Case Comments

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CASE COMMENTS

BILLS AND NOTES—CHECK, ACCEPTED BY BANK NINE MONTHS AFTER ISSUANCE, REGARDED AS PAST DUE, SUBJECTING HOLDER TO DEFENSES BETWEEN ORIGINAL PARTIES.—Plaintiff was the endorsee of a check which was not presented for payment until nine months after its date. When it was presented the drawee bank refused payment at the instance of the maker. The maker defended on the ground that the check was delivered to the payee on the condition that it was not to be cashed by him until a certain oil well which the payee was then drilling for the maker was completed and oil was found. The answer averred that the well had not been completed and that no oil had been found. Plaintiff claimed to be a holder in due course and as such not subject to equities between the original parties. Held, a check accepted by a bank nine months after issuance is regarded as past due under the rule that a check must be presented for payment within reasonable time determined by all facts and circumstances, so that the bank is subjected to the defenses between the original parties. *Fayette National Bank v. Myers*, 211 Ky. 182, 277 S. W. 292.


The Uniform Negotiable Instruments Act of Kentucky provides: "A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." Section 3720b, subsection 186, Kentucky Statutes. A "reasonable time" and an "unreasonable time" are defined in the act thus: "In determining what is a 'reasonable time' and an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case." Section 3720b, subsection 192, Kentucky Statutes. But it will be noticed that this section refers exclusively to the drawer. If the check is not presented within a reasonable time, the drawer is discharged only to the extent of the loss caused by the delay. *Lester v. Givens*, 8 Bush 357; *Smith v. Jones*, 2 Bush 103.

But an entirely different question arises when we come to the liability of indorsers, or the question whether the holder is one in due course so as to cut off the equities existing between the maker and the payee. A check is payable on demand. Section 3720b, subsection 185, Kentucky Statutes. "Where an instrument payable on demand is ne-
negotiated an unreasonable length of time after its issue, the holder is not a holder in due course." Section 3720b, subsection 53, Kentucky Statutes. It was held in *Asbury v. Taule*, 151 Ky. 142, 151 S. W. 372, that a check negotiated two days after it was drawn was negotiated within a reasonable time. But in *Frazee v. Phoenix National Bank*, 161 Ky. 175, 170 S. W. 572, the court held that, in view of the fact that the banks in central Kentucky rarely permit commercial paper to run longer than four months without negotiation, a note payable on demand and not negotiated until after four months was not negotiated within a reasonable time.

The principal case, in holding that the indorsee of a check which is not presented for payment until nine months after it is drawn is not a holder in due course, seems to follow the principles found to be good by the customs and usages of trade as well as to carry out the letter and meaning of the statute covering the point. W. D. S.

**Commerce—Names—Recovery cannot be had on contracts of one doing business under assumed name without filing certificate unless engaged in interstate commerce—Commerce embraces sale of goods after reaching destination and while they are in the original packages.**—Appellant, known as the Southeastern Aluminum Company of Charlotte, North Carolina, made a contract with the appellee, a partnership of Bowling Green, Kentucky, whereby the appellant was to furnish appellees' aluminum ware. The appellant agreed to send agents to sell the sets of aluminum ware. The appellant was accustomed to making contracts of this nature, and it appeared that he had first sent these sets to a town in Tennessee, then to Pineville, Kentucky, filling contracts in each place. Some fifty-one sets left at Pineville were shipped to Bowling Green to fill appellees' contract. The original packages had never been broken. Upon a breach of contract by the appellees, the appellant brought suit. In addition to other defenses the appellees pleaded that the appellant was carrying on business in Kentucky under an assumed name, without having filed the certificate required by section 199b, Kentucky Statutes. In reply the appellant denied that he was carrying on business in Kentucky under an assumed name; but pleaded that in making and carrying out the contract sued on he was engaged in interstate commerce. Held that he was engaged in interstate commerce and had not violated section 199b, Kentucky Statutes. *Talbott v. Smith*, 211 Ky. 239, 277 S. W. 257.

The statute makes the violation of its provisions a penal offense, therefore it has been argued that that fact tends to show that the legislature did not intend to make the contract invalid. However, in the case of *Fruit-Cotman Contracting Co. v. Chatterson*, 146 Ky. 504, 143 S. W. 6, the court laid down the rule that when the act of making a contract under an assumed name not registered unlawful, the court would also make such a contract unenforceable. Otherwise, the court
would be fostering a wrongful act. Oliver Co. v. Louisville Realty Co., 156 Ky. 658, 161 S. W. 570.

In Cashin v. Pitter, 168 Mich. 386, 134 N. W. 482, the same question arose under a similar statute. There the plaintiff argued that the statute was a penal statute and did not necessarily make the statute unlawful. The court, however, ruled that recovery could not be had on such a contract. The court also went so far as to say, that even if all parties concerned knew with whom they were dealing, the contract would still be noneforceable.

These cases show that the statute is binding as to contracts made in violation thereof, and between parties not engaged in interstate commerce. The appellant, however, pleads that the statute is void and not binding on contracts made between parties engaged in interstate commerce.

