The court held that the effect of this proviso was to specifically limit the speed of trucks in residential portions of the city to fourteen miles an hour. This case is in accord with the prin-
cipal case.

W. D. S.

**Wills—Contingent Remainder—Where Title Vests Pending Hap-
pening of Contingency.**—A devised in trust to B, an unmarried son, a life estate with remainder to B's children. B died unmarried, with-
out children, and intestate. The appellants contend that this was a good devise at the making but that upon the failure of the contin-
gency an intestacy resulted and the heirs of A at the time of B's death should take, the title in the meanwhile remaining in abeyance or in nubibus. The appellees contend that this was not a good devise, but that A died intestate as to the remainder and the property passed by inheritance to B and his heirs. From a judgment construing the will in favor of the heirs of B the heirs of A at the time of the failure of the contingency appeal. Held, that A devised only a life estate and a contingent remainder and dies intestate as to the fee and that upon his death it passed by inheritance to B, subject to being defeated by the happening of the contingency of his having no children and that upon the death of B and the failure of the contingent remainder the fee, freed of all incumbrances, descended to B's heirs. *Bourbon Agricul-

The theory that in a devise of this kind the title passes from the testator into the clouds and there remains until the happening or failure of the contingency, then to vest either in the remaindermen or in the then heirs of the testator as the case may be has been discred-
ited in this jurisdiction.

In a similar case where the estate was created by deed it was held that the grantor did not part with the title but that it remained in the grantor until the contingency happened, and if the death of the grantor occurred before that time the title passed by inheritance to his heirs upon his death. *Coots v. Yewell*, 95 Ky. 367, 25 S. W. 597, 16 K. L. R. 2, 26 S. W. 179. The same conclusion was reached in *Baxter v. Bryan*,
The question was presented again in *Newton v. Baptist Seminary*, 115 Ky. 414, 74 S. W. 180, save that in the latter case the estate was created by will, which makes it almost identical with the present case. There the contingency failed, as here, and the holding of the court was the same as in the present case, namely, that the fee never passed from the testator by the devise, but he died intestate as to the fee which passed by descent to his heirs subject to being defeated by the contingent remainder.

The case of *Bohon v. Bohon*, 78 Ky. 410, is one which supports the contention of the appellants that the title was passed by the will and remained in abeyance until the failure of the contingency when an intestacy resulted. In that case the court said: "That an estate in fee may be made to pass out of the grantor so as to remain in abeyance, in the clouds, in no person, pending the existence of the particular estate, seems to be well settled, notwithstanding the able argument of Mr. Fearne to the contrary." This case, while never overruled, was discussed in *Baxter v. Bryan*, supra, and the language of the court and the holding in that case were such as to in effect overrule it. The holding in *Cootes v. Yeowell* and in subsequent cases has been such as to leave no doubt but that the theory of the title passing from the testator by such devises and remaining "in abeyance, in the clouds, in no person," has been supplanted in this jurisdiction by what is admittedly the better view, that is, that the title remains in the grantor and his heirs subject to defeat by the happening of the contingency. The statement of the court in *Newton v. Seminary*, supra, leaves no doubt as to the Kentucky courts' stand: "There is a technical rule which recognizes a fee in abeyance, but that state of abeyance was always odious, and never admitted, but from necessity." For a full discussion of this subject see 12 K. L. J, 115, 122.

**WILLS—LEGACY OF SHARES OF STOCK HELD NOT ADEEMED BY CONSOLIDATION OF COMPANIES, WHERE SHARES OF CONSOLIDATED COMPANIES ARE ISSUED IN PLACE OF OLD SHARES.**—A testator bequeathed to his daughter four shares of stock in A bank and five shares of stock in B bank. After the execution of the will but prior to the death of the testator, each of these banks consolidated with another. In the case of the A bank the stockholders were given an equal number of shares in the consolidated organization; in the case of the B bank, the stockholders were given an equal number of shares in the new bank, and also as many shares in a realty company organized to take over certain real estate holdings of the B bank which did not go into the consolidation, as they had shares in the B bank. The plaintiff claimed that the change in the character of the securities worked an ademption of the legacy, and that the daughter took nothing under the bequests in the will. But the Court of Appeals, in *Goode v. Reynolds*, 208 Ky. 441, 271 S. W. 600, held that such change did not work an ademption.
The ademption of a legacy is effected when by some act of the testator its subject matter has ceased to exist in the form described in the will, so that on his death there is nothing answering the description to be given to the beneficiary. The question of ademption of a general legacy depends entirely upon the intention of the testator, as inferred by his acts under the rules established by law. *Cowles v. Cowles*, 56 Conn. 240, 13 Atl. 414. The ademption of a specific legacy is effected by the extinction of the thing or fund without regard to the testator's intention. A specific legacy is defined to be the bequeathing of certain, particular, ascertained article or articles. *Blackstone v. Blackstone*, 37 Am. Dec. 359.

A change in the form of a security bequeathed does not necessarily work an ademption, but it will be adeemed by any change in its state or form, effected by the testator, which makes the corpus of the legacy at his death different from what it was when the will was made. *In Re Miller*, 128 Iowa 612, 105 N. W. 105; *Blackstone v. Blackstone*, supra.

The cases of *Pruyn v. Sears*, 96 Misc. Rep. 200, 161 N. Y. S. 58, and *Gardner v. Gardner*, 72 N. H. 257, 56 Atl. 316, are directly in point, both holding that there is no ademption where stock in a consolidated corporation is accepted by testator in lieu of stock in a component corporation which he had bequeathed. In *Pruyn v. Sears*, supra, testator bequeathed thirty shares of the S. & P. corporation which did business in two towns. Later the assets of this company were transferred to a new one known by the same name, but doing business in only one of the towns. Stockholders in the old company received shares in the new company for their old stock. The court held the new shares passed under the bequest and that the same was not adeemed. It is difficult to ascertain on just what grounds these decisions are based, but the courts seem to lean toward the proposition that there is really no important change in the corpus or character of the legacy; that the new stock is representative of the old, being identical in all respects except the name of the company in which it is held; in other words, that the likeness of the new shares to the old is more important than their differences.

In the present case, the bequest of the shares in the respective banks was specific, it being of certain, definite and ascertained articles. The only change made was in the name of the corporation in which they were held, of which the old corporation was a component part. They represented the same value in the new companies that they represented in the old ones, and this mere change of name is held not to be such a change in the corpus of the legacy as will work an ademption. *Pruyn v. Sears, Gardner v. Gardner*, supra. The question whether or
not if the testator sold the specific shares bequeathed, and with the
money realized from the sale, bought other shares of same value in a
different company, such change would work an ademption of the
legacy, was not here present.

E. M. N.

WILLS—ON DEVISE IN FEE, GIFT OVER OF WHAT IS LEFT OR NOT
DISPOSED OF BY FIRST TAKER IS VOID, BUT IF ONLY LIFE ESTATE IS GIVEN,
LIMITATION OVER IS VALID—DEVISE HELD TO GIVE DEVISEE LIFE ESTATE
WITH PRIVILEGE OF CONSUMING FOR HER SUPPORT.—A testator devised
property in the following words: "To my beloved wife . . . all my
property, real and personal . . . and to use as she may deem expedi-
ent as long as she lives, and at her death whatever part, if any,
remain to go equally to our children." Held, the devise gave her a life
estate with privilege of consuming so much of the corpus of the estate
as was necessary for her maintenance and support. Sisson, Ex'tx., et

By a long line of decisions the Kentucky Court of Appeals has
established and adhered to this rule, that is, where an estate is devised
in fee, a gift over of what is left or not disposed of by the first taker
is void. On the other hand, where only a life estate is given the first
taker, the limitation over is valid. Anderson v. Hall's Admrs., 80 Ky.
91; McCullough's Admrs. v. Anderson, 90 Ky. 126; Moore v. Webb, 2
B. Mon. 282; Irwin v. Putnam, 89 S. W. 581; Hasman v. Wiltett, 107 S.
W. 334; Sutton v. Johnson, 127 S. W. 747; Becker v. Ruth, 132 Ky. 429;
Trustees Presbyterian Church v. Mize, 181 Ky. 573; Clore v. Clore, 184
Ky. 83; Wright v. Singleton, 190 Ky. 657 Kincaid v. Bell, 205 Ky. 487.

The rule is logical, and strictly according to the common law, for
when one purported to grant a fee, he gave everything there was to
give. The grantee could do anything he wanted to do with the land in
the way of transfer or alienation of the land. Thus the remainders
over were necessarily void.

It therefore becomes pertinent to inquire whether this devise was
a life estate or a fee.

In Kentucky, life estates with power to consume that portion of
the estate necessary for the maintenance of the life tenant, or life
estates with power to sell and reinvest, are well recognized. 181 Ky.
573; 184 Ky. 83. Further, estates accompanied with power to do with
as the life tenant sees fit, but at death of life tenant remainders over
of what is left have been freely recognized as life estates, and the re-
mainder over is not void. McCullough's Admrs. v. Anderson, 90 Ky. 126
(in which the judge talked of the estate being one for life with the
power of acquiring the fee by a conveyance, but in case of no convey-
ance the remainders to be valid).

It is readily seen that the case at hand falls in line with the above
cited cases. The words of the devise are not at all ambiguous, but in
fact very clear, " . . . and to use as she may deem expedient as
long as she lives." Certainly this cannot be construed as giving her an estate in fee. But it is more than a mere life estate. It is a life estate with power attached "to use as she may deem expedient."

The court construed these words of the devise as meaning that she was entitled to use and consume such portion of the corpus of the estate as may be reasonably necessary for her comfortable support and maintenance, and, on the authority of *Kincaid v. Bell*, 205 Ky. 487, that she might obtain an order of court authorizing the sale of any portion of the corpus when such necessity arises. E. B. C.