Contracts between nonresident manufacture partnerships and local dealers made by partnership agents, were deemed transactions of business within the state, and such were held to be purely interstate commerce, and not within the provisions of section 199b. Brenard Mfg. Co. v. Jones, 207 Ky. 566, 269 S. W. 722.

The appellees took the position that the legislature passed the statute for the protection of the people of Kentucky, and that it was enforceable for their protection even against interstate commerce. This view was rejected. The ruling of the United States Supreme Court is of the same effect. Sioux Remedy Co. v. Cope, 235 U. S. 197, 59 L. Ed. 193. In order to bring this case under the above given rule we must determine whether or not the transaction was one of interstate commerce. Where goods of one state are transported into another for the purpose of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in their original packages. Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678; America Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. Ed. 538.

The term "original package," when used in cases involving interstate commerce, means the form or physical condition of the article in which it is transported in its interstate movement. The weight of authority seems to uphold the court in its decision. H. M. D.

Dower—Failure of Deed to Include Wife's Name in Caption or Granting or Habendum Clause Not Fatal in Relinquishing Dower.
—The plaintiff by this action sought to have fifty acres set aside as her dower from a conveyance by her husband to the remote grantors of the defendants. Her grounds for complaint were that in the deed of grant there was nowhere recited her name. The deed filed with the petition does not anywhere in the caption, granting or habendum clauses recite her name but concluded in the signing and acknowledgment by expressly relinquishing her rights to dower. The court held
that the failure to include the name of the wife in the caption, habendum or granting clauses was not fatal in view of the insertion in the signature of her name and thereby incorporating in the body of the deed itself her relinquishment of dower. Hackney v. Smith, 209 Ky. 806, 273 S. W. 476.

There is some similarity between the case at bar of the omission of the name of the grantor of the right of dower and that of the name of the grantor in an ordinary deed. The general rule in the later instances seems to be laid down in the case of Hronska v. Janke, 66 Wis. 252, 23 N. W. 166. There the court says: "When a person signs and acknowledges a deed, supposing that he is conveying his title to certain property, it is a radical defect that his name fails to appear in the body of the deed." In the case of Gaston v. Wier, 84. Ala. 193, 4 So. 258, that court said: "A deed, signed and sealed by one who purports to be the grantor, but who is not named in the deed, is ineffectual to pass title to real estate."

As to the necessity of express relinquishment of the right of dower by a wife in a conveyance by her husband the Massachusetts court has said: "In a conveyance of land by a married man words of release by the wife are necessary to bar dower. It is not sufficient that she executes and acknowledges the deed, her name being introduced only in the conclusion and the purpose of her signing and sealing not being declared." Lufkin v. Curtis, 13 Mass. 223, Accord. Fed. Cas. No. 5,944, 3 Ind. 485, 51 Me. 367, 9 Mass. 218, 30 Mass. 382, but see contra: 41 Ark. 101, 16 Ohio 191. Another Massachusetts case gives an interpretation of "express word of grant," saying, "If a wife join in a deed with her husband" in token of her relinquishment of dower, "without any words of grant on her part, she is estopped to claim her dower." Stearns v. Swift, 25 Mass. (8 Pick.) 532.

The Kentucky doctrine seems to demand that the name of the wife appear in the instrument as one of the grantors, either of her interest in the property or of the dower rights. In Measles v. Martin, 13 S. W. 359 (not officially reported), the court says: "In order to convey the wife's right of dower her name must appear in the body of the conveyance as one of the grantors and mere signing and acknowledgment of the instrument by her will not operate to convey her interest in the property.

In deciding the case at bar the court said that this case was distinguished by the grant of the wife in express words of her dower right and that such express grant even in the conclusion of the deed was sufficiently within the body of the deed to pass her interest.

W.B.
MUST SHOW THAT ALL CANDIDATES RECEIVING MORE VOTES THAN HE VIOLATED CORRUPT PRACTICE ACT, AND THAT HE WAS FREE FROM FRAUD.—G., M. and H. were rival candidates for the nomination for jailer at the late primary. G. received 1,364 votes, M. 1,306 and H. 88. Eight other candidates in the race received more votes than H. did. G. was awarded the certificate of nomination. M. instituted contest against G. on the grounds that the officers of the various precincts by fraud or mistake counted and certified for G. more votes than he received and failed to count and certify for him (M.) votes that he did receive; and that G. was guilty of bribery and the corrupt use of money, etc., in violation of the Corrupt Practice Act. G. denied the allegations of M., and pleaded against him by way of counterclaim the same grounds that M. had pleaded against him (G.).

Within the time provided H. instituted contest for the nomination, making both G. and M. defendants, contending that they were both guilty of violating the Corrupt Practice Act, and that he (H.) had not done so. G. and M. denied H.'s right to maintain this contest, for the reason that eight other candidates received more votes than H. did and that they were not made parties to his contest. Held, that as both G. and M. were guilty of violating the Corrupt Practice Act the nomination of either of them was void, and as H. failed to prove that the eight candidates who received more votes than he did had violated the act, and that he did not, therefore, he could not be declared the nominee. *Mellon v. Goble; Harris v. Goble*, 210 Ky. 711, 276 S. W. 830.

Article 12a of chapter 41, Carroll's Kentucky Statutes, 1922, referred to above as the Corrupt Practice Act, makes it unlawful for any corporation, person, company or association to contribute, either directly or indirectly, money, service or other thing of value towards the nomination or election of any state, county, city, town or municipal officer, etc. It being proved at the trial that both G. and M. were guilty of violating the above act, the court in rendering its decision acted in strict accordance with section 2565b-11, Carroll's Kentucky Statutes, 1922, which reads as follows: "In any contest over the nomination or election of any officer mentioned in this act, it may be alleged in the pleadings that the provisions of this act have been violated by the candidate or others in his behalf without his knowledge, and if it so appears upon trial of the said contest, then said nomination or election shall be declared void, and it is hereby provided that the candidate who has received the next highest number of votes and who has not violated the provisions of this act shall be declared nominated unless it appears that one of the parties to the contest received a plurality of the votes cast and did not violate the provisions of this act."

Under the act the court may not declare one to have been nominated unless that one has established by proof that he was the candidate who received the highest number of votes who did not violate the Corrupt Practice Act. Therefore, as H. failed to prove this and as the
other eight candidates were not parties to the suit, it follows that no one involved in the contest before the court was entitled to the nomination in question. M. W. M.

HUSBAND AND WIFE—WIFE MAY CONTRACT FOR IMPROVEMENT OF REALTY IN OWN NAME OR THROUGH HUSBAND AS AGENT, IN VIEW OF STATUTE.—Appellant contracted with the husband of the appellee to install a furnace in the residence of the appellee. Appellant thought that the property belonged to the husband, but it appeared that the husband was acting as the agent of the wife, the appellee. Appellant sued the appellee as the undisclosed principal and appellee demurred. Held that under Kentucky Statutes, section 2128, the wife might be held liable. Williamson Heater Company v. Kaiser, 211 Ky. 192, 277 S. W. 237.

Under the Kentucky Statutes, section 2128, a married woman's disabilities were removed. She is allowed to make contracts dealing with her personalty, realty, to sue and be sued, to act as a single woman might act, as though a feme sole.

Hence, having such power to contract, she may do so thru an authorized agent, there being nothing in the statutes to the contrary. Numerous cases have held that the husband may be the agent of his wife. Admitting these statements the question would seem to come down to whether an undisclosed principal may be held.

In Salisbury v. Wellman Electrical Co., 173 Ky. 462, 191 S. W. 239, under Kentucky Statutes, section 2128, it was held, that where a married woman accepted material put into her house, the law implied a promise to pay. Here the defendant tried to enter as a defense the fact that the married woman had not ordered the work done. The court, however, held that such an order on her part was not necessary to make her liable.

The appellee by her demurrer admitted that the contract was made and performed as alleged by the appellant. Then it would seem that she had accepted it. The appellee here also admitted that the husband was her agent, therefore, she would seem to be liable without a doubt. In the case of Tarr v. Muir, 53 S. W. 663, 107 Ky. 283, the court went so far as to say that, though the husband has no authority to sign the wife's name to a contract for the improvement of the real estate belonging to her, yet as she acquiesced in the improvement and accepted it, the law implied a contract on her part to pay therefor.

The appellee seemed to put some reliance on the ground that the principal was not disclosed, and that appellant thought that he was dealing with the principal. It has long been a well settled rule of law that a duly authorized agent may bind an undisclosed principal, even if the agent makes the contract in his own name. Walcher v. Hefer, 95 C. C. A. 311, 170 Fed. 37. Hence, since the wife has admitted
that an agency existed between her and her husband, she will be bound.

The opinion of the Court of Appeals would seem to be beyond question. The case as decided is with the weight of authority, and correct under the Kentucky Statute.

H. M. D.

INJUNCTION—Power of Courts of One State to Enjoin Prosecution of Actions Between Its Citizens in Another State, Though Existent, Will be Exercised with Great Caution.—Action was brought in the courts of Florida—a claim against an estate in process of settlement there, affecting the rights of a devisee living in Kentucky. Held, that Florida was a proper place to bring the action; and there being no great or unnecessary inconvenience or expense involved, an injunction was refused. Keisker v. Bush, 210 Ky. 718, 276 S. W. 815.

It was formerly held that an injunction would not lie to restrain a suit in another state. Baker, Freem. Ch. 135. But it is now well settled that equity may restrain a person over whom it has jurisdiction from prosecuting a suit in the courts of another state. Reed's Administratrix v. I. C. R. Co., 182 Ky. 455, 266 S. W. 794; Hawkins v. Ireland, 64 Minn. 339; Cole v. Cunningham, 133 U. S. 107. The only question now is as to the grounds upon which equity will interpose to enjoin a prosecution. This is a difficult case, for each case depends upon the facts. The plaintiff must, in all cases, have a clear equity; to grant an injunction where there are not strong equitable grounds is to commit an act against interstate comity, as it would be to control by the court of one state a prosecution in another. It would also conflict with the United States Constitution, section 2, article 4, providing that “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,” has been construed in Cofrode v. Gartner, 79 Mich. 332, to guarantee the right of a citizen of another state to bring a suit in any state in any case where a citizen of that state was entitled to bring such suit.

In Reed's Administratrix v. I. C. R. Co., supra, the court said that an injunction would only be granted “when the facts plainly show that the institution of the suit in the foreign state was for the purpose of securing to the plaintiff some unfair or unconscionable advantage arising either under the law or fact, or that the prosecution of the suit in the foreign state would subject the defendant to such great and unnecessary inconvenience and expense as to make it appear that the foreign forum was selected for the purpose of vexatiously harassing the defendant.” Injunctions have been granted where the result of the foreign suit would necessarily be the avoidance of the laws of the parties' residence. Vail v. Knapp, 49 Barb. 299, where the object of the suit was to oppress the plaintiff. Miller v. Gittings, 85 Md. 601, to prevent fraud. Kempson v. Kempson, 43 Atl. 97.
On the other hand, that plaintiff believes he can secure a more favorable result in the local court, *Royal League v. Kavanaugh*, 84 N. E. 178, or merely because the rules of evidence of the sister state are not so favorable to plaintiff as are those of his state, *Edgell v. Clark*, 45 N. Y. Supp. 979, is not ground for an injunction restraining his opponent from prosecuting the action in a foreign state.

L. H. S.

**INToxicating Liquors—Evidence Held Sufficient to Sustain Conviction of Unlawfully Having Intoxicating Liquors in Possession.**—A small boy found hidden on his father's farm a bottle which contained what he thought to be moonshine whiskey. He showed it to his father, who tasted it and pronounced it to be whiskey. The appellant and another heard of this find and decided to claim the bottle, altho it was not theirs, and thus obtain the liquor and drink it. They went to the home of the witness and called for the whiskey, saying it belonged to them. The boy told his father of this and the father, laying no claim to the whiskey, consented to the appellant's taking it. Appellant testified that after they had left the home of the witness, he and his companion examined the contents of the bottle, and discovered that it was not whiskey and threw it away. Therefore he contends that he is not guilty of the offense of possessing intoxicating liquors in violation of the law. But the jury, after hearing the evidence, were convinced that he was guilty of the charge and returned a verdict of guilty. The Court of Appeals sustained the verdict. *Workman v. Commonwealth*, 211 Ky. 183, 277 S. W. 304.

This case presents unusual facts under the Volstead Act, and the court in rendering this decision rested the decision wholly upon the facts as found by the jury in the trial court.

M. W. M.

**Libel and Slander—Published Letter Charging Employees with Breaking up Organization Held Not Actionable per se.**—Plaintiff was an employe of defendant in its coal mines. He and certain other members of the miners' union, of which he was a member, were very much dissatisfied with their mine superintendent, and did everything in their power through their union to have him removed as superintendent. Charges, complaints, and resolutions directed against the superintendent were presented to defendant by committees of the union, but after an investigation defendant declined to remove him. The charges were also heard before the duly constituted authorities of the district organization of the miners' union and the superintendent was exonerated. But plaintiff and his colleagues continued their agitation for his removal. Under these circumstances, defendant posted in front of the general store two copies of a letter to the effect that the plaintiff and his companions were not working with the company in a spirit of harmony, and that they had done and will continue to do
everything in their power to drive the superintendent and one or two others from town. Plaintiffs claimed this letter was libelous and actionable per se. Held, there is no charge of any illegal banding together on the part of these men or of the commission of any illegal act. Such a charge is not actionable per se. Decker v. Kentucky Coke Co., 211 Ky. 66, 276 S. W. 1092.

A libel is malicious matter, expressed either in writing or printing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule. Com. v. Clapp, 4 Mass. 163, 3 Am. Dec. 212, and note. In the principal case, plaintiff and his confederates had a right, if they wished to exercise it, to be dissatisfied with their working conditions, or their superintendent, and to agitate for a change if they desired to do so. It was no felony or crime to do this and the management did not charge them with any criminal act in stating that this was what they were doing. Hence, it is clear that the letter is not actionable per se as imputing a crime, as is alleged in plaintiffs' petition.

In Chicago, R. I. & P. R. Co. v. Medley, 55 Ok. 145, 155 Pac. 211, L. R. A. 1916D 587, the court held that a service card, issued to a discharged employe by the railroad, stating that he had been discharged for being an agitator and creating trouble in the ranks of the company's men, and that his services were unsatisfactory on that account, was not actionable per se. In the case of Wabash R. Co. v. Young, 162 Ind. 102, 69 N. E. 1003, 4 L. R. A. (N. S.) 1091, it was held that a publication accusing one of being a member of a labor union and a labor agitator was not libelous per se. In the case of Tennessee Coal, Iron & R. R. Co. v. Kelly, 163 Ala. 148, 50 So. 1008, the court held that a publication charging plaintiff with having made trouble with the employes at defendant's mines or with having run negroes out of their homes was not libelous per se, such conduct not necessarily being a crime.

The principal case follows the decisions of this and other jurisdictions. The doctrine seems to be fair to employers, the employes and labor unions alike. The contrary view would present numerous difficulties and would work needless hardships upon employers with no corresponding benefit to employes.

W. D. S.

MINES AND MINERALS—Coal Company Held Within Rights Under Deed in Objecting to Surface Owner's Construction of a House on a Proposed Route to Power Transmission Line.—Appellant was the owner of the surface of a certain piece of land and the appellee was the owner of the mineral rights thereunder. The deed was substantially as follows: "The party of the first part conveys all mineral rights, etc., and such standing timber as may be deemed by the party of the second part, or successors, necessary for mining purposes, or necessary
for the enjoyment of any or all of the given privileges. The grantee to have the power to erect houses, shops, roads, tramways, etc., as he might deem necessary. Party of the first part retaining the agricultural rights, and such timber as has not been aforesaid mentioned, etc."

Under this deed the appellee laid out a route for a power transmission line. Appellant started to build a house on said route and the appellee told him not to do so; that if he did the house would be torn down. The transmission line was not built for two years. Held, appellee had a right to build the line in any place he saw fit against the surface owner's wishes. Case v. Elk Horn Coal Corporation, 210 Ky. 700, 276 S. W. 573.

By the deed granting the mineral rights it seems to be clear that the appellee has the paramount right to do whatever he may deem necessary, this being according to appellee's own judgment. The appellant's only claim would be that appellee exercised his powers oppressively, arbitrarily, wantonly or maliciously.

In construing deeds the court must look to the surrounding circumstances, the object for which the deed was granted, etc., in order to ascertain the real intention of the parties. The general rule is that all things depended on the right granted and the things necessary for obtaining it. Dand v. Kingscote, 6 Mees. & W. 174, 2 Eng. Ry. & C. Cas. 27. To one having mineral rights in land, the common law gave the right to work them, but by a way reasonable at the time of use. Antrim v. Dobbs, Jr., L. R. 30 C. L. 424. Therefore, it seems that the appellee had a right or an easement in the land of the appellant to erect such equipment as he might deem necessary.

By the deed the appellee was given unlimited power in the way of construction. Thus it does not appear that he acted with any malice toward the appellant. The court's holding, therefore, seems sound.

H. M. D.

REWARDS—PEACE OFFICER MAKING ARREST WHILE ACTING WITHIN LINE OF DUTY CANNOT RECOVER REWARD THEREFORE.—When a bank at V. was robbed a reward of $500.00 was offered for the arrest and conviction of the guilty party or parties. This reward was in addition to the reward of $1,000.00 offered by the State Bankers' Association. Several persons were seeking to recover the reward, among them the plaintiff. Plaintiff, a conductor, located the guilty parties and notified the proper authorities; the arrest was made by three peace officers. The bank paid the reward of $500.00 to these officers, but the bankers' association filed an interpleader asking to pay the money that it offered into court. Plaintiff was left out in the payments and he appealed, claiming that the officers were not entitled to the reward as they were peace officers acting within their line of duty. The Court of Appeals reversed the lower court but allowed the officers to share in the reward. Benton v. Kentucky Bankers' Association, 211 Ky. 554, 277 S. W. 858.
The court in the principal case was evidently of the opinion that the officers were not acting within their line of duty for it allowed them to recover any part of the reward. It is settled law that a reward can not be claimed by public officers whose sworn duty it is to make the arrest for which the reward is offered. *Harking v. Needy*, 71 Ky. (8 Bush) 22. The Missouri court says: "One holding the office of a captain of the day police in St. Louis cannot stipulate for a reward to make extraordinary exertions to arrest one charged with crime. It being his duty to endeavor to make such arrest, he cannot recover the stipulated reward. *Kick v. Merry*, 23 Mo. 72, 66 Am. Dec. 658.

The Kentucky court, in allowing the police officer to share in the reward, were of the opinion that he was not acting within his regular duties as a police officer for "A police officer does not become entitled to a reward, offered in general terms for the arrest and conviction of any incendiary, by services which do not exceed the scope of his duty as such officer in promoting the arrest and conviction of offenders. *Day v. Putnam Insurance Co.*, 16 Minn. 408 (Gil. 365). However, where a reward is offered for the apprehension of a felon, a police officer is not necessarily excluded from the benefit of the reward. *City Bank v. Bangs*, 2 Edw. (N. Y. Ch.) 95. If any peace officer wishes to claim a reward he will have to perform services for which the reward is offered by acts outside of his line of duty. *Kinn v. Mineral Point First National Bank*, 118 Wis. 537, 95 N. W. 969; *Smith v. Vernon County*, 188 Mo. 501, 37 S. W. 949.

The rule followed by the weight of authority that an officer cannot receive extra compensation for services to which the public is already entitled seems to be sound, for it prevents an officer from holding back in the hope that there will be a reward. *Kick v. Merry*, 23 Mo. 72, 66 Am. Dec. 658; *State v. Roberts*, 15 Mo. 28. From an early day (Bridge v. Cage, Cro. Jac 103, 79 Eng. Reprint 89) it has been established, and continues to be the rule, that an agreement to pay money to a public officer for doing what he ought to do, is void and against public policy. *Mason v. Manning*, 150 Ky. 805, 150 S. W. 1020; *Riley v. Grace*, 17 Ky. L. Rep. 1007, 33 S. W. 207; *Heather v. Thompson*, 78 S. W. 194, 25 Ky. L. Rep. 1556.

It is a familiar rule of law that no officer shall demand or receive any other or greater fee than is allowed by law. *Smith v. Gentry*, 20 Ky. Law Rep. 171, 45 S. W. — The reason for such a rule is very clear for "it would open the door to profligacy, chicanery and corruption if the officers appointed to carry out the criminal laws were permitted to receive extra compensation under a private contract. It would open a door to the escape of offenders by supineness and indifference, and compel the injured persons to take upon themselves the burden of public prosecutions." *Smith v. Whitley*, 10 Pa. 39, 49 Am. Dec. 572.

The Kentucky court did not violate these settled rules of law in allowing the peace officers to recover in *Benton v. Kentucky Bankers' Association*, supra, for they were of the opinion that the duties performed were not within their regular duties. *In Creamer v. Hall*, 2
Del. Co. Rep. (Pa.) 378, the court says, "If a peace officer does an act in which most of the duties performed are without his regular duties, he is entitled to the reward."

Tenancy in Common—Notice as to Common Ownership Held Not to Defeat Right to Commission, Where Broker Relied on Representation of One Owner as to Authority to Act—"Ashland," formerly the home of Henry Clay, now an addition to the city of Lexington, was owned by the McDowell family. Henry C. McDowell died leaving a will naming H. C. McDowell, Jr., as trustee of the estate, he to have full charge of it, but not to have power to sell or mortgage it "unless in his judgment it be advisable to sell and reinvest the proceeds in real and personal property, and unless all of his brothers and sisters then living shall concur in and agree to such sale or sales, which concurrence shall be evidenced by their joining with him in the execution of the conveyance or conveyances. The execution of such conveyance by my children then living shall be merely to evidence their concurrence in said sale or sales." There were six brothers and sisters, of whom H. C. McDowell lived in Lynchburg, Va., and W. A. McDowell at Lexington, Ky.

Defendant, W. A. McDowell, entered into an agreement with the plaintiff whereby it was agreed that if the plaintiff would find a purchaser for the land referred to who would offer a price for which the defendant would recommend to his brother, H. C. McDowell, and which his brother would approve, that there would be a sale thereof at said price, and plaintiff's commission would be 3% of the amount of the purchase money. The plaintiff performed his part of the contract and did find purchasers for the estate who offered a sum which defendant could and did recommend to his brother, and which his brother approved of. The purchasers were ready, able and willing to pay cash the price so offered by them, but the defendant violated his contract by failing to pay the plaintiff his commission for which this suit was brought.

The plaintiff contended that he had no authority to act or sign for his brother, that the will was duly recorded and probated in the county clerk's office and that plaintiff had notice thereof and that the plaintiff never found purchasers at a price approved of by his brothers and sisters. Held, that if the defendant represented to the plaintiff that he had authority to act for the other persons in interest, and that he had authority to act and sign for his brother and the plaintiff acted upon these representations, then the defendant is estopped to deny that he had no such power and that the plaintiff never obtained an offer that was approved by the defendant or trustee and the plaintiff can recover his commission. Kelly v. McDowell, 210 Ky. 229.

In Renick v. Mann, 194 Ky. 251, it was held that the broker was entitled to his commission even where the sale made by him failed
because of a defect in the employer's title. This opinion quoted with approval the following excerpt from the opinion of Womack, et al. v. Douglas, 157 Ky. 716: "It is well settled that a party who makes a contract like this is liable for the whole of the compensation agreed to be paid, although he did not own the land he placed with the broker for sale, or only owned an interest in it and was unable to carry out his contract because he did not own it, or because its other owners would not consent to the sale, although there might be an exception to this rule if the broker had knowledge of the fact that the person making the contract was not authorized to do so. Rounds v. Allen, 116 Ia. 345; Oliver v. Morawitz, 97 Wis. 332; Gorman v. Hargis, 6 Okla. 360."

If one who contracts with a broker for the sale of property jointly owned is liable to the broker for the full commissions where the broker is in ignorance of the condition of the title, and also where with the knowledge of a defect in the title it is agreed that the owner will perfect it, the same principle clearly applies where the broker has notice that the property is jointly owned, if the joint owner with whom he contracts represents that he has authority to act for all.

The general principles relating to brokerage contracts are well settled in this state and the court in rendering the decision in this case has clearly followed the decision and the authorities cited and discussed in Sanford & Co. v. Waring, 201 Ky. 169. "These cases also lay down the rule that in the absence of an express stipulation in the contract of employment requiring the consummation of the sale negotiated by the broker, in order to entitled him to his commissions, the only service required of him by his employment will have been performed when he procures a purchaser for the property ready, willing and able to take it upon the terms proposed by the employer."

M. W. M.

TRIAL—LIMITING NUMBER OF WITNESSES TO PROVE REPUTATION IN ISSUE IN LIBEL SUIT HELD ERROR.—The defendant company was a member of the Hopkinsville Retail Merchants' Credit Association. Each member of the association furnished to it the list of its credit customers, divided into four classes, as follows: (1) Good, (2) poor or slow, (3) undesirable, (4) D. B. (meaning dead beat). This latter class included the persons who would not pay their debts and would pay no attention to their bills, etc. The plaintiff was included in this class in a report sent in by the defendant and her name was marked on the list "D. B." She brought suit for libel. The defendant admitted the above stated facts and alleged that the organization was formed for no other reason than to inform the members regarding the standing of their customers in paying for the goods sold them on credit; that there was no malice on the part of the members and that the list was shown to no one but the members. At the trial the defendant took the burden of proof and after it had introduced thirteen witnesses to show
that the reputation of the plaintiff was bad for paying her debts, the
court ruled that he would not allow further evidence on this subject.
Held, that this was error on the part of the court where no ruling had
been made in advance fixing the number of witnesses that either party
might introduce on the subject. Ideal Motor Co. v. Warfield, 211 Ky.
576, 277 S. W. 862.

By section 593 of the Civil Code, the court is given a reasonable
control over the interrogation, and subject to this control the parties
may put such legal and pertinent questions as they see fit. But the
court may stop the introduction of further evidence on a particular
point if the evidence upon it already be so full as to preclude a reason-
able doubt. The Code reads as follows: "The courts shall exercise a
reasonable control over the mode of interrogation, so as to make it
rapid, distinct, and as little annoying to the witness and as effective
for the extraction of the truth as may be, but subject to his control,
the parties may put such legal and pertinent questions as they may
see fit. The court, however, may stop the production of further evi-
dence on a particular point, if the evidence upon it be already so full
as to preclude reasonable doubt."

This rule has been applied when the fact is collateral to the main
issue or the testimony is for the impeaching of a witness or is expert
or opinion evidence, but it has never been applied by this court to a con-
trolling issue in the case unless the court has reason to believe that the
purpose is simply for delay or other improper purposes. Eaton v.
Green River Coal Co., 157 Ky. 163. This rule was also followed in
North Jellico Coal Co. v. Trosper, 165 Ky. 417, and in Axton v. Vance,
207 Ky. 580. In the latter case the court said: "By section 904 of the
statutes, the court could refuse to tax as costs more than the allowance
to two witnesses, but we know of no authority under which the court
may limit the number of witnesses which a party may introduce upon
a controverted question."

The provision of the statute above quoted does not authorize the
court to limit the number of witnesses a party may introduce on the
controlling question of the case. Therefore, as the reputation of the
plaintiff was the gist of the case it was certainly prejudicial to stop
the examination when more than one-third of the witnesses the party
wished to introduce had not been examined, The Court of Appeals
in rendering his decision has clearly followed the rule on this point
as laid down in this state.

M. W. M.

WILLS—The Word "Children" Is a Word of Purchase and Not of
Limitation, Unless a Contrary Purpose Otherwise Appears from the
Will Itself; But the Contrary Is True Where from an Examination
of Entire Will, It Appears Testator Used Word in Sense of "Heirs."
—Testator devised the residue of his estate, real and personal, to
trustees to be held by them for a period of fifteen years for benefit of
certain named nephews and nieces. During this period the trustees were to pay the income and at its expiration were directed to sell the property and divide the proceeds "equally among my nephews and nieces and their children." The children claimed that under this clause they took as purchasers equally with their parents, and not as heirs at their death, under the rule that the word "children" is a word of purchase and not a word of limitation unless a contrary intention appears in the will itself. But the Court of Appeals held that the contrary is true when it appears testator used word in the sense of "heirs." Groggin v. Reed, 211 Ky. 256, 277 S. W. 257.

McFarlan v. Hatchett, 118 Ky. 423, was the case of a deed to H. "and her children." The court said: "The word 'children' is a word of purchase, and not of limitation, and therefore, where property is conveyed or devised to a woman and her children, the children take as joint tenants with the mother where there is nothing to show a contrary intention. But where there are other words in the will or deed showing that the word 'children' was used in the sense of 'heirs,' as where they are followed by the word 'forever,' and in other parts of the instrument the words 'children' and 'heirs' are used interchangeably, the term 'children' will be read as meaning 'heirs' and construed as a word of limitation and not of purchase. This construction is adopted only to effectuate the intention of the maker when there is enough on the face of the instrument to show that he used the word 'children' in sense of word 'heirs.'"

The case of Ramey v. Ramey, 195 Ky. 673, 243 S. W. 934, arose upon a conveyance to grantor's granddaughter and "her children." The court said: "An examination of the cases referred to will disclose that one of the technical rules for the construction of writings transferring title to real estate, is that the 'children,' appearing in the class of grantees, is a word of purchase and not of limitation, but it will be found from the cases that this technical rule will surrender to manifest intention of the parties as gathered from the entire instrument and their surroundings."

The case of Lachland v. Downing, 11 B. Monroe 32, is directly in point. It was a case of a devise to three persons and a designated class equally "to them and their children forever." It was held that the word "children" was a word of limitation and not of purchase. The decision was based primarily upon the proposition that if the testator had intended to make the children participants in the division he would have expressly named them along with the other devisees in the clause which stated explicitly between what parties the allotment was to be made; and as he did not do so, it evidenced an intention on his part to include them merely as heirs of the named devisees and not as purchasers taking equal shares with such devisees. In the words of the court the failure to designate the children individually "is equivalent to an express exclusion of their children." This position is amply sustained by authorities in other jurisdictions, also.
In the case under consideration the testator devised the property in trust "for benefit of my nephews and nieces," following which the names and addresses of the nephews and nieces were given "who take under this will," without reference to their children. The children were mentioned only in the last clause which dealt with the final distribution of the corpus of the fund, and then only as children of the named devisees, and such a general designation of them would not be sufficient to overcome the presumption raised in the first instance by the bequest of the income to the nephews and nieces only, without any mention whatever of the children, that he intended only such named devisees to share in the distribution of the corpus as well as the income. As used here, the phrase "my nephews and nieces and their children," would simply show an intention that such nephews and nieces were to take an absolute interest in the property, the children being named merely as heirs.

Groggin v. Reed, 211 Ky. 256. After all, it is simply applying the cardinal rule of will construction that the intention of the testator takes precedence over mere technical rules of construction and will be permitted to govern.

WILLS—WHEN DEVISE OVER OF UNDISPOSED OF REMAINDER IS VALID STATED.—R. gave his wife a life estate in express terms. He gave her a general power of disposition to provide for her comfortable support and maintenance. He also made her sole judge of the necessity of a sale for that purpose and provided that a sale or deed of conveyance by her would convert the estate into a fee so far as the purchasers were concerned. The will then provided that the estate undisposed of at the wife's death should go to a certain church. The wife failed to dispose of the estate during her life and the lower court in deciding the case held the devise over to the church valid. The heirs appealed, but the court affirmed the lower court's decisions. Hicks, et al. v. Connor, Administrator, et al., 210 Ky. 773, 276 S. W. 844.

It is well settled in Kentucky that where property is devised absolutely, with the power of unlimited disposition, and by a subsequent part of the will testator undertakes to devise over the undisposed remainder of the property, the limitation over is void. Nelson, et al v. Nelson's Executor, 140 Ky. 410, 131 S. W. 187. However, the rule is otherwise when a life estate only is devised and the life tenant is given a power of disposition, for in such a case a limitation over of such property as may remain undisposed of by the life tenant, at his death, is a valid limitation. Clay v. Chenault, 108 Ky. 77, 55 S. W. 729; McMullen's Administrator v. Anderson, 90 Ky. 126, 13 S. W. 353; Payne v. Johnson, 95 Ky. 175, 24 S. W. 238.
The authorities seem to agree that a gift of property expressly for life, with a limitation over of what remains undisposed of, creates a life estate with a power and a valid limitation over of whatever has not passed under the power. *Anderson v. Hall*, 80 Ky. 91, 3 Ky. L. Rep. 579; *Johnson v. Batelle*, 125 Mass. 453; *Seward v. Davis*, 198 N. Y. 154, 91 N. E. 1107; *Pendley v. Madison*, 83 Ala. 484, 3 So. 618. Since the facts before the court were similar in *Hicks v. Connor*, supra, it is safe to say that the court followed the weight of authority in holding the gift over valid. A good statement of the rule may be found in the holding of the Alabama Court in *Pendley v. Madison*, 83 Ala. 484, 3 So. 618, where the court says: "When a devise is made to a testator's widow for and during her natural life with the limitation over of whatever shall not have been used up by her confers only a life estate, and the remainder over is valid."

In the case under consideration we have a life estate with power of disposal given by will, therefore, it will logically come within the rule: "When a life estate with power of disposal is given by will, and provisions as to power of disposal, no matter how broad, contemplate a possibility that a portion of the property may remain undisposed of, a devise of the remainder in such portion as shall be undisposed of at the termination of the life estate is effective, and vests such remainder in the devisee named. *Steiff v. Seibert*, 105 N. W. 328, 128 Ia. 746. The doctrine laid down in this case is a general rule and is supported by the following cases: *Widows' Home v. Lippardt*, 70 Ohio St. 261, 71 N. E. 770; *Tuerk v. Schueler*, 71 N. J. L. 331, 60 Atl. 357; *Melton v. Camp*, 121 Ga. 693, 49 S. E. 690; *Fiske v. Fiske*, 26 R. I. 509, 59 Atl. 840.

If the testator gives his wife only a life estate, with a power of disposition, and at her death anything remains, either of the original estate or its proceeds, that residue passes to the remainderman. *McGuire v. Gallagher*, 99 Me. 334, 59 Atl. 445. The rule that a remainder may be limited after a life estate, is a well settled principle of our law. The attempt to create such a limitation is not opposed by the policy of the law, or by any of its rules. If the intention to create such a limitation is manifested in a will, the courts will sustain it. 6 Peters (U. S. Sup. Ct.) 68.

R. C. S.